INTERNATIONAL COURT OF JUSTICE

APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL UNDER ARTICLE 84 OF THE CONVENTION ON INTERNATIONAL CIVIL AVIATION

(BAHRAIN, EGYPT, SAUDI ARABIA AND UNITED ARAB EMIRATES v. QATAR)

MEMORIAL OF THE KINGDOM OF BAHRAIN, THE ARAB REPUBLIC OF EGYPT, THE KINGDOM OF SAUDI ARABIA, AND THE UNITED ARAB EMIRATES

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United Nations, General Assembly Resolution 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965

United Nations document A/RES/20/2131

United Nations **A/RES/20/2131**

General Assembly

Distr: General
21 December 1965

Twentieth session
Agenda item 107

Resolution adopted by the General Assembly

2131 (XX). Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty

The General Assembly,

Deeply concerned at the gravity of the international situation and the increasing threat to universal peace due to armed intervention and other direct or indirect forms of interference threatening the sovereign personality and the political independence of States,

Considering that the United Nations, in accordance with their aim to eliminate war, threats to the peace and acts of aggression, created an Organization, based on the sovereign equality of States, whose friendly relations would be based on respect for the principle of equal rights and self-determination of peoples and on the obligation of its Members to refrain from the threat or use of force against the territorial integrity or political independence of any State,

Recognizing that, in fulfilment of the principle of self-determination, the General Assembly, in the *Declaration on the Granting of Independence to Colonial Countries and Peoples* contained in *resolution 1514 (XV)* of 14 December 1960, stated its conviction that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development,

Recalling that in the *Universal Declaration of Human Rights* the General Assembly proclaimed that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, without distinction of any kind,

Reaffirming the principle of non-intervention, proclaimed in the charters of the Organization of American States, the League of Arab States and the Organization of African Unity and affirmed at the conferences held at Montevideo, Buenos Aires, Chapultepec and Bogotá, as well as in the decisions of the Asian-African Conference at Bandung, the First Conference of Heads of State or Government of Non-Aligned Countries at Belgrade, in the Programme for Peace and International Cooperation adopted at the end of the Second Conference of Heads of State or Government of Non-

Aligned Countries at Cairo, and in the declaration on subversion adopted at Accra by the Heads of State and Government of the African States,

Recognizing that full observance of the principle of the non-intervention of States in the internal and external affairs of other States is essential to the fulfilment of the *purposes and principles of the United Nations*,

Considering that armed intervention is synonymous with aggression and, as such, is contrary to the basic principles on which peaceful international cooperation between States should be built,

Considering further that direct intervention, subversion and all forms of indirect intervention are contrary to these principles and, consequently, constitute a violation of the Charter of the United Nations,

Mindful that violation of the principle of non-intervention poses a threat to the independence, freedom and normal political, economic, social and cultural development of countries, particularly those which have freed themselves from colonialism, and can pose a serious threat to the maintenance of peace,

Fully aware of the imperative need to create appropriate conditions which would enable all States, and in particular the developing countries, to choose without duress or coercion their own political, economic and social institutions,

In the light of the foregoing considerations, solemnly declares:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

2. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, Finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

3. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

4. The strict observance of these obligations is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten international peace and security.

5. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

6. All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.

7. For the purpose of the present Declaration, the term "State" covers both individual States and groups of States.

8. Nothing in this Declaration shall be construed as affecting in any manner the relevant provisions of the *Charter of the United Nations* relating to the maintenance of international peace and security, in particular those contained in *Chapters VI*, *VII* and *VIII*.

1408th plenary meeting
21 December 1965

Annex 86

United Nations, General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970

United Nations document A/RES/25/2625

RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE

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2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

The General Assembly,

Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

Having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,[1] which met in Geneva from 31 March to 1 May 1970,

Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States,

Deeply convinced that the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter,

Considering the desirability of the wide dissemination of the text of the Declaration,

1. *Approves* the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the text of which is annexed to the present resolution;

2. *Expresses its appreciation* to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for its work resulting in the elaboration of the Declaration;

3. *Recommends* that all efforts be made so that the Declaration becomes generally known.

1883rd plenary meeting,
24 October 1970.

[1] *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18* (A/8018).

ANNEX

DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

PREAMBLE

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfilment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,

Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles,

Considering that the progressive development and codification of the following principles:

(*a*) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

(*b*) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,

(*c*) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,

(*d*) The duty of States to co-operate with one another in accordance with the Charter,

(*e*) The principle of equal rights and self-determination of peoples,

(*f*) The principle of sovereign equality of States,

(*g*) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter,

so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations,

Having considered the principles of international law relating to friendly relations and co-operation among States,

1. *Solemnly proclaims* the following principles:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(*a*) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(*b*) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(*a*) States shall co-operate with other States in the maintenance of international peace and security;

(*b*) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(*c*) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;

(*d*) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights

and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(*a*) To promote friendly relations and co-operation among States; and

(*b*) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(*a*) States are juridically equal;

(*b*) Each State enjoys the rights inherent in full sovereignty;

(*c*) Each State has the duty to respect the personality of other States;

(*d*) The territorial integrity and political independence of the State are inviolable;

(*e*) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(*f*) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

GENERAL PART

2. *Declares* that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

3. *Declares further* that:

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

2634 (XXV). Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-second session,[2]

Emphasizing the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations,

Noting with satisfaction that at its twenty-second session the International Law Commission completed its provisional draft articles on relations between States and international organizations, continued the consideration of matters concerning the codification and progressive development of the international law relating to succession of States in respect of treaties and State responsibility and included in its programme of work the question of treaties concluded between States and international organizations or between two or more international organizations, as recommended by the General Assembly in resolution 2501 (XXIV) of 12 November 1969,

Noting further that the International Law Commission has proposed to hold a fourteen-week session in 1971 in order to enable it to complete the second reading of the draft articles on relations between States

[2] *Ibid., Supplement No. 10* (A/8010/Rev.1).

Annex 87

United Nations, Resolution 1267 (1999) adopted by the Security Council at its 4051st Meeting on 15 October 1999

Website of the United Nations available at
http://www.un.org/ga/search/view_doc.asp?symbol= S/RES/1267%281999%29

UNITED NATIONS **S**

Security Council

Distr.
GENERAL

S/RES/1267 (1999)
15 October 1999

RESOLUTION 1267 (1999)

Adopted by the Security Council at its 4051st meeting
on 15 October 1999

The Security Council,

Reaffirming its previous resolutions, in particular resolutions 1189 (1998) of 13 August 1998, 1193 (1998) of 28 August 1998 and 1214 (1998) of 8 December 1998, and the statements of its President on the situation in Afghanistan,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan, and its respect for Afghanistan's cultural and historical heritage,

Reiterating its deep concern over the continuing violations of international humanitarian law and of human rights, particularly discrimination against women and girls, and over the significant rise in the illicit production of opium, and stressing that the capture by the Taliban of the Consulate-General of the Islamic Republic of Iran and the murder of Iranian diplomats and a journalist in Mazar-e-Sharif constituted flagrant violations of established international law,

Recalling the relevant international counter-terrorism conventions and in particular the obligations of parties to those conventions to extradite or prosecute terrorists,

Strongly condemning the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts, and reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security,

Deploring the fact that the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations,

Noting the indictment of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States, and noting also the request of the United States of America to the Taliban to surrender them for trial (S/1999/1021),

Determining that the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constitutes a threat to international peace and security,

Stressing its determination to ensure respect for its resolutions,

Acting under Chapter VII of the Charter of the United Nations,

1. Insists that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice;

2. Demands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice;

3. Decides that on 14 November 1999 all States shall impose the measures set out in paragraph 4 below, unless the Council has previously decided, on the basis of a report of the Secretary-General, that the Taliban has fully complied with the obligation set out in paragraph 2 above;

4. Decides further that, in order to enforce paragraph 2 above, all States shall:

(a) Deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban as designated by the Committee established by paragraph 6 below, unless the particular flight has been approved in advance by the Committee on the grounds of humanitarian need, including religious obligation such as the performance of the Hajj;

(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly,

/...

by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need;

5. Urges all States to cooperate with efforts to fulfil the demand in paragraph 2 above, and to consider further measures against Usama bin Laden and his associates;

6. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

(a) To seek from all States further information regarding the action taken by them with a view to effectively implementing the measures imposed by paragraph 4 above;

(b) To consider information brought to its attention by States concerning violations of the measures imposed by paragraph 4 above and to recommend appropriate measures in response thereto;

(c) To make periodic reports to the Council on the impact, including the humanitarian implications, of the measures imposed by paragraph 4 above;

(d) To make periodic reports to the Council on information submitted to it regarding alleged violations of the measures imposed by paragraph 4 above, identifying where possible persons or entities reported to be engaged in such violations;

(e) To designate the aircraft and funds or other financial resources referred to in paragraph 4 above in order to facilitate the implementation of the measures imposed by that paragraph;

(f) To consider requests for exemptions from the measures imposed by paragraph 4 above as provided in that paragraph, and to decide on the granting of an exemption to these measures in respect of the payment by the International Air Transport Association (IATA) to the aeronautical authority of Afghanistan on behalf of international airlines for air traffic control services;

(g) To examine the reports submitted pursuant to paragraph 9 below;

7. Calls upon all States to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed by paragraph 4 above;

8. Calls upon States to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed by paragraph 4 above and to impose appropriate penalties;

9. Calls upon all States to cooperate fully with the Committee established by paragraph 6 above in the fulfilment of its tasks, including

supplying such information as may be required by the Committee in pursuance of this resolution;

10. Requests all States to report to the Committee established by paragraph 6 above within 30 days of the coming into force of the measures imposed by paragraph 4 above on the steps they have taken with a view to effectively implementing paragraph 4 above;

11. Requests the Secretary-General to provide all necessary assistance to the Committee established by paragraph 6 above and to make the necessary arrangements in the Secretariat for this purpose;

12. Requests the Committee established by paragraph 6 above to determine appropriate arrangements, on the basis of recommendations of the Secretariat, with competent international organizations, neighbouring and other States, and parties concerned with a view to improving the monitoring of the implementation of the measures imposed by paragraph 4 above;

13. Requests the Secretariat to submit for consideration by the Committee established by paragraph 6 above information received from Governments and public sources on possible violations of the measures imposed by paragraph 4 above;

14. Decides to terminate the measures imposed by paragraph 4 above once the Secretary-General reports to the Security Council that the Taliban has fulfilled the obligation set out in paragraph 2 above;

15. Expresses its readiness to consider the imposition of further measures, in accordance with its responsibility under the Charter of the United Nations, with the aim of achieving the full implementation of this resolution;

16. Decides to remain actively seized of the matter.

Annex 88

United Nations, Resolution 1373 (2001) adopted by the Security Council at its 4385th Meeting on 28 September 2001

Website of the United Nations available at https://undocs.org/S/RES/1373(2001)

United Nations S/RES/1373 (2001)

Security Council

Distr.: General

28 September 2001

Resolution 1373 (2001)

Adopted by the Security Council at its 4385th meeting, on 28 September 2001

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

01-55743 (E)

1. *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls* upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.

Annex 89

United Nations Press Release SC/7803, "Security Council Committee Adds Names of 17 Individuals to Al-Qaida Section of Consolidated List", 26 June 2003

Website of the United Nations available at
https://www.un.org/press/en/2003/sc7803.doc.htm

UNITED NATIONS | PRESS RELEASE

SECURITY COUNCIL >

SC/7803
26 JUNE 2003

SECURITY COUNCIL COMMITTEE ADDS NAMES OF 17 INDIVIDUALS TO AL-QAIDA SECTION OF CONSOLIDATED LIST

1. **ABDAOUI Youssef** (a.k.a. Abu ABDULLAH; ABDELLAH; ABDULLAH); Born in Kairouan (Tunisia) on 4th June 1966; Address: Piazza Giovane Italia n.2, Varese, Italy.

2. **AKLI Mohamed Amine** (a.k.a. Mohamed Amine Akli; Killech Shamir;Kali Sami; Elias); Born in Abordj El Kiffani (Algeria) on 30th March 1972, of no fixed address in Italy.

3. **AMDOUNI Mehrez** (a.k.a. FUSCO Fabio; HASSAN Mohamed; ABU Thale); Born in Tunis (Tunisia) on 18th December 1969, of non fixed address in Italy.

4. **AYARI Chiheb Ben Mohamed** (a.k.a. HICHEM Abu Hchem); Born in Tunis (Tunisia) on 19th December 1965. Address: Via di Saliceto n.51/9, Bologna, Italy.

5. **BAAZAOUI Mondher** alias **HAMZA.** Born in Kairouan (Tunisia) on 18th March 1967. Address: Via di Saliceto n.51/9, Bologna, Italy.

6. **DUMONT Lionel** (a.k.a. BILAL; HAMZA; BROUGERE Jacques); Born in Robaix (France) on 21st January 1971, of non fixed address in Italy.

7. **ESSAADI Moussa Ben Amor** (a.k.a. DAH DAH; ABDELRAHMMAN; BECHIR); Born in Tabarka (Tunisia) on 4th December 1964; Address: Via Milano n.108, Brescia, Italy.

8. **FETTAR Rachid** (a.k.a. Amine del Belgio; Djaffar); Born in Boulogin (Algeria) on 16th April 1969; Address: Via degli Apuli n.5, Milan, Italy.

9 **HAMAMI Brahim Ben Hedili**; Born in Goubellat (Tunisia) on 20th November 1971; Address: Via de' Carracci n.15, Casalecchio di Reno (Bologna), Italy.

12. **JENDOUBI Faouzi** (a.k.a. SAID; SAMIR); Born in Beja (Tunisia) on 30th January 1966; Address: Via Agucchi n.250, Bologna Italy; domicile: Via di Saliceto n.51/9, Bologna, Italy.

13. **MNASRI Fethi Ben Rebai** (a.k.a. AMOR; ABU Omar; ALIC Fethi); Born in Nefza (Tunisia) on 6th March 1969; Address: Via Toscana n.46, Bologna, Italy; domicile: Via di Saliceto n.51/9, Bologna, Italy.

14. **OUAZ Najib;** Born in Hekaima (Tunisia) on 12th April 1960; Address: Vicolo dei Prati n.2/2, Bologna, Italy.

15. **RARRBO Ahmed Hosni** (a.k.a. ABDALLAH o ABDULLAH); Born in Bologhine (Algeria) on 12th September 1974, of no fixed address in Italy.

16. **SALEH Nedal** (a.k.a. HITEM); Born in Taiz (Yemen) on 1st March 1970; Address: Via Milano n.105, Casal di Principe (Caserta), Italy, domicile. Via di Saliceto n.51/9, Bologna, Italy.

17. **YANDARBIEV Zelimkhan Ahmedovic (Abdul-Muslimovich)**;Date of birth: 12 September 1952; Place of birth: USSR, Eastern Kazakhstan region, village of Vydriha; Nationality: Russian Federation; Passports: For travelling abroad can use Russian passport 43 No. 1600453

The list is updated regularly, on the basis of relevant information provided by Member States and regional organizations. An updated list is accessible at the Committee's Web site: http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm (http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm).

Annex 90

United Nations, Resolution 1624 (2005) adopted by the Security Council at its 5261st Meeting, 14 September 2005

Website of the United Nations available at https://undocs.org/S/RES/1624(2005)

United Nations S/RES/1624 (2005)

Security Council

Distr.: General
14 September 2005

Resolution 1624 (2005)

Adopted by the Security Council at its 5261st meeting, on 14 September 2005

The Security Council,

Reaffirming its resolutions 1267 (1999) of 15 October 1999, 1373 (2001) of 28 September 2001, 1535 (2004) of 26 March 2004, 1540 (2004) of 28 April 2004, 1566 (2004) of 8 October 2004, and 1617 (2005) of 29 July 2005, the declaration annexed to its resolution 1456 (2003) of 20 January 2003, as well as its other resolutions concerning threats to international peace and security caused by acts of terrorism,

Reaffirming also the imperative to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations, and also *stressing* that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law,

Condemning in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security, and *reaffirming* the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations,

Condemning also in the strongest terms the incitement of terrorist acts and *repudiating* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts,

Deeply concerned that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States, undermines global stability and prosperity, and must be addressed urgently and proactively by the United Nations and all States, and *emphasizing* the need to take all necessary and appropriate measures in accordance with international law at the national and international level to protect the right to life,

Recalling the right to freedom of expression reflected in Article 19 of the Universal Declaration of Human Rights adopted by the General Assembly in 1948 ("the Universal Declaration"), and recalling also the right to freedom of expression

05-51052 (E)

0551052

in Article 19 of the International Covenant on Civil and Political Rights adopted by the General Assembly in 1966 ("ICCPR") and that any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR,

Recalling in addition the right to seek and enjoy asylum reflected in Article 14 of the Universal Declaration and the non-refoulement obligation of States under the Convention relating to the Status of Refugees adopted on 28 July 1951, together with its Protocol adopted on 31 January 1967 ("the Refugees Convention and its Protocol"), and also *recalling* that the protections afforded by the Refugees Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations,

Reaffirming that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations,

Deeply concerned by the increasing number of victims, especially among civilians of diverse nationalities and beliefs, caused by terrorism motivated by intolerance or extremism in various regions of the world, *reaffirming* its profound solidarity with the victims of terrorism and their families, and *stressing* the importance of assisting victims of terrorism and providing them and their families with support to cope with their loss and grief,

Recognizing the essential role of the United Nations in the global effort to combat terrorism and *welcoming* the Secretary-General's identification of elements of a counter-terrorism strategy to be considered and developed by the General Assembly without delay with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses at the national, regional and international level to counter terrorism,

Stressing its call upon all States to become party, as a matter of urgency, to the international counter-terrorism Conventions and Protocols whether or not they are party to regional Conventions on the matter, and to give priority consideration to signing the International Convention for the Suppression of Nuclear Terrorism adopted by the General Assembly on 13 April 2005,

Re-emphasizing that continuing international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and addressing unresolved regional conflicts and the full range of global issues, including development issues, will contribute to strengthening the international fight against terrorism,

Stressing the importance of the role of the media, civil and religious society, the business community and educational institutions in those efforts to enhance dialogue and broaden understanding, and in promoting tolerance and coexistence, and in fostering an environment which is not conducive to incitement of terrorism,

Recognizing the importance that, in an increasingly globalized world, States act cooperatively to prevent terrorists from exploiting sophisticated technology, communications and resources to incite support for criminal acts,

Recalling that all States must cooperate fully in the fight against terrorism, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens,

1. *Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

(a) Prohibit by law incitement to commit a terrorist act or acts;

(b) Prevent such conduct;

(c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct;

2. *Calls upon* all States to cooperate, inter alia, to strengthen the security of their international borders, including by combating fraudulent travel documents and, to the extent attainable, by enhancing terrorist screening and passenger security procedures with a view to preventing those guilty of the conduct in paragraph 1 (a) from entering their territory;

3. *Calls upon* all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters;

4. *Stresses* that States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law;

5. *Calls upon* all States to report to the Counter-Terrorism Committee, as part of their ongoing dialogue, on the steps they have taken to implement this resolution;

6. *Directs* the Counter-Terrorism Committee to:

(a) Include in its dialogue with Member States their efforts to implement this resolution;

(b) Work with Member States to help build capacity, including through spreading best legal practice and promoting exchange of information in this regard;

(c) Report back to the Council in twelve months on the implementation of this resolution.

7. *Decides* to remain actively seized of the matter.

Annex 91

Council Implementing Regulation (EU) No 611/2011 of 23 June 2011 Implementing Regulation (EU) No 422/2011 Concerning Restrictive Measures in View of the Situation in Syria, 2011

Website of the Publications Office of the European Union available at https://publications.europa.eu/en/publication-detail/-/publication/bc2bbb38-e068-402f-abda-0575760be015/language-en

24.6.2011 EN Official Journal of the European Union L 164/1

II

(Non-legislative acts)

REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) No 611/2011

of 23 June 2011

implementing Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EU) No 442/2011 of 9 May 2011 concerning restrictive measures in view of the situation in Syria [1], and in particular Article 14(1) thereof,

Whereas:

In view of the gravity of the situation in Syria and in accordance with Council Implementing Decision 2011/367/CFSP of 23 June 2011 implementing Decision 2011/273/CFSP concerning restrictive measures against Syria [2], additional persons and entities should be included in the list of persons, entities and bodies subject to restrictive measures set out in Annex II to Regulation (EU) No 442/2011,

HAS ADOPTED THIS REGULATION:

Article 1

The persons and entities listed in the Annex to this Regulation shall be added to the list set out in Annex II to Regulation (EU) No 442/2011.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 23 June 2011.

For the Council
The President
MARTONYI J.

[1] OJ L 121, 10.5.2011, p. 1.
[2] See page 14 of this Official Journal.

ANNEX

Persons and entities referred to in Article 1

A. **Persons**

	Name	Identifying information (date of birth, place of birth…)	Reasons	Date of listing
1.	Zoulhima CHALICHE (Dhu al-Himma SHALISH)	Born in 1951 or 1946 in Kerdaha.	Head of presidential security; involved in violence against demonstrators; first cousin of President Bashar Al-Assad.	23.6.2011
2.	Riyad CHALICHE (Riyad SHALISH)		Director of Military Housing Establishment; provides funding to the regime; first cousin of President Bashar Al-Assad.	23.6.2011
3.	Brigadier Commander Mohammad Ali JAFARI (a.k.a. JA'FARI, Aziz; a.k.a. JAFARI, Ali; a.k.a. JAFARI, Mohammad Ali; a.k.a. JA'FARI, Mohammad Ali; a.k.a. JAFARI-NAJAFABADI, Mohammad Ali)	DOB 1 Sep 1957; POB Yazd, Iran.	General Commander of Iranian Revolutionary Guard Corps, involved in providing equipment and support to help the Syria regime suppress protests in Syria.	23.6.2011
4.	Major General Qasem SOLEIMANI (a. k. a Qasim SOLEIMANY)		Commander of Iranian Revolutionary Guard Corps, IRGC - Qods, involved in providing equipment and support to help the Syria regime suppress protests in Syria.	23.6.2011
5.	Hossein TAEB (a.k.a. TAEB, Hassan; a.k.a. TAEB, Hosein; a.k.a. TAEB, Hossein; a.k.a. TAEB, Hussayn; a.k.a. Hojjatoleslam Hossein TA'EB)	DOB 1963; POB Tehran, Iran.	Deputy Commander for Intelligence of Iranian Revolutionary Guard Corps, involved in providing equipment and support to help the Syria regime suppress protests in Syria.	23.6.2011
6.	Khalid QADDUR		Business associate of Maher Al-Assad; provides funding to the regime.	23.6.2011
7.	Ra'if AL-QUWATLI (a.k.a. Ri'af AL-QUWATLI)		Business associate of Maher Al-Assad; provides funding to the regime.	23.6.2011

B. **Entities**

	Name	Identifying information	Reasons	Date of listing
1.	Bena Properties		Controlled by Rami Makhlouf; provides funding to the regime.	23.6.2011
2.	Al Mashreq Investment Fund (AMIF) (alias Sunduq Al Mashrek Al Istithmari)	P.O. Box 108, Damascus Tel.: 963 112110059 / 963112110043 Fax: 963 933333149	Controlled by Rami Makhlouf; provides funding to the regime.	23.6.2011

	Name	Identifying information	Reasons	Date of listing
3.	Hamcho International (a.k.a. Hamsho International Group)	Baghdad Street, P.O. Box 8254, Damascus Tel.: 963 112316675 Fax: 963 112318875 Website: www.hamshointl.com Email: info@hamshointl.com et hamshogroup@yahoo.com	Controlled by Mohammad Hamcho or Hamsho; provides funding to the regime.	23.6.2011
4.	Military Housing Establishment (alias MILIHOUSE)		Public works company controlled by Riyad Shalish and Ministry of Defence; provides funding to the regime.	23.6.2011

Annex 92

United Nations, Resolution 2133 (2014) adopted by the Security Council at its 7101st Meeting, 27 January 2014

Website of the United Nations available at https://undocs.org/S/RES/2133(2014)

United Nations S/RES/2133 (2014)

Security Council

Distr.: General
27 January 2014

Resolution 2133 (2014)

Adopted by the Security Council at its 7101st meeting, on 27 January 2014

The Security Council,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed and *further reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Recalling all its relevant resolutions and Presidential Statements concerning threats to international peace and security caused by terrorist acts,

Reiterating the obligation of Member States to prevent and suppress the financing of terrorist acts,

Recalling relevant international counter-terrorism instruments, including the International Convention for the Suppression of the Financing of Terrorism and the International Convention against the Taking of Hostages,

Strongly condemning incidents of kidnapping and hostage-taking committed by terrorist groups for any purpose, including raising funds or gaining political concessions,

Expressing concern at the increase in incidents of kidnapping and hostage-taking committed by terrorist groups with the aim of raising funds, or gaining political concessions, in particular the increase in kidnappings by Al-Qaida and its affiliated groups, and underscoring that the payment of ransoms to terrorists funds future kidnappings and hostage-takings which creates more victims and perpetuates the problem,

Expressing its determination to prevent kidnapping and hostage-taking committed by terrorist groups and to secure the safe release of hostages without ransom payments or political concessions, in accordance with applicable international law and, in this regard, *noting* the work of the Global Counterterrorism Forum (GCTF), in particular its publication of several framework documents and good practices, including in the area of kidnapping for ransom, to complement the work of the relevant United Nations counter-terrorism entities,

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Recognizing the need to further strengthen efforts to support victims and those affected by incidents of kidnapping for ransom and hostage-taking committed by terrorist groups and to give careful consideration to protecting the lives of hostages and those kidnapped, and *reaffirming* that States must ensure that any measures taken to counter terrorism comply with their obligations under international law, in particular international human rights law, refugee law, and international humanitarian law, as appropriate,

Noting the decision of the Group of Eight Summit in Lough Erne to address the threat posed by kidnapping for ransom by terrorists and the preventive steps the international community can take in this regard and to encourage further expert discussion, including at the Roma Lyon group, to deepen understanding of this problem, and *further noting* that paragraph 225.6 of the Final Document of the 16th Summit of the Heads of State or Government of the Non-Aligned Movement condemned criminal incidences of hostage-taking with resultant demands for ransoms and/or other political concessions by terrorist groups,

Expressing its commitment to support efforts to reduce terrorist groups' access to funding and financial services through the ongoing work of United Nations counter-terrorism bodies and the Financial Action Task Force to improve anti-money laundering and terrorist financing frameworks worldwide,

Expressing concern at the increased use, in a globalized society, by terrorists and their supporters of new information and communication technologies, in particular the Internet, for the purposes of recruitment and incitement to commit terrorist acts, as well as for the financing, planning and preparation of their activities,

Recalling its resolutions 1904 (2009), 1989 (2011) and 2083 (2012), which, inter alia, confirm that the requirements of operative paragraph 1 (a) of these resolutions, also apply to the payment of ransoms to individuals, groups, undertakings or entities on the Al-Qaida sanctions list,

Reaffirming that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations,

1. *Reaffirms* its resolution 1373 (2001) and in particular its decisions that all States shall prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

2. *Further reaffirms* its decision in resolution 1373 (2001) that all States shall prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

3. *Calls upon* all Member States to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages;

4. *Calls upon* all Member States to cooperate closely during incidents of kidnapping and hostage-taking committed by terrorist groups;

5. *Reaffirms* its decision in resolution 1373 (2001) that all States shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts;

6. *Recognizes* the need to continue expert discussions on kidnapping for ransom by terrorists, and *calls upon* Member States to continue such expert discussions within the United Nations and other relevant international and regional organizations, including the GCTF, on additional steps the international community could take to prevent kidnappings and to prevent terrorists from benefiting directly or indirectly from using kidnapping to raise funds or gain political concessions;

7. *Notes* that ransom payments to terrorist groups are one of the sources of income which supports their recruitment efforts, strengthens their operational capability to organize and carry out terrorist attacks, and incentivizes future incidents of kidnapping for ransom;

8. *Encourages* the Counter-Terrorism Committee (CTC) established pursuant to resolution 1373 (2001) to hold, with the assistance of appropriate expertise, a Special Meeting with the participation of Member States and relevant international and regional organizations to discuss measures to prevent incidents of kidnapping and hostage-taking committed by terrorist groups to raise funds or gain political concessions, and requests the CTC to report to the Council on the outcomes of this Meeting;

9. *Recalls* the adoption by the GCTF of the "Algiers Memorandum on Good Practices on Preventing and Denying the Benefits of Kidnapping for Ransom by Terrorists" and *encourages* CTED to take it into account, as appropriate, consistent with its mandate, including in its facilitation of capacity building to Member States;

10. *Calls upon* all Member States to encourage private sector partners to adopt or to follow relevant guidelines and good practices for preventing and responding to terrorist kidnappings without paying ransoms;

11. *Calls upon* all Member States to cooperate and engage in dialogue with all relevant United Nations counter-terrorism bodies, as appropriate, to improve their capacities to counter the financing of terrorism, including from ransoms;

12. *Encourages* the Monitoring Team of the 1267/1989 Al-Qaida Sanctions Committee and the Committee established pursuant to resolution 1988 (2011) and other relevant United Nations counter-terrorism bodies to cooperate closely when providing information on the measures taken by Member States on this issue and on relevant trends and developments in this area;

13. *Decides* to remain seized of this matter.

Annex 93

United Nations, Resolution 2178 (2014) adopted by the Security Council at its 7272nd Meeting, 24 September 2014

Website of the United Nations available at https://undocs.org/S/RES/2178(2014)

United Nations S/RES/2178 (2014)

Security Council

Distr.: General
24 September 2014

Resolution 2178 (2014)

Adopted by the Security Council at its 7272nd meeting, on 24 September 2014

The Security Council,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and *remaining* determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Noting with concern that the terrorism threat has become more diffuse, with an increase, in various regions of the world, of terrorist acts including those motivated by intolerance or extremism, and *expressing* its determination to combat this threat,

Bearing in mind the need to address the conditions conducive to the spread of terrorism, and *affirming* Member States' determination to continue to do all they can to resolve conflict and to deny terrorist groups the ability to put down roots and establish safe havens to address better the growing threat posed by terrorism,

Emphasizing that terrorism cannot and should not be associated with any religion, nationality or civilization,

Recognizing that international cooperation and any measures taken by Member States to prevent and combat terrorism must comply fully with the Charter of the United Nations,

Reaffirming its respect for the sovereignty, territorial integrity and political independence of all States in accordance with the Charter,

Reaffirming that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, *underscoring* that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and *noting* that failure to comply with these and other international obligations, including under the Charter

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of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity,

Expressing grave concern over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and *resolving* to address this threat,

Expressing grave concern about those who attempt to travel to become foreign terrorist fighters,

Concerned that foreign terrorist fighters increase the intensity, duration and intractability of conflicts, and also may pose a serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict in which foreign terrorist fighters are active and that are affected by serious security burdens, and *noting* that the threat of foreign terrorist fighters may affect all regions and Member States, even those far from conflict zones, and *expressing* grave concern that foreign terrorist fighters are using their extremist ideology to promote terrorism,

Expressing concern that international networks have been established by terrorists and terrorist entities among States of origin, transit and destination through which foreign terrorist fighters and the resources to support them have been channelled back and forth,

Expressing particular concern that foreign terrorist fighters are being recruited by and are joining entities such as the Islamic State in Iraq and the Levant (ISIL), the Al-Nusrah Front (ANF) and other cells, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), *recognizing* that the foreign terrorist fighter threat includes, among others, individuals supporting acts or activities of Al-Qaida and its cells, affiliates, splinter groups, and derivative entities, including by recruiting for or otherwise supporting acts or activities of such entities, and *stressing* the urgent need to address this particular threat,

Recognizing that addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors, including by preventing radicalization to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support to foreign terrorist fighters, countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation,

Recognizing also that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and *underlining* the need to address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the United Nations Global Counter-Terrorism Strategy (A/RES/60/288),

Expressing concern over the increased use by terrorists and their supporters of communications technology for the purpose of radicalizing to terrorism, recruiting and inciting others to commit terrorist acts, including through the internet, and

financing and facilitating the travel and subsequent activities of foreign terrorist fighters, and *underlining* the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law,

Noting with appreciation the activities undertaken in the area of capacity building by United Nations entities, in particular entities of the Counter-Terrorism Implementation Task Force (CTITF), including the United Nations Office of Drugs and Crime (UNODC) and the United Nations Centre for Counter-Terrorism (UNCCT), and also the efforts of the Counter Terrorism Committee Executive Directorate (CTED) to facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipients, in coordination with other relevant international, regional and subregional organizations, to assist Member States, upon their request, in implementation of the United Nations Global Counter-Terrorism Strategy,

Noting recent developments and initiatives at the international, regional and subregional levels to prevent and suppress international terrorism, and *noting* the work of the Global Counterterrorism Forum (GCTF), in particular its recent adoption of a comprehensive set of good practices to address the foreign terrorist fighter phenomenon, and its publication of several other framework documents and good practices, including in the areas of countering violent extremism, criminal justice, prisons, kidnapping for ransom, providing support to victims of terrorism, and community-oriented policing, to assist interested States with the practical implementation of the United Nations counter-terrorism legal and policy framework and to complement the work of the relevant United Nations counter-terrorism entities in these areas,

Noting with appreciation the efforts of INTERPOL to address the threat posed by foreign terrorist fighters, including through global law enforcement information sharing enabled by the use of its secure communications network, databases, and system of advisory notices, procedures to track stolen, forged identity papers and travel documents, and INTERPOL's counter-terrorism fora and foreign terrorist fighter programme,

Having regard to and highlighting the situation of individuals of more than one nationality who travel to their states of nationality for the purpose of the perpetration, planning, preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and *urging* States to take action, as appropriate, in compliance with their obligations under their domestic law and international law, including international human rights law,

Calling upon States to ensure, in conformity with international law, in particular international human rights law and international refugee law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, including by foreign terrorist fighters,

Reaffirming its call upon all States to become party to the international counter-terrorism conventions and protocols as soon as possible, whether or not they are a party to regional conventions on the matter, and to fully implement their obligations under those to which they are a party,

Noting the continued threat to international peace and security posed by terrorism, and *affirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, including those perpetrated by foreign terrorist fighters,

Acting under Chapter VII of the Charter of the United Nations,

1. *Condemns* the violent extremism, which can be conducive to terrorism, sectarian violence, and the commission of terrorist acts by foreign terrorist fighters, and *demands* that all foreign terrorist fighters disarm and cease all terrorist acts and participation in armed conflict;

2. *Reaffirms* that all States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents, *underscores*, in this regard, the importance of addressing, in accordance with their relevant international obligations, the threat posed by foreign terrorist fighters, and *encourages* Member States to employ evidence-based traveller risk assessment and screening procedures including collection and analysis of travel data, without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law;

3. *Urges* Member States, in accordance with domestic and international law, to intensify and accelerate the exchange of operational information regarding actions or movements of terrorists or terrorist networks, including foreign terrorist fighters, especially with their States of residence or nationality, through bilateral or multilateral mechanisms, in particular the United Nations;

4. *Calls upon* all Member States, in accordance with their obligations under international law, to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization to terrorism and recruitment of foreign terrorist fighters, including children, preventing foreign terrorist fighters from crossing their borders, disrupting and preventing financial support to foreign terrorist fighters, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters;

5. *Decides* that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities;

6. *Recalls* its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and *decides* that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:

(a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to

travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;

(b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training; and,

(c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training;

7. *Expresses* its strong determination to consider listing pursuant to resolution 2161 (2014) individuals, groups, undertakings and entities associated with Al-Qaida who are financing, arming, planning, or recruiting for them, or otherwise supporting their acts or activities, including through information and communications technologies, such as the internet, social media, or any other means;

8. *Decides* that, without prejudice to entry or transit necessary in the furtherance of a judicial process, including in furtherance of such a process related to arrest or detention of a foreign terrorist fighter, Member States shall prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the acts described in paragraph 6, including any acts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida, as set out in paragraph 2 of resolution 2161 (2014), provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents;

9. *Calls upon* Member States to require that airlines operating in their territories provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories, or attempted entry into or transit through their territories, by means of civil aircraft, of individuals designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) ("the Committee"), and further *calls upon* Member States to report any such departure from their territories, or such attempted entry into or transit through their territories, of such individuals to the Committee, as well as sharing this information with the State of residence or nationality, as appropriate and in accordance with domestic law and international obligations;

10. *Stresses* the urgent need to implement fully and immediately this resolution with respect to foreign terrorist fighters, *underscores* the particular and urgent need to implement this resolution with respect to those foreign terrorist fighters who are associated with ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee, and *expresses* its

readiness to consider designating, under resolution 2161 (2014), individuals associated with Al-Qaida who commit the acts specified in paragraph 6 above;

International Cooperation

11. *Calls upon* Member States to improve international, regional, and subregional cooperation, if appropriate through bilateral agreements, to prevent the travel of foreign terrorist fighters from or through their territories, including through increased sharing of information for the purpose of identifying foreign terrorist fighters, the sharing and adoption of best practices, and improved understanding of the patterns of travel by foreign terrorist fighters, and for Member States to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law;

12. *Recalls* its decision in resolution 1373 (2001) that Member States shall afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, and *underlines* the importance of fulfilling this obligation with respect to such investigations or proceedings involving foreign terrorist fighters;

13. *Encourages* Interpol to intensify its efforts with respect to the foreign terrorist fighter threat and to recommend or put in place additional resources to support and encourage national, regional and international measures to monitor and prevent the transit of foreign terrorist fighters, such as expanding the use of INTERPOL Special Notices to include foreign terrorist fighters;

14. *Calls upon* States to help build the capacity of States to address the threat posed by foreign terrorist fighters, including to prevent and interdict foreign terrorist fighter travel across land and maritime borders, in particular the States neighbouring zones of armed conflict where there are foreign terrorist fighters, and *welcomes* and *encourages* bilateral assistance by Member States to help build such national capacity;

Countering Violent Extremism in Order to Prevent Terrorism

15. *Underscores* that countering violent extremism, which can be conducive to terrorism, including preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters is an essential element of addressing the threat to international peace and security posed by foreign terrorist fighters, and *calls upon* Member States to enhance efforts to counter this kind of violent extremism;

16. *Encourages* Member States to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion;

17. *Recalls* its decision in paragraph 14 of resolution 2161 (2014) with respect to improvised explosive devices (IEDs) and individuals, groups, undertakings and entities associated with Al-Qaida, and *urges* Member States, in this context, to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources, including audio and video, to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law;

18. *Calls upon* Member States to cooperate and consistently support each other's efforts to counter violent extremism, which can be conducive to terrorism, including through capacity building, coordination of plans and efforts, and sharing lessons learned;

19. *Emphasizes* in this regard the importance of Member States' efforts to develop non-violent alternative avenues for conflict prevention and resolution by affected individuals and local communities to decrease the risk of radicalization to terrorism, and of efforts to promote peaceful alternatives to violent narratives espoused by foreign terrorist fighters, and *underscores* the role education can play in countering terrorist narratives;

United Nations Engagement on the Foreign Terrorist Fighter Threat

20. *Notes* that foreign terrorist fighters and those who finance or otherwise facilitate their travel and subsequent activities may be eligible for inclusion on the Al-Qaida Sanctions List maintained by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) where they participate in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of, Al-Qaida, supplying, selling or transferring arms and related materiel to, or recruiting for, or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof, and *calls upon* States to propose such foreign terrorist fighters and those who facilitate or finance their travel and subsequent activities for possible designation;

21. *Directs* the Committee established pursuant to resolution 1267 (1999) and 1989 (2011) and the Analytical Support and Sanctions Monitoring Team, in close cooperation with all relevant United Nations counter-terrorism bodies, in particular CTED, to devote special focus to the threat posed by foreign terrorist fighters recruited by or joining ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida;

22. *Encourages* the Analytical Support and Sanctions Monitoring Team to coordinate its efforts to monitor and respond to the threat posed by foreign terrorist fighters with other United Nations counter-terrorism bodies, in particular the CTITF;

23. *Requests* the Analytical Support and Sanctions Monitoring Team, in close cooperation with other United Nations counter-terrorism bodies, to report to the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) within 180 days, and provide a preliminary oral update to the Committee within 60 days, on the threat posed by foreign terrorist fighters recruited by or joining ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida, including:

(a) a comprehensive assessment of the threat posed by these foreign terrorist fighters, including their facilitators, the most affected regions and trends in radicalization to terrorism, facilitation, recruitment, demographics, and financing; and

(b) recommendations for actions that can be taken to enhance the response to the threat posed by these foreign terrorist fighters;

24. *Requests* the Counter-Terrorism Committee, within its existing mandate and with the support of CTED, to identify principal gaps in Member States' capacities to implement Security Council resolutions 1373 (2001) and 1624 (2005) that may hinder States' abilities to stem the flow of foreign terrorist fighters, as well as to identify good practices to stem the flow of foreign terrorist fighters in the implementation of resolutions 1373 (2001) and 1624 (2005), and to facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipients, especially those in the most affected regions, including through the development, upon their request, of comprehensive counter-terrorism strategies that encompass countering violent radicalization and the flow of foreign terrorist fighters, recalling the roles of other relevant actors, for example the Global Counterterrorism Forum;

25. *Underlines* that the increasing threat posed by foreign terrorist fighters is part of the emerging issues, trends and developments related to resolutions 1373 (2001) and 1624 (2005), that, in paragraph 5 of resolution 2129 (2013), the Security Council directed CTED to identify, and therefore merits close attention by the Counter-Terrorism Committee, consistent with its mandate;

26. *Requests* the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) and the Counter-Terrorism Committee to update the Security Council on their respective efforts pursuant to this resolution;

27. *Decides* to remain seized of the matter.

Annex 94

United Nations, Resolution 2199 (2015) adopted by the Security Council at its 7379th Meeting, 12 February 2015

Website of the United Nations available at https://undocs.org/S/RES/2199(2015)

United Nations S/RES/2199 (2015)

Security Council

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Resolution 2199 (2015)

Adopted by the Security Council at its 7379th meeting, on 12 February 2015

The Security Council,

Reaffirming its primary responsibility for the maintenance of international peace and security, in accordance with the Charter of the United Nations,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed,

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee, and humanitarian law, threats to international peace and security caused by terrorist acts, stressing in this regard the important role the United Nations plays in leading and coordinating this effort,

Emphasizing that sanctions are an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security including countering terrorism, and *underlining* the importance of prompt and effective implementation of relevant resolutions, in particular Security Council resolutions 1267 (1999) and 1989 (2011) as key instruments in the fight against terrorism,

Recalling its Resolutions 1267 (1999), 1989 (2011), 2161 (2014), 2170 (2014), and 2178 (2014) and its Presidential Statements of 28 July 2014 and 19 November 2014, including its stated intention to consider additional measures to disrupt oil trade by Islamic State in Iraq and the Levant (ISIL, also known as Daesh), Al-Nusrah Front (ANF) and all other individuals, groups, undertakings and entities associated with Al-Qaida, as a source of terrorism financing,

Recognizing the importance of the role that financial sanctions play in disrupting ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, and emphasizing also the need for a comprehensive approach to fully disrupt ISIL and ANF that integrates multilateral strategies with national action by Member States,

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Reaffirming the independence, sovereignty, unity and territorial integrity of the Republic of Iraq and the Syrian Arab Republic, and reaffirming further the purposes and principles of the Charter of the United Nations,

Reaffirming also that terrorism cannot and should not be associated with any religion, nationality, or civilization,

Stressing that terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States, and international and regional organizations to impede, impair, isolate and incapacitate the terrorist threat,

Expressing, in this regard, its deep appreciation for Arab League Resolution 7804 (7 September 2014), the Paris Statement (15 September 2014), the FATF statement on countering the financing of ISIL (24 October 2014) and the Manama declaration on countering terrorist finance (9 November 2014),

Reaffirming its resolution 1373 (2001) and in particular its decisions that all States shall prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists,

Recognizing the significant need to build capacities of Member States to counter terrorism and terrorist finance,

Reiterating its deep concern that oilfields and their related infrastructure, as well as other infrastructure such as dams and power plants, controlled by ISIL, ANF and potentially other individuals, groups, undertakings and entities associated with Al-Qaida, are generating a significant portion of the groups' income, alongside extortion, private foreign donations, kidnap ransoms and stolen money from the territory they control, which support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks,

Condemning in the strongest terms abductions of women and children, *expressing outrage* at their exploitation and abuse, including rape, sexual abuse, forced marriage, committed by ISIL, ANF, and other individuals, groups, undertakings and entities associated with Al-Qaida, and encouraging all state and non-state actors with evidence to bring it to the attention of the Council, along with any information that human trafficking may support the perpetrators financially,

Reaffirming the obligation of Member States to freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities,

Expressing its concern that economic resources such as oil, oil products, modular refineries and related material, other natural resources including precious metals such as gold, silver, and copper, diamonds, and any other assets are made available to ISIL, ANF, and other individuals, groups, undertakings and entities associated with Al-Qaida, and noting that direct or indirect trade with ISIL and ANF in such materials could constitute a violation of the obligations imposed by resolution 2161 (2014),

Reminding all States of their obligation to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice,

Reaffirming its decision 2133 (2014) and *noting again* that ransom payments to terrorist groups are one of the sources of income which supports their recruitment efforts, strengthens their operational capability to organize and carry out terrorist attacks, and incentivizes future incidents of kidnapping for ransom,

Expressing concern at the increased use, in a globalized society, by terrorists and their supporters, of new information and communications technologies, in particular the Internet, to facilitate terrorist acts, as well as their use to incite, recruit, fund or plan terrorist acts,

Expressing grave concern at the increased incidents of kidnapping and hostage-murdering committed by ISIL, and condemning those heinous and cowardly murders which demonstrate that terrorism is a scourge impacting all of humanity and people from all regions and religions or belief,

Welcoming the report on ANF and ISIL from the Analytical Support and Sanctions Monitoring Team, published on 14 November 2014, and *taking note* of its recommendations,

Noting with concern the continued threat posed to international peace and security by ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, and reaffirming its resolve to address all aspects of that threat,

Acting under Chapter VII of the Charter of the United Nations,

Oil Trade

1. *Condemns* any engagement in direct or indirect trade, in particular of oil and oil products, and modular refineries and related material, with ISIL, ANF and any other individuals, groups, undertakings and entities designated as associated with Al-Qaida by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011), and *reiterates* that such engagement would constitute support for such individuals, groups, undertakings and entities and may lead to further listings by the Committee;

2. *Reaffirms* that States are required by resolution 2161 (2014) to ensure that their nationals and those in their territory not make assets or economic resources, directly or indirectly, available to ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, and *notes* that this obligation applies to the direct and indirect trade in oil and refined oil products, modular refineries and related material;

3. *Reaffirms* that States are required by resolution 2161 (2014) to freeze without delay the funds and other financial assets or economic resources of ISIL, ANF, and other individuals, groups, undertakings and entities associated with Al-Qaida, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction;

4. *Reaffirms* that States are required by resolution 2161 (2014) to ensure that no funds, other financial assets or economic resources are made available,

directly or indirectly, by their nationals or by persons within their territory for the benefit of ISIL, ANF, and other individuals, groups, undertakings and entities associated with Al-Qaida;

5. *Recalls* that funds and other financial assets or economic resources made available to or for the benefit of listed individuals or entities are not always held directly by them, and *recalls* in addition that in identifying such funds and benefits, States should be alert to the possibility that property owned or controlled indirectly by the listed party may not be immediately visible;

6. *Confirms* that economic resources include oil, oil products, modular refineries and related material, other natural resources, and any other assets which are not funds but which potentially may be used to obtain funds, goods or services;

7. *Emphasizes* therefore that States are required by UN Security Council resolution 2161 (2014) to freeze without delay funds, other financial assets and economic resources of ISIL, ANF, and other individuals, groups, undertakings and entities associated with Al-Qaida, including oil, oil products, modular refineries and related material and other natural resources owned or controlled by them, or persons acting on their behalf or at their direction, as well as any funds or negotiable benefit arising from such economic resources;

8. *Recognizes* the need to take measures to prevent and suppress the financing of terrorism, individual terrorists, and terrorist organizations, including from the proceeds of organized crime, inter alia, the illicit production and trafficking of drugs and their chemical precursors, and the importance of continued international cooperation to that aim;

9. *Emphasizes* that States are required to ensure that their nationals and persons in their territory not make available, directly or indirectly, any funds, other financial assets or economic resources, including oil, oil products, modular refineries and related material and other natural resources that are identified as directed to, collected for, or otherwise for the benefit of ISIL, ANF, and other individuals, groups, undertakings and entities associated with Al-Qaida, as well as any funds or negotiable benefit arising from such economic resources;

10. *Expresses concern* that vehicles, including aircraft, cars and trucks and oil tankers, departing from or going to areas of Syria and Iraq where ISIL, ANF or any other groups, undertakings and entities associated with Al-Qaida operate, could be used to transfer oil and oil products, modular refineries and related material, cash, and other valuable items including natural resources such as precious metals and minerals like gold, silver, copper and diamonds, as well as grain, livestock, machinery, electronics, and cigarettes by or on behalf of such entities for sale on international markets, for barter for arms, or for use in other ways that would result in violations of the asset freeze or arms embargo in paragraph 1 of resolution 2161 (2014) and *encourages* Member States to take appropriate steps in accordance with international law to prevent and disrupt activity that would result in violations of the asset freeze or targeted arms embargo in paragraph 1 of resolution 2161 (2014);

11. *Reaffirms* that all States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that such terrorist acts are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts, and *emphasizes* that

such support may be provided through trade in oil and refined oil products, modular refineries and related material with ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida;

12. *Decides* that Member States shall inform the 1267/1989 Committee within 30 days of the interdiction in their territory of any oil, oil products, modular refineries, and related material being transferred to or from ISIL or ANF, and *calls upon* Member States to report to the Committee the outcome of proceedings brought against individuals and entities as a result of such activity;

13. *Encourages* the submission of listing requests to the Committee by Member States of individuals and entities engaged in oil trade-related activities with ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida and directs the 1267/1989 Al-Qaida Sanctions Committee to immediately consider designations of individuals and entities engaged in oil trade-related activities with ISIL, the ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida;

14. *Calls upon* Member States to improve international, regional, and subregional cooperation, including through increased sharing of information for the purpose of identifying smuggling routes used by ISIL and ANF, and for Member States to consider provision of technical assistance and capacity building to assist other Member States to counter smuggling of oil and oil products, and modular refineries and related material, by ISIL, ANF and any other individual, group, undertaking or entity associated with Al-Qaida;

Cultural Heritage

15. *Condemns* the destruction of cultural heritage in Iraq and Syria particularly by ISIL and ANF, whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects;

16. *Notes with concern* that ISIL, ANF and other individuals, groups, undertakings and entities associated with Al-Qaida, are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks;

17. *Reaffirms* its decision in paragraph 7 of resolution 1483 (2003) and *decides* that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people and *calls upon* the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph;

Kidnapping for Ransom and External Donations

18. *Reaffirms its condemnation of* incidents of kidnapping and hostage-taking committed by ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida for any purpose, including with the aim of raising

funds or gaining political concessions and *expresses its determination* to prevent kidnapping and hostage-taking committed by terrorist groups and to secure the safe release of hostages without ransom payments or political concessions, in accordance with applicable international law;

19. *Reaffirms* that the requirements of paragraph 1 (a) of resolution 2161 (2014) apply to the payment of ransoms to individuals, groups, undertakings or entities on the Al-Qaida Sanctions List, regardless of how or by whom the ransom is paid, *emphasizes* that this obligation applies to ISIL and ANF, and *calls upon* all Member States to encourage private sector partners to adopt or to follow relevant guidelines and good practices for preventing and responding to terrorist kidnappings without paying ransom;

20. *Reiterates* its *call upon* all Member States to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages, and *reaffirms* the need for all Member States to cooperate closely during incidents of kidnapping and hostage-taking committed by terrorist groups;

21. *Expresses its grave concern* of reports that external donations continue to make their way to ISIL, ANF and other individuals, groups, undertakings and entities associated with Al-Qaida, and *recalls the importance* of all Member States complying with their obligation to ensure that their nationals and persons within their territory do not make donations to individuals and entities designated by the Committee or those acting on behalf of or at the direction of designated entities;

22. *Stresses* that donations from individuals and entities have played a role in developing and sustaining ISIL and ANF, and that Member States have an obligation to ensure that such support is not made available to those terrorist groups and other individuals, groups, undertakings and entities associated with Al-Qaida by their nationals and persons within their territory, and urges Member States to address this directly through enhanced vigilance of the international financial system and by working with their non-profit and charitable organizations to ensure financial flows through charitable giving are not diverted to ISIL, ANF or any other individuals, groups, undertakings and entities associated with Al-Qaida;

Banking

23. *Urges* Member States to take steps to ensure that financial institutions within their territory prevent ISIL, ANF or other individuals, groups, undertakings or entities associated with Al-Qaida from accessing the international financial system;

Arms and related materiel

24. *Reaffirms* its decision that States shall prevent the direct or indirect supply, sale, or transfer to ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical advice, assistance or training related to military activities, as well as its calls for States to find ways of intensifying and accelerating the exchange of

operational information regarding traffic in arms, and to enhance coordination of efforts on national, subregional, regional and international levels;

25. *Expresses concern* at the proliferation of all arms and related materiel of all types, in particular man-portable surface-to-air missiles, to ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, and its potential impact on regional and international peace and security and impeding efforts to combat terrorism in some cases;

26. *Reminds* Member States of their obligation pursuant to paragraph 1 (c) of resolution 2161 (2014), to prevent the direct or indirect supply, sale or transfer of arms and related materiel of all types to listed individuals and entities, including ISIL and ANF;

27. *Calls upon* all States to consider appropriate measures to prevent the transfer of all arms and related materiel of all types, in particular man-portable surface-to-air missiles, if there is a reasonable suspicion that such arms and related materiel would be obtained by ISIL, the ANF or other individuals, groups, undertakings and entities associated with Al-Qaida;

Asset Freeze

28. *Reaffirms* that the requirements in paragraph 1 (a) of Security Council resolution 2161 apply to financial and economic resources of every kind, including but not limited to those used for the provision of Internet hosting or related services, used for the support of Al-Qaida and other individuals, groups, undertakings or entities included on the Al-Qaida Sanctions List;

Reporting

29. *Calls upon* Member States to report to the Committee within 120 days on the measures they have taken to comply with the measures imposed in this resolution;

30. *Requests* the Analytical Support and Sanctions Monitoring Team, in close cooperation with other United Nations counter-terrorism bodies to conduct an assessment of the impact of these new measures and to report to the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) within 150 days, and thereafter to incorporate reporting on the impact of these new measures into their reports to the Committee in order to track progress on implementation, identify unintended consequences and unexpected challenges, and to help facilitate further adjustments as required, and further requests the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) to update the Security Council on the implementation of this resolution as part of its regular oral reports to the Council on the state of the overall work of the Committee and the Monitoring Team;

31. *Decides* to remain actively seized of the matter.

Annex 95

Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, *Narrative Summaries of Reasons for Listing QDi.380 Abd al-Latif bin Abdallah Salih Muhammad al-Kawari*, United Nations Security Council Subsidiary Organs (last updated 21 September 2015)

Website of the United Nations available at
https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list/summaries/individual/abd-al-latif-bin-abdallah-salih-muhammad-al

SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 1267 (1999) 1989 (2011) AND 2253 (2015) CONCERNING ISIL (DA'ESH) AL-QAIDA AND ASSOCIATED INDIVIDUALS GROUPS UNDERTAKINGS AND ENTITIES

NARRATIVE SUMMARIES OF REASONS FOR LISTING

In accordance with paragraph 13 of resolution 1822 (2008) and subsequent related resolutions, the Al-Qaida Sanctions Committee makes accessible a narrative summary of reasons for the listing for individuals, groups, undertakings and entities included in the Al-Qaida Sanctions List.

QDi.380 Abd al-Latif bin Abdallah Salih Muhammad al-Kawari

Date on which the narrative summary became available on the Committee's website: 21 September 2015

Date(s) on which the narrative summary was updated: 21 September 2015

Reason for listing:

Abd al-Latif bin Abdallah Salih Muhammad al-Kawari was listed on 21 September 2015 pursuant to paragraphs 2 and 4 of resolution 2161 (2014) as being associated with Al-Qaida for "participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of" Al-Qaida (QDe.004).

Additional information:

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Abd al-Latif Bin Abdallah Salih Muhammad al-Kawari is a Qatar-based facilitator who provides financial support for, and services to, or in support of Al-Qaida (QDe.004) by transferring money to the group, raising funds for the group, and coordinating contributions to it.
In early 2012, Al-Kawari worked with Al-Qaida facilitators to coordinate the delivery of funding from Qatari financiers intended to support Al-Qaida and to deliver receipts confirming that Al-Qaida received foreign donor funding from Qatar-based extremists. As of 2012, he continued to collect financial support for Al-Qaida. Early that year, he also facilitated the international travel of a courier who was carrying tens of thousands of dollars earmarked for Al-Qaida.

In the early 2000s, Al-Kawari worked with Al-Qaida operative Mustafa Hajji Muhammad Khan (a.k.a. Hassan Ghul) (QDi.306) and Qatari Al-Qaida facilitator Ibrahim 'Isa Hajji Muhammad al-Bakr (QDi.344) to transfer money to Al-Qaida in Pakistan. At that time, Al-Kawari also obtained a fraudulent passport for Hassan Ghul, which Ghul used to travel to Qatar with Al-Kawari and Al-Bakr.

Related listed individuals and entities:

Al-Qaida (QDe.004), listed on 6 October 2001

Mustafa Hajji Muhammad Khan (QDi.306), listed on 14 March 2012
Ibrahim 'Isa Hajji Muhammad al-Bakr (QDi.344), listed on 23 January 2015

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Annex 96

Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, *Narrative Summaries of Reasons for Listing QDi.382 Sa'd bin Sa'd Muhammad Shariyan al-Ka'bi*, United Nations Security Council Subsidiary Organs (last updated 21 September 2015)

Website of the United Nations available at
https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions _list/summaries/individual/sa%27d-bin-sa%27d-muhammad-shariyan-al-ka%27bi

SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 1267 (1999) 1989 (2011) AND 2253 (2015) CONCERNING ISIL (DA'ESH) AL-QAIDA AND ASSOCIATED INDIVIDUALS GROUPS UNDERTAKINGS AND ENTITIES

NARRATIVE SUMMARIES OF REASONS FOR LISTING

In accordance with paragraph 13 of resolution 1822 (2008) and subsequent related resolutions, the Al-Qaida Sanctions Committee makes accessible a narrative summary of reasons for the listing for individuals, groups, undertakings and entities included in the Al-Qaida Sanctions List.

QDi.382 Sa'd bin Sa'd Muhammad Shariyan al-Ka'bi

Date on which the narrative summary became available on the Committee's website: 21 September 2015

Date(s) on which the narrative summary was updated: 21 September 2015

Reason for listing:

Sa'd bin Sa'd Muhammad Shariyan al-Ka'bi was listed on 21 September 2015 pursuant to paragraphs 2 and 4 ofresolution 2161 (2014) as being associated with Al-Qaida for "participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of" Al-Nusrah Front for the People of the Levant (QDe.137).

Additional information:

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Sa'd bin Sa'd Muhammad Shariyan al-Ka'bi is a Qatar-based facilitator who provides financial support for and services to, or in support of, Al-Nusrah Front for the People of the Levant (Al-Nusrah Front) (QDe.137) by transferring money to the group, raising funds for the groups, and coordinating contributions to it.

As of early 2014, Al-Ka'bi said that he had donation campaigns set up in Qatar to aid with fundraising in response to a request from an Al-Nusrah Front associate for money to purchase weapons and food. In that same time period, an Al-Nusrah Front official requested Al-Ka'bi act as an intermediary for collecting a ransom for a hostage being held by Al-Nusrah Front, and he worked to facilitate a ransom payment in exchange for the release of a hostage held by Al-Nusrah Front.

In 2013, Al-Ka'bi worked closely with Kuwaiti Al-Nusrah Front fundraiser Hamid Hamad Hamid al-'Ali (QDi.326) and received funding from him to support Al-Nusrah Front. Since at least late 2012, Al- Ka'bi provided support to Al-Nusrah Front in Syria.

Related listed individuals and entities:

Al-Nusrah Front for the People of the Levant (QDe.137), listed on 14 May 2014

Hamid Hamad Hamid al-'Ali (QDi.326), listed on 15 August 2014

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Annex 97

United Nations Security Council, 8007th Meeting, 20 July 2017

Website of the United Nations available at
https://www.securitycouncilreport.org/atf/cf/%7b65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/s_pv_8007.pdf

United Nations S/PV.8007

Security Council

Seventy-second year

Provisional

8007th meeting
Thursday, 20 July 2017, 10 a.m.
New York

President:	Mr. Liu Jieyi	(China)
Members:	Bolivia (Plurinational State of)	Mr. Inchauste Jordán
	Egypt	Mr. Moustafa
	Ethiopia	Mr. Alemu
	France	Mr. Delattre
	Italy	Mr. Biagini
	Japan	Mr. Bessho
	Kazakhstan	Mr. Sadykov
	Russian Federation	Mr. Safronkov
	Senegal	Mr. Seck
	Sweden	Mr. Skoog
	Ukraine	Mr. Yelchenko
	United Kingdom of Great Britain and Northern Ireland	Mr. Rycroft
	United States of America	Ms. Sison
	Uruguay	Mr. Rosselli

Agenda

Threats to international peace and security caused by terrorist acts

17-22286 (E)

The meeting was called to order at 10.05 a.m.

Adoption of the agenda

The agenda was adopted.

Threats to international peace and security caused by terrorist acts

The President (*spoke in Chinese*): The Security Council will now begin its consideration of the item on its agenda.

Members of the Council have before them document S/2017/615, which contains the text of a draft resolution submitted by Ethiopia, France, Italy, Japan, Kazakhstan, Senegal, Sweden, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

The Council is ready to proceed to the vote on the draft resolution before it. I shall put the draft resolution to the vote now.

A vote was taken by show of hands.

In favour:

Bolivia (Plurinational State of), China, Egypt, Ethiopia, France, Italy, Japan, Kazakhstan, Russian Federation, Senegal, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay

The President (*spoke in Chinese*): The draft resolution received 15 votes in favour. The draft resolution has been adopted unanimously as resolution 2368 (2017).

I shall now give the floor to those members of the Council who wish to make statements following the voting.

Ms. Sison (United States of America): With today's adoption of resolution 2368 (2017), the Security Council is taking another important step towards helping to defeat the Islamic State in Iraq and the Sham (ISIS) and Al-Qaida. We thank the other sponsors of the resolution for their support.

There is no higher priority for the United States, which is why we are leading a 72-member coalition that is making great strides in liberating territory from the grip of ISIS. The United States has been supporting the Iraqi Government in its effort to push ISIS out of Mosul, and ISIS's last strongholds in Syria are coming under intense pressure. But even as it is losing ground in Syria and Iraq, the threat that it represents is far from over. ISIS will continue looking to spread its ideology and radicalize new groups around the world. It will create new offshoots in new places; fighters who trained with ISIS in Syria are now starting to return home.

The Security Council has to show that it can adapt to such changing threats, and that is the goal of the resolution we have adopted today. Its provisions recognize the importance of focusing not just on ISIS but also on its affiliates, wherever they may emerge. We have also redoubled our commitment to enforcing these measures. The resolution urges for more international cooperation in cutting off terrorist funding, preventing terrorists from travelling and stopping such groups from acquiring arms. In order to help ensure that those sanctions are being fully and fairly implemented, we have reaffirmed our support to the Analytical Support and Sanctions Monitoring Team of the Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities and to its Ombudsperson. In another important step, in today's resolution the Security Council added eight new individuals and entities to the 1267 Committee's sanctions list. They include ISIS leaders in South-East Asia, foreign fighters from the Caucasus, illicit money exchange businesses and ISIS-affiliated terrorist groups in Syria, and there will be more designations to come.

In order to make the best use of this tool, the Security Council should regularly add to the sanctions list the names of any new ISIS- or Al-Qaida-affiliated individuals or groups, wherever they may be in the world. But while implementing the sanctions is essential, it is only one part of a broader strategy for defeating ISIS and the violent, extremist ideology that feeds it. All States Members of the United Nations should work together to prevent groups from declaring allegiance to ISIS and becoming one of its affiliates. We must mobilize action to address the issue of former ISIS fighters who return or relocate to other countries. We cannot allow them to become a new threat elsewhere.

And we must do more, especially here at the United Nations, to help countries prevent and counter violent extremism before it takes root. In order to do so, it is essential that we build strong partnerships with civil society, faith leaders, youth and local communities. ISIS, along with similar groups, threaten not just our

security, but also our values, such as tolerance, human dignity and freedom. For that reason, in every region of the world, people of all faiths have come together to condemn terrorism. The United States will continue to lead that effort. Today's unanimous vote reinforces the global resolve to defeat terrorism wherever it is found.

Mr. Safronkov (Russian Federation) (*spoke in Russian*): The Russian Federation supported resolution 2368 (2017), on sanctions related to the Islamic State in Iraq and the Levant (ISIL) and Al-Qaida. Taking into account the unprecedented magnitude and scale of the threats to international relations from those groups, we concur with our colleagues from the United States. Today yet another important step has been taken towards strengthening the counter-terrorism regime. Now all States, without exception, are called upon to fully and conscientiously comply with the provisions of today's key resolution. There can be no double standards.

We are deeply troubled by the fact that, due to the positions of some delegations, Council members' concerns were not fully taken into account in reaching agreement on the adoption of a text on such a key issue as jointly combating terrorism. I am chiefly referring to the Russian proposal to impose a comprehensive ban on any trade and economic links with any territories under ISIL control. We must bear in mind that terrorists deal with wide-ranging, cross-border smuggling in hydrocarbons and other goods. Illegal business provides them with tens of millions of dollars in revenue on a monthly basis. That revenue is used to purchase munitions and weapons, which makes it all the more difficult to apply coercive measures against them. We firmly advocate that we continue to such measures, as well as other others, in order to ensure a full financial, material and technical isolation of terrorist groups.

We are equally confounded by the fact that the text does not include a reference to Article 103 of the Charter of the United Nations, which is something that we insisted upon. Article 103 refers to the primacy of the Charter over other international treaties. The relevance of such a reference based on the need to enhance the authority of the Security Council's binding decisions with regard to sanctions and to ensure that they are fully implemented nationally by all branches of Government. Our firm position is that we must ensure full and complete compliance with the Charter. Without that, it will be impossible to ensure the integrity of the sanctions regime. We firmly believe that, in order to make consistent progress in combating terrorists, we need to genuinely dovetail the efforts of all stakeholders. Therein lies the sole way of ensuring a full and definitive end of the terrorist threat to global stability. We stand ready to engage in collective efforts to that end.

Mr. Alemu (Ethiopia): Ethiopia welcomes the unanimous adoption of resolution 2368 (2017), on the review of the sanctions regime on Al-Qaida and the Islamic State in Iraq and the Levant (ISIL) under resolution 2253 (2015). I would like to express my appreciation to the penholder for successfully steering the review process, and to the members of the Council for their flexibility. We are pleased to have co-sponsored the resolution.

Ethiopia finds itself in one of the most volatile regions of Africa, which is facing increasing levels of terrorism and radicalization. Therefore, Ethiopia is firmly committed to combating the scourge of terrorism in order to ensure its own peace and security in the region, where Al-Shabaab and other terrorist groups affiliated with ISIL and Al-Qaida are very active. Ethiopia recognizes that its fight against terrorism cannot be effective without forging the required regional and international cooperation. In the light of that, sanctions are indeed one of the most important tools at the disposal of the Security Council in the fight against terrorism. That is why the sanctions regime against ISIL and Al-Qaida remains very important.

The report of the Secretary-General (S/2017/467), as well as the reports of the Monitoring Team, have highlighted the impact of resolution 2253 (2015) with regard to the criminalization of terrorism, financing, measures taken to freeze the assets of those supporting terrorist organizations or individual terrorists, increased integration of financial intelligence into counter-terrorism work, raising and moving funds, as well as other matters related to the fight against terrorism. In that connection, we consider vital the inclusion in resolution 2368 (2017) of the issue of addressing foreign terrorist fighters and returnees, language against terrorism financing, updated language on the work of the Ombudsperson, all while recalling recent Council resolutions and their transitory provisions, which have strengthened the sanctions regime. We believe that, if the resolution is properly implemented, it would definitely serve as a very good tool in the fight against ISIL, Al-Qaida and their affiliates. We hope that it will contribute to promoting international peace and security.

Mr. Bessho (Japan): Japan welcomes the unanimous adoption of resolution 2368 (2017), which we co-sponsored. I would like to express my gratitude to the United States for taking the lead on drafting this important resolution.

We have witnessed a large number of terrorist attacks around the world since the adoption of resolution 2253 (2015), in December 2015, and tactics are evolving. It was clear that we had to step up our measures by reviewing resolution 2253 (2015).

There are a number of new paragraphs in today's resolution that address recent terrorist trends. I would especially like to highlight paragraph 39, on returning and relocating foreign terrorist fighters, and paragraph 36 on passenger name records (PNR). While the Islamic State in Iraq and the Levant is experiencing military setbacks in Iraq and Syria, their threat is spreading globally. Foreign terrorist fighters are returning to their countries of origin and transiting through, travelling to or relocating in other Member States.

For example, as the Secretary-General's report of 31 May (S/2017/467) indicates, the threat level has intensified in South-East Asia due to returnees and relocating fighters going to the region. Given the global nature of the phenomenon, all Member States must enhance their measures against returning and relocating foreign terrorist fighters. In addressing the issue, we must bear in mind that the tactics of foreign terrorist fighters are evolving, including through the use of broken travel techniques. Passenger name records are one effective measure to detect foreign terrorist fighters. Today's resolution is the first to call upon Member States to use and develop PNRs. Such documents include passengers' booking information, including itineraries, the names of traveling companions and payment methods. By analyzing PNRs, we can uncover suspicious travel patterns, the flow of terrorist actors and funds and, ultimately, terrorist networks. I stress the importance of PNRs and encourage all Member States that have not yet done so to employ PNR systems as soon as possible. To my knowledge, only 15 of the 193 Member States have introduced PNR systems thus far.

In conclusion, I stress the importance of moving from adoption to implementation. Japan is always ready to work closely with other countries to enhance their capacities in this area. We must unite against the Islamic State in Iraq and the Levant and other terrorist groups by implementing today's resolution, as well as related resolutions, in order to further enhance our counter-terrorism measures.

Mr. Moustafa (Egypt) (*spoke in Arabic*):First of all, I would like to thank the delegation of the United States for its efforts to facilitate negotiations on the very important resolution that we have just adopted, resolution 2368 (2017). In our opinion, it is one of the Security Council's most important resolutions with regard to combating terrorism. It goes without saying that the resolution contains very substantial provisions, such as those, for example, that are linked to the sanctions imposed upon Da'esh and Al-Qaida, as well as on individuals, groups, entities and institutions that are affiliated with those groups. Moreover, we also note the significant paragraphs that commit all countries to prevent the financing of terrorism and the provision of arms and any other support intended for terrorist ends.

We would like to confirm very briefly two very important points.

First, it is crucial that our efforts to combat terrorism be successful. We must adopt a global approach based on combating terrorism, wherever it is found, and tackle its root causes without any exception.

Secondly, we reiterate that, since we joined the Security Council, we have noted that its resolutions, especially with respect to combating terrorism. It is critical for the Security Council to hold countries that do not respect its resolutions accountable. It is inadmissible and irrational for the Council to discover that, after adopting resolutions that establish a legal and operational framework for combating terrorism, regimes or groups in small countries undermine and destroy that framework. Those regimes continuously and flagrantly violate the Council's resolutions without any fear of being held to account. They continue to finance terrorism, provide arms and safe havens to terrorists.

In that regard, I need only cite as evidence the regime of Qatar, which has embraced a policy that favours terrorism. That regime has financed terrorism, provided arms to terrorists, given them refuge and incited terrorism, whether in Libya, Syria, Iraq or in other countries. That is the policy of the Qatar regime, which has already violated the Council's resolutions and believes that economic and political interests will shield it from accountability vis-à-vis the Security Council. It is actually a shameful situation that cannot be allowed

to continue. It is inconceivable to witness the silence and absence of political will pn that account shown by members of the Council, whose resolutions must be effective, for which it must work to end all violations.

In conclusion, I reaffirm that Egypt will always respect its commitments. We will always be at the forefront of the fight against terrorism, while respecting international law, human rights and the rule of law.

Mr. Delattre (France) (*spoke in French*): France welcomes the unanimous adoption of resolution 2368 (2017) and thanks the United States for introducing the resolution and for facilitating the important work carried out during negotiations. Last Friday, my country commemorated the one-year anniversary of the tragic attack that occurred in Nice on 14 July 2016, which claimed the lives of 86 individuals of various nationalities. That memory, as well as the many other recent terrorist attacks throughout the world, remind us of the extent to which we must remain united and determined in our struggle against terrorists, who seek to destroy our way of life and freedom.

The work of the international community against Da'esh is showing results, and that is worth underscoring. On the ground, Da'esh has continued to suffer considerable losses in Iraq and Syria. The victory of Iraqi forces in Mosul is underway. That is a major turning point in the development of the conflict, while in Raqqa the battle continues to deprive that group of a safe haven there. Of late, Da'esh has actually attracted fewer foreign terrorist fighters, which is also of key importance.

However, as we know, sometimes all it takes is one individual to carry out a terrorist attack. Such a threat remains complex and multifaceted. We must therefore continue to take measures commensurate with the threat with which we are faced. That means that we must continue to take action in several areas. Combating propaganda and radicalization disseminated over the Internet, blocking the financial sources used by terrorist groups and preparing for the return of foreign terrorist fighters are three top priorities, without exception, in that context.

Resolution 2368 (2017), which we just adopted today, allows us to update the sanctions regime against Da'esh and Al-Qaida, so as to better take into account the development of the threat and revise our priorities, taken as whole. The resolution — and I would like to highlight this point — is a critical step in our shared struggle against terrorism, which must, more than ever, unite us.

Rest assured of the full commitment of France in the struggle against terrorism in general and against Da'esh, in particular.

Mr. Skoog (Sweden): Like others, I would like to thank the United States for introducing resolution 2368 (2017) today, which improves the tools at the disposal of the international community in combating international terrorism.

Sweden welcomes the unanimous adoption of today's resolution and the substantive updates to the sanctions regime. As the Islamic State in Iraq and the Levant (ISIL)/Da'esh and Al-Qaida develop new strategies and adapt to a changing landscape, the sanctions regime must be adjusted so as to effectively counter the threat posed by those groups. In particular, we welcome the substantive additions with regard to trafficking in persons, while linking the sanctions regime to landmark resolution 2331 (2016). Once again, the Security Council has reaffirmed its intention to consider targeted sanctions for individuals and entities that are associated with ISIL or Al-Qaida and involved in trafficking in persons in areas affected by armed conflict and in sexual violence in conflict.

The Office of the Ombudsperson is a demonstration of the Council's commitment to fulfilling due-process requirements, and the Office is essential to the effectiveness of the sanctions regime. We wish, in that connection, to take this opportunity to congratulate the Ombudsperson, Catherine Marchi-Uhel, on her important appointment as Head of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, and thank her for her outstanding work. We ask the Secretary-General and the Secretariat to facilitate a swift transition.

Mr. Biagini (Italy): Italy welcomes the unanimous adoption of resolution 2368 (2017), which it co-sponsored. The resolution is aimed at updating and expanding the international legal framework for the sanctions regime against Islamic State in Iraq and the Levant (ISIL)/Al-Qaida. Its implementation is now paramount. The sustained military pressure on Da'esh, as well as the depletion of its financial resources, has diminished but not taken away the group's ability to

fund its supporters outside the conflict zone and to carry out attacks on civilians. ISIL can still rely on diversified sources of financing and has drawn income from, inter alia, antiquities smuggling, the exploitation of mineral resources and human trafficking.

Since resolution 2253 (2015) was adopted, the global nature of the threat posed by terrorists has changed and the international community has been confronted with new challenges, including the increasing flow of returning foreign terrorist fighters, the misuse of the Internet and social media by terrorists and the exploitation of human trafficking networks. The new resolution acknowledges and tackles this evolving scenario, which requires a coordinated response by the international community. The United Nations must spearhead the efforts for enhanced cooperation.

In an effort to address and detect the flow of foreign terrorist fighters, some States have adopted and put in place the Advanced Passenger Information and Passenger Name Records tools. These tools are an important means to rein in thr movements of terrorists and recruiters more effectively, and we encourage Member States that have not yet done so to take the necessary steps to develop them. Member States have also taken concrete steps to strengthen their relationship with the private sector with a view to responding to terrorist use of information and communication technologies. These public-private partnerships are of paramount importance, not only in countering terrorism financing, but also in detecting and removing terrorist contacts on line.

With regard to the growing concern that terrorists could benefit from trafficking in persons, we regret that it was not possible to have more stringent language in the resolution, stressing the exploitation of human trafficking networks in conflict zones and the potential nexus between that heinous practice and the financing of terrorist organizations.

It is still imperative for the international community to put into place an effective and coordinated response to the terrorist threat for the purpose of eliminating any gaps. It remains crucial to enhance cooperation within and between public sector agencies, both domestically and internationally, and to empower financial intelligence units, law enforcement and intelligence services to improve the exchange of relevant information in a timely manner. Italy is strongly committed to providing international judicial and law enforcement cooperation in the framework of transnational investigations.

Let me conclude by reiterating Italy's strong appreciation of the work conducted by the Analytical Support and Sanctions Monitoring Team and of the significant role played by the Office of the Ombudsperson in its efforts to guarantee due process and transparency.

Mr. Seck (Senegal) (*spoke in French*): Senegal welcomes the adoption of resolution 2368 (2017), which we had the honour of co-sponsoring. I would therefore like to thank and congratulate the delegation of the United States of America on its leadership in the consultations and the other members of the Council for their contributions, which have enriched the text that we have just adopted, with its 105 paragraphs and 3 annexes that expand the scope and the field of action of the fight against terrorism.

The resolution refers, under Chapter VII of the Charter of the United Nations, to numerous and complex measures to be implemented in the fight against the Islamic State in Iraq and the Levant, Al-Qaida and individuals, groups and entities that are directly or indirectly related to them. Whether it be on the dark net or the stony ground of the Sahel, the fight against terrorism requires means, technique, coordination and partnership. That is where international cooperation must be intensified in order to help the least privileged States and regions to better understand the complexity of the fight against terrorism and thereby help them become more effective in our common struggle.

Within a context where the international community must more than ever face the problem of the return of foreign terrorist fighters, the resolution strengthens the provisions to fight that pernicious phenomenon. That is the rationale for the support given by Senegal during the consultations, keeping in mind the scope and intensity of the phenomenon in Africa — from the Horn of Africa to the Sahel, including the Lake Chad basin and the Maghreb.

Mr. Rycroft (United Kingdom): The United Kingdom welcomes the unanimous adoption of resolution 2368 (2017), which extends the United Nations sanctions against Da'esh and Al-Qaida. This adoption comes at an important moment in the international community's battle against Da'esh. The liberation of Mosul after a long-fought campaign represents a vital milestone in the battle against Da'esh

in Iraq. I want to pay tribute to the bravery and sacrifice of the Iraqi forces that made this possible. In Syria, operations against Raqqa have begun, and it is only a matter of time before Da'esh see its so-called caliphate crumble. But as we heard from Under-Secretary-General for Political Affairs Feltman in his briefing to the Council last month (see S/PV.7962), now is not the time for complacency. Instead, we must remain vigilant and resolute.

The fight against Da'esh will not end in Iraq and Syria. Even as we defeat them there, we must actively confront the threat that Da'esh, Al-Qaida and their affiliates pose in other parts of the world. And that is why United Nations sanctions remain an important tool, and why the United Kingdom welcomes the adoption of this resolution. It tightens our stranglehold on those groups and ensures that our measures are fit for purpose. In particular, we welcome the eight new designations adopted today. These designations include terrorist outfits, money-laundering companies, terrorist leaders and foreign terrorist fighters. The diversity of those fighters — from Syria, Iraq, Russia and Indonesia — really underscores that this is a global threat that requires a global response.

The United Kingdom continues to work with its partners, not just on sanctions, but in all our efforts to counter the terrorist threat. That means bringing Da'esh to justice, shutting down terrorist financing, managing the risk posed by foreign terrorist fighters and tackling extremism on line. This is a fight for the long haul, but together we will defeat the scourge of terrorism and our collective values will prevail, and the resolution that we have adopted today is a vital part of that effort.

The President (China) (*spoke in Chinese*): I shall now make a statement in my national capacity.

China welcomes the unanimous adoption by the Council of resolution 2368 (2017). Terrorism is the common enemy of humankind. China supports the international community in coordinating its activities and in adopting to an integrated and effective approach to enhance cooperation against terrorism, especially the use of the Internet by terrorists to spread, incite and organize terrorist activities, terrorist financing and the return of terrorist fighters.

In the realm of counter-terrorism, we must adhere to uniform standards, fully leverage the leading role of the United Nations and the Security Council and enhance international coordination effectively. The Committee established pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida,and associated individuals, groups, undertakings and entities is an important counter-terrorism mechanism of the United Nations and the Security Council. China supports the Committee in enhancing communications with the countries concerned and in strengthening cooperation with regional and subregional counter-terrorism mechanisms, in accordance with the mandate given to it by the Council. The Committee must constantly improve its work effectiveness so that it can make a greater contribution to advancing the counter-terrorism cause.

We also hope that Member States and the Secretariat will strictly comply with the relevant resolution and the Committee's rules of procedure, and continue to support and cooperate with the Committee in its work so that, together, we can defend the authority and effectiveness of the sanctions regime.

I now resume my functions as President of the Security Council.

There are no more names inscribed on the list of speakers.

The meeting rose at 10.40 a.m.

Annex 98

United Nations, Resolution 2396 (2017) adopted by the Security Council at its 8148th Meeting, 21 December 2017

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Security Council

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Resolution 2396 (2017)

Adopted by the Security Council at its 8148th meeting, on 21 December 2017

The Security Council,

Reaffirming its resolutions 1267 (1999), 1325 (2000), 1368 (2001), 1373 (2001), 1566 (2004) 1624 (2005), 1894 (2009), 2106 (2013), 2133 (2014), 2150 (2014), 2170 (2014), 2178 (2014), 2195 (2014) 2199 (2015), 2242 (2015), 2249 (2015), 2253 (2015), 2309 (2016) 2322 (2016), 2331 (2016), 2341 (2017), 2347 (2017), 2354 (2017), 2367 (2017), 2368 (2017), 2370 (2017) 2379 (2017) and its relevant presidential statements,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever and by whomsoever committed, and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Reaffirming that terrorism poses a threat to international peace and security and that countering this threat requires collective efforts on national, regional and international levels on the basis of respect for international law and the Charter of the United Nations,

Emphasizing that terrorism and violent extremism conducive to terrorism cannot and should not be associated with any religion, nationality, or civilization,

Reaffirming its commitment to sovereignty, territorial integrity and political independence of all States in accordance with the Charter of the United Nations,

Stressing that Member States have the primary responsibility in countering terrorist acts and violent extremism conducive to terrorism,

Reaffirming that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, *underscoring* that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and *noting* that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of

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the factors contributing to increased radicalization to violence and fosters a sense of impunity,

Stressing that terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States and international and regional organizations to impede, impair, isolate, and incapacitate the terrorist threat,

Urging Member States and the United Nations system to take measures, pursuant to international law, to address all drivers of violent extremism conducive to terrorism, both internal and external, in a balanced manner as set out in the United Nations Global Counter-Terrorism Strategy,

Recalling Resolution 2178 and the definition of foreign terrorist fighters, and *expressing grave concern* over the acute and growing threat posed by foreign terrorist fighters returning or relocating, particularly from conflict zones, to their countries of origin or nationality, or to third countries,

Reaffirming its call on Member States to ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists,

Expressing continued concern that international networks have been established and strengthened by terrorists and terrorist entities among states of origin, transit, and destination, through which foreign terrorist fighters and the resources to support them have been channelled back and forth,

Acknowledging that returning and relocating foreign terrorist fighters have attempted, organized, planned, or participated in attacks in their countries of origin or nationality, or third countries, including against "soft" targets, and that the Islamic State in Iraq and the Levant (ISIL) also known as Da'esh, in particular has called on its supporters and affiliates to carry out attacks wherever they are located,

Stressing the need for Member States to develop, review, or amend national risk and threat assessments to take into account "soft" targets in order to develop appropriate contingency and emergency response plans for terrorist attacks,

Expressing grave concern that foreign terrorist fighters who have joined entities such as (ISIL), the Al-Nusrah Front (ANF) and other cells, affiliates, splinter groups or derivatives of ISIL, Al-Qaida or other terrorist groups, may be seeking to return to their countries of origin or nationality, or to relocate to third countries, and *recognizing* that the threat of returning or relocating foreign terrorist fighters includes, among others, such individuals further supporting acts or activities of ISIL, Al-Qaida and their cells, affiliates, splinter groups, and derivative entities, including by recruiting for or otherwise providing continued support for such entities, and *stressing* the urgent need to address this particular threat,

Having regard to and highlighting the situation of individuals of more than one nationality who travel abroad for the purpose of the perpetration, planning, preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and may seek to return to their state of origin or nationality, or to travel to a third state, and *urging* States to take action, as appropriate, in compliance with their obligations under their domestic law and international law, including international human rights law,

Underlining the importance of strengthening international cooperation to address the threat posed by foreign terrorist fighters, including on information sharing, border security, investigations, judicial processes, extradition, improving prevention and addressing conditions conducive to the spread of terrorism, preventing

and countering incitement to commit terrorist acts, preventing radicalization to terrorism and recruitment of foreign terrorist fighters, disrupting, preventing financial support to foreign terrorist fighters, developing and implementing risks assessments on returning and relocating foreign terrorist fighters and their families, and prosecution, rehabilitation and reintegration efforts, consistent with applicable international law,

Recognizing, in this regard, that foreign terrorist fighters may be travelling with family members they brought with them to conflict zones, with families they have formed or family members who were born while in conflict zones, *underscoring* the need for Member States to assess and investigate these individuals for any potential involvement in criminal or terrorist activities, including by employing evidence-based risk assessments , and to take appropriate action in compliance with relevant domestic and international law, including by considering appropriate prosecution, rehabilitation, and reintegration measures, and *noting* that children may be especially vulnerable to radicalization to violence and in need of particular social support, such as post-trauma counselling, while *stressing* that children need to be treated in a manner that observes their rights and respects their dignity, in accordance with applicable international law,

Noting with concern that terrorists craft distorted narratives, which are utilized to polarize communities, recruit supporters and foreign terrorist fighters, mobilize resources and garner support from sympathizers, in particular by exploiting information and communications technologies, including through the Internet and social media,

Encouraging Member States to collaborate in the pursuit of effective counter-narrative strategies and initiatives, including those relating to foreign terrorist fighters and individuals radicalized to violence, in a manner compliant with their obligations under international law, including international human rights law, international refugee law and international humanitarian law,

Calling upon Member States to improve timely information sharing, through appropriate channels and arrangements, and consistent with international and domestic law, on foreign terrorist fighters, especially among law enforcement, intelligence, counterterrorism, and special services agencies, to aid in determining the risk foreign terrorist fighters pose, and preventing them from planning, directing, conducting, or recruiting for or inspiring others to commit terrorist attacks,

Recognizing that Member States face challenges in obtaining admissible evidence, including digital and physical evidence, from conflict zones that can be used to help prosecute and secure the conviction of foreign terrorist fighters and those supporting foreign terrorist fighters,

Welcoming the establishment of the UN Office on Counterterrorism (UNOCT), and encouraging continued cooperation on counterterrorism efforts between UNOCT, the Counter Terrorism Committee Executive Directorate (CTED), International Civil Aviation Organization (ICAO), and United Nations Office of Drugs and Crime (UNODC), and all other relevant UN bodies, and INTERPOL, on technical assistance and capacity building, in coordination with other relevant international, regional and subregional organizations, to assist Member States in implementing the Global Counter Terrorism Strategy,

Welcoming recent developments and initiatives at the international, regional and subregional levels to prevent and suppress international terrorism, including the UN Counter-terrorism Committee's 2015 Madrid Guiding Principles, and noting the ongoing work of the Global Counterterrorism Forum (GCTF), in particular its 2016 adoption of the Hague-Marrakech Memorandum Addendum on Good Practices for a

More Effective Response to the FTF Phenomenon with a focus on Returning FTFs and its comprehensive set of good practices to address the foreign terrorist fighter phenomenon, and its publication of several other framework documents and good practices, including in the areas of countering violent extremism conducive to terrorism, including online, criminal justice, prosecution, rehabilitation and reintegration, soft target protection, kidnapping for ransom, providing support to victims of terrorism, and community-oriented policing to assist interested States with the practical implementation of the United Nations counter-terrorism legal and policy framework and to complement the work of the relevant United Nations counter-terrorism entities in these areas,

Expressing concern that Foreign Terrorist Fighters may use civil aviation both as a means of transportation and as a target, and may use cargo both to target civil aviation and as a means of shipment of materiel, and *noting* in this regard that International Civil Aviation Organization (ICAO) Annex 9 and Annex 17 to the Convention on International Civil Aviation, done at Chicago on December 7, 1944 (the "Chicago Convention"), contain standards and recommended practices relevant to the detection and prevention of terrorist threats involving civil aviation, including cargo screening,

Welcoming, in this regard, ICAO's decision to establish a standard under Annex 9 — Facilitation, regarding the use of Advance Passenger Information (API) systems by its Member States with effect from October 23, 2017, and *recognizing* that many ICAO Member States have yet to implement this standard,

Noting with concern that terrorists and terrorist groups continue to use the Internet for terrorist purposes, and *stressing* the need for Member States to act cooperatively when taking national measures to prevent terrorists from exploiting technology and communications for terrorist acts, as well as to continue voluntary cooperation with private sector and civil society to develop and implement more effective means to counter the use of the Internet for terrorist purposes, including by developing counter-terrorist narratives and through innovative technological solutions, all while respecting human rights and fundamental freedoms and in compliance with domestic and international law, and *taking note* of the industry led Global Internet Forum to Counter Terrorism (GIFCT) and calling for the GIFCT to continue to increase engagement with governments and technology companies globally,

Recognizing the development of the UN CTED-ICT4 Peace Tech Against Terrorism initiative and its efforts to foster collaboration with representatives from the technology industry, including smaller technology companies, civil society, academia, and government to disrupt terrorists' ability to use the Internet in furtherance of terrorist purposes, while also respecting human rights and fundamental freedoms,

Noting with appreciation the efforts of INTERPOL, to address the threat posed by foreign terrorist fighters, including through global law enforcement information sharing enabled by the use of its secure communications network, databases, and system of advisory notices and procedures to track stolen, forged identity papers and travel documents, and INTERPOL's counter-terrorism fora and foreign terrorist fighter programme,

Recognizing that relevant information, including information included in INTERPOL databases from Member States, should be shared among national agencies, such that law enforcement, judicial and border security officers can proactively and systematically use that information as a resource, where appropriate and necessary, for investigations, prosecutions and screening at points of entry,

Recognizing that a comprehensive approach to the threat posed by foreign terrorist fighters requires addressing the conditions conducive to the spread of terrorism, including by preventing radicalization to terrorism, stemming recruitment, disrupting financial support to terrorists, countering incitement to commit terrorist acts, and promoting political and religious tolerance, good governance, economic development, social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating investigation, prosecution, reintegration and rehabilitation,

Reaffirming its request in paragraph 2 of resolution 2379 (2017), to establish an investigative team, to be headed by a Special Adviser, to support domestic efforts to hold ISIL (Da'esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Daesh) in Iraq, and recalling its invitation in paragraph 29 of resolution 2388 to the Secretary-General to ensure that the work of the Investigative Team is informed by relevant anti-trafficking research and expertise and that its efforts to collect evidence on trafficking in persons offences are gender-sensitive, victim centred, trauma-informed, rights-based and not prejudicial to the safety and security of victims,

Acknowledging that prisons can serve as potential incubators for radicalization to terrorism and terrorist recruitment, and that proper assessment and monitoring of imprisoned foreign terrorist fighters is critical to mitigate opportunities for terrorists to attract new recruits, *recognizing* that prisons can also serve to rehabilitate and reintegrate prisoners, where appropriate, and *also recognizing* that Member States may need to continue to engage with offenders after release from prison to avoid recidivism, in accordance with relevant international law and *taking into consideration*, where appropriate, the United Nations Standard Minimum Rules for the Treatment of Prisoners, or "Nelson Mandela Rules",

Noting that some member states may face technical assistance and capacity building challenges when implementing this resolution, and *encouraging* the provision of assistance from donor states to help address such gaps,

Encouraging relevant UN entities, including UNODC and UNOCT, to further enhance, in close consultation with the Counter-Terrorism Committee and CTED, the provision and delivery of technical assistance to States, upon request, to better support Member State efforts to implement this resolution,

Acting under Chapter VII of the Charter of the United Nations

1. *Recalls* its decision in resolution 2178 that all Member States shall establish serious criminal offenses regarding the travel, recruitment, and financing of foreign terrorist fighters, *urges* Member States to fully implement their obligations in this regard, including to ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense, and *reiterates* its call on Member States to cooperate and support each other's efforts to counter violent extremism conducive to terrorism;

Border Security and Information Sharing

2. *Calls upon* Member States to prevent the movement of terrorists by effective national border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls upon* Member States to notify, in a timely manner, upon travel, arrival, or deportation of captured or detained individuals whom they have reasonable

grounds to believe are terrorists, including suspected foreign terrorist fighters, including, as appropriate, the source country, destination country, any transit countries, all countries where the travelers hold citizenship, and including any additional relevant information about the individuals, and further calls upon Member States to cooperate and respond expeditiously and appropriately, and consistent with applicable international law, and to share such information with INTERPOL, as appropriate;

4. *Further calls upon* Member States to assess and investigate individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters, and distinguish them from other individuals, including their accompanying family members who may not have been engaged in foreign terrorist fighter-related offenses, including by employing evidence-based risk assessments, screening procedures, and the collection and analysis of travel data, in accordance with domestic and international law, including international human rights and humanitarian law, as applicable, without resorting to profiling based on any discriminatory ground prohibited by international law;

5. *Calls upon* Member States, in accordance with domestic and international law, to intensify and accelerate the timely exchange of relevant operational information and financial intelligence regarding actions or movements, and patterns of movements, of terrorists or terrorist networks, including foreign terrorist fighters, including those who have travelled to the conflict zones or are suspected to have travelled to the conflict zones, and their families travelling back to their countries of origin or nationality, or to third countries, from conflict zones, especially the exchange of information with their countries of origin, residence or nationality, transit, as well as their destination country, through national, bilateral and multilateral mechanisms, such as INTERPOL;

6. *Urges* Member States to expeditiously exchange information, through bilateral or multilateral mechanisms and in accordance with domestic and international law, concerning the identity of foreign terrorist fighters, including, as appropriate, foreign terrorist fighters of more than one nationality with Member States whose nationality the foreign terrorist fighter holds, as well as to ensure consular access by those Member States to their own detained nationals, in accordance with applicable international and domestic law;

7. *Calls upon* Member States to take appropriate action, consistent with domestic law and applicable international law, including human rights law, to ensure that their domestic law enforcement, intelligence, counterterrorism, and military entities routinely have access to relevant information, as appropriate, about suspected terrorists, including foreign terrorist fighters;

8. *Urges* that Member States consider, where appropriate, downgrading for official use intelligence threat and related travel data related to foreign terrorist fighters and individual terrorists, to appropriately provide such information domestically to front-line screeners, such as immigration, customs and border security agencies, and to appropriately share such information with other concerned States and relevant international organizations in compliance with international and domestic national law and policy; and to share good practices in this regard;

9. *Welcomes* the approval by ICAO of the new Global Aviation Security Plan (GASeP) that provides the foundation for ICAO, Member States, the civil aviation industry, and other stakeholders to work together with the shared and common goal of enhancing aviation security worldwide and to achieve five key priority outcomes, namely to enhance risk awareness and response, to develop security culture and human capability, to improve technological resources and innovation, to improve oversight and quality assurance, and to increase cooperation and support, and calls

for action at the global, regional, and national levels, as well as by industry and other stakeholders, in raising the level of effective implementation of global aviation security, *urges* ICAO, Member States, the civil aviation industry, and other relevant stakeholders to implement the GASeP and to fulfil the specific measures and tasks assigned to them in Appendix A to the GASeP, the Global Aviation Security Plan Roadmap, and *encourages* Member States to consider contributions to support ICAO's work on aviation security;

10. *Further welcomes* the recognition in the GASeP of the importance of enhancing risk awareness and response, *underlines* the importance of a wider understanding of the threats and risks facing civil aviation, and *calls upon* all Member States to work within ICAO to ensure that its international security standards and recommended practices as set out in Annex 17 of the Chicago Convention and related to ICAO guidance material, are updated and reviewed, as appropriate, to effectively address the threat posed by terrorists targeting civil aviation;

11. *Decides* that, in furtherance of paragraph 9 of resolution 2178 and the standard established by ICAO that its Member States establish advance passenger information (API) systems as of October 23, 2017, that Member States shall require airlines operating in their territories to provide API to the appropriate national authorities, in accordance with domestic law and international obligations, in order to detect the departure from their territories, or attempted travel to, entry into or transit through their territories, by means of civil aircraft, of foreign terrorist fighters and individuals designated by the Committee established pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015), and *further calls upon* Member States to report any such departure from their territories, or such attempted entry into or transit through their territories, by sharing this information with the State of residence or nationality, or the countries of return, transit or relocation, and relevant international organizations as appropriate and in accordance with domestic law and international obligations, and to ensure API is analysed by all relevant authorities, with full respect for human rights and fundamental freedoms for the purpose of preventing, detecting, and investigating terrorist offenses and travel;

12. *Decides* that Member States shall develop the capability to collect, process and analyse, in furtherance of ICAO standards and recommended practices, passenger name record (PNR) data and to ensure PNR data is used by and shared with all their competent national authorities, with full respect for human rights and fundamental freedoms for the purpose of preventing, detecting and investigating terrorist offenses and related travel, *further calls upon* Member States, the UN, and other international, regional, and subregional entities to provide technical assistance, resources and capacity building to Member States in order to implement such capabilities, and, where appropriate, *encourages* Member States to share PNR data with relevant or concerned Member States to detect foreign terrorist fighters returning to their countries of origin or nationality, or traveling or relocating to a third country, with particular regard for all individuals designated by the Committee established pursuant to resolutions 1267 (1999), 1989 (2011), and 2253 (2015), and also *urges* ICAO to work with its Member States to establish a standard for the collection, use, processing and protection of PNR data;

13. *Decides* that Member States shall develop watch lists or databases of known and suspected terrorists, including foreign terrorist fighters, for use by law enforcement, border security, customs, military, and intelligence agencies to screen travelers and conduct risk assessments and investigations, in compliance with domestic and international law, including human rights law, and *encourages* Member States to share this information through bilateral and multilateral mechanisms, in compliance with domestic and international human rights law, and further *encourages* the facilitation of capacity building and technical assistance by Member States and

other relevant Organizations to Member States as they seek to implement this obligation;

14. *Encourages* improved cooperation between ICAO and CTED, in coordination with other relevant UN entities, in identifying areas where Member States may need technical assistance and capacity-building to implement the obligations of this resolution related to PNR and API and watch lists, as well as implementation of the GaSEP;

15. *Decides that* Member States shall develop and implement systems to collect biometric data, which could include fingerprints, photographs, facial recognition, and other relevant identifying biometric data, in order to responsibly and properly identify terrorists, including foreign terrorist fighters, in compliance with domestic law and international human rights law, *calls upon* other Member States, international, regional, and subregional entities to provide technical assistance, resources, and capacity building to Member States in order to implement such systems and *encourages* Member States to share this data responsibly among relevant Member States, as appropriate, and with INTERPOL and other relevant international bodies;

16. *Calls upon* Member States to contribute to and make use of INTERPOL's databases and ensure that Member States' law enforcement, border security and customs agencies are connected to these databases through their National Central Bureaus, and make regular use of INTERPOL databases for use in screening travelers at air, land and sea ports of entry and to strengthen investigations and risk assessments of returning and relocating foreign terrorist fighters and their families, and *further calls upon* Member States to continue sharing information regarding all lost and stolen travel documents with INTERPOL, as appropriate and consistent with domestic law and applicable international law to enhance the operational effectiveness of INTERPOL databases and notices;

Judicial Measures and International Cooperation

17. *Recalls* its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, and further *recalls* its decision that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize the activities described in paragraph 6 of resolution 2178 in a manner duly reflecting the seriousness of the offense;

18. *Urges* Member States, in accordance with domestic and applicable international human rights law and international humanitarian law, to develop and implement appropriate investigative and prosecutorial strategies, regarding those suspected of the foreign terrorist fighter-related offenses described in paragraph 6 of resolution 2178 (2014);

19. *Reaffirms* that those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable;

20. *Calls upon* Member States, including through relevant Central Authorities, as well as UNODC and other relevant UN entities that support capacity building, to share best practices and technical expertise, informally and formally, with a view to improving the collection, handling, preservation and sharing of relevant information and evidence, in accordance with domestic law and the obligations Member States have undertaken under international law, including information obtained from the internet, or in conflict zones, in order to ensure foreign terrorist fighters who have

committed crimes, including those returning and relocating to and from the conflict zone, may be prosecuted;

21. *Encourages* enhancing Member State cooperation with the private sector, in accordance with applicable law, especially with information communication technology companies, in gathering digital data and evidence in cases related to terrorism and foreign terrorist fighters;

22. *Calls upon* Member States to improve international, regional, and sub regional cooperation, if appropriate through multilateral and bilateral agreements, to prevent the undetected travel of foreign terrorist fighters from or through their territories, especially returning and relocating foreign terrorist fighters, including through increased sharing of information for the purpose of identifying foreign terrorist fighters, the sharing and adoption of best practices, and improved understanding of the patterns of travel by foreign terrorist fighters and their families, and for Member States to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources to support terrorist acts, while respecting human rights and fundamental freedoms and consistent with their obligations under domestic and applicable international law;

23. *Recalls* its decision in resolution 1373 (2001) that Member States shall afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, and further underscores that this includes physical and digital evidence, *underlines* the importance of fulfilling this obligation with respect to such investigations or proceedings involving foreign terrorist fighters, while respecting human rights and fundamental freedoms and consistent with obligations under domestic and applicable international law; and *urges* Member States to act in accordance with their obligations under international law in order to find and bring to justice, extradite or prosecute any person who supports, facilitates, participates or attempts to participate in the direct or indirect financing of activities conducted by terrorists or terrorist groups;

24. *Underscores* the need for Member States to strengthen international judicial cooperation, as outlined in Resolution 2322 and in light of the evolving threat of foreign terrorist fighters, including, as appropriate, to use applicable international instruments to which they are parties as a basis for mutual legal assistance and, as appropriate, for extradition in terrorism cases, *reiterates* its call on Member States to consider strengthening the implementation of, and where appropriate, to review possibilities for enhancing the effectiveness of, their respective bilateral and multilateral treaties concerning extradition and Mutual Legal Assistance in criminal matters related to counterterrorism, and *encourages* Member States, in the absence of applicable conventions or provisions, to cooperate when possible on the basis of reciprocity or on a case by case basis, and *reiterates* its call upon Member States to consider the possibility of allowing, through appropriate laws and mechanisms, the transfer of criminal proceedings, as appropriate, in terrorism-related cases and *recognizing* the role of UNODC is providing technical assistance and expertise in this regard;

25. *Calls upon* Member States to help build the capacity of other Member States to address the threat posed by foreign terrorist fighter returnees and relocators and their accompanying family members, prioritizing those Member States most affected by the threat, including to prevent and monitor foreign terrorist fighter travel across land and maritime borders, and to help collect and preserve evidence admissible in judicial proceedings;

26. *Calls upon* Member States to improve domestic information sharing within their respective criminal justice systems in order to more effectively monitor returning and relocating foreign terrorist fighters and other individuals radicalized to violence or directed by ISIL or other terrorist groups to commit terrorist acts, in accordance with international law;

27. *Calls upon* Member States to establish or strengthen national, regional and international partnerships with stakeholders, both public and private, as appropriate, to share information and experience in order to prevent, protect, mitigate, investigate, respond to and recover from damage from terrorist attacks against "soft" targets;

28. *Urges* States able to do so to assist in the delivery of effective and targeted capacity development, training and other necessary resources, and technical assistance, where it is needed to enable all States to develop appropriate capacity to implement contingency and response plans with regard to attacks on "soft" targets;

Prosecution, Rehabilitation and Reintegration Strategies

29. *Calls upon* Member States to assess and investigate suspected individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters and their accompanying family members, including spouses and children, entering those Member States' territories, to develop and implement comprehensive risk assessments for those individuals, and to take appropriate action, including by considering appropriate prosecution, rehabilitation, and reintegration measures and *emphasizes* that Member States should ensure that they take all such action in compliance with domestic and international law;

30. *Calls upon* Member States, *emphasizing* that they are obliged, in accordance with resolution 1373, to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, to develop and implement comprehensive and tailored prosecution, rehabilitation, and reintegration strategies and protocols, in accordance with their obligations under international law, including with respect to foreign terrorist fighters and spouses and children accompanying returning and relocating foreign terrorist fighters, as well as their suitability for rehabilitation, and to do so in consultation, as appropriate, with local communities, mental health and education practitioners and other relevant civil society organizations and actors, and *requests* UNODC and other relevant UN agencies, consistent with their existing mandates and resources, and other relevant actors to continue providing technical assistance to Member States, upon request, in this regard;

31. *Emphasizes* that women and children associated with foreign terrorist fighters returning or relocating to and from conflict may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and require special focus when developing tailored prosecution, rehabilitation and reintegration strategies, and *stresses* the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities;

32. *Underscores* the importance of a whole of government approach and *recognizes* the role civil society organizations can play, including in the health, social welfare and education sectors in contributing to the rehabilitation and reintegration of returning and relocating foreign terrorist fighters and their families, as civil society organizations may have relevant knowledge of, access to and engagement with local communities to be able to confront the challenges of recruitment and radicalization to violence, and *encourages* Member States to engage with them proactively when developing rehabilitation and reintegration strategies;

33. *Stresses* the need to effectively counter the ways that ISIL, Al-Qaida, and associated individuals, groups, undertakings and entities use their narratives to incite and recruit others to commit terrorist acts, and further recalls in this regard resolution 2354 (2017) and the "Comprehensive International Framework to Counter Terrorist Narratives" (S/2017/375) with recommended guidelines and good practices;

34. *Encourages* Member States to collaborate in the pursuit of developing and implementing effective counter-narrative strategies in accordance with resolution 2354 (2017), including those relating to foreign terrorist fighters, in a manner compliant with their obligations under international law, including international human rights law, international refugee law and international humanitarian law, as applicable;

35. *Reiterates* that States should consider engaging, where appropriate, with religious authorities, community leaders and other civil society actors, who have relevant expertise in crafting and delivering effective counter-narratives, in countering narratives used by terrorists, including foreign terrorist fighters, and their supporters;

36. *Recognizes* the particular importance of providing, through a whole of government approach, timely and appropriate reintegration and rehabilitation assistance to children associated with foreign terrorist fighters returning or relocating from conflict zones, including through access to health care, psychosocial support and education programs that contribute to the well-being of children and to sustainable peace and security;

37. *Encourages* Member States to develop appropriate legal safeguards to ensure that prosecution, rehabilitation and reintegration strategies developed are in full compliance with their international law obligations, including in cases involving children;

38. *Calls upon* Member States to develop and implement risk assessment tools to identify individuals who demonstrate signs of radicalization to violence and develop intervention programs, including with a gender perspective, as appropriate, before such individuals commit acts of terrorism, in compliance with applicable international and domestic law and without resorting to profiling based on any discriminatory grounds prohibited by international law;

39. *Encourages* Member States, as well as international, regional, and sub-regional entities to ensure participation and leadership of women in the design, implementation, monitoring, and evaluation of these strategies for addressing returning and relocating foreign terrorist fighters and their families;

40. *Encourages* Member States to take all appropriate actions to maintain a safe and humane environment in prisons, develop tools that can help address radicalization to violence and terrorist recruitment, and to develop risk assessments to assess the risks of prison inmates' susceptibility to terrorist recruitment and radicalization to violence, and develop tailored and gender-sensitive strategies to address and counter terrorist narratives within the prison system, consistent with international humanitarian law and human rights law, as applicable and in accordance with relevant international law and *taking into consideration, as appropriate*, the United Nations Standard Minimum Rules for the Treatment of Prisoners, or "Nelson Mandela Rules";

41. *Encourages* Member States to take all appropriate actions to prevent inmates who have been convicted of terrorism-related offenses from radicalizing other prisoners to violence, with whom they may come into contact, in compliance with domestic and international law;

United Nations Efforts on Returning and Relocating Foreign Terrorist Fighters

42. *Reaffirms* that foreign terrorist fighters and those who finance or otherwise facilitate their travel and subsequent activities may be eligible for inclusion on the ISIL (Da'esh) & Al-Qaida Sanctions List maintained by the Committee pursuant to resolutions 1267 (1999), 1989 (2011), and 2253 (2015) where they participate in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of, supplying, selling or transferring arms and related materiel to, or recruiting for, or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof, and *calls upon* States to propose such foreign terrorist fighters and those who facilitate or finance their travel and subsequent activities for possible designation;

43. *Directs* the Committee established pursuant to resolution 1267 (1999), 1989 (2011) and 2253 (2015) and the Analytical Support and Sanctions Monitoring Team, in close cooperation with all relevant United Nations counter-terrorism bodies, to continue to devote special focus to the threat posed by foreign terrorist fighters, specifically those associated with ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida;

44. *Requests* the Counter-Terrorism Committee, within its existing mandate and with the support of Counter-Terrorism Executive Directorate (CTED), to review the 2015 Madrid Guiding Principles in light of the evolving threat of foreign terrorist fighters, particularly returnees, relocators and their families, and other principle gaps that may hinder States' abilities to appropriately detect, interdict, and where possible, prosecute, rehabilitate and reintegrate foreign terrorist fighter returnees and relocators and their families, as well as to continue to identify new good practices and to facilitate technical assistance, upon their request, specifically by promoting engagement between providers of capacity-building assistance and recipients, especially those in the most affected regions, including through the development of comprehensive counter-terrorism strategies that encompass countering radicalization to violence and the return and relocation of foreign terrorist fighters and their families, recalling the roles of other relevant actors, for example the Global Counterterrorism Forum;

45. *Further requests* CTED, in coordination with UNODC and other relevant UN bodies, INTERPOL, and the private sector, and in collaboration with Member States, to continue to collect and develop best practices on the systematic categorization, collection and sharing among Member States of biometric data, with a view to improving biometric standards and improving the collection and use of biometric data to effectively identify terrorists, including foreign terrorist fighters, including through the facilitation of capacity building, as appropriate;

46. *Requests* the Committee established pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) and the Counter-Terrorism Committee to update the Security Council on their respective efforts pursuant to this resolution, as appropriate;

47. *Encourages* relevant UN entities, including UNODC and UNOCT, to further enhance, in close consultation with the Counter-Terrorism Committee and CTED, the provision and delivery of technical assistance to States, upon request, to better support Member State efforts to implement this resolution;

48. *Notes* that the implementation of aspects of this resolution, especially PNR and biometric data collection, can be resource-intensive and take an extended period of time to develop and make operational, *directs* CTED to take this into consideration when assessing Member States' implementation of relevant resolutions, and in its furtherance of facilitating technical assistance as requested in paragraph 47;

49. *Urges* the Office of Counterterrorism to incorporate CTED assessments and identification of emerging issues, trends and developments as related to foreign terrorist fighters into the design and implementation of their work, in accordance with their respective mandates, as well as to enhance cooperation with relevant UN counter-terrorism entities such as CTED, UNODC, the Analytical Support and Sanctions Monitoring Team, and INTERPOL;

50. *Requests* the Office of Counterterrorism, in close cooperation with CTED, including through use of CTED country assessments, to review the UN Capacity Building Implementation Plan to counter the Flow of FTFs, as called for under S/PRST/2015/11, to ensure that the Plan supports Member States in their efforts to implement the priorities of this resolution, the establishment of effective API systems, the development of PNR capability, the development of effective biometric data systems, the improvement of judicial procedures, and the development of comprehensive and tailored prosecution, rehabilitation, and reintegration strategies, *further requests* OCT to communicate the prioritization of these projects and any updates to the plan to all Member States and relevant international, regional, and sub-regional bodies by June 2018, and to continue incorporating CTED country assessments in its Plan on a routine basis, *further requests* OCT to develop ways to measure the effectiveness of these projects, and *calls upon* Member States, as appropriate, to provide the resources needed to implement these projects;

51. *Decides* to remain seized of the matter.

Annex 99

United Nations Security Council, "The List established and maintained pursuant to Security Council res. 223 (2015)", generated on 23 November 2018

Website of the United Nations Security Council available at https://scsanctions.un.org/fop/fop?xml=htdocs/resources/xml/en/consolidated.xml&xslt=htdocs/resources/xsl/en/iran-r.xsl

The List established and maintained pursuant to Security Council res. 2231 (2015)

Generated on: 23 November 2018

"Generated on refers to the date on which the user accessed the list and not the last date of substantive update to the list. Information on the substantive list updates are provided on the Council / Committee's website."

Composition of the List

The list consists of the two sections specified below:
A. Individuals
B. Entities and other groups

Information about de-listing may be found at:
https://www.un.org/sc/suborg/en/ombudsperson (for res. 1267)
https://www.un.org/sc/suborg/en/sanctions/delisting (for other Committees)
https://www.un.org/en/sc/2231/list.shtml (for res. 2231)

A. Individuals

IRi.001 Name: 1: FEREIDOUN 2: ABBASI-DAVANI 3: na 4: na
Title: na **Designation:** Senior Ministry of Defence and Armed Forces Logistics (MODAFL) Scientist **DOB: a)** 1958 **b)** 1959 **POB:** Abadan, Iran (Islamic Republic of) **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** Has "links to the Institute of Applied Physics, working closely with Mohsen Fakhrizadeh-Mahabadi" (designated under IRi.016) [Old Reference # I.47.C.1].

IRi.003 Name: 1: AZIM 2: AGHAJANI 3: na 4: na
Title: na **Designation:** Member of the IRGC-Qods Force operating under the direction of Qods Force Commander, Major General Qasem Soleimani, who was designated by the UN Security Council in resolution 1747 (2007) **DOB:** na **POB:** na **Good quality a.k.a.:** Azim Adhajani; Azim Agha-Jani **Low quality a.k.a.:** na **Nationality:** Iran (Islamic Republic of) **Passport no: a)** 6620505, issued in Iran (Islamic Republic of) **b)** 9003213, issued in Iran (Islamic Republic of) **National identification no:** na **Address:** na **Listed on:** 18 Apr. 2012 (amended on 17 Dec. 2014) **Other information:** Facilitated a breach of paragraph 5 of resolution 1747 (2007) prohibiting the export of arms and related materiel from Iran. [Old Reference # I.AC.50.18.04.12.(1)]

IRi.004 Name: 1: ALI AKBAR 2: AHMADIAN 3: na 4: na
Title: na **Designation: a)** Vice Admiral **b)** Chief of IRGC Joint Staff **DOB:** 1961 **POB:** Kerman, Iran (Islamic Republic of) **Good quality a.k.a.:** Ali Akbar Ahmedian **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** Position changed. [Old Reference # I.47.D.2]

IRi.009 Name: 1: BAHMANYAR MORTEZA 2: BAHMANYAR 3: na 4: na
Title: na **Designation:** Head of Finance and Budget Department of the Aerospace Industries Organization (AIO). **DOB:** 31 Dec. 1952 **POB:** na **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** Iran **Passport no: a)** I0005159, issued in Iran **b)** 10005159, issued in Iran **National identification no:** na **Address:** na **Listed on:** 23 Dec. 2006 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.37.D.4]

IRi.012 Name: 1: AHMAD VAHID 2: DASTJERDI 3: na 4: na
Title: na **Designation:** Head of the AIO **DOB:** 15 Jan. 1954 **POB:** na **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** number A0002987, issued in Iran **National identification no:** na **Address:** na **Listed on:** 23 Dec. 2006 (amended on 17 Dec. 2014) **Other information:** Served as Deputy Defense Minister 2009-10. [Old Reference # I.37.D.2]

IRi.013 Name: 1: AHMAD 2: DERAKHSHANDEH 3: na 4: na
Title: na **Designation:** Chairman and Managing Director of Bank Sepah, which provides support for the AIO and subordinates, including SHIG and SBIG, both of which were designated under resolution 1737 (2006). **DOB:** 11 Aug. 1956 **POB:** na **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** 33 Hormozan Building, Pirozan St., Sharak Ghods, Tehran, Iran (Islamic Republic of) **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.47.C.8]

IRi.014 Name: 1: MOHAMMAD 2: ESLAMI 3: na 4: na
Title: Dr. **Designation:** Head of Iran's Defence Industries Training and Research Institute. **DOB:** na **POB:** na **Good quality a.k.a.:** Mohammad Islami; Mohamed Islami; Mohammed Islami **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 3 Mar. 2008 (amended on 17 Dec. 2014) **Other information:** Served as Deputy Defence Minister from 2012 to 2013. [Old Reference # I.03.I.6]

IRi.015 Name: 1: REZA-GHOLI 2: ESMAELI 3: na 4: na
Title: na **Designation:** Head of Trade and International Affairs Department of the AIO. **DOB:** 3 Apr. 1961 **POB:** na **Good quality a.k.a.:** Reza-Gholi Ismaili **Low quality a.k.a.:** na **Nationality:** na **Passport no:** number A0002302, issued in Iran (Islamic Republic of) **National identification no:** na **Address:** na **Listed on:** 23 Dec. 2006 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.37.D.3]

IRi.016 Name: 1: MOHSEN 2: FAKHRIZADEH-MAHABADI 3: na 4: na
Title: na **Designation:** **a)** Senior MODAFL scientist **b)** Former head of the Physics Research Centre (PHRC) **DOB:** na **POB:** na **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** **a)** A0009228 (Unconfirmed (likely Iran)) **b)** 4229533 (Unconfirmed (likely Iran)) **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** The IAEA have asked to interview him about the activities of the PHRC over the period he was head but Iran has refused. [Old Reference # I.47.C.2]

IRi.017 Name: 1: MOHAMMAD 2: HEJAZI 3: na 4: na
Title: na **Designation:** **a)** Brigadier General **b)** Commander of Bassij resistance force **DOB:** 1959 **POB:** Isfahan, Iran (Islamic Republic of) **Good quality a.k.a.:** Mohammed Hijazi **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.47.D.5]

IRi.018 Name: 1: MOHSEN 2: HOJATI 3: na 4: na
Title: na **Designation:** Head of Fajr Industrial Group, which is designated under resolution 1737 (2006) for its role in the ballistic missile programme. **DOB:** 28 Sep. 1955 **POB:** na **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** number G4506013, issued in Iran (Islamic Republic of) **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.47.C.5]

IRi.020 Name: 1: MEHRDADA AKHLAGHI 2: KETABACHI 3: na 4: na
Title: na **Designation:** Head of the Shahid Bagheri Industrial Group (SBIG), which is designated under resolution 1737 (2006) for its role in the ballistic missile programme (designated under IRe.066). **DOB:** 10 Sep. 1958 **POB:** na **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** A0030940, issued in Iran (Islamic Republic of) **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.47.C.6]

IRi.022 Name: 1: NASER 2: MALEKI 3: na 4: na
Title: na **Designation:** **a)** Head of Shahid Hemmat Industrial Group (SHIG), which is designated under resolution 1737 (2006) for its role in Iran's ballistic missile programme (designated under IRe.067). **b)** MODAFL official overseeing work on the Shahab-3 ballistic missile programme, Iran's long range ballistic missile currently in service. **DOB:** 1960 **POB:** na **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** number A0003039, issued in Iran (Islamic Republic of) **National identification no:** Iran (Islamic Republic of) 0035011785, issued in Iran (Islamic Republic of) **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.47.C.7]

IRi.026 Name: 1: MOHAMMAD REZA 2: NAQDI 3: na 4: na
Title: na **Designation: a)** Brigadier-General **b)** Former Deputy Chief of Armed Forces General Staff for Logistics and Industrial Research **c)** Head of State Anti-Smuggling Headquarters **DOB: a)** 11 Feb. 1949 **b)** 11 Feb. 1952 **c)** 11 Feb. 1953 **d)** 11 Feb. 1961 **POB: a)** Najaf, Iraq **b)** Tehran, Iran (Islamic Republic of) **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 3 Mar. 2008 (amended on 17 Dec. 2014) **Other information:** Engaged in efforts to get round the sanctions imposed by resolutions 1737 (2006) and 1747 (2007). [Old Reference # I.03.I.10]

IRi.027 Name: 1: MOHAMMAD MEHDI 2: NEJAD NOURI 3: na 4: na
Title: na **Designation: a)** Lieutenant General **b)** Rector of Malek Ashtar University of Defence Technology (chemistry department, affiliated to MODAFL, has conducted experiments on beryllium). **DOB:** na **POB:** na **Good quality a.k.a.:** na **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 23 Dec. 2006 (amended on 17 Dec. 2014) **Other information:** Deputy Minister of Science, Research and Technology. [Old Reference # I.37.C.7]

IRi.033 Name: 1: MORTEZA 2: REZAIE 3: na 4: na
Title: na **Designation: a)** Brigadier General **b)** Deputy Commander of IRGC **DOB:** 1956 **POB:** na **Good quality a.k.a.:** Mortaza Rezaie; Mortaza Rezai; Morteza Rezai **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.47.D.1]

IRi.035 Name: 1: MORTEZA 2: SAFARI 3: na 4: na
Title: na **Designation: a)** Rear Admiral **b)** Commander of IRGC Navy **DOB:** na **POB:** na **Good quality a.k.a.:** Mortaza Safari; Morteza Saferi; Murtaza Saferi; Murtaza Safari **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference #I.47.D.4]

IRi.036 Name: 1: YAHYA RAHIM 2: SAFAVI 3: na 4: na
Title: na **Designation: a)** Major General **b)** Commander, IRGC (Pasdaran) **DOB:** 1952 **POB:** Isfahan, Iran (Islamic Republic of) **Good quality a.k.a.:** Yahya Raheem Safavi **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 23 Dec. 2006 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.37.E.1]

IRi.038 Name: 1: HOSEIN 2: SALIMI 3: na 4: na
Title: na **Designation: a)** General **b)** Commander of the Air Force, IRGC (Pasdaran) **DOB:** na **POB:** na **Good quality a.k.a.:** Husain Salimi; Hosain Salimi; Hussain Salimi; Hosein Saleemi; Husain Saleemi; Hosain Saleemi; Hussain Saleemi; Hossein Salimi; Hossein Saleemi **Low quality a.k.a.:** na **Nationality:** na **Passport no:** number D08531177, issued in Iran (Islamic Republic of) **National identification no:** na **Address:** na **Listed on:** 23 Dec. 2006 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.37.D.1]

IRi.039 Name: 1: QASEM 2: SOLEIMANI 3: na 4: na
Title: na **Designation: a)** Brigadier General **b)** Commander of Qods force **DOB:** 11 Mar. 1957 **POB:** Qom, Iran (Islamic Republic of) **Good quality a.k.a.:** Qasim Soleimani; Qasem Sulaimani; Qasim Sulaimani; Qasim Sulaymani; Qasem Sulaymani; Kasim Soleimani; Kasim Sulaimani; Kasim Sulaymani **Low quality a.k.a.:** Haj Qasem; Haji Qassem; Sardar Soleimani **Nationality:** na **Passport no:** number 008827, issued in Iran (Islamic Republic of) **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** Promoted to Major General, retaining his position as Commander of Qods force. [Old Reference # I.47.D.6]

IRi.041 Name: 1: ALI AKBAR 2: TABATABAEI 3: na 4: na
Title: na **Designation:** Member of the IRGC Qods Force operating under the direction of Qods Force Commander, Major General Qasem Soleimani who was designated by the UN Security Council in resolution 1747 (2007) (designated under IRi.039). **DOB:** 1967 **POB:** na **Good quality a.k.a.: a)** Sayed Akbar Tahmaesebi; Syed Akber Tahmaesebi **b)** Ali Akber Tabatabaei; Ali Akber Tahmaesebi; Ali Akbar Tahmaesebi **Low quality a.k.a.:** na **Nationality:** Iran (Islamic Republic of) **Passport no: a)** 9003213, issued in Iran / unknown **b)** 6620505, issued in Iran / unknown **National identification no:** na **Address:** na **Listed on:** 18 Apr. 2012 (amended on 17 Dec. 2014) **Other information:** Facilitated a breach of paragraph 5 of resolution 1747 (2007) prohibiting the export of arms and related materiel from Iran. [Old Reference # I.AC.50.18.04.12.(2)]

IRi.042 Name: 1: MOHAMMAD REZA 2: ZAHEDI 3: na 4: na
Title: na **Designation: a)** Brigadier General **b)** Commander of IRGC Ground Forces **DOB:** 1944 **POB:** Isfahan, Iran (Islamic Republic of) **Good quality a.k.a.:** Mohammad Reza Zahidi; Mohammad Raza Zahedi **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.47.D.3]

IRi.043 Name: 1: MOHAMMAD BAQER 2: ZOLQADR 3: na 4: na
Title: na **Designation: a)** General **b)** IRGC officer **c)** Deputy Interior Minister for Security Affairs **DOB:** na **POB:** na **Good quality a.k.a.:** Mohammad Bakr Zolqadr; Mohammad Bakr Zolkadr; Mohammad Baqer Zolqadir; Mohammad Baqer Zolqader **Low quality a.k.a.:** na **Nationality:** na **Passport no:** na **National identification no:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** [Old Reference # I.47.D.7]

B. Entities and other groups

IRe.001 Name: 7TH OF TIR
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 23 Dec. 2006 (amended on 17 Dec. 2014) **Other information:** Subordinate of Defence Industries Organisation (DIO), widely recognized as being directly involved in the nuclear programme. [Old Reference #E.37.A.7]

IRe.002 Name: ABZAR BORESH KAVEH CO. (BK CO.)
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 (amended on 17 Dec. 2014) **Other information:** Involved in the production of centrifuge components. [Old Reference # E.03.III.1]

IRe.003 Name: AMIN INDUSTRIAL COMPLEX
A.k.a.: a) Amin Industrial Compound **b)** Amin Industrial Company **F.k.a.:** na **Address: a)** P.O. Box 91735-549, Mashad, Iran (Islamic Republic of) **b)** Amin Industrial Estate, Khalage Rd., Seyedi District, Mashad, Iran (Islamic Republic of) **c)** Kaveh Complex, Khalaj Rd., Seyedi St., Mashad, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 (amended on 17 Dec. 2014) **Other information:** Sought temperature controllers which may be used in nuclear research and operational/production facilities. Amin Industrial Complex is owned or controlled by, or acts on behalf of, DIO, which was designated in resolution 1737 (2006). [Old Reference # E.29.I.1]

IRe.004 Name: AMMUNITION AND METALLURGY INDUSTRIES GROUP (AMIG)
A.k.a.: Ammunition Industries Group **F.k.a.:** na **Address:** na **Listed on:** 24 Mar. 2007 (amended on 17 Dec. 2014) **Other information:** Controls 7th of Tir, which is designated under resolution 1737 (2006) for its role in Iran's centrifuge programme. AMIG is in turn owned and controlled by DIO, which is designated under resolution 1737 (2006). [Old Reference # E.47.A.1]

IRe.005 Name: ARMAMENT INDUSTRIES GROUP (AIG)
A.k.a.: na **F.k.a.:** na **Address: a)** Sepah Islam Road, Karaj Special Road Km 10, Iran (Islamic Republic of) **b)** Pasdaran Ave., Tehran, Iran (Islamic Republic of) **c)** P.O. Box 19585/777, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 (amended on 17 Dec. 2014) **Other information:** Manufacturers and services a variety of small arms and light weapons, including large- and medium-calibre guns and related technology. AIG conducts the majority of its procurement activity through Hadid Industries Complex. [Old Reference # E.29.I.2]

IRe.008 Name: BARZAGANI TEJARAT TAVANMAD SACCAL COMPANIES
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 **Other information:** A subsidiary of Saccal System companies, this company tried to purchase sensitive goods for an entity listed in resolution 1737 (2006). [Old Reference # E.03.III.2]

IRe.009 Name: BEHINEH TRADING CO.
A.k.a.: na **F.k.a.:** na **Address:** Tavakoli Building, Opposite of 15th Alley, Emam-Jomeh Street, Tehran, Iran (Islamic Republic of) **Listed on:** 18 Apr. 2012 **Other information:** An Iranian company that played a key role in Iran's illicit transfer of arms to West Africa and acted on behalf of the IRGC Qods Force, commanded by Major General Qasem Soleimani, designated by the UN Security Council in resolution 1747 (2007), as the shipper of the weapons consignment. (Additional Information: Telephone: 98-919-538-2305; Website: http://www.behinehco.ir) [Old Reference # E.AC.50.18.04.12]

IRe.010 Name: CRUISE MISSILE INDUSTRY GROUP
A.k.a.: Naval Defence Missile Industry Group **F.k.a.:** na **Address:** na **Listed on:** 24 Mar. 2007 **Other information:** Production and development of cruise missiles. Responsible for naval missiles including cruise missiles. [Old Reference # E.47.A.7]

IRe.011 Name: DEFENCE INDUSTRIES ORGANISATION (DIO)
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 23 Dec. 2006 **Other information:** Overarching MODAFL-controlled entity, some of whose subordinates have been involved in the centrifuge programme making components, and in the missile programme. [Old Reference # E.37.A.6]

IRe.012 Name: DEFENSE TECHNOLOGY AND SCIENCE RESEARCH CENTER (DTSRC)
A.k.a.: na **F.k.a.:** na **Address:** Pasdaran Av., PO Box 19585/777, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 (amended on 17 Dec. 2014) **Other information:** Owned or controlled by, or acts on behalf of, MODAFL, which oversees Iran's defence research and development, production, maintenance, exports and procurement. [Old Reference # E.29.I.3]

IRe.013 Name: DOOSTAN INTERNATIONAL COMPANY (DICO)
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 (amended on 17 Dec. 2014) **Other information:** Supplies elements to Iran's ballistic missile programme. [Old Reference # E.29.I.4]

IRe.014 Name: ELECTRO SANAM COMPANY
A.k.a.: a) E. S. Co. **b)** E. X. Co. **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 **Other information:** AIO front-company, involved in the ballistic missile programme. [Old Reference # E.03.III.3]

IRe.016 Name: ETTEHAD TECHNICAL GROUP
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 **Other information:** AIO front-company, involved in the ballistic missile programme. [Old Reference # E.03.III.4]

IRe.017 Name: FAJR INDUSTRIAL GROUP
A.k.a.: na **F.k.a.:** Instrumentation Factory Plant **Address:** na **Listed on:** 23 Dec. 2006 **Other information:** Subordinate entity of AIO. [Old Reference # E.37.B.3]

IRe.018 Name: FARASAKHT INDUSTRIES
A.k.a.: na **F.k.a.:** na **Address:** P.O. Box 83145-311, Kilometer 28, Esfahan-Tehran Freeway, Shahin Shahr, Esfahan, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acts on behalf of, the Iran Aircraft Manufacturing Company, which in turn is owned or controlled by MODAFL. [Old Reference # E.29.I.5]

IRe.019 Name: FARAYAND TECHNIQUE
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 23 Dec. 2006 **Other information:** Involved in centrifuge programme, identified in IAEA reports. [Old Reference # E.37.A.5]

IRe.020 Name: FATER INSTITUTE
A.k.a.: Faater Institute **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Khatam al-Anbiya (KAA) subsidiary. Fater has worked with foreign suppliers, likely on behalf of other KAA companies on IRGC projects in Iran. [Old Reference # E.29.II.1]

IRe.022 Name: GHARAGAHE SAZANDEGI GHAEM
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by KAA. [Old Reference # E.29.II.2]

IRe.023 Name: GHORB KARBALA
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by KAA. [Old Reference # E.29.II.3]

IRe.024 Name: GHORB NOOH
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by KAA. [Old Reference # E.29.II.4]

IRe.025 Name: HARA COMPANY
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by Ghorb Nooh. [Old Reference # E.29.II.5]

IRe.026 Name: IMENSAZAN CONSULTANT ENGINEERS INSTITUTE
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acts on behalf of, KAA. [Old Reference # E.29.II.6]

IRe.027 Name: INDUSTRIAL FACTORIES OF PRECISION (IFP) MACHINERY
A.k.a.: Instrumentation Factories Plant **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 **Other information:** Used by AIO for some acquisition attempts. [Old Reference # E.03.III.5]

IRe.031 Name: JOZA INDUSTRIAL CO.
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 **Other information:** AIO front-company, involved in the ballistic missile programme. [Old Reference # E.03.III.7]

IRe.032 Name: KALA-ELECTRIC
A.k.a.: Kalaye Electric **F.k.a.:** na **Address:** na **Listed on:** 23 Dec. 2006 **Other information:** Provider for PFEP - Natanz. [Old Reference # E.37.A.3]

IRe.034 Name: KAVEH CUTTING TOOLS COMPANY
A.k.a.: na **F.k.a.:** na **Address:** **a)** 3rd Km of Khalaj Road, Seyyedi Street, Mashad, 91638, Iran (Islamic Republic of) **b)** Km 4 of Khalaj Road, End of Seyedi Street, Mashad, Iran (Islamic Republic of) **c)** P.O. Box 91735-549, Mashad, Iran (Islamic Republic of) **d)** Khalaj Rd., End of Seyyedi Alley, Mashad, Iran (Islamic Republic of) **e)** Moqan St., Pasdaran St., Pasdaran Cross Rd., Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acts on behalf of, DIO. [Old Reference # E.29.I.7]

IRe.036 Name: KHATAM AL-ANBIYA CONSTRUCTION HEADQUARTERS (KAA)
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 (amended on 17 Dec. 2014) **Other information:** KAA is an IRGC-owned company involved in large scale civil and military construction projects and other engineering activities. It undertakes a significant amount of work on Passive Defense Organization projects. In particular, KAA subsidiaries were heavily involved in the construction of the uranium enrichment site at Qom/Fordow. [Old Reference # E.29.II.7]

IRe.037 Name: KHORASAN METALLURGY INDUSTRIES
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 **Other information:** Subsidiary of AMIG which depends on DIO. Involved in the production of centrifuges components. [Old Reference # E.03.III.8]

IRe.038 Name: M. BABAIE INDUSTRIES
A.k.a.: na **F.k.a.:** na **Address:** P.O. Box 16535-76, Tehran, 16548, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Subordinate to Shahid Ahmad Kazemi Industries Group (formally the Air Defense Missile Industries Group) of Iran's Aerospace Industries Organization (AIO). AIO controls the missile organizations Shahid Hemmat Industrial Group (SHIG) and the Shahid Bakeri Industrial Group (SBIG), both of which were designated in resolution 1737 (2006). [Old Reference # E.29.I.8]

IRe.039 Name: MAKIN
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by or acting on behalf of KAA, and is a subsidiary of KAA. [Old Reference # E.29.II.8]

IRe.040 Name: MALEK ASHTAR UNIVERSITY
A.k.a.: na **F.k.a.:** na **Address:** Corner of Imam Ali Highway and Babaei Highway, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Subordinate of the DTRSC within MODAFL. This includes research groups previously falling under the Physics Research Center (PHRC). IAEA inspectors have not been allowed to interview staff or see documents under the control of this organization to resolve the outstanding issue of the possible military dimension to Iran's nuclear programme. [Old Reference # E.29.I.9]

IRe.042 Name: MINISTRY OF DEFENSE LOGISTICS EXPORT
A.k.a.: MODLEX **F.k.a.:** na **Address: a)** P.O. Box 16315-189, Tehran, Iran (Islamic Republic of) **b)** Located on the west side of Dabestan Street, Abbas Abad District, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** MODLEX sells Iranian-produced arms to customers around the world in contravention of resolution 1747 (2007), which prohibits Iran from selling arms or related materiel. [Old Reference # E.29.I.10]

IRe.043 Name: MIZAN MACHINERY MANUFACTURING
A.k.a.: 3MG **F.k.a.:** na **Address:** P.O. Box 16595-365, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acts on behalf of, SHIG. [Old Reference # E.29.I.11]

IRe.045 Name: NIRU BATTERY MANUFACTURING COMPANY
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 **Other information:** Subsidiary of DIO. Its role is to manufacture power units for the Iranian military including missile systems. [Old Reference # E.03.III.9]

IRe.048 Name: OMRAN SAHEL
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by Ghorb Nooh. [Old Reference # E.29.II.9]

IRe.049 Name: ORIENTAL OIL KISH
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acts on behalf of, KAA. [Old Reference # E.29.II.10]

IRe.050 Name: PARCHIN CHEMICAL INDUSTRIES
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 24 Mar. 2007 **Other information:** Branch of DIO, which produces ammunition, explosives, as well as solid propellants for rockets and missiles. [Old Reference # E.47.A.4]

IRe.051 Name: PARS AVIATION SERVICES COMPANY
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 24 Mar. 2007 **Other information:** Maintains various aircraft, including MI-171, used by IRGC Air Force. [Old Reference # E.47.B.2]

IRe.053 Name: PEJMAN INDUSTRIAL SERVICES CORPORATION
A.k.a.: na **F.k.a.:** na **Address:** P.O. Box 16785-195, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acts on behalf of, SBIG. [Old Reference # E.29.I.14]

IRe.055 Name: QODS AERONAUTICS INDUSTRIES
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 24 Mar. 2007 **Other information:** Produces unmanned aerial vehicles (UAVs), parachutes, para-gliders, para-motors, etc. IRGC has boasted of using these products as part of its asymmetric warfare doctrine. [Old Reference # E.47.B.1]

IRe.056 Name: RAH SAHEL
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acting on behalf of, KAA. [Old Reference # E.29.II.11]

IRe.057 Name: RAHAB ENGINEERING INSTITUTE
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acting on behalf of, KAA and is a subsidiary of KAA. [Old Reference # E.29.II.12]

IRe.058 Name: SABALAN COMPANY
A.k.a.: na **F.k.a.:** na **Address:** Damavand Tehran Highway, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Sabalan is a cover name for SHIG. [Old Reference # E.29.I.15]

IRe.059 Name: SAD IMPORT EXPORT COMPANY
A.k.a.: na **F.k.a.:** na **Address: a)** Haftom Tir Square, South Mofte Avenue, Tour Line No 3/1, Tehran, Iran (Islamic Republic of) **b)** P.O. Box 1584864813, Tehran, Iran (Islamic Republic of) **Listed on:** 20 Dec. 2012 (amended on 17 Dec. 2014) **Other information:** Assisted Parchin Chemical Industries and 7th of Tir Industries, designated in resolutions 1747 (2007) and 1737 (2006), in violating paragraph 5 of resolution 1747 (2007). [Old Reference # I.AC.50.20.12.12.(2)]

IRe.060 Name: SAFETY EQUIPMENT PROCUREMENT (SEP)
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 3 Mar. 2008 **Other information:** AIO front-company, involved in the ballistic missile programme. [Old Reference # E.03.III.11]

IRe.061 Name: SAHAND ALUMINUM PARTS INDUSTRIAL COMPANY (SAPICO)
A.k.a.: na **F.k.a.:** na **Address:** Damavand Tehran Highway, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** SAPICO is a cover name for SHIG. [Old Reference # E.29.I.16]

IRe.062 Name: SAHEL CONSULTANT ENGINEERS
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by Ghorb Nooh. [Old Reference # E.29.II.13]

IRe.063 Name: SANAM INDUSTRIAL GROUP
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 24 Mar. 2007 **Other information:** Subordinate to AIO, which has purchased equipment on AIO's behalf for the missile programme. [Old Reference # E.47.A.9]

IRe.064 Name: SEPANIR
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acting on behalf of, KAA. [Old Reference # E.29.II.14]

IRe.065 Name: SEPASAD ENGINEERING COMPANY
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acting on behalf of, KAA. [Old Reference # E.29.II.15]

IRe.066 Name: SHAHID BAGHERI INDUSTRIAL GROUP (SBIG)
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 23 Dec. 2006 **Other information:** Subordinate entity of AIO. [Old Reference # E.37.B.2]

IRe.067 Name: SHAHID HEMMAT INDUSTRIAL GROUP (SHIG)
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 23 Dec. 2006 **Other information:** Subordinate entity of AIO. [Old Reference # E.37.B.1]

IRe.068 Name: SHAHID KARRAZI INDUSTRIES
A.k.a.: na **F.k.a.:** na **Address:** Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acts on behalf of, SBIG. [Old Reference # E.29.I.17]

IRe.069 Name: SHAHID SATTARI INDUSTRIES
A.k.a.: Shahid Sattari Group Equipment Industries **F.k.a.:** na **Address:** Southeast Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Owned or controlled by, or acts on behalf of, SBIG. [Old Reference # E.29.I.18]

IRe.070 Name: SHAHID SAYYADE SHIRAZI INDUSTRIES (SSSI)
A.k.a.: na **F.k.a.:** na **Address: a)** Next To Nirou Battery Mfg. Co, Shahid Babaii Expressway, Nobonyad Square, Tehran, Iran (Islamic Republic of) **b)** Pasdaran St., P.O. Box 16765, Tehran, 1835, Iran (Islamic Republic of) **c)** Babaei Highway - Next to Niru M.F.G, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** SSSI is owned or controlled by, or acts on behalf of, DIO. [Old Reference # E.29.I.19]

IRe.071 Name: SHO'A' AVIATION
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 24 Mar. 2007 **Other information:** Produces micro-lights which IRGC has claimed it is using as part of its asymmetric warfare doctrine. [Old Reference # E.47.B.3]

IRe.073 Name: SPECIAL INDUSTRIES GROUP (SIG)
A.k.a.: na **F.k.a.:** na **Address:** Pasdaran Avenue, PO Box 19585/777, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Subordinate of DIO. [Old Reference # E.29.I.20]

IRe.075 Name: TIZ PARS
A.k.a.: na **F.k.a.:** na **Address:** Damavand Tehran Highway, Tehran, Iran (Islamic Republic of) **Listed on:** 9 Jun. 2010 **Other information:** Tiz Pars is a cover name for SHIG. Between April and July 2007, Tiz Pars attempted to procure a five axis laser welding and cutting machine, which could make a material contribution to Iran's missile programme, on behalf of SHIG. [Old Reference # E.29.I.21]

IRe.076 Name: YA MAHDI INDUSTRIES GROUP
A.k.a.: na **F.k.a.:** na **Address:** na **Listed on:** 24 Mar. 2007 **Other information:** Subordinate to AIO, which is involved in international purchases of missile equipment. [Old Reference # E.47.A.10]

IRe.077 Name: YAS AIR
A.k.a.: na **F.k.a.:** na **Address:** Mehrabad International Airport, Next to Terminal No. 6, Tehran, Iran (Islamic Republic of) **Listed on:** 20 Dec. 2012 **Other information:** Yas Air is the new name for Pars Air, a company that was owned by Pars Aviation Services Company, which in turn was designated by the United Nations Security Council in resolution 1747 (2007). Yas Air has assisted Pars Aviation Services Company, a United Nations-designated entity, in violating paragraph 5 of resolution 1747 (2007). [Old Reference # I.AC.50.20.12.12.(1)]

IRe.078 Name: YAZD METALLURGY INDUSTRIES (YMI)
A.k.a.: a) Yazd Ammunition Manufacturing and Metallurgy Industries **b)** Directorate of Yazd Ammunition and Metallurgy Industries **F.k.a.:** na **Address: a)** Pasdaran Avenue, next to Telecommunication Industry, Tehran, 16588, Iran **b)** Postal Box 89195/878, Yazd, Iran **c)** P.O. Box 89195-678, Yazd, Iran **d)** Km 5 of Taft Road, Yazd, Iran **Listed on:** 9 Jun. 2010 **Other information:** YMI is a subordinate of DIO. [Old Reference #E.29.I.22].

Annex 100

"Threats and Responses: Counterterrorism; Qaeda Aide Slipped Away Long Before Sept. 11 Attack", *The New York Times*, 8 March 2003

Available at https://www.nytimes.com/2003/03/08/world/threats-responses-counterterrorism-qaeda-aide-slipped-away-long-before-sept-11.html

The New York Times

ARCHIVES | 2003

THREATS AND RESPONSES: COUNTERTERRORISM; Qaeda Aide Slipped Away Long Before Sept. 11 Attack

By **JAMES RISEN** and **DAVID JOHNSTON** MARCH 8, 2003

President Bush has hailed the arrest of Khalid Shaikh Mohammed as a watershed event in the war against terrorism.

Yet, the United States actually came tantalizingly close to catching Mr. Mohammed seven years ago, after his involvement in a botched terror operation in the Philippines, but long before he planned and executed Al Qaeda's deadly plot to attack the World Trade Center and government targets in Washington.

An investigation into the long manhunt for Mr. Mohammed, based on interviews with officials in Washington and the Persian Gulf, reveals evidence that as the Federal Bureau of Investigation closed in on him in early 1996, top government officials in Qatar -- now an important American ally in any military action against Iraq -- tipped him off and enabled him to escape.

Today, many American officials believe that when Mr. Mohammed eluded their grasp in Qatar, they missed their best opportunity to prevent the Sept. 11 strikes on New York and Washington.

But Qatar never paid a significant diplomatic price for its support of Mr. Mohammed. About the only rebuke it received was a private one in the form of a stinging letter from Louis Freeh, then the F.B.I. director, to Qatar's foreign minister. "I have received disturbing information suggesting that Mohammed has again escaped the surveillance of your Security Services and

that he appears to be aware of F.B.I. interest in him," Mr. Freeh wrote. "A failure to apprehend Khalid Shaikh Mohammed would allow him and other associates to continue to conduct terrorist operations."

Within two years of slipping away from Qatar, the C.I.A. now believes, Mr. Mohammed linked up with Osama bin Laden, became one of his most trusted lieutenants and brought with him an abiding interest in large-scale terrorist plots involving commercial airliners.

The support that Mr. Mohammed received from Qatar came despite the fact that the tiny nation was just then emerging as one of America's closest allies in the Persian Gulf. Even as Qatar was harboring Mr. Mohammed, the country was gaining favor in Washington by agreeing to do a major energy deal with Israel, and was also moving toward a close military alliance with the United States. Eventually it would agree to allow the Pentagon to build the American military's largest overseas supply depot on its territory and also set up the forward headquarters for the United States Central Command. Today, military cooperation with Qatar is a cornerstone of the Bush administration's plans to defeat Saddam Hussein.

Yet Qatari officials played a double game on counterterrorism, according to American officials and some Qataris who are angry with their own government's actions. Not only did Qatar harbor Mr. Mohammed, it also allowed a group of Egyptian terrorists to either stay in Qatar or move through the country safely during the mid-1990's, according to American and Qatari officials as well as an internal Qatar government document obtained by The New York Times.

One government minister is believed to have harbored as many as 100 Arab extremists -- including many veterans of fighting in Afghanistan -- on his farm in Qatar during the mid-1990's. There have been reports that even Osama bin Laden was allowed to pass through Qatar.

Qatar's support for Mr. Mohammed and other Islamic radicals even as the country was becoming a pro-American ally is a case study in the complex

nature of the relationships the United States maintains with countries throughout the Arab world.

Many of them tilt toward the United States but also have to deal with popular support for Islamic extremism. As a result, they have sought to balance their pro-Western stance with a quiet tolerance of the terrorists living in their midst.

This acquiescence declined sharply after the Sept. 11 attacks, when the United States demanded a crackdown on terrorism throughout the Arab world. Before Sept. 11, however, many Arab countries felt little pressure to cooperate fully with the United States to arrest terrorists.

Mr. Mohammed first came to the attention of American counterterrorist officials in 1995, as a result of his role in a Philippines-based plan hatched with his relative, Ramzi Yousef, to blow up as many as a dozen American airliners as they crossed the Pacific. This was to be followed by a dramatic series of terrorist strikes against the United States.

In January 1996, the C.I.A. obtained evidence that Mr. Mohammed was hiding in Qatar. The C.I.A. also soon discovered that he had a job as a mechanical engineer in the country's Water Department. A C.I.A. case officer in Doha, the capital, tried to get a local operative a job in the same department as a way to get Mr. Mohammed's fingerprints to definitively identify him, while also finding out more about his routine.

The C.I.A. officer planned to keep him under surveillance while the United States explored ways to apprehend him. The C.I.A. officer believed, however, that if the United States officially asked for the assistance of the Qatar government, Mr. Mohammed would be tipped off, since it appeared that he was living in Doha under the government's protection.

Back in Washington, counterterrorism officials at the National Security Council said they shared that worry. Senior counterterrorism officials already knew about the past support for Islamic extremists by one Qatar official, Sheik Abdullah bin Khalid al-Thani, Qatar's minister of religious endowments and Islamic affairs. This was the same official who had

repeatedly allowed Arab extremists who had fought in Afghanistan to live on his farm.

White House officials agreed with the C.I.A. about the inadvisability of going directly to the Qatar government for help. So they began considering a plan to grab him secretly.

At the request of the N.S.C., the Pentagon developed a plan calling for the military to snatch Mr. Mohammed. That plan was taken to the Deputies Committee, an interagency group during the Clinton administration that was made up of high-ranking officials from major departments and agencies, including Justice, Defense, State and the N.S.C. But Pentagon had devised a plan on such a large scale that it was was rejected, according to former counterterrorism officials. The only alternative was to go to the Qatar government.

The F.B.I. sent agents to Qatar and Patrick N. Theros, then the ambassador to Qatar, met with Qatar's foreign minister, Sheik Hamad bin Jassim bin Jabr al-Thani, and other officials to ask for help in seizing Mr. Mohammed. Mr. Freeh also met with the Qatari foreign minister in Washington to discuss the matter.

In his meeting with Mr. Freeh, the foreign minister indicated some knowledge of Mr. Mohammed's activities, according to the letter that Mr. Freeh later wrote to him. "You indicated during our meeting that he may be in the process of manufacturing an explosive device that could potentially endanger the lives of the citizens of Qatar," the F.B.I. director wrote. "In addition, you indicated that Mohammed has over 20 false passports at his disposal."

But the Qatari officials appeared to the Americans to be reluctant to cooperate, and the talks never went anywhere, according to American officials. Not long after, the F.B.I. discovered that Mr. Mohammed had slipped away. Some American officials quickly suspected that Sheik bin Khalid, the Islamic affairs minister, had played a role in tipping him off, though exactly what happened inside the Qatari government remains

unclear. One Qatari official said that Sheik bin Khalid had always provided support for Islamic extremists with the knowledge and acceptance of Qatar's emir, Hamad bin Khalifa al-Thani.

Mr. Theros, the former ambassador to Qatar, says he does not believe that Qatar tipped off Mr. Mohammed. "I have no information that would lead me to conclude that the Qatar government tipped off Khalid Shaikh Mohammed," he said.

While other former American officials agree there wass no "smoking gun" to prove Qatar tipped him off, they are still convinced that someone in the Qatar government warned Mr. Mohammed. "I never saw any hard evidence that the Qatari government tipped off K.S.M. , but seems beyond the realm of plausibility that they didn't," said one former official.

Mohy al-Khatib, a Qatar Embassy official in Washington, said today that officials there would not comment on the 1996 incident involving Mr. Mohammed.

For American officials, the failure to catch Mr. Mohammed in Qatar offered a painful lesson in the realities of conducting counterterrorism operations in countries that are supposedly America's allies. "Sometimes they are horse thieves," said one former official. "And so sometimes you have to learn how to steal horses with them."

A version of this article appears in print on March 8, 2003, on Page A00012 of the National edition with the headline: THREATS AND RESPONSES: COUNTERTERRORISM; Qaeda Aide Slipped Away Long Before Sept. 11 Attack.

Annex 101

Video Excerpts of Yusuf Al-Qaradawi, *Al Jazeera Television*, 28-30 January 2009

(Video not reproduced)

Website of the Middle East Media Research Institute available at https://www.memri.org/tv/sheik-yousuf-al-qaradhawi-allah-imposed-hitler- upon-jews-punish-them-allah-willing-next-time-will

Yusuf Al-Qardawi - MEMRI Video Clip dated 28-30 January 2009

Arabic Transcription

أن الله سلط عليهم طوال التاريخ من يؤدبهم نتيجة أفسادهم. أخر تأديب كان تأديب هتلر وأن كان بالغوا (أي اليهود) في الأمر ما بالغوا ولكن أستطاع ان يوقفهم عند حدودهم وكان هذا أدبا الهيا تأديبا الهيا وعقابا عقابا قدريا لهؤلاء والمرة القادمة أن شاء الله ستكون على أيدي المؤمنين.

(تسجيل مختلف في نفس الشريط)

يقول: وكل ما أتمناه في ختام كلمتي هذه أن يهيئ الله لي في ختام حياتي فرصة للذهاب الى أرض الجهاد والمقاومة على كرسي متحرك فأطلق رصاصة على أعداء الله اليهود ويطلقون علي قنبلة أختم بها حياتي بالشهادة و السلام عليكم و رحمة الله و بركاته.

Yusuf Al-Qardawi - MEMRI Video Clip dated 28-30 January 2009
Transcription of English Subtitles

[Sheik Yousuf Al-Qaradawi]:

Throughout history, Allah has imposed upon the [Jews] people who would punish them for their corruption. The last punishment was carried out by Hitler. By means of all the things he did to them – even though they exaggerated this issue – he managed to put them in their place. This was divine punishment for them. Allah willing, the next time will be at the hand of the believers.

[...]

To conclude my speech, I'd like to say that the only thing I hope for is that as my life approaches its end, Allah will give me an opportunity to go to the land of Jihad and resistance, even if in a wheelchair. I will shoot Allah's enemies, the Jews, and they will throw a bomb at me, and thus, I will seal my life with martyrdom. Praise be to Allah, Lord of the Worlds. Allah's mercy and blessings upon you.

Annex 102

Video Excerpt of Yusuf Al-Qaradawi, 'Sharia and Life',
Al Jazeera Television, 17 March 2013

(Video not reproduced)

(Transcript of English subtitles and of Arabic original)
Available at https://www.youtube.com/watch?
v=XPaqvL0lHKQ

Yusuf Al-Qardawi - Video Clip dated 17 March 2013

Arabic Transcription

الأمور أنها لا تجوز الا بتدبير جماعي يعني الأصل ان الانسان يقاتل فيقتل انما عشان يفجر نفسه هذا لابد ان الجماعة هي التي ترى انها في حاجة الى هذا الامر، إذا الجماعة رأت انها في حاجة الى من يفجر نفسه في الاخرين ويعني يكون هذا أمرا مطلوبا وتدبر الجماعة كيف يفعل هذا بأقل الخسائر الممكنة وإذا استطاع ان ينجو بنفسه فليفعل، أنما لا يترك هذا للأفراد وحدهم. (المذيع يقاطع فيقول: لكن اليس رأي الجماعة) فيقاطعه القرضاوي بأنه أكمل حديثه: لا يجوز للفرد أن يتصرف هذا أنا أروح أفجر نفسي لا أنت ما تتصرفشي لوحدك لازم تتصرف في حدود ما تريده الجماعة تسلم نفسك للجماعة الجماعة هي التي تصرف الافراد حسب حاجاتها و حسب المطالب، انما لا يتصرف الافراد وحدهم هذا هو المطلوب في هذه القضية.

Yusuf Al-Qardawi - Video Clip dated 17 March 2013
Transcription of English Subtitles

[Al-Qaradawi]:
The rule of these things
It can only be achieved by collective measure
The rule is that man fights and kills
But to blow himself, it must be the group's decision
If it thinks it is needed
If the group saw that it needs someone
to blow himself up in others
And, and, and this is required
The group manages how to do this
with least possible casualties
And if he was able to survive
so he would do it.
But this is not left to individuals alone
[Other speaker]:
But isn't …
[Al-Qaradawi]:
individual should not act this …I will blow myself up .. No
You shouldn't act alone.
You have to act within the limits of what the group wants
Give yourself up to the group
The group manages the behavior of individuals according to its needs
According to the requirements
But individuals do not act alone
This is required in this case

Annex 103

"Muslim Brotherhood Opponents and Al-Jazeera Employees Protest: The Channel Is Biased and Unprofessional", *Middle East Media Research Institute*, 12 July 2013

Website of the Middle East Media Research Institute available at https://www.memri.org/reports/muslim-brotherhood-opponents-and-al-jazeera-employees-protest-channel-biased-and

July 12, 2013 Special Dispatch No.5360

Muslim Brotherhood Opponents And Al-Jazeera Employees Protest: The Channel Is Biased And Unprofessional

The Al-Jazeera channel's coverage of the events in Egypt surrounding Muhammad Mursi's ouster from power has in recent days sparked protest by channel employees and opponents of Mursi and the Muslim Brotherhood (MB), who contend that the channel is clearly promoting the agenda of the deposed regime and behaving unprofessionally and non-objectively.

This tilt by the channel has many facets: continuous broadcasts of protest demonstrations by Mursi supporters at the Rabaa Al-Adawiya Mosque in Cairo, compared with the more limited coverage of the anti-Mursi demonstrations in Tahrir Square;[1] exclusive and continuous coverage from the headquarters of the Republican Guard on July 8, 2013, where dozens of MB supporters were killed by army gunfire when they tried to storm the headquarters where Mursi is being held, while repeatedly displaying pictures of the dead and calling the events "a massacre"; the vast majority of text messages from viewers that the channel runs as subtitles at the bottom of the screen convey support for the MB; an incident that the channel's correspondent provoked during an Egyptian army press conference on July 8, 2013, during which she attacked the army's behavior and was expelled from the auditorium by the other correspondents;[2] and claims raised in the Facebook account of one of the channel's presenters, Ahmad Mansouron, purporting that provisional president 'Adly Mansour is Jewish.[3]

Nevertheless, it should be noted that Al-Jazeera does not refrain from broadcasting press conferences held by members of the new Egyptian regime and by Egypt's army and security forces.

In recent days a number of Al-Jazeera employees have submitted their resignations to protest the tendentious coverage by the channel. Additionally, many of Mursi's opponents have called for closing Al-Jazeera, because in contrast to its support of the revolution against Mubarak in January 2011, the channel did not rally to the side of the "popular revolution" against the MB government. In the streets of Cairo and other cities throughout Egypt posters were hung condemning Al-Jazeera. Citizens trod on posters that bore portraits of the channel's broadcasters, or turned them into petitions to close the channel. Likewise, a legal suit was filed to close the channel. Campaigns were also launched on Facebook accusing Al-Jazeera of causing fitna (civil war) in Egypt. Magdi Al-Galad, the editor of the Egyptian daily Al-Watan, even launched a campaign to delete the Al-Jazeera channel from all satellite boxes. In the Egyptian press articles appeared accusing Al-Jazeera of favoring one side in the intra-Egyptian struggle while deliberately shunning the other side, although the channel's slogan is "the opinion and the other opinion." One of the articles even branded Al-Jazeera a Jewish channel that promotes the agenda of the U.S., Zionism, and the MB, while implementing the Protocols of the Elders of Zion.

The studios of the channel Al-Jazeera Egypt Direct, another channel that belongs to the Al-Jazeera network that began broadcasting after the January 25, 2011 revolution and broadcasts exclusively in Egypt, were closed by the Egyptian army on July 3, 2013, soon after the Egyptian defense minister announced Mursi's ouster. Some of the channel's employees, including the channel's director, were briefly arrested on the charge that the channel was operating without a license.[4] Nevertheless, Al-Jazeera's broadcasts via satellite are continuing, without studio broadcasts from Egypt itself but with reports and telephone interviews.

This report will survey the protests against Al-Jazeera.

Al-Jazeera Employees Resign In Protest Over The Biased Coverage By The Channel

On July 8, 2013 a number of Al-Jazeera employees announced their resignations in protest over the channel's bias. They approached the channel's management in Qatar with the demand that it retract its editorial policy which favored the MB.[5] The journalist Fatma Nabil, known as the presenter with the hijab, said following her resignation: "[Injuring] the army constitutes a red line from my perspective, and I will not allow a mistake to be made on this score." She claimed that she resigned from Al-Jazeera and doesn't know if she'll ever be able to return to television because there are some people who identify her with the MB regime, since she wore a hijab while broadcasting. Nabil criticized the manner in which the channel covered the events of June 30 and the deliberate division of the screen into two – with a broadcast from Rabaa Al-Adawiya on the and a broadcast from Tahrir Square to the left. She expressed the opinion that the channel attempted to support and empower the pro-Mursi demonstrations, and added that during the months that she worked at Al-Jazeera, "we had the feeling that the channel is partisan in favor of political Islam, and in most cases selectivity is exercised in broadcasting the text messages [of the viewers] on the channel, and even more so in the selection of guests and interviewees."[6]

Presenter Fatma Nabil (Al-Wafd, Egypt, July 11, 2013.)

Calls In Egyptian Courts, On The Street, On Facebook, And In The Press To Shut Down Al-Jazeera

Egyptian attorney Rada Barkawi filed a suit in Administrative Court seeking to revoke the license and close the Al-Jazeera Direct Egypt channel, arguing that it was damaging national security and inciting the Mursi supporters to acts of violence and killing. She shared her opinion that the channel was working to foment chaos in Egypt, and described the June 30 revolution as a military coup. She added that since Mursi came to power, the channel had attacked his opponents and worked in his favor.[7]

At the same time, an outcry arose amongst Mursi's opponents against Al-Jazeera. In Cairo and other cities throughout Egypt, posters were hung condemning the channel. Citizens trod on posters bearing the pictures of the channel's broadcasters, and signed them as if they were petitions seeking Al-Jazeera's closure. A Facebook campaign was launched reiterating the same slogans. Below are pictures from the street protests in Egypt against Al-Jazeera.[8]

Additionally, the protest is being pushed by a number of Facebook pages calling for the closing of Al-Jazeera in Egypt and accusing the channel of sowing *fitna* (civil war) in the country. Below are pictures from the posts on Facebook against Al-Jazeera:

Street and Facebook campaign against Al-Jazeera: "A bullet may kill a person, but a lying camera kills [an entire] nation: beware of false news on the fitna channel that strives to disseminate violence and killing and cause Egypt's collapse" (.facebook.com/Scandals.of.AlJazeera.Channel, July 9, 2013.)

Another combined street and Facebook campaign features well-known Al-Jazeera presenter Ahmad Mansour in a composite picture with the pyramids in flames, and standing next to Israel Defense Forces soldiers.

"Al-Jazeera – the fitna *[civil war] and the other* fitna*[a parody on the channel's slogan 'The opinion and the other opinion']"; "Fitna producers, take your schemes and beat it!" (facebook.com/jazeera.Fetna/photos_stream#!/jazeera.Fetna, July 6, 2013)*

Facebook page "Together For Closing The Al-Jazeera Direct Egypt[channel]" (facebook.com/eljezira.misr, July 9, 2013.)

"Al-Hakeera [the pitiful]" (facebook.com/intifadamasria,July 10, 2013.)

Joining the campaign was the editor of the Egyptian daily *Al-Watan*, MagdiAl-Galad, who launched a popular campaign, with the backing of his newspaper and his journalist colleagues, on satellite television stations and in the press, to remove Al-Jazeera from the home satellite boxes. He claimed that Al-Jazeera was operating in coordination with the intelligence apparatuses and with Western regimes to topple the army.[9]

Egyptian Columnist: The True Face Of Al-Jazeera Has Been Revealed

In the Egyptian press, a number of articles condemning Al-Jazeera appeared. For example, a columnist in the Egyptian daily *Al-Ahram*, Sayyid 'Abd Al-Maguid, wrote: "During the January 25 [2011 revolution], the camera of the television channel Al-Masriya [Egyptian state television that was still loyal to Mubarak] didn't find [content to broadcast] save for the surface of the eternal Nile, and this was presented to us, as if we were not familiar with it. In the distant corner of [the picture], groups of people appeared on the promenade, at the edges of Tahrir [Square], as if they were ghosts. At the same time the Qatari channel Al-Jazeera was in the thick of the fire, and although it broadcasts from a country that has no connection with democracy, it transmitted the cries of the oppressed who cursed the oppression and the oppressors. At the same time, it managed to issue a death certificate to the Maspero television [the building where Egyptian state television is headquartered in Cairo] …

"It is true that without [Al-Jazeera], and without other [television] networks with an even smaller viewership, the world would not have known what was happening in Egypt, [and it is true] that through them the simple Egyptians in [the provinces] and villages learned that a sweeping revolution was underway against tyranny and repression, which the young people were leading in the squares of Cairo, Suez, and Alexandria. But it appears [that Al-Jazeera was working] not on Allah's behalf and not in favor of liberty, and the proof of this is its paeans of praise over the rise of political Islam. Recently the small and wealthy country [Qatar] promised to wipe out the despicable innovations… that are called 'liberalism', 'enlightenment' and 'modernity'; may they be annihilated, and they can go, together with their propagators, to hell…

"However… last Sunday [June 30, 2013], the decisive day in the life of this great country, the Tamarrud [campaign] channeled a torrent of anger that was unprecedented in history, and the true face of the Al-Jazeera [channel] came to light: an opinion without another opinion, [10] one direction that does not have an opposing [direction],[11]and, most ironic, at the time that most of the people were irate about Mursi's last address [on July 2, 2013], the director [of the Al-Jazeera bureau in Cairo], Abd Al-Fattah [Fayed], began to praise him before his colleague Nouran [Sallam, an Egyptian journalist who works at the channel]…

"The question is: does this justify the attacks on [the channel] and its employees? Of course not… [Let the channel] say what it wants, because to put it plainly, [its conduct in the end result] obtains the opposite of what those in charge of [the channel] aspire to. As proof of this, throughout the entire year that the MB ruled, [the channel] ignored their acts of repression and even congratulated their rule, and the result was 3 million Egyptians in the streets."[12]

An Egyptian Columnist: Al-Jazeera - A Jewish Channel That Implements The Protocols Of The Elders Of Zion

In an article titled "Al Jazeera A Jewish Idea Against The Egyptian Popular Will" that was published in the daily *Al*-Wafd, the columnist Hanan Abu Al-Diaa claims that Al-Jazeera is a Jewish channel that serves the United States, Zionism, and the MB, and was implementing the Protocols of the Elders of Zion. Abu Al-Diaa wrote: "The Al Jazeera channel is still [serving] as an agent of the Jews and the Americans, and is spreading its poison. It is clear to the eye… that [the channel] is implementing the Zionist plan against Egypt. Therefore, it comes as

no surprise that the channel is continuing to work against the popular will of the Egyptians and is disseminating lies regarding the popular support that the illegitimate president Muhammad Mursi enjoys… The broadcaster Kawthar Al-Bashrawi, who resigned from Al-Jazeera recently, unveiled the truth regarding the channel and those in charge of it: We're dealing with a counterfeit channel that does not do justice to liberty, and has no inkling of what constitutes neutrality and objectivity, and avoids accuracy. The channel was laid bare to all and its ugly and true countenance was revealed… This channel [that serves] as an agent is the main tool [for implementing] the program of the Elders of Zion; how can this not be the case? For it was [Al-Jazeera] that disseminated the ideas of the MB, defended them, and implemented directives from them in a total fashion… The MB went from the prisons to the seats of power, and the rise of the Islamists to power is one of the Zionists' dreams…"[13]

Endnotes:

[1] Until the announcement by General 'Abd Al-Fatah Al-Sisi about the ouster of Mursi, Al-Jazeera went to split-screen coverage. At the right of the screen was a broadcast from the Rabaa Al-Adawiya Mosque, and on the left was a broadcast from Tahrir Square. After the announcement by Al-Sisi, the channel began to broadcast exclusively from Rabaa Al-Adawiya. A note of apology frequently appeared at the corner of the screen, explaining that the channel was not succeeding in broadcasting from Tahrir Square, but was attempting to do so. This occurred after the channel's correspondents were attacked by demonstrators in Cairo.

[2] Youtube.com/watch?v=Us9WLtIPRlU, July 8, 2013.

[3] Mansour wrote on his Facebook account: "To those who think that the new Egyptian president is a Muslim, here's the truth about the new Egyptian president. The new Egyptian president is from the Seventh Day Adventist sect, that is a Jewish sect that tried to draw close to Christianity but the Coptic Patriarch refused to baptize them… My congratulations to you, here is your Judeo-Christian government."facebook.com/pages/%D8%A7%D8%AD%D9%85%D8%AF-%D9%85%D9%86%D8%B5%D9%88%D8%B1-ahmed-mansour/305862772805037?hc_location=timeline, July 4, 2013. See also MEMRI Video Clip #3910 - Al-Jazeera TV Host Ahmad Mansour to Morsi Supporters: Our Revolution Was Hijacked by the Coup

[4] *Al-Sharq Al-Awsat* (London), July 9, 2013.

[5]*Al-Sharq Al-Awsat* (London), July 9, 2013.

[6] *Al-Quds Al-Arabi*(Egypt), July 8, 2013.

[7] *Al-Misriyyoun* (Egypt), July 9, 2013.

[8] Zamnpress.com; *Al-Masri Al-Yawm* (Egypt), July 7, 2013.

[9] *Al-Watan* (Egypt), July 8, 2013.

[10] An allusion to the channel's slogan "the opinion and the other opinion."

[11] An allusion to the channel's famous television program "The Opposite Direction,"moderated by Faisal Al-Qassem.

[12] *Al-Ahram* (Egypt), July 9, 2013.

[13] *Al-Wafd* (Egypt), July 4, 2013.

Annex 104

"Qatar criticizes Egypt's designation of the Muslim Brotherhood as a terrorist organization", *BBC Arabic*, 4 January 2014

(English translation, Arabic original)

Available at
http://www.bbc.com/arabic/middleeast/2014/01/140104_qatar_egypt#share-tools

قطر تنتقد قرار مصر اعتبار جماعة الإخوان منظمة إرهابية

4 يناير/ كانون الثاني 2014

انتقدت قطر قرار السلطات في مصر اعتبار جماعة الإخوان المسلمين منظمة إرهابية، قائلة إن ذلك "مقدمة لسياسة تكثيف إطلاق النار على المتظاهرين بهدف القتل".

وردت الحكومة المصرية على الانتقاد القطري باستدعاء سفير قطر لدى القاهرة.

وذكرت وزارة الخارجية القطرية في بيان أن "قرار تحويل حركات سياسية شعبية إلى منظمات إرهابية، وتحويل التظاهر إلى عمل إرهابي لم يجد نفعا في وقف المظاهرات السلمية، بل كان فقط مقدمة لسياسة تكثيف إطلاق النار على المتظاهرين بهدف القتل".

وأعربت الخارجية القطرية عن قلقها من تزايد أعداد ضحايا المظاهرات في مصر ومقتل عدد كبير من الأشخاص في شتى أنحاء البلاد.

وأضاف البيان، الذي بثته وكالة الأنباء الرسمية، أن "ما جرى ويجري في مصر ليقدم الدليل تلو الدليل على أن طريق المواجهة والخيار الأمني والتجييش لا تؤدي إلى الاستقرار."

http://www.bbc.com/arabic/middleeast/2014/01/140104_qatar_egypt#share-tools

[Image]

Qatar criticizes Egypt decision considering the Muslim Brothers Gamaa a terrorist organization
4 January 2014

[Image]

Qatar criticized Egypt decision considering the Muslim Brothers Gamaa a terrorist organization, saying that this is "to pave the way to intensify shooting against the demonstrators with the intent to kill."

The Egyptian Government responded to the Qatari criticism by summoning the Ambassador of Qatar in Cairo

http://www.bbc.com/arabic/middleeast/2014/01/140104_qatar_egypt

مواضيع قد تهمك

ترامب: سي آي أيه لم تلق مسؤولية مقتل خاشقجي على ولي العهد السعودي

ما هو قانون ماغنيتسكي الذي قد يستخدم لمعاقبة قتلة خاشقجي؟

الحكومة البريطانية "خذلت" مواطنها المدان بالتجسس في الإمارات

"استأجرتُ رجلاً ليكون والد ابنتي"

واعتبرت الخارجية القطرية أن "الحل الوحيد هو الحوار بين المكونات السياسية للمجتمع والدولة... من دون إقصاء أو اجتثاث".

وعقب صدور البيان، قال المتحدث باسم الخارجية المصرية، السفير بدر عبد العاطي، لبي بي سي إنه جرى استدعاء السفير القطري في القاهرة إلى مقر وزارة الخارجية المصرية لإبلاغه برفض مصر للبيان الصادر عن قطر.

وقال عبد العاطي إن استدعاء السفير القطري "خطوة غير معتادة فيما بين الدول العربية".

وأضاف أن ما جاء في البيان القطري "يعد تدخلا مرفوضا في الشأن الداخلي للبلاد".

وكانت الدوحة داعما قويا للرئيس المصري محمد مرسي - الذي ينتمي لجماعة الإخوان المسلمين - وتدهورت علاقاتها بالقاهرة منذ عزله الجيش في يوليو/ تموز الماضي اثر احتجاجات حاشدة ضد حكمه الذي دام عاما.

وتتهم الحكومة المصرية قناة الجزيرة القطرية بدعم جماعة الإخوان المسلمين التي أعلنتها السلطات المصرية منظمة إرهابية يوم 25 ديسمبر/ كانون الأول.

والأسبوع الماضي امر النائب العام المصري بحبس عدد من صحفي الجزيرة 15 يوما على ذمة التحقيق في اتهام بـ"اختلاق" مشاهد مصورة وبثها على انها حقيقة بهدف "تشويه صورة البلاد".

وفي مقابلة مع صحيفة المصري اليوم المصرية في نوفمبر/ تشرين الثاني قال وزير الخارجية المصري نبيل فهمي إن قناة الجزيرة أحد أسباب تدهور العلاقات بين مصر وقطر.

ويوم الجمعة قتل 17 محتجا بالرصاص في اشتباكات بين انصار جماعة الاخوان المسلمين والشرطة في انحاء مصر.

ووفقا لتقديرات، قتل أكثر من 1500 شخص اغلبهم من انصار جماعة الاخوان المسلمين منذ عزل مرسي. ولقي نحو 400 رجل شرطة وجندي حتفه في حوادث تفجير واطلاق رصاص. وتم اعتقال الآلاف من أعضاء الاخوان المسلمين.

وينظم إسلاميون يعارضون عزل الجيش لمرسي مظاهرات يومية منذ شهور.

The Qatari Ministry of Foreign Affairs mentioned in a statement that "the decision to convert people political movements to terrorist organizations and converting demonstrations into a terrorist acts was not helpful in stopping the peaceful demonstrations, but it was only an introduction of the policy of intensifying shooting the demonstrators with the intent to kill."

The Qatari Foreign Affairs expressed its concern regarding the increasing numbers of victims of demonstrations in Egypt and the killing of a large number of people across the country.

The statement, which was broadcasted by the official news agency, added that "what happened and still happening in Egypt presents evidence after another that the confrontation policy, security option and mobilizing do not lead to stability."

The Qatari Foreign Affairs considered that "the only solution is the dialogue between the society's political components and the state…without exclusion nor eradication."

Following the issuance of the statement, the speaker of the Egyptian Foreign Affairs, Ambassador Badr Abdel Aaty, said to B.B.C. that the Qatari Ambassador in Cairo was summoned to the headquarters of the Egyptian Ministry of Foreign Affairs to inform him with Egypt's rejection of Qatar's statement .

Abdel Aaty said that summoning the Qatari Ambassador "is an unusual step among the Arab countries."

He reiterated that what was mentioned in the Qatari statement "is considered an unacceptable middling in the country's internal affairs."

Doha was a strong supporter of the Egyptian President Mohammad Morsi – who is a member of the Muslim Brothers Gamaa – and its(Doha) relations with Cairo deteriorated after he was removed by the Army in last July following mass protests against his rule which lasted for a year.

The Egyptian Government accuses Al-Jazeera Qatari Channel of supporting the Muslim Brothers Gamaa which was announced a terrorist organization by the Egyptian authorities on 25 December.

Last week, the Egyptian Attorney General ordered the imprisonment of several Al-Jazeera journalists for 15 days for investigation they were accused of "making up" footage and broadcasting it as real one for the purpose of "defamation of the country."

In an interview with the Egyptian Al-Masry Al-Youm newspaper in November, the Egyptian Minister of Foreign Affairs, Nabil Fahmy that Al-Jazeera channel is one of the reasons for the relations deterioration between Egypt and Qatar.

On Friday, 17 protesters were shot dead in clashes between of Muslim Brothers Gamaa supporters and the police all over Egypt.

According to estimates, more 1500 persons were killed, most of them supporter of the Muslim Brothers Gamaa since the removal of Morsi. An about 400 policemen died in explosion and shooting accidents. Thousands of the Muslim Brothers members were arrested.

Islamists who oppose the removal of Morsi by the Army are organizing daily demonstrations for months.

http://www.bbc.com/arabic/middleeast/2014/01/140104_qatar_egypt

Annex 105

"Update 2 – Egypt summons Qatari envoy after criticisms of crackdown", *Reuters*, 4 January 2014

Available at https://www.reuters.com/article/egypt-brotherhood-qatar/update-2-egypt-summons-qatari-envoy-after-criticisms-of-crackdown-idUSL6N0KE05S20140104

INTEL JANUARY 4, 2014 / 1:20 PM / 5 YEARS AGO

UPDATE 2-Egypt summons Qatari envoy after criticisms of crackdown

3 MIN READ

(Recasts with Egypt foreign ministry comments)

CAIRO, Jan 4 (Reuters) - Egypt's foreign ministry summoned Qatar's ambassador on Saturday to complain about interference in its internal affairs after Doha criticised Cairo's crackdown on the Islamist Muslim Brotherhood.

The formerly close Qatari-Egyptian relationship has soured since the Egyptian army ousted Islamist President Mohamed Mursi, who had been firmly supported by Doha, last July following mass protests against his one-year rule.

Cairo then launched a wide crackdown against Mursi's Muslim Brotherhood group and labeled it a terrorist group last week.

Qatar said on Saturday that the decision to name the Brotherhood a terrorist organisation was "a prelude to a shoot-to-kill policy" against demonstrators who have been staging frequent protests to call for Mursi's reinstatement.

"Egypt reiterates that it will not allow any external party to interfere in its internal affairs under any name or justification," Egypt's Foreign Ministry spokesman Badr Abdelatty said in a statement.

Any country that tried to interfere would have "the responsibility for the consequences," he added of the message given to Qatar's ambassador to Cairo, Saif Moqadam Al-Boenain after the envoy was called in on Saturday.

Egypt accuses Qatar and its Doha-based Al Jazeera television channel of backing the Muslim Brotherhood. Thousands of the Brotherhood's members have been arrested.

Earlier, a Qatari foreign ministry statement said: "The decision to designate popular political movements as terrorist organisations, and labeling peaceful demonstrations as terrorism, did not succeed in stopping the peaceful protests.

"It was only a prelude to a shoot-to-kill policy on demonstrators," the statement published by state news agency QNA said. It said that "inclusive dialogue" between all sides was the only solution to Egypt's crisis.

On Friday, 17 people were shot dead as supporters of the Brotherhood clashed with police across Egypt, defying a widening state crackdown on the movement that ruled the country until six months ago.

Islamists opposed to the army's overthrow of Mursi have been holding daily demonstrations for months.

Last week, Egypt's general prosecutor detained several journalists for 15 days for broadcasting graphics on Al Jazeera, alleging that they damaged Egypt's reputation.

In an interview with Egypt's newspaper Al-Masry Al-Youm in November, Foreign Minister Nabil Fahmi said Al Jazeera was one of the reasons for worsening ties between the two states.

Egypt expelled the Turkish ambassador in November after it accused Ankara of backing organisations bent on undermining the country - an apparent reference to the Brotherhood.

A conservative estimate puts the death toll since Mursi's fall at well over 1,500 people, mainly Brotherhood supporters. About 400 police and soldiers have been killed in bombings and shootings. (Writing by Rania El Gamal in Dubai and Asma Alsharif in Cairo; editing by Ralph Boulton and Alister Doyle)

Our Standards: *The Thomson Reuters Trust Principles.*

Annex 106

E. Dickinson, "How Qatar Lost the Middle East", *Foreign Policy*, 5 March 2014

Available at http://foreignpolicy.com/2014/03/05/how-qatar-lost-the-middle-east/

DISPATCH

How Qatar Lost the Middle East

The oil-rich emirate once was heralded as the Arab world's rising power. Now, its neighbors are pressuring it to take a back seat role.

BY ELIZABETH DICKINSON | MARCH 5, 2014, 10:44 PM

ABU DHABI — "The good times are over," a Doha-based diplomat told me glumly last week, as if foretelling the political earthquake about to hit Qatar.

On March 5, Saudi Arabia, the United Arab Emirates (UAE), and Bahrain announced in a joint statement that they were withdrawing their ambassadors from Doha — a move that escalates their long-running feud with the tiny, gas-rich emirate to its most fraught point in recent memory. Qatar, the countries said, had failed to live up to its pledges made in a November meeting in Riyadh not to interfere in other Gulf countries' affairs, not to support groups threatening regional stability, and not to host "hostile media" — a likely reference to programming on the Qatar-owned Al Jazeera network.

The moves follow three years of growing tensions between Qatar and other Arab Gulf countries about how to cope with the Muslim Brotherhood's influence. Doha championed the Muslim Brotherhood's rise to power in Egypt, supported its influence within the Syrian opposition, and provided hundreds of millions of dollars to its Palestinian affiliate, Hamas. Saudi Arabia and its allies, meanwhile, have long seen the organization as a competitor for Islamist legitimacy, and supported its rivals throughout the Arab world.

The Gulf states' diplomatic maneuver also tops a spectacular fall from grace for Qatar, which not long ago was hailed as an unlikely leading power in the Middle East. Over the last year, Qatar's allies have steadily lost ground: Egypt's President Mohamed Morsi was ousted from power and leaders of the Muslim Brotherhood, who could frequently be spotted in Doha's hotel lobbies sipping tea and meeting diplomats, were jailed. In the summer of 2013, Saudi Arabia also took a leadership role in the Syrian uprising, usurping Qatar's role as the primary financer and political backer of the opposition.

"Qatar took a step back with the Syrian opposition," says one Doha-based opposition member. "Politically, it is in the back seat — or maybe not even in the car."

But what seems to have angered Qatar's neighbors most is Doha's persistent attempts to regain the political initiative in the Middle East. The Muslim Brotherhood has suffered setbacks across the region, but they still have a friend in Qatar.

The Muslim Brotherhood has suffered setbacks across the region, but they still have a friend in Qatar.

Doha has been trying "very actively to repair and maintain relations with Egypt, the UAE, and Saudi Arabia," says Gerd Nonneman, dean of Georgetown University's School of Foreign Service in Qatar. "But they are not going to compromise their view of what's right and proper, or effective, just to get into the good books of the rest of the Gulf."

Wednesday's decision followed a meeting of Gulf foreign ministers late Tuesday, which newspapers described as "stormy." It's not clear what the exact trigger for the diplomatic action could have been, though one possible irritant may have been the Qatari foreign minister's trip to Iran in late February. Speaking from Tehran, the Qatari official suggested that Tehran could play a role in political talks to end the Syrian crisis — a notion sharply rejected in Riyadh. Inter-Gulf relations have been particularly difficult since last summer. Setbacks in Qatar's foreign policy coincided with the June inauguration of a new Qatari emir, the 33-year-old Sheikh Tamim bin Hamad al-Thani, who came into office vowing to focus on domestic affairs. Doha's once-busy conference halls may have quieted, but many in the Gulf believe Qatar has continued to quietly support Egypt's Muslim Brotherhood and hardline Syrian Islamist groups.

Most annoying to Gulf states has been Brotherhood-linked Egyptian cleric Yusuf al-Qaradawi, a longtime exile with Qatari citizenship and a hugely popular weekly show on Al Jazeera's Arabic channel. Qaradawi has denounced other Gulf countries' support for the military-backed government in Egypt, going as far as to say in January that the UAE was opposed to Islamic rule. After attempting unsuccessfully to resolve matters quietly, Abu Dhabi summoned the Qatari ambassador on Feb. 2 in protest.

Qaradawi is also a wanted man in Cairo, though Doha has declined to comply with Egyptian requests for his extradition. Qatar has insisted that Qaradawi is an independent citizen and that he doesn't represent Doha's foreign policy. But his prominence in Qatari intellectual circles and on Al Jazeera has led many to believe otherwise. Even beyond Qaradawi, Al Jazeera's Arabic channel has consistently provided pro-Brotherhood figures with a pulpit from which to condemn the military coup in Cairo. Egypt has responded by jailing nine Al Jazeera staff members, accusing them of supporting the Brotherhood.

Qatar's perceived support of the Muslim Brotherhood has also not gone over well with Saudi Arabia and the UAE, which view the organization as a subversive threat that could seek to overthrow the Gulf's ruling monarchies. Both countries, as well as Kuwait, have rushed to aid the post-Brotherhood Egypt, offering a combined $12 billion in aid to the new military-backed government. At home, the UAE has brought dozens of alleged Brotherhood members to trial, including Emirati, Qatari, and Egyptian citizens.

Tension between Qatar's new emir and his fellow Gulf leaders had been rising for months before Wednesday's announcement. The pledges Qatar is accused of breaking were made during a meeting in Riyadh in November 2013, and relate to the implementation of a 2012 Gulf Security Agreement that stipulates all members must refrain from interference in fellow signatories' internal affairs. The agreement was seen as a pre-emptive reaction to turmoil elsewhere in the Middle East, following the uprisings of the Arab Spring — but fellow Gulf countries accuse Doha of failing to put the policies into action.

Kuwaiti Emir Sheikh Sabah Al Ahmad Al Sabah sat between the Qatari and Saudi leaders, reviving a role he has often played to mediate disputes among Gulf brethren. Apparently not trusting the discussion alone to alleviate tensions, the Qatari emir was asked to put his promises on paper. "The three countries had hoped" that the pledges would "be put into effect by the State of Qatar if signed," Wednesday's joint statement reads.

After that initial gathering, Gulf countries held at least two more meetings in an attempt to convince Qatar to change its ways. On Feb. 17, the three countries asked their foreign ministers to "clarify the seriousness of the matter" to Qatar, the statement says. Meeting in Kuwait, the countries agreed on a mechanism to implement Qatar's promises. But arguing nothing has changed since, Saudi Arabia, the UAE, and Bahrain now say they will have to "start taking whatever they deem appropriate to protect their security and stability by withdrawing their ambassadors."

Qatar's cabinet reacted with "regret and surprise" to the ambassadors' withdrawal, a statement from the official news agency said. Doha also announced that it will not withdraw its own ambassadors and is "absolutely keen on brotherly ties."

The next move is Qatar's. Back in 2002, Saudi Arabia withdrew its ambassador from Doha in anger over Al Jazeera's coverage; it took half a decade and savvy maneuvering to restore relations. Even if Doha is finally out of the international spotlight, its trickiest diplomacy may lie ahead.

TAGS: DEFAULT, DIPLOMACY, DISPATCH, FREE, MIDDLE EAST, POLITICS, WEB EXCLUSIVE

Annex 107

"UAE Cabinet Approves List of Designated Terrorist Organisations, Groups", *Emirates News Agency*, 16 November 2014

Available at http://wam.ae/en/details/1395272478814

UAE Cabinet approves list of designated terrorist organisations, groups

Sun 16-11-2014 02:34 AM

DHABI, 15th November 2014 (WAM) --- The UAE Cabinet has approved a list of designated terrorist organisations and groups in implementation of Federal Law No. 7 for 2014 on combating terrorist crimes, issued by President His Highness Sheikh Khalifa bin Zayed Al Nahyan, and the Cabinet's own resolution on the designation of terrorist organisations that provided for the publication of the lists in the media for the purposes of transparency and to raise awareness in society about these organisations.

The following is the list of organisations designated as terrorist that has been approved by the Cabinet:

:: The UAE Muslim Brotherhood.
:: Al-Islah (or Da'wat Al-Islah).
:: Fatah al-Islam (Lebanon).
:: Associazione Musulmani Italiani (Association of Italian Muslims).
:: Khalaya Al-Jihad Al-Emirati (Emirati Jihadist Cells).
:: Osbat al-Ansar (the League of the Followers) in Lebanon.
:: The Finnish Islamic Association (Suomen Islam-seurakunta).
:: Alkarama organisation.
:: Al-Qaeda in the Land of the Islamic Maghreb (AQIM or Tanzim al-Qa idah fi Bilad al-Maghrib al-Islami).
:: The Muslim Association of Sweden (Sveriges muslimska forbund, SMF)
:: Hizb al-Ummah (The Ommah Party or Nation's Party) in the Gulf and the Arabian Peninsula
:: Ansar al-Sharia in Libya (ASL, Partisans of Islamic Law).
:: Det Islamske Forbundet i Norge (Islamic Association in Norway).
:: Al-Qaeda.
:: Ansar al-Sharia in Tunisia (AST, Partisans of Sharia) in Tunisia.
:: Islamic Relief UK.

:: Dae'sh (ISIL).
:: Harakat al-Shabaab al-Mujahideen (HSM) in Somalia (Mujahideen Youth Movement)
:: The Cordoba Foundation (TCF) in Britian.
:: Al-Qaeda in the Arabian Peninsula (AQAP).
:: Boko Haraam (Jama'atu Ahlis Sunna Lidda'Awati Wal-Jihad) in Nigeria.
:: Islamic Relief Worldwide (IRW) of the Global Muslim Brotherhood.
:: Jama'at Ansar al-Shari'a (Partisans of Sharia) in Yemen.
:: Al-Mourabitoun (The Sentinels) group in Mali.
:: Tehrik-i-Taliban Pakistan (Taliban Movement of Pakistan).
:: The Muslim Brotherhood (MB) organisation and groups.
:: Ansar al-Dine (Defenders of the faith) movement in Mali.
:: Abu Dhar al-Ghifari Battalion in Syria.
:: Jama'a Islamia in Egypt (AKA al-Gama'at al-Islamiyya, The Islamic Group, IG).
:: The Haqqani Network in Pakistan.
:: Al-Tawheed Brigade (Brigade of Unity, or Monotheism) in Syria.
:: Ansar Bait al-Maqdis (ABM, Supporters of the Holy House or Jerusalem) and now rebranded as Wilayat Sinai (Province or state in the Sinai).
:: Lashkar-e-Taiba (Soldiers, or Army of the Pure, or of the Righteous).
:: Al-Tawhid wal-Eman battalion (Battalion of Unity, or Monotheism, and Faith) in Syria.
:: Ajnad Misr (Soldiers of Egypt) group.
:: The East Turkistan Islamic Movement in Pakistan (ETIM), AKA the Turkistan Islamic Party (TIP), Turkistan Islamic Movement (TIM).
:: Katibat al-Khadra in Syria (The Green Battalion).
:: Majlis Shura al-Mujahideen Fi Aknaf Bayt al-Maqdis (the Mujahedeen Shura Council in the Environs of Jerusalem, or MSC).
:: Jaish-e-Mohammed (The Army of Muhammad).
:: Abu Bakr Al Siddiq Brigade in Syria.
:: The Houthi Movement in Yemen.
:: Jaish-e-Mohammed (The Army of Muhammad) in Pakistan and India.
:: Talha Ibn 'Ubaid-Allah Compnay in Syria.
:: Hezbollah al-Hijaz in Saudi Arabia.
:: Al Mujahideen Al Honoud in Kashmor/ India (The Indian Mujahideen, IM).
:: Al Sarim Al Battar Brigade in Syria.
:: Hezbollah in the Gulf Cooperation Council.
:: Islamic Emirate of the Caucasus (Caucasus Emirate or Kavkaz and Chechen jidadists).
:: The Abdullah bin Mubarak Brigade in Syria.
:: Al-Qaeda in Iran.
:: The Islamic Movement of Uzbekistan (IMU).
:: Qawafil al-Shuhada (Caravans of the Martyrs).
:: The Badr Organisation in Iraq.
:: Abu Sayyaf Organisation in the Philippines.
:: Abu Omar Brigade in Syria.
:: Asa'ib Ahl al-Haq in Iraq (The Leagues of the Righteous).
:: Council on American-Islamic Relations (CAIR)
:: Ahrar Shammar Brigade in Syria (Brigade of the free men of the Shammar Tribe).
:: Hezbollah Brigades in Iraq.
:: CANVAS organisation in Belgrade, Serbia.
:: The Sarya al-Jabal Brigade in Syria.
:: Liwa Abu al-Fadl al-Abbas in Syria.
:: The Muslim American Society (MAS).

:: Al Shahba' Brigade in Syria.
:: Liwa al-Youm al-Maw'oud in Iraq (Brigade of Judgment Day).
:: International Union of Muslim Scholars (IUMS).
:: Al Ka'kaa' Brigade in Syria.
:: Liwa Ammar bin Yasser (Ammar bin Yasser Brigade).
:: Ansar al-Islam in Iraq.
:: Federation of Islamic Organisations in Europe.
:: Sufyan Al Thawri Brigade.
:: Ansar al-Islam Group in Iraq (Partisans of Islam).
:: Union of Islamic Organisations of France (L'Union des Organisations Islamiques de France, UOIF).
:: Ebad ar-Rahman Brigade (Brigade of Soldiers of Allah) in Syria.
:: Jabhat al-Nusra (Al-Nusra Front) in Syria.
:: Muslim Association of Britain (MAB).
:: Omar Ibn al-Khattab Battalion in Syria.
:: Harakat Ahrar ash-Sham Al Islami (Islamic Movement of the Free Men of the Levant).
:: Islamic Society of Germany (Islamische Gemeinschaft Deutschland).
:: Al-Shayma' Battaltion in Syria.
:: Jaysh al-Islam in Palestine (The Army of Islam in Palestine)
:: The Islamic Society in Denmark (Det Islamiske Trossamfund, DIT).
:: Katibat al-Haqq (Brigade of the Righteous).
: The Abdullah Azzam Brigades.
:: The League of Muslims in Belgium (La Ligue des Musulmans de Belgique, LMB)
WAM/MMYS

WAM 2230 2014/11/15
END

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Annex 108

"Islamic State: Egyptian Christians held in Libya 'killed'",
BBC, 15 February 2015

Available at https://www.bbc.co.uk/news/world-31481797

Islamic State: Egyptian Christians held in Libya 'killed'

15 February 2015

A video has emerged apparently showing the beheadings of 21 Egyptian Christians who had been kidnapped by Islamic State (IS) militants in Libya.

The footage shows a group wearing orange overalls being forced to the ground and then decapitated.

President Abdel Fattah al-Sisi has said Egypt reserves the right to respond in any way it sees fit.

IS militants claim to have carried out several attacks in Libya, which is in effect without a government.

However, with many armed groups operating in Libya, it is not clear how much power IS actually wields.

National mourning

The kidnapped Egyptian workers, all Coptic Christians, were seized in December and January from the coastal town of Sirte in eastern Libya, now under the control of Islamist groups.

The video of the beheadings was posted online by Libyan jihadists who pledge loyalty to IS. A caption made it clear the men were targeted because of their faith.

"Egypt and the whole world are in a fierce battle with extremist groups carrying extremist ideology and sharing the same goals," President Sisi said.

The beheadings were described as "barbaric" by al-Azhar, the highly regarded theological institution which is based in Egypt.

The Coptic church said it was "confident" Egypt would exact retribution. Egypt has declared seven days of national mourning.

Libya has been in turmoil since 2011 and the overthrow of its then-leader, Col Muammar Gaddafi.

Since then, numerous other militia groups have battled for control.

The head of the US Defense Intelligence Agency warned last month that IS was assembling "a growing international footprint that includes ungoverned and under-governed areas", including Libya.

Analysis - Orla Guerin, BBC News, Cairo

The five-minute video shows hostages in orange jumpsuits being marched along a beach, each accompanied by a masked militant. The men are made to kneel before they are simultaneously beheaded.

Most were from a poor village in Upper Egypt where some relatives fainted on hearing the news. A caption accompanying the video made it clear the hostages were targeted because of their faith. It referred to the victims as "people of the cross, followers of the hostile Egyptian church".

There's speculation here that Egypt may now consider airstrikes across the border. President Abdel Fattah al-Sisi has said in the past that militants in Libya are a danger not just to Egypt, but also to the Middle East.

Rival governments

Libya has two rival governments, one based in Tripoli, the other in Tobruk. Meanwhile, the eastern city of Benghazi, headquarters of the 2011 revolution, is largely in the hands of Islamist fighters, some with links to al-Qaeda.

On Sunday, Italy closed its embassy in Tripoli. Italy, the former colonial power, lies less than 500 miles (750km) from Libya at the shortest sea crossing point.

Italian Premier Matteo Renzi has been calling for the UN to intervene in Libya. Thousands of migrants use the Libyan coast as a starting point to flee the violence and attempt to reach the EU.

UK Foreign Secretary Philip Hammond condemned the beheadings.

"Such barbaric acts strengthen our determination to work with our partners to counter the expanding terrorist threat to Libya and the region," he said.

On Sunday, President Sisi banned all travel to Libya by Egyptian citizens.

Despite the turmoil in Libya, thousands of Egyptians go to the country looking for work.

There had been demonstrations in Egypt calling on the government to do more to secure the release of those held.

Related Topics

Islamic State group **Egypt** **Libya**

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Annex 109

T. Kamal, "Thousands Mourn Egyptian Victims of Islamic State in Disbelief", *Reuters*, 16 February 2015

Available at https://uk.reuters.com/article/uk-mideast-crisis-egypt-village/thousands-mourn-egyptian-victims-of-islamic-State-in-disbelief-id UKKBN0LK1L420150216

WORLD NEWS
FEBRUARY 16, 2015 / 5:27 PM / 4 YEARS AGO

Thousands mourn Egyptian victims of Islamic State in disbelief

Treza Kamal

AL-OUR, Egypt (Reuters) - Thousands of traumatized mourners gathered on Monday at the Coptic church in al-Our village south of Cairo, struggling to come to terms with the fate of compatriots who paid a gruesome price for simply seeking work in Libya.

Thousands mourn Egyptian victims of Islamic State in disbelief

The father of one of the Egyptian Coptic men killed in Libya mourns at a church before attending mass in El-Our village, in Minya governorate, south of Cairo, February 16, 2015. REUTERS/Asmaa Waguih

Thirteen of 21 Egyptians beheaded by Islamic State came from the impoverished dirt lanes of al-Our, violence that prompted the Egyptian military to launch an air strike on Islamic State militant targets in Libya.

One man was in denial at the death of his son.

"Oh Kerollos, this is your wedding party ... I'm very sorry my son, because I did not have enough money to keep you from going to this place," he moaned.

Thousands mourn Egyptian victims of Islamic State in disbelief

Black banners hung on the walls of the Church of the Virgin Mary, proclaiming "Egypt rise up, the blood of your martyrs is calling for you to take revenge". Relatives fainted from grief.

Pictures of the victims were laid out beside images of Jesus. There were no coffins because the bodies of the victims, who were dressed in orange jumpsuits, forced to kneel on a beach and were then beheaded, were not returned home.

Sheikhs from al Azhar, Egypt's main centre of Islamic learning which condemned the beheadings, joined the mourning.

Many could not fathom why men who simply wanted to support their families back home would be butchered by Islamic State, the ultra-orthodox militant group that took over parts of Syria and Iraq and has now expanded its operations to Libya.

"They are not humans. They are monsters. They are holding unarmed people (who) were going to bring bread for their families," said Father Tawadros, pastor of the church.

Facing grim economic prospects at home, many desperate young Egyptians seek jobs in Libya, a country sliding into lawlessness where armed groups battle for control and dozens of their compatriots have been kidnapped.

Given Egypt's high unemployment rate, other men are likely to keep streaming into Libya.

Family members spoke of 23-year-old Milad Sameer Majli who had only been in Libya 15 days before he was kidnapped.

https://uk.reuters.com/article/uk-mideast-crisis-egypt-village/thousands-mourn-egyptian-victims-of-islamic-state-in-disbelief-idUKKBN0LK1L4201...

Father Sami Naseef said the stories of those killed were all similar. They were men who were down on their luck and struggling to make ends meet for their families.

Naseef spoke of Abanoob Atiya, 23, who had a technical degree and used to earn 320 Egyptian pounds ($42), only to give most of it to his siblings and the rest went towards transport.

"After he finished his military service, he decided to go to Libya to earn money for his family," Naseef said.

He never made it home.

Writing by Yara Bayoumy and Michael Georgy; Editing by Tom Heneghan

Our Standards: *The Thomson Reuters Trust Principles.*

Annex 110

J. Malsin and C. Stephen, "Egyptian Air Strikes in Libya Kill Dozens of Isis Militants", *The Guardian*, 17 February 2015

Available at https://www.theguardian.com/world/2015/feb/16/egypt-air-strikes-target-isis-weapons-stockpiles-libya

The Guardian

Egypt TV broadcasts footage purporting to show fighter jets bombing Islamic State (Isis) targets in Libya

Egyptian air strikes in Libya kill dozens of Isis militants

Training bases and weapons stockpiles targeted day after Islamic State militants post beheadings video

Jared Malsin in Cairo and **Chris Stephen**

Tue 17 Feb 2015 08.42 GMT

Egyptian war planes have hit jihadi targets in Libya in swift revenge for the murder of 21 Christian workers by masked militants affiliated to the Islamic State (Isis), widening the north African country's already grave crisis.

Air strikes on weapons caches and training camps were announced on Monday by the armed forces general command in Cairo – the first time Egypt has acknowledged any kind of military intervention in its increasingly chaotic and violent western neighbour.

The attacks were "to avenge the bloodshed and to seek retribution from the killers", a spokesman said. "Let those far and near know that Egyptians have a shield that protects them." They followed Sunday's release of a graphic propaganda video showing the first mass execution outside Isis's familiar heartland in Syria and Iraq.

Egyptian air strikes killed 64 Isis fighters, including three of the leadership, in the coastal cities of Derna and Sirte, the Libyan army said. Reports reaching Tunis said at least 35 more Egyptians had been rounded up by Isis in retaliation for the morning air raids – but there was no confirmation of this from the Egyptian presidential spokesman.

Libya's air force, under the command of the internationally-recognised government in the eastern city of Tobruk, announced that it had also launched strikes in Derna.

The upsurge in violence coincided with the fourth anniversary of the 2011 Benghazi uprising, which led to Muammar Gaddafi's overthrow a few months later. It brought immediate demands for a more coherent international response to the crisis. François Hollande, the French president, and Abdel Fatah al-Sisi, his Egyptian counterpart, called for the UN security council to meet over Libya.

Jonathan Powell, the British government's Libya envoy, told the Guardian that the oil-rich country risked becoming a failed state or a "Somalia on the Mediterranean" and urged

greater efforts to reach agreement on a ceasefire and a national unity government.

On Monday night Nasser Kamel, Egypt's ambassador to the UK, criticised Britain and other countries that intervened militarily in Libya in 2011 for not doing enough to help the country transition from Gaddafi's dictatorship to a legitimate state.

He also called for the lifting of the UN arms embargo on the Libyan government to help it fight terrorism. Kamel told BBC Two's Newsnight: "I think after toppling Gaddafi, that no one is questioning that he was a dictator, we as an international community, especially those that intervened militarily, did not put enough resources [in] for developing a modern, democratic, Libyan state ... I think we should have done more, the UN should have been more involved."

Italian officials said that Rome would consider participating in any military intervention to stop Isis advancing should UN-led diplomatic efforts fail.

In Cairo, Sisi called an urgent meeting of the country's national defence council and declared a seven-day mourning period. The Coptic church called on its followers to have "confidence that their great nation won't rest without retribution for the evil criminals".

Militants have frequently attacked Egyptian citizens and installations in Libya over recent months of deepening turmoil. Egypt is a key supporter of Libya's internationally-recognised government. Egyptian Coptic Christians have also been singled out for attacks.

The gruesome beheading video was released the day after Isis took control of Sirte, birthplace of Gaddafi, with gunmen capturing government buildings and radio stations. It is the third town in Libya it now holds.

Sirte had previously been held by Libya Dawn, the Islamist-led militia alliance that rebelled against the elected government last summer and has been fighting a bitter war against pro-government forces ever since.

Isis has emerged in recent weeks as a third side in a complex and debilitating civil war, fuelling western fears that it will launch terrorist attacks against targets in Europe. Fears of an attack by Isis prompted Italy to evacuate its Tripoli embassy on Sunday, the last major power to do so.

"Libya is in a downward spiral that we need to reverse and turn into an upward one," said Powell, Tony Blair's former chief of staff and Northern Ireland peace negotiator. "There is a good deal of immediacy about this. But these things don't happen overnight. You've got to rebuild trust that has been badly broken."

Thousands of mourners gathered on Monday at the Coptic church in al-Our village south of Cairo, home to 13 of 21 Egyptians beheaded by Isis.

According to Reuters one man was in denial at the death of his son. "Oh Kerollos, this is your wedding party ... I'm very sorry my son, because I did not have enough money to

keep you from going to this place," he said.

Black banners hung on the walls of the Church of the Virgin Mary, proclaiming "Egypt rise up, the blood of your martyrs is calling for you to take revenge".

Pictures of the victims were laid out beside images of Jesus. There were no coffins because the bodies of the victims, who were dressed in orange jumpsuits, forced to kneel on a beach and then beheaded, were not returned home.

Sheikhs from al-Azhar, Egypt's main centre of Islamic learning which condemned the beheadings, joined the mourning.

Facing grim economic prospects at home, many desperate young Egyptians seek jobs in Libya despite the perilous security situation in the country.

Annex 111

"Al-Nusra Leader Jolani Announces Split from al-Qaeda",
Al Jazeera, 29 July 2016

Available at http://www.aljazeera.com/news/2016/07/al-nusra-leader-jolani-announces-split-al-qaeda-160728163725624

ALJAZEERA

NEWS / MIDDLE EAST

Al-Nusra leader Jolani announces split from al-Qaeda

Al Jazeera obtains exclusive video of Abu Mohammed al-Jolani, saying group's name has changed to Jabhat Fath al Sham.

29 Jul 2016

Al Jazeera has obtained exclusive video of the former leader of al-Nusra Front confirming the Syria-based armed group's split from al-Qaeda.

Abu Mohammed al-Jolani appeared in camera for the first time to announce his group's name has also changed to Jabhat Fath al Sham, or The Front for liberation of al Sham.

"We declare the complete cancellation of all operations under the name of Jabhat al-Nusra, and the formation of a new group operating under the name 'Jabhat Fath al-Sham', noting that this new organisation has no affiliation to any external entity," Jolani said.

The release of the video on Thursday followed earlier reports that the leader of al-Qaeda had approved the split, so the Nusra forces could concentrate on their fight against the Syrian government and other rebel groups.

'We look at it with relief'

Al-Nusra first surfaced on the internet in early 2012 to claim responsibility for suicide bombings in Aleppo and Damascus.

The well-armed group, with highly trained fighters, has since staged numerous attacks on security forces - as well as on other armed groups in the country.

It is sanctioned by the UN Security Council and listed as a "terrorist" group by the US and Russia.

In February, the US and Russia excluded the group, as well as the Islamic State of Iraq and the Levant (ISIL, also known as ISIS) from a cessation of hostilities deal aimed at ending the fighting in Syria.

Reacting to Jolani's declaration, Farah al-Atassi, a spokeswoman for the High Negotiations Committee, the Syrian opposition's main negotiating bloc, said it was still "very premature" to predict the full consequences of the split from al-Qaeda.

Atassi added, however, that she was hopeful that the move would rid powers such as Russia of their reasoning for bombing Syria.

"We look at it with relief," she told Al Jazeera from Washington DC, minutes after Jolani's announcement.

"This will reflect somehow positively on the Free Syrian Army (FSA) who has been fighting ISIL and al-Nusra for the past six months, because Russia is bombing and hitting FSA positions and civilian neighbourhoods with the excuse that they are hitting al-Nusra."

'Mixed reaction'

Al Jazeera's Mohamed Jamjoom, reporting from Gaziantep on the Turkish side of the Syrian-Turkish border, said the initial reaction from members of the opposition within Syria was "decidedly mixed.

"All the opposition activists we've spoken with inside Syria told us they were not surprised by the announcement; there had been mounting speculation in the last few days that this was going to happen," Jamjoom said.

"A few told us they believed that by al-Nusra separating itself formally from al-Qaeda and changing its name, as well as by speaking about unifying in the fight in Syria, that that meant that the US and others would no longer consider al-Nusra to be a terrorist organisation; that more international backers would be behind rebel groups."

However, most of the activists in Aleppo did not "really believe what Jolani is saying; they don't trust the motivations," Jamjoom added.

"Some of them wondered whether this was some kind of publicity stunt to get more support from the international community, with many wondering whether this was going to have any practical impact."

View from Washington

Later on Thursday, the White House said its assessment of al-Nusra had not changed, despite the announcement that that the group was cutting its ties with al-Qaeda.

"There continues to be increasing concern about Nusra Front's growing capacity for external operations that could threaten both the United States and Europe," White House spokesman Josh Earnest told reporters at a briefing.

"We certainly see no reasons to believe that their actions or their objectives are any different," US State Department spokesman John Kirby said.

"They are still considered a foreign terrorist organisation," Kirby said. "We judge a group by what they do, not by what they call themselves."

Al Jazeera's Rosiland Jordan, reporting from Washington DC, said the White House "considered Nusra a security threat" to the US and its interests.

"When the US made the decision to declare Nusra a terrorist organisation [in 2014], there was a lot of criticism, notably coming from members of the Syrian opposition who said Nusra had the best trained, most effective fighters in their efforts to topple the government of [Syrian President] Bashar al-Assad," Jordan said.

"But the US government was not moved, saying that they considered its [Nusra's] de facto ties to al-Qaeda to be a very serious problem."

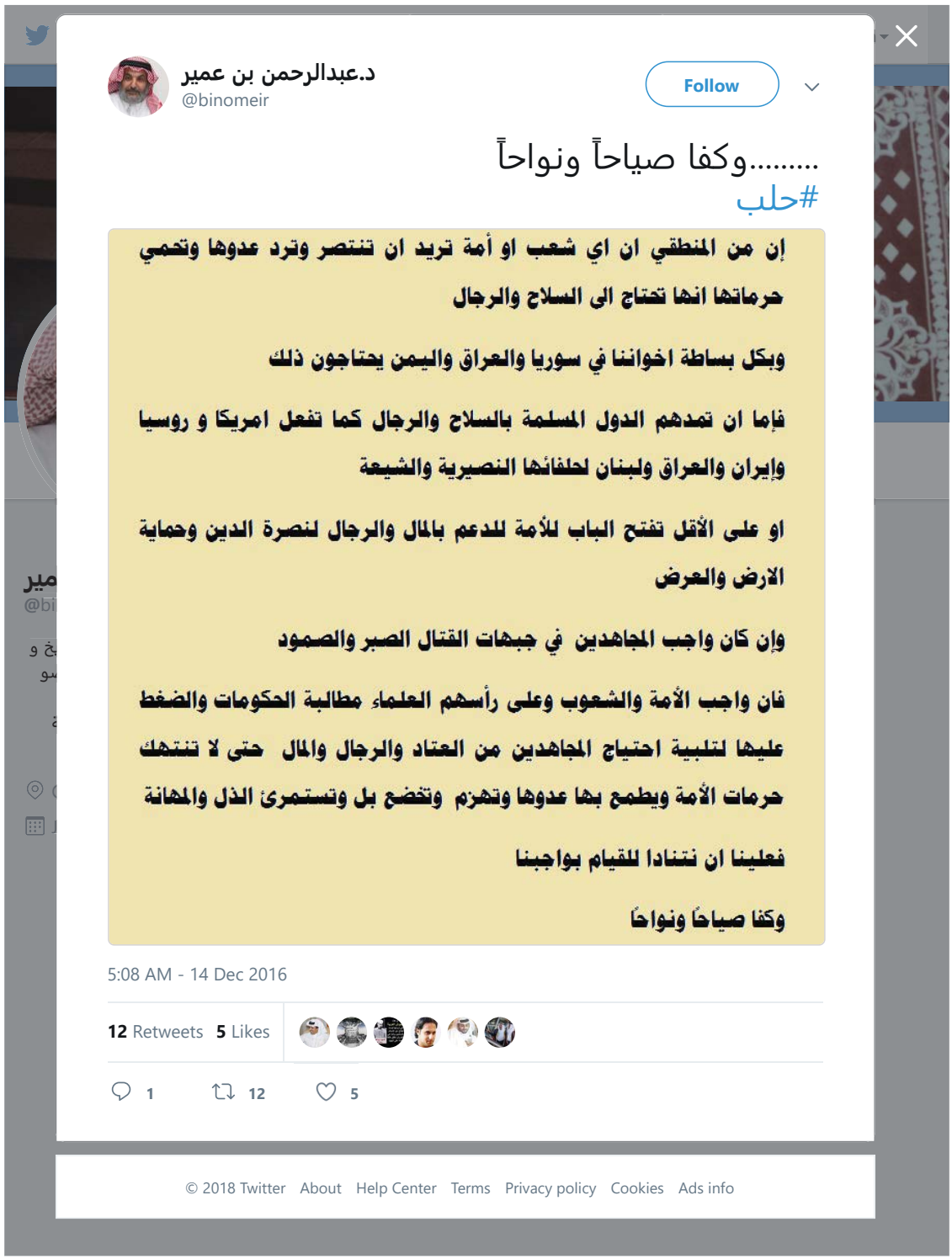
SOURCE: **AL JAZEERA**

Annex 112

R. al-Nu'aymi (@binomeir), *Twitter*, 14 December 2016, 05:08 a.m.

(English translation, Arabic original)

Available at https://twitter.com/binomeir/status/809022288905535488



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5:08 AM - 14 Dec 2016

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Dr. Abdul Rahman bin Omeir

@binomeir

Stop shouting and bemoaning…

#Aleppo

It is reasonable that any people or nation which wants to score a victory, push away its enemy and protect its sanctities, needs weapon and men.

In simple words, our brothers in Syria and Iraq are in need of weapon and men.

The Muslim countries can either provide them with weapon and men, just as the US, Russia, Iran, Iraq, and Lebanon do with their Nusairi and Shiite allies; or at least open the door for the people to offer support by means of money and men to make this religion triumph, and safeguard the land and honor.

If a Muslim fighter must be patient and perseverant in battle fronts, the nation and people, with the clergymen on top of them, have a duty to demand their governments, and exercise pressure on them, to satisfy the needs of the Muslim fighters in terms of equipment, men, and money; so that the nation's sacred belongings cannot be intruded on, the nation enemy's desire to possess, defeat, subjugate such nation can be prevented, and for the sake of not having a nation that finds subservience and disgrace pleasing.

So, we have to get together to fulfill our duty.

Stop shouting and bemoaning…

5:08 AM - 14 Dec 2016

12 Retweets 5 Likes

Annex 113

A. Tamimi, "Hamas' Political Document: What to Expect",
Al Jazeera, 1 May 2017

Available at https://www.aljazeera.com/indepth/features/2017/04/hamas-political-document-expect-170430100247543.html

ALJAZEERA

FEATURE / HAMAS

Hamas' political document: What to expect

Hamas' long-awaited updated founding charter will be released on Monday, raising questions over its contents.

by **Azzam Tamimi**
1 May 2017

As the Palestinian Hamas movement gears up to release the long-awaited updated version of its founding charter, rumours surrounding the changes to the document have put many on edge.

On Monday evening, Hamas' political leader Khaled Meshaal is expected to reveal the new document to the public after two years of work, and several occasional leaks of the document.

It remains to be seen whether Meshaal will have the courage to affirm, quite unequivocally, that this new document replaces, supersedes and even abolishes, the old one. He needs to say that his current move is a correction of a mistake that should not have been made in the first place.

Hamas critics could find nothing more damning for the movement than its own charter, which was released to the public on August 18, 1988, less than nine months following its birth out of the womb of the Muslim Brotherhood movement in Palestine.

Israelis and their supporters quote the Hamas Charter as proof that the movement is anti-Semitic and incites violence.

READ MORE: 'Palestinians, not Israel, need security guarantees'

The old Charter speaks of the conflict in Palestine in religious, rather than political, terms.

It took Meshaal and his comrades 10 years to accept the fact that the Charter, which few of them thought was of any relevance to their work, was a major vulnerability and a weapon in the hands of their enemies.

The new charter, or political document as Meshaal prefers to call it, does away with much of what was considered to be erroneous in the old charter. The new document will state unequivocally that the conflict in Palestine is not a religious one:

"Hamas affirms that its conflict is with the Zionist project not with the Jews because of their religion. Hamas does not wage a struggle against Jews because they are Jewish but wages a struggle against the Zionists who occupy Palestine. However, it is the Zionists who constantly refer to Judaism and the Jews in identifying their colonial project and illegal entity," the new document is expected to read.

Furthermore, unlike the old charter, the new document will be free from any conspiracy theory analysis. It provides a clear view of what the conflict is about:

"The Palestinian cause in its essence is a cause of an occupied land and a displaced people. The right of the Palestinian refugees and the displaced to return to their homes from which they were banished or were banned from returning to - whether in the lands occupied in 1948 or in 1967 (that is the whole of Palestine), is a natural right, both individual and collective. This right is confirmed by all divine laws as well as by the basic principles of human rights and international laws. It is an inalienable right and cannot be dispensed with by any party, whether Palestinian, Arab or international."

The new document will define the movement in terms of national liberation, stating that:

"The Islamic Resistance Movement 'Hamas' is a Palestinian Islamic national liberation and resistance movement. Its goal is to liberate Palestine and confront the Zionist project. Its frame of reference is Islam, which determines its principles, objectives and means."

However, as far as the objective is concerned, there has been no change of position. Hamas has long called for the "liberation" of the whole of historic Palestine, and is expected to continue to do so in the new charter.

"Hamas believes that no part of the land of Palestine shall be compromised or conceded, irrespective of the causes, the circumstances and the pressures and no matter how long the occupation lasts. Hamas rejects any alternative to the full and complete liberation of Palestine, from the river to the sea."

In what may be perceived as an element of pragmatism unseen in the old charter, the new document states that the movement would accept a de facto Palestinian state in the West Bank and the Gaza Strip.

"However, without compromising its rejection of the Zionist entity [Israel] and without relinquishing any Palestinian rights, Hamas considers the establishment of a fully sovereign and independent Palestinian state with Jerusalem as its capital along the lines of the 4th of June 1967, with the return of the refugees and the displaced to their homes from which they were expelled, to be a formula of national consensus."

This item is likely to stir up some controversy and draw accusations that the movement is being ambivalent. The truth is that this position has been mostly the outcome of considerable pressure exercised on the movement by regional and international actors who want to see it resume reconciliation talks with the Fatah movement and moderate its position towards Israel.

However, what the new document will express is a position that falls well short of accepting the two-state solution that is assumed to be the end product of the Oslo Accords between Israel and the Palestinian Liberation Organization (PLO).

As for the Oslo agreements, signed between 1993 and 1995, the new charter is expected to say the following:

"Hamas affirms that the Oslo Accords and their addenda contravene the governing rules of international law in that they generate commitments that violate the inalienable rights of the Palestinian people. Therefore, the [Hamas] movement rejects these agreements and all that flows from them such as the obligations that are detrimental to the interests of our people, especially security coordination (collaboration)."

The new document is also expected to express the movement's unwavering rejection of the three demands of the Middle East Quartet, comprising of the United Nations, the United States, and the European Union and Russia, for the recognition of Hamas. The demands consist of the recognition of Israel, the renunciation of violence, and the adherence of previous diplomatic agreements.

On the issue of violence, the amended document is expected to state the following:

"Resisting the occupation with all means and methods is a legitimate right guaranteed by divine laws and by international norms and laws. At the heart of these lies armed resistance, which is regarded as the strategic choice for protecting the principles and the rights of the Palestinian people."

READ MORE: The price of Oslo

Hamas has long promised to make changes to its charter, which has placed it at a disadvantage within the international community. The updates are long overdue, but the circumstances seem finally suitable for releasing a new document.

So why has the Hamas leadership decided to release the amendments to its charter now?

Firstly, the increasing pressure from a growing community of Hamas supporters around the world from Latin America to the Far East demanding that the Hamas leadership should do something about the Charter, which is often used against them in public discussions and in the media as proof that Hamas is anti-Semitic and is anything but a national liberation movement.

Secondly, the growing number of channels of communication between the movement and official as well as semi-official entities around the world, especially in Europe and the US, and the discussions these channels generated about what Hamas stand for and what it hopes to achieve.

Thirdly, the maturation of thinking at the grassroots level, as well as at the top leadership level regarding the nature of the conflict and the best means of promoting the cause worldwide.

Fourthly, the failure of the Oslo Accords in achieving peace and the ascendance of Hamas as a potentially major player in any future settlement. Israelis themselves were often eager to set up secret backchannels with Hamas to negotiate a prisoners' exchange or a long-term truce arrangement.

And finally, the decision by Meshaal to retire and leave behind a legacy for which he would be remembered best.

SOURCE: **AL JAZEERA NEWS**

Annex 114

D. McElroy, "Qatar's Top Terror Suspect Hosts Prime Minister at Wedding", *The National*, 17 April 2018

Available at https://www.thenational.ae/world/qatar-s-top-terror-suspect-hosts-prime-minister-at-wedding-1.722398

The National

Qatar's top terror suspect hosts prime minister at wedding

Qatar's prime minster attends family wedding of man that he put on terror list month

Damien McElroy
April 17, 2018

Updated: April 17, 2018 03:14 PM

Abdullah Al Nuaimi, the groom, left, and Sheikh Abdullah bin Nasser bin Khalifa Al Thani, the Qatari prime minister and interior minister. Image taken from social media

Qatar's prime minister attended the wedding of the son of a man the country had added to its terrorism list last month alongside the Hamas leader Khaled Mishaal.

Photos of the wedding were published days ago in the Qatar newspaper Al Raya showing Sheikh Abdullah bin Nasser bin Khalifa Al Thani, the prime minister and interior minister, fondly greeting Abdullah Al Nuaimi at the ceremony. In the background is Abdulrahman Al Nuaimi, the father, a former head of the Qatar Football Association who was designated by the US and UN for financing Al Qaeda in Iraq, who was smiling happily.

The wedding page photographs also show father and son posing with Mr Meshaal, who has been living in Qatar for more than a decade.

Qatar crisis

Qatar increasing pace of asset sales as Gulf boycott takes toll

Quartet says Qatar must meet demands to end boycott

UAE says Qatar's terror list confirms its support of terrorism

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The images provoked outrage across social media and among security experts, who called into question Qatar's commitment to targeting terror suspects and those who finance extremism.

"Qatar's policy on how to treat terrorists is astonishing. Here's a picture posted an hour ago by a guest at the wedding of Abdulrahman Al Nuaimi's son (father & son in the picture). Al Nuaimi was named on #Qatar's recent terrorist list," Prince Talal Mohammed Al Faisal wrote.

https://www.thenational.ae/world/qatar-s-top-terror-suspect-hosts-prime-minister-at-wedding-1.722398

"It's hard to know what's worse: that Nuaymi was free to attend his son's wedding weeks after being designated a terrorist by his even own govt [and] months after Qatar told NYT he was in jail, or that it seems the party was attended & blessed by a top religion anchor for state media," wrote terror expert David Weinberg on Twitter.

As interior minister, Sheikh Abdullah was responsible for issuing the list of 19 Qataris and others who were designated as terrorists by the country for the first time. The March announcement was presented by Doha as major step by the country to meet its undertakings to the US Treasury when the US-GCC Terrorist Finance Targeting Centre (TFTC) was established last May.

According to analysis published by Mr Weinberg, there is a glaring omission of Al Qaeda and ISIS from the list. "Qatar is a founding member of the Global Coalition to Defeat Daesh, and yet its new list of banned terrorist groups still does not include the Islamic State's central branch in Syria and Iraq," he wrote. " Only the group's branch in the Sinai Peninsula is proscribed by Qatar's new list, a significant omission given that Islamic State branches and loyalists carried out attacks in over 20 countries in 2016 alone.

"Also excluded from the list is Muthanna al-Dhari, an Iraqi subject to a United Nations travel ban for allegedly funding IS's forerunner, al-Qaeda in Iraq, to the tune of over a million dollars. Al-Dhari has been let into Qatar numerous times – including in the last year – and was hugged and kissed by Emir Tamim's father in 2015."

After Al Nuaimi was put on the US Treasury's sanctions list on 2013, an activist group he founded in Geneva, protested the decision. According to its website, Al Karama rejects the designation. "Alkarama's Executive Director Mourad Dhina commented on this situation in an article , "The Arab world needs bridge building, not terrorist listing", arguing that the US decision was certainly not the way to go for advancing democracy and human rights in the region'," it said.

AlKarama had its special consultative status to the UN's Economic and Social Council (ECOSOC) revoked last year in the wake of the controversy.

Read more: Qatar terror suspect finishes second in Doha triathlon

Mubarak Al Ajji, second left, had a podium finish in the national championship section of the triathlon on March 16.

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Annex 115

"Qatar Says 'No Hypocrisy', Admits to PM Attending Wedding of Terrorist's Son", *Al Arabiya*, 22 April 2018

Available at https://english.alarabiya.net/en/News/gulf/2018/04/22/Qatar-says-no-hypocrisy-admits-to-PM-attending-wedding-of-terrorist-s-son-.html

Qatar says ‘no hypocrisy’, admits to PM attending wedding of terrorist’s son

The Qatari government admitted in a statement released on Saturday that their Prime Minister Sheikh Abdullah bin Nasser bin Khalifa al-Thani did in fact attend the wedding of terrorist financier Abdulrahman al-Nuaimi’s son, affirming that there is “no hypocrisy at work.”

They added that he was “personally” invited by the groom, whom they described as “a government employee of the state of Qatar, and an upstanding young man.”

An Al Arabiya recent expose on Qatar’s open relationship between government officials and known terrorist financiers, some of whom are on Doha’s on terror sponsor list, has shed light on the country’s lack of seriousness on addressing its ties and support of extremists groups.

Last week, Al Arabiya **reported** that know terrorist financier Abdulrahman al-Nuaimi had been living out in the open despite having just been designated as a terrorist by his own country a month earlier.

"There is no hypocrisy at work here. The prime minister will continue to support the good work of his employees," the government communications office added in the statement.

In a new claim, the Qatari government said that prosecutors were "building a new case" against al- Nuaimi whom they added roams free "due to lack of evidence."

However, in March, and after significant international pressure, Qatar itself included Al-Nuaimi in their terrorist list, five years after he was first designated by the US as a supporter of terrorism, and a longtime after the United Nations Security Council and its GCC neighbors did so as well.

In the statement, the Qatari government claimed that "the Emir of Qatar has no authority to unilaterally jail an individual."

International experts said that the Qatari statement reaffirms the questioning of the credibility of Doha's government over its support of terrorism.

Last year Trump denounced that Qatar is a "funder of terror", after Saudi Arabia, the United Arab Emirates, Egypt and Bahrain severed diplomatic and trade links with Qatar in June of 2017 for its support of terrorist activities and groups in the region.

Following further assurances made by Tamim bin Hamad al-Thani, the Qatari Emir, during a visit to the White House on April 9, Trump welcomed the Emir's pledge to combat terrorist financing.

Sheikh Abdullah's attendance of the terrorist financier's son's wedding came just two days after this pledge.

"It throws into doubt Qatar's claims to be taking a zero-tolerance approach to terror financiers as it attempts to end a blockade by neighboring states that accuse the country of supporting terrorist groups across the region and of being too close to Iran," prominent UK newspaper The Telegraph wrote.

The Telegraph confirmed the information first exposed by **Al Arabiya.net** which revealed that the prime minister was photographed in the event only a few weeks after his government designated Nuaimi as a financier of terrorism.

The report pushed many terrorism experts and former US officials to call the White House and the international community to make Doha **accountable** for its double-sided policy.

Who is Trump really siding with in Qatar's crisis?

WATCH: Saudi FM Jubeir tears apart Qatar's façade in 150 seconds

Last Update: Sunday, 22 April 2018 KSA 17:20 - GMT 14:20

Annex 116

"Qatar Must Improve Relations with Neighbors, Desist from Backing up Extremism, Terrorism, Regional Destabilization, Saudi Ambassador to UK Says", *Saudi Press Agency*, 25 April 2018

Available at https://www.spa.gov.sa/1756484

وكالة الأنباء السعودية

Qatar Must Improve Relations with Neighbors, Desist from Backing up Extremism, Terrorism, Regional Destabilization, Saudi Ambassador to UK Says

الأربعاء 1439/8/9 هـ الموافق 2018/04/25 م واس

Riyadh, Sha'ban 9, 1439, Apr 25, 2018, SPA -- In a letter to the London-based Financial Times daily, Prince Mohammed bin Nawaf bin Abdulaziz, Saudi Ambassador to the United Kingdom, asserted that Qatar should improve relations with neighboring countries and desist from backing extremism, terrorism and regional destabilization.

That was included in a jointly written letter by the ambassadors of governments of states advocating counterterrorism, in London, namely Prince Mohammed bin Nauwaf, Sheikh Fawaz bin Mohammed Al Khalifa, Ambassador of the Kingdom of Bahrain, UAE Ambassador Suleiman Al-Mazrui and the Egyptian Ambassador Nasser Kamil, as a rejoinder to Financial Times' editorial comment under the motto: "the continuing blockade of Qatar makes no sense".

Governments of the quartet boycotting countries do not like to reduce Qatar to a Vassal State, as the editorial comment claims, however they envision Qatar to abide by international standards relating to combat terrorism, the jointly authored letter explained.

Sheikh Tamim of Qatar has made remarks to the media, following a meeting with the US President Donald Trump, at the White House on 11th of April, in which he claims that his country does not tolerate persons who fund and back terrorism, nonetheless, within two days of the Qatari Emir comments, the Qatari Premier attended a wedding hosted by Abdulrahman Al-Naeimi, classified as a terrorism financier, whom the US Treasury Department claimed that "He had overseen transfers of $2 million per month, to Qaeda network, in Iraq", the letter pointed out.

Al-Naeimi is among a lot of terrorism financiers who are regularly doing such acts form inside of Qatar and keeping moving freely and unpunished, in a stark example of systematic support for terrorists, the letter stated.

Ambassadors' joint letter added that within days, and away from improving relations with neighbors, Qatar utilized its media network to back up and promote terrorists' acts, in the whole region, clearly through relaying Houthi militias calls to wage offences on the Kingdom of Saudi Arabia.

Qatar says something to the Western capitals, however, it does the contrary, in fact, the letter reaffirmed, advising Qatar, instead of concentrating on the PR campaigns, it shall change its conduct, in order to put an end to such a conflict, the letter concluded.

SPA --

LOCAL TIME 17:57 GMT 20:57

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Annex 117

J. Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", *The Washington Post*, 28 April 2018

Available at https://www.washingtonpost.com/world/national-security/hacked-messages-show-qatar-appearing-to-pay-hundreds-of-millions-to-free-hostages/2018/04/27/46759ce2-3f41-11e8-974f-aacd97698cef_story.html?utm_term=.1b02c34ca651

The Washington Post

National Security

Hacked messages show Qatar appearing to pay hundreds of millions to free hostages

By Joby Warrick
April 28

One morning last April, in the 16th month of a grueling hostage negotiation, a top Qatari diplomat sent a text message to his boss to complain about a brazen robbery being perpetrated against his own country.

Qatar had entered secret talks to free 25 of its citizens from kidnappers in Iraq, yet the bargaining had turned into a kind of group shakedown, the official said, with a half-dozen militias and foreign governments jostling to squeeze cash from the wealthy Persian Gulf state.

"The Syrians, Hezbollah-Lebanon, Kata'ib Hezbollah, Iraq — all want money, and this is their chance," Zayed bin Saeed al-Khayareen, Qatar's ambassador to Iraq and chief negotiator in the hostage affair, wrote in the message. "All of them are thieves."

And yet, the Qataris were willing to pay, and pay they did, confidential documents confirm.

In the April text message and in scores of other private exchanges spanning 1½ years, Qatari officials fret and grouse, but then they appear to consent to payments totaling at least $275 million to free nine members of the royal family and 16 other Qatari nationals kidnapped during a hunting trip in southern Iraq, according to copies of the intercepted communications obtained by The Washington Post.

The secret records reveal for the first time that the payment plan allocated an additional $150 million in cash for individuals and groups acting as intermediaries, although they have long been regarded by U.S. officials as sponsors of international terrorism. These include Iran's Islamic Revolutionary Guard Corps and Kata'ib Hezbollah, an Iraqi paramilitary group linked to numerous lethal attacks on American troops during the Iraq War, the records show.

The payments were part of a larger deal that would involve the Iranian, Iraqi and Turkish governments as well as Lebanon's Hezbollah militia and at least two Syrian opposition groups, including al-Nusra Front, the notorious Sunni rebel faction linked to al-Qaeda. The total sum

demanded for the return of the hostages at times climbed as high as $1 billion, although it is not clear from the documents exactly how much money ultimately changed hands.

Qatar, which acknowledged receiving help from multiple countries in securing the hostages' release last year, has consistently denied reports that it paid terrorist organizations as part of the deal. In a letter last month denouncing a published account of the events in the New York Times, Qatar's ambassador to the United States asserted flatly that "Qatar did not pay a ransom."

"The idea that Qatar would undertake activities that support terrorism is false," the ambassador, Sheikh Meshal bin Hamad al-Thani, wrote. The letter does not deny that Qatar paid money to end the crisis, but it suggests that the recipients were government officials, citing vaguely a Qatari initiative with Iraq to "strengthen bilateral relations and ensure the safe release of the abductees."

But the conversations and text messages obtained by The Post paint a more complex portrait. They show senior Qatari diplomats appearing to sign off on a series of side payments ranging from $5 million to $50 million to Iranian and Iraqi officials and paramilitary leaders, with $25 million earmarked for a Kata'ib Hezbollah boss and $50 million set aside for "Qassem," an apparent reference to Qassem Soleimani, the leader of Iran's Islamic Revolutionary Guard Corps and a key participant in the hostage deal.

"You will get your money after we take our people," Khayareen writes in an April 2017 text message, recounting his conversation with a top official of Kata'ib Hezbollah.

The text exchanges are part of a trove of private communications about the hostage ordeal that were surreptitiously recorded by a foreign government and provided to The Post. The intercepted communications also include cellphone conversations and voice-mail messages in Arabic that were played for Post reporters for authentication purposes, on the condition that the name of the foreign government that provided the materials not be revealed.

Qatari officials declined to comment on specific issues raised in the text exchanges. But one senior Middle Eastern official knowledgeable about the communications said the sums mentioned in the texts referred to proposals that were floated by negotiators but ultimately rejected. The official, speaking on the condition of anonymity to discuss a diplomatically sensitive subject, also asserted that some of the texts appeared to have been edited or repackaged to give a misleading impression, but he did not offer specifics. The official did not

dispute reports that hundreds of millions of dollars of Qatar's money were flown to Baghdad in April 2017, just days before the release of the hostages. Iraqi officials confiscated the cash, which has not been returned.

Other governments, including some in the West, have paid ransoms to known terrorist organizations to win the release of kidnapped citizens. For example, France and Spain paid cash to kidnappers — either directly or through state-owned companies — to free French and Spanish nationals captured by the Islamic State or al-Qaeda affiliates in separate incidents between 2010 and 2014.

But Qatar's bargaining with militants over the hostage affair would become a flash point in a larger feud between the country and its Arab neighbors, some of which have repeatedly criticized Qatari leaders over what they say are the country's cordial ties with Iran and support for the Muslim Brotherhood and other groups identified with political Islam. Weeks after the hostages were freed, Saudi Arabia and the United Arab Emirates joined three other Arab states in severing relations with Qatar, triggering a diplomatic crisis that quickly escalated into a virtual blockade on shipping and air travel into and out of Qatar.

The rift has occasionally prompted the Trump administration to take sides. Last June, President Trump voiced support for the embargo and blasted Qatar as a "funder of terrorism at a very high level." But Trump lavished praise on Qatar's emir, Sheikh Tamim bin Hamad al-Thani, when he visited Washington this month, calling him a "big advocate" for combating terrorism financing.

An ancient pastime

It started with a simple hunting trip, albeit one that was marred from the outset by bad luck and questionable decisions about the excursion's timing and locale.

Iraq in late 2015 was an extraordinarily dangerous place. A third of the country was occupied by the Islamic State, while elsewhere, bands of Kurdish and Shiite militiamen roamed towns and villages as Iraqi leaders mobilized for an all-out assault against the Islamist extremists. Yet, in November 2015, a large party of Qataris entered southern Iraq's Muthanna province to enjoy a pastime favored by well-to-do Arabs since antiquity: using trained falcons to hunt a desert game bird called the houbara bustard.

The outing was nearing its end on Dec. 15, 2015, when heavily armed fighters rolled into the foreigners' camp in trucks. Twenty-eight members of the hunting party — 25 Qataris, two Saudis and a Pakistani — were taken hostage, the starting point in a confusing, politically charged drama that lasted just over 16 months.

Who, exactly, was behind the kidnapping was initially unclear, but Qatari officials quickly came to suspect that Iraqis had leaked information about the hunting party to the kidnappers. The Qatari hunters had given the precise coordinates of their camp to Iraq's Interior Ministry as part of their permit application, and Iraqi government employees had made a surprise visit to the camp just hours before the men were captured, according to the senior Middle Eastern official familiar with the events.

In any case, Qatari officials quickly sought help from the Iraqi government and Iraqi Shiite leaders in initiating contact with the kidnappers.

Qatar soon learned that the hostages were being held by Kata'ib al-Imam Ali, an obscure Iraqi Shiite militant group affiliated with Kata'ib Hezbollah. Both organizations receive funding and weapons from Iran, and the latter is officially designated by the United States a foreign terrorist group. Kata'ib Hezbollah was linked to scores of roadside bomb and sniper attacks against U.S. personnel in Iraq in the last decade, and since 2013, it has waged war against the Islamic State in Iraq, while also joining other Shiite militias in defending embattled dictator Bashar al-Assad inside Syria.

In response to the kidnappings, Qatar set up a crisis team that included Khayareen and Foreign Minister Mohammed bin Abdulrahman al-Thani, as well as Hamad bin Khalifa al-Attiyah, a personal adviser to the emir. Once it became clear that the captors were an Iranian-backed militia group, the officials began working through an array of influential intermediaries to gain the hostages' freedom.

Of the complex deal that ultimately emerged, key elements have been documented by other publications. The Guardian and the Financial Times last year described how the release of Qatar's hostages became tied to an Iranian-engineered plan, supported by Turkey and Lebanon's Hezbollah, to evacuate four Syrian villages — two Sunni and two Shiite — that had been under siege for months by different militant groups. Last month, an article in the New York Times Magazine recounted the seizure of $360 million in Qatari cash — money apparently intended in part to pay off the Syrian fighters and implement the evacuations — by Iraqi officials at Baghdad's international airport as the hostage-release plan was being implemented.

But what was unknown until now was that key conversations about the hostage affair were monitored by outsiders.

In the recorded communications between diplomats and mediators, Qatari officials complain about the prospect of paying millions of dollars to reward violent organizations that engage in kidnapping. But then they are seen to approve a plan to do exactly that.

Confusing demands

At the outset, Qatari diplomats appeared to struggle to understand what the kidnappers wanted. After a perplexing silence in the early weeks of the ordeal, Kata'ib Hezbollah officials spoke directly to Khayareen to discuss the possibility of releasing two of the captives, while also issuing confusing demands.

Khayareen, recounting the phone conversations with Kata'ib Hezbollah's negotiator, told Qatar's foreign minister that the militants asked him to "bring the money" in exchange for the two hostages. But later, through an Iraqi intermediary, the kidnappers asked for other concessions that appeared intended to benefit Iran: Qatar's complete withdrawal from the Saudi-led coalition fighting Shiite Houthi rebels in Yemen, and a promise to release Iranian soldiers held by Qatari-backed Sunni rebels in Syria.

"Your requests are not logical at all," the kidnappers were told, Khayareen wrote in a March 2016 text.

But soon afterward, money becomes a primary focus. In the text exchanges and phone conversations, Qatari officials initially discuss a payment of $150 million to Kata'ib Hezbollah if all the hostages are released, with an additional fee of $10 million to an Iraqi mediator for the group identified as Abu Mohammed al-Sa'adi. It was the first of many discussions of possible side payments for militia officials and mediators, some of whom demanded additional money from the Qataris while simultaneously asking for discretion so that their militia brethren would not discover that they were receiving bonuses.

"Al-Sa'adi asked me, 'What's in it for me?' " Khayareen told the Qatari foreign minister in a voice-mail message played for The Post. "The man told me frankly, 'I want ten [million dollars]. I told him, 'Ten? I am not giving you ten. Only in one case: If you get my guys done, 100 percent, I will give you the $150 [million] and then I will give you the ten."

As the dickering continued through the spring of 2016, wildly differing figures were thrown around as the cast of interlocutors grew to include Soleimani and other senior Iranian officials. In May, Khayareen tells his boss that negotiators have arrived at a figure of $275 million, with the transaction set to take place in Iraq's Sulaymaniyah province. At several points, the figure $1 billion is suggested as the price of a comprehensive deal involving the Iranians and the four-village evacuation plan. Soleimani had been seeking to implement the village plan for nearly two years, and Iranian officials apparently viewed the Qatari hostages as leverage, since Qatari-backed rebel groups were besieging two Shiite villages and their cooperation was essential to making the plan work.

"Qassem was pressuring the kidnappers and is very upset with them," Khayareen says in an April 2016 text message. Later, his texts describe trips by Soleimani to meet with the Kata'ib group in Iraq, as well as meetings between Qatari negotiators and representatives of the Islamic Revolutionary Guard Corps and the office of Iran's supreme leader, Ayatollah Ali Khamenei.

In May 2016, Qatar appears to balk at the Iranian plan, sending word through an intermediary that the fate of the Syrian villages was a United Nations affair, and Qatari officials "don't cooperate or open a channel" with terrorist groups. At several points, the messages reflect Qatari anxiety over the safety of the hostages, the escalating demands for payments and the political pressure placed on Doha to use its wealth to end the ordeal.

The negotiations dragged on fruitlessly for months until late 2016, when the militants finally appear to have grown weary of talking.

"The Kata'ib told the [mediator] that they are fed up with the case and want any solution to end it, so [they] get some money out of it," Khayareen writes in November of that year. "It seems that the group is bankrupt."

By April 2017, after additional meetings with Iranians, the outlines of a comprehensive deal are in place. In a carefully choreographed chain of events, buses arrive at the four Syrian villages to begin the evacuations, and the Qatari hostages are taken to Baghdad and released. Senior Qatari officials are present to help oversee both events, the documents show.

How much money the Qataris ultimately doled out to close the deal is not spelled out in the documents obtained by The Post. But the Qataris in the intercepted communications are explicit about the amounts earmarked for individuals who assisted in delivering the hostages. Just days after the captives' release, on April 25, 2017, Khayareen picks up his cellphone once

more to give Qatar's foreign minister the breakdown. He lists five recipients who would divvy up $150 million in Qatari cash:

"Qassem, 50. Sulaymaniyah [provincial government official who facilitated the negotiations], 50. Abu Hussain, leader of Kata'ib, 25. Banhai [Iranian official involved in the talks], 20."

The final person on the list is Abu Mohammed al-Sa'adi, the negotiator for Kata'ib Hezbollah who had asked for an extra $10 million. He is rewarded with $5 million.

Khayareen follows up with a seven-second voice-mail message to his boss confirming that all the payments have been made.

"They are done and distributed," he is heard to say.

Azhar AlFadl Miranda contributed to this report.

Joby Warrick
Joby Warrick joined The Washington Post's National staff in 1996. He has covered national security, the environment and the Middle East and writes about terrorism. He is the author of two books, including 2015's "Black Flags: The Rise of ISIS," which was awarded a 2016 Pulitzer Prize for nonfiction. Follow

Annex 118

"Amir Hosts Iftar banquet for scholars, judges and imams",
Gulf Times, 30 May 2018

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Amir hosts Iftar banquet for scholars, judges and imams

May 30
2018

11:43 PM

Amir hosts Iftar banquet for scholars, judges and imams

4.6 Stars

Doha

His Highness the Amir Sheikh Tamim bin Hamad al-Thani on Wednesday hosted an Iftar banquet in honour of scholars, judges, imams and religious leaders on the occasion of the holy month of Ramadan.

The banquet, held at the Amiri Diwan, was attended by His Highness the Personal Representative of the Amir Sheikh Jassim bin Hamad al-Thani.

https://www.gulf-times.com/story/594565/Amir-hosts-Iftar-banquet-for-scholars-judges-and-i

Annex 119

D. McElroy, "US Advisers Quit Qatar Role as Emir Dines with Muslim Brotherhood Leader", *The National*, 7 June 2018

Available at https://www.thenational.ae/world/gcc/us-advisers-quit-qatar-role-as-emir-dines-with-muslim-brotherhood-leader-1.737981

The National

US advisers quit Qatar role as emir dines with Muslim Brotherhood leader

Qatar's emir has triggered an exodus of leading US advisers to his government after hosting a leading Islamist extremist at dinner this week

Damien McElroy
June 7, 2018

Updated: June 7, 2018 08:41 PM

Yousef Al Qaradawi, the radical Egyptian head of the Muslim Brotherhood frequently uses Al Jazeera to justify suicide bombings. Karim Jaffar / AFP

Prominent US consultants engaged by Qatar as part of its influence operations in the US have quit in recent days, including one in outright protest provoked by pictures of the emir and Yusuf al-Qaradawi, who has a long track record of incitement to violence.

Mort Klein, a campaigner who traveled to Qatar as recently as February as a part of an outreach to influential Jewish Americans, said he could no longer associate with Doha. "I've lost confidence that they're at all serious about changing," he told the Politico news site.

Joey Allaham, a Syrian-born businessman who has been an active proponent of Qatar, has also cut ties, citing the meeting in Doha during a Ramadan gathering for religious leaders. Completing the spate of resignations was Nick Muzin, a former adviser to Senator Ted Cruz who has been engaged in lobbying efforts since the boycott of Qatar by the Arab Quartet.

Sheikh Tamim bin Hamad al-Thani was seen laughing with Qaradawi, who was seated next to him at the gathering. Qaradawi has been hosted by Doha for decades but the Muslim Brotherhood leader is banned from entering both Britain and the US for his record of hate speech.

"Qatar enjoys portraying themselves as the purveyor of peace in the region, but this could not be further from the truth," said Mr Allaham.

The resignations come as Qatar marked a year of efforts to shore up its position as a result of the diplomatic and security crisis with its neighbours.

Read more:

Dr Anwar Gargash: solving the Qatar crisis must involve tackling the 'trust deficit'

A year on, the quartet stands firm against Doha aggression

Politico said that Mr Allaham had "emerged in recent months as an important behind-the-scenes player in the stateside influence battle touched off by the Gulf crisis".

https://www.thenational.ae/world/gcc/us-advisers-quit-qatar-role-as-emir-dines-with-muslim-brotherhood-leader-1.737981

Mr Muzin also hinted at future differences to be revealed with Qatar in a statement announcing he had cut ties. "I am proud of the work we did to foster peaceful dialogue in the Middle East, to increase Qatar's defense and economic ties with the United States, and to expand humanitarian support of Gaza," he said "I look forward to speaking out in the days ahead about the challenges we faced and what more needs to be done."

Qatar invited leading American Jewish leaders, including the lawyer Alan Dershowitz and the rabbi Shmuley Boteach to visit the country in January. The trip was not an unalloyed sucess with Mr Boteach dubbing Mr Dershowitz a "junketeer" and the lawyer decrying a "personal attack".

https://www.thenational.ae/world/gcc/us-advisers-quit-qatar-role-as-emir-dines-with-muslim-brotherhood-leader-1.737981

Annex 120

P. Wood, "'Billion Dollar Ransom': Did Qatar Pay Record Sum?",
BBC, 17 July 2018

Available at https://www.bbc.com/news/world-middle-east-44660369

'Billion dollar ransom': Did Qatar pay record sum?

By Paul Wood
BBC News, Doha

17 July 2018

Qatar crisis

On the morning of 16 December 2015 Qatar's ruling family got bad news: 28 members of a royal hunting party had been kidnapped in Iraq.

A list of the hostages was given to Sheikh Mohammed bin Abdulrahman al-Thani, who was about to become Qatar's foreign minister. He realised that it included two of his own relatives.

"Jassim is my cousin and Khaled is my aunt's husband," he texted Qatar's ambassador to Iraq, Zayed al-Khayareen. "May God protect you: once you receive any news, update me immediately."

The two men would spend the next 16 months consumed by the hostage crisis.

In one version of events, they would pay more than a billion dollars to free the men. The money would go to groups and individuals labelled "terrorists" by the US: Kataib Hezbollah in Iraq, which killed American troops with roadside bombs; General Qasem Soleimani, leader of the Iranian Revolutionary Guards' Quds Force and personally subject to US and EU sanctions; and Hayat Tahrir al-Sham, once known as al-Nusra Front, when it was an al-Qaeda affiliate in Syria.

In another version of events - Qatar's own - no money was paid to "terrorists", only to the Iraqi state.

In this version, the money still sits in the Central Bank of Iraq's vault in Baghdad, though all the hostages are home. The tortuous story of the negotiations emerges, line by line, in texts and voicemails sent between the foreign minister and the ambassador.

These were obtained by a government hostile to Qatar and passed to the BBC.

So, did Qatar pay the biggest ransom in history?

- **Qatari hunting party freed in Iraq**
- **Why Qatar is the focus of terrorism claims**

Sheikh Mohammed is a former economist and a distant relative of the emir. He was not well known before he was promoted to foreign minister at the relatively young age of 35.

At the time of the kidnapping, the ambassador Zayed al-Khayareen was in his 50s, and was said to have held the rank of colonel in Qatari intelligence. He was Qatar's first envoy to Iraq in 27 years, but this was not an important post.

The crisis was his chance to improve his position.

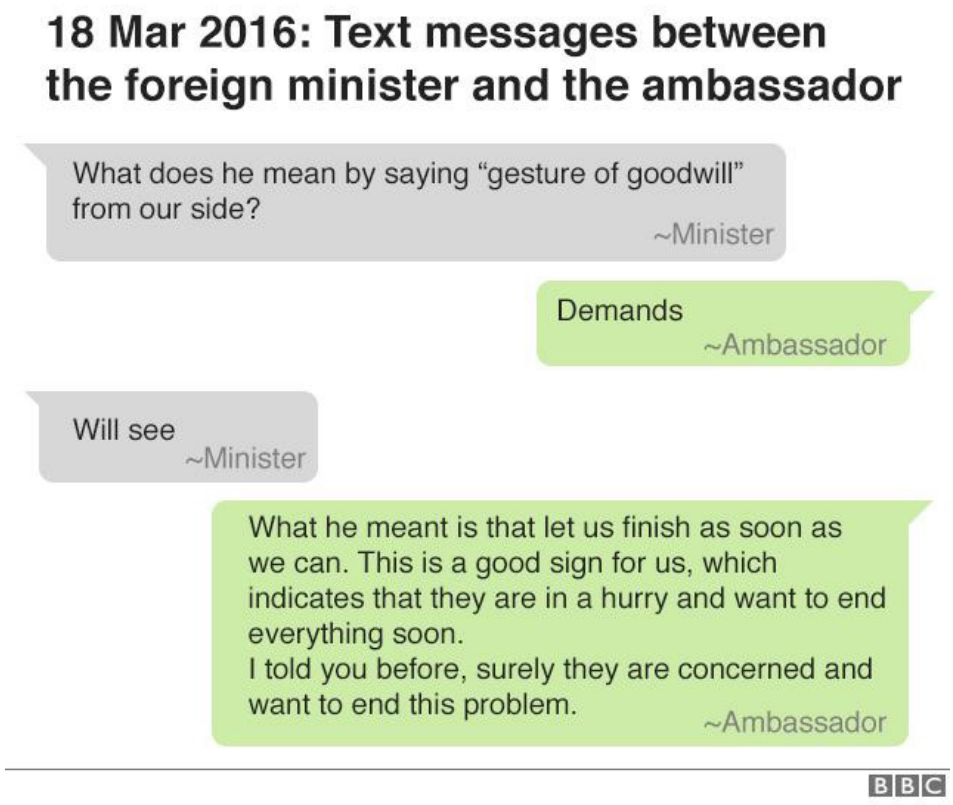
The hostages had gone to Iraq to hunt with falcons. They were warned - implored - not to go. But falconry is the sport of kings in the Gulf and there were flocks of the falcons' prey, the Houbara bustard, in the empty expanse of southern Iraq.

The hunters' camp was overrun by pick-up trucks mounted with heavy machine guns in the early hours of the morning.

A former hostage told the New York Times they thought it was "Isis", the Sunni jihadist group Islamic State. But then one of the kidnappers used a Shia insult to Sunnis.

For many agonising weeks, the Qatari government heard nothing. But in March 2016, things started to move. Officials learned that the kidnappers were from Kataib Hezbollah (the Party of God Brigades), an Iraqi Shia militia supported by Iran.

The group wanted money. Ambassador Khayareen texted Sheikh Mohammed: "I told them, 'Give us back 14 of our people... and we will give you half of the amount.'" The "amount" is not clear in the phone records at this stage.



Five days later, the group offered to release three hostages. "They want a gesture of goodwill from us as well," the ambassador wrote. "This is a good sign... that they are in a hurry and want to end everything soon."

Two days later the ambassador was in the Green Zone in Baghdad, a walled off and heavily guarded part of the city where the Iraqi government and foreign embassies are located.

Iraq in March is already hot. The atmosphere in the Green Zone would have seemed especially stifling: supporters of the Shia cleric Moqtada Sadr were at the gates, protesting about corruption. The staff of some embassies had fled, the ambassador reported. This provided a tense backdrop to the negotiations.

Mr Khayareen waited. But there was no sign of the promised release. He wrote: "This is the third time that I come to Baghdad for the hostages' case and I have never felt frustrated like this time. I've never felt this stressed. I don't want to leave without the hostages. :(:("

The kidnappers turned up, not with hostages but with a USB memory stick containing a video of a solitary captive.

"What guarantee do we have that the rest are with them?" Sheikh Mohammed asked the ambassador. "Delete the video from your phone... Make sure it doesn't leak, to anyone."

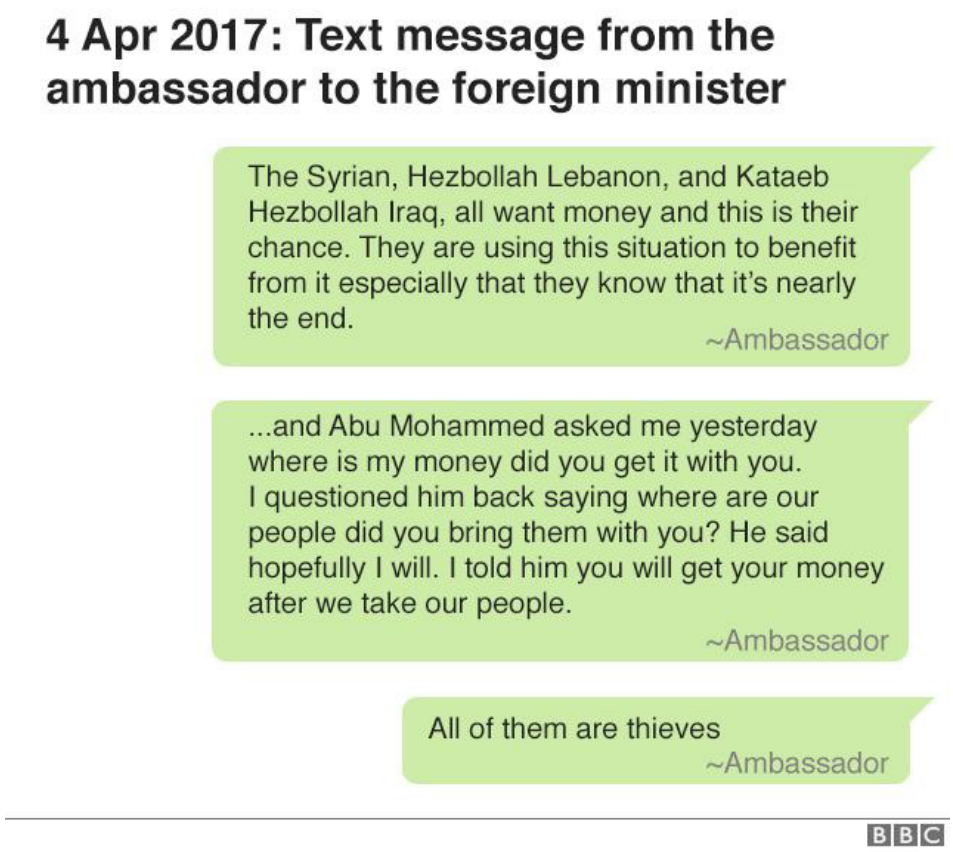
Mr Khayareen agreed, saying: "We don't want their families to watch the video and get emotionally affected."

The hostages had been split up - the royals were put in a windowless basement; their friends, the other non-royals, and the non-Qataris in the party, were taken elsewhere and given better treatment and food.

A Qatari official told me that the royals were moved around, sometimes every two to three days, but always kept somewhere underground. They had only a single Koran to read between them.

For almost the entire 16 months they spent in captivity, they had no idea what was happening in the outside world.

If money was the answer to this problem, at least the Qataris had it. But the texts and voicemails show that the kidnappers added to their demands, changing them, going backwards and forwards: Qatar should leave the Saudi-led coalition battling Shia rebels in Yemen. Qatar should secure the release of Iranian soldiers held prisoner by rebels in Syria.



Then it was money again. And as well as the main ransom, the militia commanders wanted side payments for themselves.

As one session of talks ended, a Kataib Hezbollah negotiator, Abu Mohammed, apparently took the ambassador aside and asked for $10m (£7.6m) for himself.

"Abu Mohammed asked, 'What's in it for me? Frankly I want 10'," the ambassador said in a voicemail.

"I told him, 'Ten? I am not giving you 10. Only if you get my guys done 100%...'

"To motivate him, I also told him that I am willing to buy him an apartment in Lebanon."

The ambassador used two Iraqi mediators, both Sunnis. They visited the Qatari foreign minister, asking in advance for "gifts": $150,000 in cash and five Rolex watches, "two of the most expensive kind, three of regular quality". It's not clear if these gifts were for the mediators themselves or were to grease the kidnappers' palms as the talks continued.

In April 2016, the phone records were peppered with a new name: Qasem Soleimani, Kataib Hezbollah's Iranian patron.

By now, the ransom demand appears to have reached the astonishing sum of $1bn. Even so, the kidnappers held out for more. The ambassador texted the foreign minister: "Soleimani met with the kidnappers yesterday and pressured them to take the $1b. They didn't respond because of their financial condition... Soleimani will go back."

The ambassador texted again that the Iranian general was "very upset" with the kidnappers. "They want to exhaust us and force us to accept their demands immediately. We need to stay calm and not to rush." But, he told Sheikh Mohammed, "You need to be ready with $$$$." The minister replied: "God helps!"

Months passed. Then in November 2016, a new element entered the negotiations. Gen Soleimani wanted Qatar to help implement the so-called "four towns agreement" in Syria.

At the time, two Sunni towns held by the rebels were surrounded by the Syrian government, which is supported by Iran. Meanwhile, two Shia towns loyal to the government were also under siege by Salafist rebels, who were apparently supported by Qatar. (The rebels were said to include members of the former al-Nusra Front.) Under the agreement, the sieges of the four towns would be lifted and their populations evacuated.

According to the ambassador, Gen Soleimani told Kataib Hezbollah that if Shia were saved because of the four towns agreement, it would be "shameful" to demand personal bribes.

"Hezbollah Lebanon, and Kataib Hezbollah Iraq, all want money and this is their chance," the ambassador texted the foreign minister. "They are using this situation to benefit... especially that they know that it's nearly the end... All of them are thieves."

The last mention in the exchanges of a $1bn ransom is in January 2017, along with another figure - $150m.

The government that gave us this material - which is hostile to Qatar - believes the discussions between Sheikh Mohammed and Mr Khayareen were about $1bn in ransom plus $150m in side payments, or "kickbacks". But the texts are ambiguous. It could be that the four towns deal was what was required to free the hostages, plus $150m in personal payments to the kidnappers.

Qatari officials accept that the texts and voicemails are genuine, though they believe they have been edited "very selectively" to give a misleading impression.

The transcripts were leaked, to the Washington Post, in April 2018. Our sources waited until officials in Doha issued denials. Then they sought to embarrass Qatar by releasing the original audio recordings.

Qatar is under economic blockade by some of its neighbours - Saudi Arabia, the United Arab Emirates, Bahrain and Egypt. This regional dispute has produced an intensive, and expensive, campaign of hacking, leaking and briefings in Washington and London.

The hostage crisis was brought to an end in April 2017. A Qatar Airways plane flew to Baghdad to deliver money and bring the hostages back. This was confirmed by Qatari officials, though Qatar Airways itself declined to comment.

EPA

Qatar is in a legal dispute with its neighbours about overflight rights. The question of whether the emirate's national carrier was used to make payments to "terrorists" will have a bearing on the case - one reason, presumably, why we were leaked this material.

Who would get the cash flown into Baghdad - and how much was there? Our original source - the government opposed to Qatar - maintains that it was more than $1bn, plus $150m in kickbacks, much of it destined for Kataib Hezbollah.

Qatari officials confirm that a large sum in cash was sent - but they say it was for the Iraqi government, not terrorists. The payments were for "economic development" and "security co-operation". "We wanted to make the Iraqi government fully responsible for the hostages' safety," the officials say.

The Qataris thought they had made a deal with the Iraqi interior minister. He was waiting at the airport when the plane landed with its cargo of cash in black duffel bags. Then armed men swept in, wearing military uniforms without insignia.

"We still don't know who they were," a Qatari official told me. "The interior minister was pushed out." This could only be a move by the Iraqi Prime Minister, Haider al-Abadi, they reasoned. The Qatari prime minister frantically called Mr Abadi. He did not pick up.

Mr Abadi later held a news conference, saying that he had taken control of the cash.

Although the money had been seized, the hostage release went ahead anyway, tied to implementation of the "four towns agreement".

In the texts, a Qatari intelligence officer, Jassim Bin Fahad Al Thani - presumably a member of the royal family - was present on the ground.

First, "46 buses" took people from the two Sunni towns in Syria. "We took out 5,000 people over two days," Jassim Bin Fahad texted. "Now we are taking 3,000... We don't want any bombings."

A few days later, the Shia towns were evacuated. Sheikh Mohammed sent a text that "3,000 [Shia] are being held in exchange location... when we have seen our people, I will let the buses move."

The ambassador replied that the other side was worried. "They are panicking. They said that if the sun rises [without the Shia leaving] they will take our people back."

On 21 April 2017, the Qatari hostages were released. All were "fine", the ambassador reported, but "they lost almost half of their weight". The ambassador arranged for the plane taking them home to have "biryani and kabsa, white rice and sauté... Not for me. The guys are missing this food."

Sixteen months after they were taken, television pictures showed the hostages, gaunt but smiling, on the tarmac at Doha airport.

The sources for the texts and voicemails - officials from a government hostile to Qatar - say the material shows that "Qatar sent money to terrorists".

Shortly after the money was flown to Baghdad, Saudi Arabia, the United Arab Emirates, Bahrain and Egypt began their economic blockade of Qatar. They still accuse Qatar of having a "long history" of financing "terrorism".

The anti-Qatar sources point to one voicemail from Ambassador Khayareen. In it, he describes telling a Kataib Hezbollah leader: "You should trust Qatar, you know what Qatar did, what His Highness the Emir's father did... He did many things, this and that, and paid 50 million, and provided infrastructure for the south, and he was the first one who visited."

Our sources maintain that this shows an historic payment, under the old emir, of $50m to Kataib Hezbollah.

Qatari officials say it shows support for Shia in general.

Whether the blockade of Qatar continues will depend on who wins the argument over "terrorist financing".

Partly, this is a fight over whom to believe about how a kidnapping in the Iraqi desert was ended. Qatari officials say the money they flew to Baghdad remains in a vault in the Iraqi central bank "on deposit".

Their opponents say that the Iraqi government inserted itself into the hostage deal and distributed the money.

For the time being, the mystery over whether Qatar did make the biggest ransom payment in history remains unsolved.

Update 17 July 2018: Since the article was published, a Qatari official told the BBC the payment of $50m by the Qatari emir's father was for humanitarian aid. The official said: "Qatar has a history of providing humanitarian aid for people in need regardless of religion or race. Whether they were Sunni or Shia did not factor into the decisions."

Annex 121

"Hacked Phone Messages Shed Light on Massive Payoff that Ended Iraqi Hostage Affair", *The Washington Post*, Undated

Available at https://www.washingtonpost.com/apps/g/page/world/hacked-phone-messages-shed-light-on-massive-payoff-that-ended-iraqi-hostage-affair/2303/?tid=a_inl-amp

The Washington Post

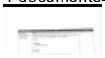
Hacked phone messages shed light on massive payoff that ended Iraqi hostage affair

In late 2015, kidnappers seized nine members of Qatar's royal family and 21 others during a hunting trip in southern Iraq. Nearly 17 months later, the hostages were freed unharmed after Qatar reportedly agreed to a settlement involving cash payments totaling in the hundreds of millions of dollars. Intercepted text and phones messages appear to show Qatari officials agreeing to pay tens of millions of dollars a group of mediators that included senior Iranian officials as well as representatives of a paramilitary group the United States regards as a terrorist organization. The conversations–mostly between Qatari ambassador to Iraq Zayed bin Saeed al-Khayareen al-Hajri and Qatari Foreign Minister Mohammad bin Abdulrahman al-Thani–were provided to The Washington Post by a foreign government on the condition that the source not be revealed. To authenticate the exchanges, The Post viewed original screen grabs of the text messages in Arabic, and listened to recordings of the voice memos. Qatari officials assert that their government made no ransom payments to kidnappers or to terrorist groups. Qatar has not disputed claims that it provided money to foreign governments to win the hostages' release. Hacked messages show Qatar appearing to pay hundreds of millions to free hostages.

Correspondence between ambassador and minister, 1
Four months into hostage negotiations, Qatari officials appear to be working directly with Iran to end the ordeal...

https://www.washingtonpost.com/apps/g/page/world/hacked-phone-messages-shed-light-on-massive-payoff-that-ended-iraqi-hostage-affair/2303/

Correspondence between minister and ambassador, 2
Negotiators appear to be nearing agreement on a plan to pay $275 million for a hostage exchange that is set to...
1 documents



Correspondence	Text	Date
Ambassador	ZBS:مساء الخير اهم ماحصل اليوم : تم تسليم الغرض سوف يعقد اجتماع غدا مساء الساعه 6 لتحديد البدء في المفاوضات الجدية و تحديد المبلغ المطلوب علما ان سليماني التقى معهم أمس وشدد عليهم في أخذ المليار ولكنهم لم يستجيبوا له بسبب ظرفهم المالي وايضاً بسبب الأغراض التي تم ايصالها اليهم من قبلنا و هم جادين الان في حسم الامر وبشكل عاجل وانا راح ارجع الدوحة الأربعاء وقد تبتدي المفاوضات معهم الأسبوع القادم علما ان سليماني راح يرجع لهم يوم الاربعاء مساء	4/12/2016 0:02
Minister	MBA:؟ متى ممكن يعني يبدا معهم الدكتور	4/12/2016 0:03
Ambassador	ZBS: أهوا بداء بالجلوس الغير الرسمي مع الأطراف المساعدة لنا من داخلهم وراح يبتدي مباشر بعد زيارة سليماني لهم وبعد اجتماعهم الي راح ايكون بكرة	4/12/2016 0:05
Ambassador	ZBS:يعني هما راح يجتمعون بكرة ويحددون المبلغ الفعلي المطلوب ونتفاوض علية	4/12/2016 0:06

Correspondence	Text	Date
Ambassador	ZBS: Good Evening, the most important thing that happened today is the delivery of the package. Also, a meeting will take place tomorrow at 6 pm to decide on the negotiations start date and to decide on the ransom payment.	4/12/2016 0:02
	Noting that Soleimani met with the kidnappers yesterday and pressured them to take the $1b. However, they didn't respond to Soleimani because of their financial condition in addition to the package **(initial amount)** that we have delivered to the kidnappers. Now, they are serious to finalize the issue and urgently. I am going to return to Doha on Wednesday and the negotiations might start with the kidnappers next week. Soleimani will go back to meet the kidnappers on Wednesday evening.	
Minister	MBA: When can the Dr. **(Walid)** start the negotiations with the kidnappers?	4/12/2016 0:03
Ambassador	ZBS: Walid met informally with individuals who are trying to help us and will start immediately after Soleimani's visit to kidnappers and after their meeting tomorrow.	4/12/2016 0:05
Ambassador	ZBS: They are going to meet tomorrow to decide on the final amount and will start to negotiate on it.	4/12/2016 0:06

Correspondence	Text	Date
Minister	MBA: Any news from our friend **(Walid)**?	5/7/2016 21:25
Ambassador	ZBS: He reached Sulaymaniah and met with the group there. He is leaving now to Irbil and tomorrow morning he will go to Baghdad. Walid told me that he will call me after an hour on Viber.	5/7/2016 21:34
Minister	MBA: Hope things go well!	5/7/2016 21:42
Ambassador	ZBS: It will give us a space for people to talk.	5/7/2016 21:49
Minister	MBA: I am sure.	5/7/2016 21:57
Ambassador	ZBS: Walid just called me and told me that he met with Soleimani's Assistant in Sulaymaniah and explained to him that the mediator; Abu Mohammed have asked them not to speed up things and that he is going to increase the amount. Walid told Harmati that this is not true and that the Qatari Government has already decided on the amount and there is no more increase. But, we can add for you a small amount. Then, Soleimani's Assistant told Walid that he will be going to Tehran tomorrow and will reach consensus on the deal. Afterwards, Walid told me that they called for an urgent meeting tomorrow in Baghdad to end the case.	5/8/2016 0:33
Minister	MBA: Hope things go well!	5/8/2016 0:34
Ambassador	ZBS: Abu Abdulrahman **(Minister)** they are playing around with us and every day they are saying that they will end the issue and they extend it. But, we need to go with the flow and stay beside them until the end. Therefore, we will limit our loses.	5/8/2016 0:35
Minister	MBA: Hope things go well!	5/8/2016 0:36
Ambassador	ZBS: Qasem Soleimani's Assistant is called Harmati.	5/8/2016 1:22
Ambassador	ZBS: Good Evening	5/8/2016 20:35
Ambassador	ZBS: Dr. Walid arrived Baghdad and hopefully he will update me with good news tonight.	5/8/2016 20:35
Ambassador	ZBS: Good news (Amb. is correcting his spelling).	5/8/2016 20:36
Minister	MBA: Will see.	5/8/2016 20:37
Ambassador	ZBS: The amount of money could reach 200 and the collection point might be in Sulaymaniah.	5/9/2016 1:14
Ambassador	ZBS: Soleimani met today with the Sulaymaniah Group and asked them to end the case. Afterwards, the Sulaymaniah Group called the Dr. while he was in Baghdad and asked him to return back to Sulaymaniah.	5/9/2016 1:17
Ambassador	ZBS: The Dr. is going to be there tomorrow afternoon.	5/9/2016 1:17
Minister	MBA: What is the total amount?	5/9/2016 2:01
Ambassador	ZBS:275	5/9/2016 2:02

Correspondence	Text	Date
From the Ambassador to the Minister	ZBS: وبعدين تراك مرة قلت لي انا ماعندي الا 150 وكيفكم وروح تفاهم مع حمد ومااراح تدفع الا هذا المبلغ وانا قلت لك اتفق معك احنا أصلا ماتفقنا الا مع جماعة بغداد فقط على مجموع المبلغ 150 ومتوزع على خمس جهات قاسم 50 سليمانية 50 ابوحسين قائد الكتائب 25 بنهاي 20 ابومحمد 5 هذي هي الجماعة الي احنا متفقين معها غيرهم احنا ماتفقنا معه ابدا	4/25/2017 17:16

Correspondence	Text	Date
From the Ambassador to the Minister	ZBS: Once you told me that you only have 150 and it is up to me to go and talk to Hamad and that you won't pay more than this amount, I told you that I agree with you and we only agreed with Baghdad Group on the total amount **(150).** It is distributed on 5 parties as follow: 1. Qasem 50 2. Sulaymaniah 50 3. Abu Hussain; Leader of Kataeb 25 4. Banhai 20 5. Abu Mohammed 5 We have agreed on these groups only and didn't have a deal with others.	4/25/2017 17:16

Voice Note	Correspondence	Duration	Description
Ambassador updating the Minister about his meeting with Abu Mohammed Al Sa'adi	Ambassador to the Minister	00:00:49	And when I was about to leave, Abu Mohammed Al Sa'adi asked me what is in it for me? I told him if you help us in the right way, you will get what you deserve. But, if you don't help us, you will not get anything. But..now you need to get things done and hopefully your reward is guaranteed. He asked me how much will you give me? I asked him how much is in your mind? Anyway, the man told me frankly I want 10. I told him, 10? I am not giving you 10. Only in one case; if you get my guys done 100% and I will give you the **150** and then I will give you the **10.** Abu Mohammed said if I get half done, give me half. I said ok fine get this done and I will give you that. So this is it. May you be safe.

Annex 122

R. I. R. Abeyratne, "Law Making and Decision Making Powers of the ICAO Council – A Critical Analysis", (1992) 41 *Zeitschrift für Luft- und Weltraumrecht* 387

Law Making and Decision Making Powers of the ICAO Council – a Critical Analysis

By R. I. R. Abeyratne, Montreal *

I. Introduction

The Council of the International Civil Aviation Organization (ICAO) has its genesis in the Interim Council of the Provisional International Civil Aviation Organization (PICAO)[1]. PICAO occupied such legal capacity as may have been necessary for the performance of its functions and was recognized as having full juridical personality wherever compatible with the Constitution and the laws of the State concerned[2]. The definitive word "juridical" attributed to PICAO a mere judicial function, unequivocally stipulating that the organization and its component bodies, such as the Interim Council were obligated to remain within the legal parameters allocated to them by the Interim Agreement[3] and that PICAO was of a purely technical and advisory nature. A legislative or quasi-legislative function could not therefore be imputed to the Interim Council of PICAO. It could mostly study, interpret and advise on standards and procedures[4] and make recommendations with respect to technical matters through the Committee on Air Navigation[5]. The International Civil Aviation Organization (ICAO) which saw the light of day on April 4, 1947 derived the fundamental postulates of its technical and administrative structure from its progenitor – PICAO – and it would seem reasonable to attribute a certain affinity *ipso facto* between the two Organizations and hence, their Councils. The words "legislative power" have been legally defined as "power

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1 Hereafter referred to as PICAO. See Interim Agreement on International Civil Aviation, opened for signature at Chicago, December 7, 1944, Article 3. (The Chicago Convention is printed in ICAO Doc 7300/6, Sixth Edition, 1980. Also see *Hudson*, International Legislation; Vol. IX (1942–1945, New York) at 159.

2 Id. Article 1 Section 4. It is interesting to note that PICAO was established as a provisional organization of a technical and advisory nature for the purpose of collaboration in the field international civil aviation. Vide Article 1 Section 1.

3 Op. cit. Note 1.

4 Interim Agreement, op. cit. Section 6.4.b(1).

5 Id. Section 6.4.b(6). Also, *T. Buergenthal*, Law Making in the International Civil Aviation Organization (1969) at 4, where the author states that PICAO's functions were merely advisory, which precludes any imputation of legislative or quasi-legislative character to its Interim Council.

to prescribe rules of civil conduct"[6], while identifying law as a "rule of civil conduct". The word "quasi" is essentially a term that makes a resemblance to another and classifies it. It is suggestive of comparative analogy and is accepted as:

> The conception to which it serves as an index and its connection with the conception with which the comparison is instituted by strong superficial analogy or resemblance[7].

The question *stricto sensu* according to the above definition is therefore whether the ICAO Council now has power to prescribe rules of civil conduct (legislative power) or in the least a power that resembles by analogy the ability to prescribe rules of conduct (quasi-legislative power). Since legislative power is usually attributed to a State, it would be prudent to inquire, on a general basis, whether the ICAO Council has law making powers (in a quasi-legislative sense). Therefore, all references hereafter that may refer to legislative powers would be reflective of the Council's law making powers in a quasi-legislative sense.

II. Law making powers

Article 54 (1) of the Convention on International Civil Aviation[8] (also, popularly known as the Chicago Convention and hereafter referred to as the Convention) prescribes the adoption of international Standards and Recommended Practices (hereafter, SARPS) and their designation in Annexes to the Convention, while notifying all contracting States of the action taken. The adoption of SARPS was considered a priority by the ICAO Council in its Second Session (2 September–12 December 1947)[9] which attempted to obviate any delays to the adoption of SARPS on air navigation as required by the First Assembly of ICAO[10]. SARPS inevitably take two forms: a negative form e.g. that States shall not impose more than certain maximum requirements; and a positive form e. g. that States shall take certain steps as prescribed by the ICAO Annexes[11].

Article 37 of the Convention obtains the undertaking of each contracting State to collaborate in securing the highest practical degree of uniformity in regulations, standards, procedures and organization in relation to international civil aviation in all matters in which such uniformity will facilitate and improve air navigation. Article 38 obligates all contracting States to the Convention to inform ICAO immediately if they are unable to comply with any such international standard or

6 *Schaake v. Dolly* 85 Kan. 590., 118 Pac. 80.

7 *People v. Bradley* 60 Ill. 402, at 405. Also, *Bouviers* Law Dictionary and Concise Encyclopedia 3 ed. Vol 11, Vernon Law Book Co., New York 1914.

8 ICAO Doc 7300/6.

9 Proceedings of the Council 2nd Session 2 September–12 December 1947, Doc 7248 – C/839 at 44–45.

10 ICAO Resolutions A – 13 and A – 33 which resolved that SARPS relating to the efficient and safe regulation of international air navigation be adopted.

11 ICAO Annex 9, Facilitation, Ninth Edition, July 1990, Foreword.

procedure and notify differences between their own practices and those prescribed by ICAO. In the case of amendments to international Standards, any State which does not make the appropriate amendment to its own regulations or practices shall give notice to the Council of ICAO within 60 days of the adoption of the said amendment to the international Standard or indicate the action which it proposes to take.

The element of compulsion that has been infused by the drafters of the Convention is compatible with the "power to prescribe rules of civil conduct" on a *stricto sensu* legal definition of the words "legislative power" as discussed above. There is no room for doubt that the 18 Annexes to the Convention or parts thereof lay down rules of conduct both directly and analogically. In fact, although there is a conception based on a foundation of practicability that ICAO's international Standards that are identified by the words "contracting States shall" have a mandatory flavour (infused by the word "shall") while Recommended Practices identified by the words "contracting States may" have only an advisory and recommendatory connotation (infused by the word "may"), it is interesting that at least one ICAO document requires States under Article 38 of the Convention, to notify ICAO of all significant differences from both Standards and Recommended Practices, thus making all SARPS regulatory in nature[12].

Another strong factor that reflects the overall ability and power of the Council to prescribe civil rules of conduct (and therefore legislate) on a strict interpretation of the word is that in Article 22 of the Convention each contracting State agrees to adopt all practical measures through the issuance of special regulations or otherwise, to facilitate and expedite air navigation ... It is clear that this provision can be regarded as an incontrovertible rule of conduct that responds to the requirement in Article 54 (1) of the Convention. Furthermore, the mandatory nature of Article 90 of the Convention–that an Annex or amendment thereto shall become effective within three months after it is submitted by the ICAO Council to contracting States – is yet another pronouncement on the power of the Council to prescribe rules of State conduct in matters of international civil aviation. *A fortiori,* it is arguable that the Council is seen not only to possess the attribute of the term "jurisfaction" (the power to make rules of conduct) but also the term "jurisaction" (the power to enforce its own rules of conduct). The latter attribute can be seen where the Convention obtains the undertaking of contracting States not to allow airlines to operate through their air space if the Council decides that the airline concerned is not conforming to a final decision rendered by the Council on a mat-

12 Aeronautical Information Services Manual, ICAO Doc 8126 – 0 AN/872/3. ICAO Resolution A 1–31 defines a Standard as any specification for physical characteristics ... the uniform application of which is recognised as necessary ... and one that States will conform to. The same resolution describes a Recommended Practice as any specification for physical characteristics ... which is recognised as desirable ... and one that member States will endeavour to conform to ... *Buergenthal* op. cit. at 10 also cites the definitions given in ICAO's Annex 9 of SARPS.

ter that concerns the operation of an international airline[13]. This is particularly applicable when such airline is found not to conform to the provisions of Annex 2 to the Convention that derives its validity from Article 12 of the Convention relating to rules of the air[14]. In fact, it is very relevant that Annex 2, the responsibility for the promulgation of which devolves upon the Council by virtue of Article 54 (1), sets mandatory rules of the air, making the existence of the legislative powers of the Council an unequivocal and irrefutable fact. Academic and professional opinion also favours the view that in a practical sense, the ICAO Council does have legislative powers.

Professor *Michael Milde* says:

> The Chicago Convention, as any other legal instrument, provides only a general legal framework which is given true life only in the practical implementation of its provisions. Thus, for example, Article 37 of the Convention relating to the adoption of international standards and recommended procedures would be a very hollow and meaningless provision without active involvement of all contracting States, Panels, Regional and Divisional Meetings, deliberations in the Air Navigation Commission and final adoption of the standards by the Council. Similarly, provisions of Article 12 relating to the rules of the air applicable over the high seas, Articles 17 to 20 on the nationality of aircraft, Article 22 on facilitation, Article 26 on the investigation of accidents, etc., would be meaningless without appropriate implementation in the respective Annexes. On the same level is the provision of the last sentence of Article 77 relating to the determination by the Council in what manner the provisions of the Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies[15].

Professor *Milde* concludes that ICAO hat regulatory and quasi-legislative functions in the technical field and plays a consultative and advisory role in the economic sphere[16]. A similar view had earlier been expressed by *Buergenthal* who states:

> The manner in which the International Civil Aviation Organization has exercised its regulatory functions in matters relating to the safety of international air navigation and the facilitation of international air transport provides a fascinating example of international law making . . . the Organization has consequently not had to contend with any of the post war ideological differences that have impeded international law making on politically sensitive issues[17].

13 Article 86 of the Convention.

14 Article 12 stipulates that over the high seas, the rules in force shall be those established under the Convention, and each contracting State undertakes to insure the prosecution of all persons violating the applicable regulations.

15 *Michael Milde*, The Chicago Convention – After Forty Years, IX Annals Air and Space L. 119, at 126. See also *Jacob Schenkman*, International Civil Aviation Organization, Geneve, 1955 at 163.

16 *Milde*, op. cit. 122.

17 *Buergenthal*, op. cit. at 9.

Paul Stephen Dempsey endorses in a somewhat conservative manner, the view that ICAO has the ability to make regulations when he states:

> In addition to the comprehensive, but largely dormant adjudicative enforcement held by ICAO under Articles 84–88 of the Chicago Convention, the Agency also has a solid foundation for enhanced participation in economic regulatory aspects of international aviation in Article 44, as well as the Conventions's Preamble[18].

A significant attribute of the legislative capabilites of the ICAO Council is its ability to adopt technical standards as Annexes to the Convention without going through a lengthy process of ratification[19]. *Eugene Sochor* refers to the Council as a powerful and visible body in international aviation[20]. It is interesting however to note that although by definition, the ICAO Council has been considered by some as unable to deal with strictly legal matters, since other important matters come within its purview[21], this does not derogate the compelling facts that reflect the distinct law making abilities of ICAO. Should this not be true, the functions that the Convention assigns to ICAO in Article 44 – that ICAO's aims and objectives are »to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport« – would be rendered destitute of effect.

III. Decision making powers

Unter the Interim Agreement[22] the PICAO Council was required to act as an arbitral body on any differences arising among member States relating to matters of international civil aviation which may be submitted to it, wherein the Interim Council of PICAO was empowered to render an advisory report or if the parties involved so wished, give a decision on the matter before it[23]. The Interim Council, which was the precursor to the ICAO Council, set the stage therefore for providing the Council with unusual arbitral powers which are not attributed to similar organs of the specialised agencies of the United Nations systems[24]. *A fortiori*, since the ICAO Council is permanent and is almost in constant session, contracting States could expect any matter of dispute brought by them before the Council to be dealt with, without unreasonable delay[25].

18 *Paul Stephen Dempsey*, Law and Foreign Policy in International Aviation, Transnational Publishers Inc., Dobbs Ferry New York 1987, at 302.

19 *Eugene Sochor*, The Politics of International Aviation, McMillan, London, 1991, at 58.

20 Ibid.

21 *Alexander Tobolewski*, ICAO's Legal Syndrome ... IV Annals Air and Space L. 1979, 349 at 359.

22 See Note 1.

23 Interim Agreement, Article 111, Section 6 (i).

24 *Schenkman*, op. cit. 160.

25 See statement of *R. Kidron*, Israeli Head Delegate, Statement of the Second Plenary Meeting of the Seventh Assembly on June 17, 1953, reported in ICAO Monthly Bulletin, August–October 1953, at 8.

Chapter XVIII of the Convention formalises the arbitral powers of the Council by stating:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, *it shall* (emphasis added), on the application of any State concerned in the disagreement, be decided by the Council . . .[26]

This provision reflects two significant points: the first is that contracting States should first attempt to resolve their disputes by themselves, through negotiation[27]; the second is that the word *shall* in this provision infuses into the decision making powers of the Council an unquestionably mandatory character. Furthermore, a decision taken by the Council is juridically dignified by Article 86 of the Convention, when the Article states that unless the Council decided otherwise, any decision by the Council on whether an international airline is operating in conformity with the provisions of the Convention shall remain in effect unless reversed in appeal. The council also has powers of sanction granted by the Convention, if its decision is not adhered to[28]. *Schenkman* states:

> The power of sanctions in this field is an entirely new phenomenon, attributed to an aeronautical body . . . none of the prewar instruments in the field of aviation had the power of sanctions as a means of enforcement of its decisions[29].

Most contracting States have, on their own initiative, enacted disputesettlement clauses in their bilateral air services agreements wherein provision is usually made to refer inter-State disputes relating to international civil aviation to the ICAO Council, in accordance with Chapter XVIII of the Convention. In this context, it is also relevant to note that the President of the Council is empowered by the Convention to appoint an arbitrator and an umpire in certain circumstances leading to an appeal from a decision of the Council[30].

A most interesting aspect of the ICAO Council remains to be that one of its mandatory functions is to consider any subject referred to it by a contracting State for its consideration[31] or any subject which the President of the Council or the Secretary General of the ICAO Secretariat desires to bring before the Council[32].

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26 Article 84.

27 *Hingorani*, Dispute Settlement in International Civil Aviation 14 Arb J 14, at 16 (1959). See also, Rules of Procedure for the Council, Fifth Edition 1980, Article 14.

28 Article 87.

29 *Schenkman*, op. cit. 162.

30 Article 85.

31 Rules of Procedure for the Council. op. cit. Section IV, Rule 24 (e). Also, Article 54 (n) stipulates that one of the mandatory functions of the Council is to consider any matter relating to the Convention which any contracting State refers to it.

32 Rules of Procedure for the Council, op. cit. Section IV Rule 24 (f). The two additional multilateral agreements stemming from the Convention and providing for the exchange

Although the Council is bound to consider a matter submitted to it by a contracting State it can refrain from giving a decision as the Council is only obligated to consider a matter before it.

There seems to be an unfortunate dichotomy in terminology in the Convention since on the one hand, Article 54(n) makes it mandatory that the Council shall merely *consider* any matter relating to the Convention which any contracting State refers to it, while on the other, Article 84 categorically states that any disagreement between two or more States relating to the interpretation or application of the Convention and its Annexes, that cannot be settled by negotiation shall . . . be decided by the Council. The difficulty arises on a strict interpretation of Article 54(n) where even a disagreement between two States as envisaged under Article 84 could well be considered as »any matter« under Article 54(n). In such an instance, the Council could well be faced with the dilemma of choosing between the two provisions. It would not be incorrect for the Council to merely consider a matter placed before it, although a decision is requested by the applicant State, since, Article 54(n) is perceived to be comprehensive as the operative and controlling provision that lays down mandatory functions of the Council. It is indeed unfortunate that these two provisions obfuscate the issue which otherwise would have given a clear picture of the decision making powers of the Council. A further thread in the fabric of adjudicatory powers of the Council is found in Article 14 of the Rules of Settlement promulgated by the Council in 1957[33] which allows the Council to request the parties in dispute to engage in direct negotiations at any time[34]. This emphasis on conciliation has prompted the view that the Council, under article 84 would favour the settling of disputes rather than adjudicating them[35]. This view seems compatible with the proposition that the consideration of a matter under Article 54(n) would be a more attractive approach *in limine* in a matter of dispute between two States.

Dempsey points out that in the four decades since the promulgation of Chapter XVIII, only three disputes had been submited to the Council for formal resolution[36]: the first involved a dispute between India and Pakistan (1952), where India complained that Pakistan was in breach of the Convention by not permitting Indian aircraft to overfly Pakistani airspace on their way to Afghanistan; the second was a complaint filed by the United Kingdom against Spain (1969), alleging the violation by Spain of the Convention by the establishment of a prohibited zone over Gibraltar; and the third was a complaint by Pakistan against India (1971),

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of traffic rights – the Air Services Transit Agreement and the Air Transport Agreement, also contain provisions that empower the ICAO Council to hear disputes and "make appropriate findings and recommendations . . ." see Air Services Transit Agreement Article 11 Section 1, and the Air Transport Agreement Article IV Section 2.

33 Rules for the Settlement of Differences, ICAO Doc 7782/2 (2 ed. 1975).

34 Id. Article 14 (a).

35 *Buergenthal,* op. cit. at 136.

36 *Paul Stephen Dempsey,* op. cit. at 295.

concerning a hijacking of Indian aircraft which landed in Pakistan. India unilaterally suspended Pakistan's overflying privileges, five days after the hijacking. The first complaint was amicably resolved by the parties, the second was differed by the parties *sine die* and the third was suspended with the formation of the State of Bangladesh in 1972, even though the matter had processed as an appeal from the Council to the International Court of Justice. Unfortunately, none of these instances was taken to its conclusion so that the World could have had the opportunity to evaluate clearly, ICAO's decision making process.

Professor *Michael Milde,* the present Director of McGill University's Institute of Air and Space Law, and the former Director of ICAO's Legal Bureau noted in 1979 when he was ICAO's Principal Legal Officer:

> The Council of ICAO cannot be considered a suitable body for adjudication in the proper sense of the word – i.e. settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of *States* (not independent individuals) and its decisions would always be based on policy and equity considerations rather than on pure legal grounds ... truly legal disputes ... can be settled only by a true judicial body which can bring into the procedure full judicial detachment, independence and expertise. The under-employed ICJ is the most suitable body for such types of disputes[37].

The perceived inadequacies of the ICAO Council in being ethically unsuitable to decide on disputes between States can only be alleviated by the thought that the members of the Council are presumed to be well versed in matters of international civil aviation and therefore would be deemed to be better equipped to comprehend the issues placed before them than the distinguished members of the international Court of Justice, some of whom may not be experts of international air law. Nonetheless, there is no doubt that the ICAO Council possesses juridical powers[38], and that, as *Gerald F. Fitzgerald* once said:

> In ICAO did not exist, it would have to be invented; otherwise, international civil aviation would not function with the safety, efficiency and regularity that it has achieved today[39].

37 *Michael Milde,* Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO), Settlement of Space Law Disputes (1979) 87, at 88.

38 *J. C. Sampaio de Lacerda,* A Study About the Decisions of The ICAO Council ... 111 Annals of Air and Space L. (1978) 219.

39 *Gerald F. Fitzgerald,* ICAO Now and in the Coming of Decades, International Air Transport: Law, Organization and Politics for the Future (*N. M. Matte* ed. 1976) 47 at 50.

Annex 123

J. Bae, "Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication",
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Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication

JON BAE*

Chapter XVIII of the 1944 Chicago Convention empowered the Council of the International Civil Aviation Organization to decide upon any dispute concerning the interpretation of the Convention. The ICAO Council, however, is in essence a political and policy-setting body composed of 36 representatives of the contracting States instead of jurists. This article examines how this structural flaw in the Council's design has made it unwilling and unable to adjudicate on the merits of a dispute, and how it has still facilitated the resolution of inter-State conflicts by means other than adjudication. On the one hand, when focused on the 'narrower' aspect of its arbitral mandate under Chapter XVIII of the Chicago Convention, the Council has largely failed to live up to the early expectations. On the other hand, when looking at the 'broader' objective of resolving inter-State conflicts, the Council has performed satisfactorily. Based on these observations, this article will go on to discuss the prospects for disputing contracting States under the current dispute settlement mechanism of the Chicago Convention, and also what would constitute a better regime for the resolution of international aviation disputes.

1. *Introduction*

A controversy has arisen due to the decision by the European Union (EU) to include the international aviation sector in its Emission Trading Scheme (EU-ETS) from January 2012: non-EU airlines and States are now looking to the International Civil Aviation Organization (ICAO) as a potential forum to resolve the dispute.[1] The 1944 Convention on International Civil Aviation (the 'Chicago Convention')[2] grants the ICAO Council, composed of representatives of 36 of the contracting States, the power to decide upon any

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[1] Dominic Welling, *ACI Calls for ICAO to Interfere with EU ETS* Airport World (2 November 2011) <http://airport-world.com/news-articles/item/1132-aci-calls-for-icao-to-intervene-with-eu-ets> accessed 10 October 2012.

[2] *Convention on International Civil Aviation* (7 December 1944) 15 UNTS 295 (hereinafter *Chicago Convention*).

dispute concerning the interpretation of the Convention.[3] Chapter XVIII (Articles 84–88) of the Convention prescribes stringent sanctions against any non-complying airlines or contracting States.[4] A number of bilateral aviation treaties also designate the ICAO Council as their adjudicative or advisory body to deal with such potential disputes as those concerning routes, rates, capacity and frequency. In addition to these quasi-judicial mandates, the governing body of the ICAO is supposed to deal with any inter-State conflict on either explicit or implicit grounds.

At its inception, the ICAO's dispute settlement mechanism was hailed as the first major incorporation of arbitration into the field of international conventions[5] and a landmark in the history of international arbitration.[6] However, such high expectations gradually turned into mixed or negative reviews. While defenders of the Council's role in conflict resolution still exist,[7] the majority opinion seems to be that the ICAO Council has been ineffective in carrying out its quasi-judicial functions.[8] Mindful of such apparently contrasting evaluations, this article will attempt to make a balanced critique of the ICAO Council's performance. On the one hand, when focused on the 'narrower' aspect of its arbitral mandate under Chapter XVIII of the Chicago Convention, the Council has largely failed to live up to the early expectations. On the other hand, when looking at the 'broader' objective of resolving inter-State conflicts, the Council has performed quite satisfactorily. This article will examine how the flaws in the Council's design have made it unwilling and unable to adjudicate on the merits of a dispute, what actions it has taken to deal with such defects over the past six decades, and how it has still facilitated the resolution of inter-State conflicts by means other than those of Chapter XVIII. Based on these observations, this article will go on to discuss the prospects for disputing contracting States under the current dispute settlement mechanism of the Chicago Convention, bearing in mind the EU-ETS controversy, and also what would constitute a better regime for the resolution of international aviation disputes.

A dispute, the most widely used term in this article, can be defined as 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'.[9] This broad definition by the Permanent Court of International Justice (PCIJ) may encompass such terms as 'disagreement'[10] or 'differences'[11] used in the Chicago Convention and its associated instruments,

[3] Jacob Schenkman, *International Civil Aviation Organization* (Geneva: H. Studer, 1955) 160.

[4] Arts 87 and 88 of the Chicago Convention. Professor Schenkman viewed this attribution of sanctioning power to the ICAO Council as unprecedented. *Id* at 162.

[5] John C Cooper, 'New Problems in International Civil Aviation Arbitration Procedures' (1947) 2 Arb J 119.

[6] Martin Domke, 'International Civil Aviation Sets New Pattern' (1945) 1 Int'l Arb J 20.

[7] Richard N Gariepy and Daivd L Botsford, 'The Effectiveness of the International Civil Aviation Organization's Adjudicatory Machinery' (1976) 42 Air L & Com 351; G Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' (1995) 44 Duke LJ 849, 866.

[8] Gabriel S Sanchez, 'The Impotence of the Chicago Convention's Dispute Settlement Provisions' (2010) 10 Issues in Aviation Law and Policy 27.

[9] *Mavrommatis Palestine Concessions Case* (*Greece v Great Britain*), Judgment of 30 August 1924, 1924 PCIJ Rep Series A No 2 at 11.

[10] Art 84 of the Chicago Convention, Art 34 of the 1919 Paris Convention.

[11] Art 3 of the Interim Agreement on International Civil Aviation; provisions of ICAO Council's Rules of Procedures for the Settlement of Differences between Contracting States (ICAO Doc 7782/2).

for they relate to the application or interpretation of the instruments. Depending on the context, this article also refers to conflicts or controversy especially when trying to cover instances where a legal claim has yet to be made or formulated.[12]

2. *The ICAO Council as an Arbitral Body: Origin, Expectations and Expansion*

The 1919 Paris Convention,[13] the predecessor to the 1944 Chicago Convention, authorized the International Commission for Air Navigation (ICAN)[14] to deal only with any disagreement concerning its annexes, while leaving Convention-related disputes to the PCIJ.[15] With the benefit of hindsight, such a division of jurisdiction based on the nature of a dispute seems fair and appropriate.[16] ICAN's regulatory power under the Paris Convention was confined to the 'technical' regulations annexed to the Convention, while any 'legal' differences concerning the interpretation of the Convention were best left to the adjudication of the PCIJ.

At the Chicago Conference in 1944, the distinction between legal and technical disputes was omitted at the initial stage of the negotiations; the Canadian proposal provided for the submission of any dispute directly to the PCIJ,[17] and the US draft convention referred to the Executive Council as the competent body for determining such disputes.[18] With the express support of the UK and France,[19] the US proposal for compulsory arbitration under the Council was more closely followed with the addition of a built-in possibility of appeal to the PCIJ.[20] Article 84 of the Chicago Convention thus reads:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the

[12] For the definition of a conflict, see Dictionary of Conflict Resolution (1999) <http://www.credoreference.com/entry/wileyconfres/dispute> accessed 10 October 2012.

[13] *The Convention Relating to the Regulation of Aerial Navigation* (13 October 1919), LNTS 173.

[14] CINA (*Commission Internationale de la Navigation Aerienne*) in French in Arts 34 and 37 of the Paris Convention.

[15] Art 37 of the Paris Convention provides: 'In the case of a disagreement between two or more States relating to the interpretation of the present Convention, the question in dispute shall be determined by the Permanent Court of International Justice to be established by the League of Nations, and, until its establishment, by arbitration. … Disagreement relating to the technical regulations annexed to the present Convention shall be settled by the decision of the International Commission for Air Navigation by a majority of votes…'

[16] Michael Milde, *International Air Law and ICAO* (Utrecht: Eleven International Publishing, 2008) 183.

[17] Art XLIII of the Canadian Revised Preliminary Draft of an International Air Convention: '(1) In case of any disagreement between two or more member states relating to the interpretation or application of the present Convention, the matter shall be referred to the Permanent Court of International Justice, provided that, if any one of the states concerned has not assented to the Statute of the Court the matter shall, on the demand of such state, be settled by arbitration…' *U.S. Department of State, Proceedings of the International Civil Aviation Conference, Chicago, Illinois, Nov. 1 to Dec. 7, 1944* (Washington, 1948) (Doc 50), 587.

[18] Art 26 of US Proposal of a Convention on Air Navigation: 'In the case of a disagreement between two or more States relating to the interpretation of this Convention or any of its Annexes the question in dispute shall be determined by a majority of the total possible votes of the members of the Executive Council… In the event that any state a party to this Convention should be dissatisfied with the decision of the Executive Council the question in dispute may be appealed by such state … to the Chamber for Summary Procedure of the Permanent Court of International Justice or arbitration may be demanded…' (Doc 16) ibid at 564.

[19] *Verbatim Minutes of Joint Plenary Meeting of Committees, Part II: Work of the Committees* (ibid at 472).

[20] *Commentary on the Development of the Individual Articles of the Convention on International Aviation* (ibid at 1394).

> disagreement, be decided by the Council. ... Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice....

The *travaux preparatoires* of the Chicago Conference did not further elaborate on the rationale behind the enhanced role of the Council in this quasi-judicial assignment. In addition to the United State's failure to ratify the PCIJ Statute, it can be inferred that the participants at the Chicago Conference envisaged an international aviation body with greater authority, both legislative and judicial, in the technical and specialized field of aviation.[21] There must have been also an assumption among the drafters that the Chicago Convention was a 'self-contained corpus of public international air law'[22] and that a Council composed of aviation experts and professionals would be better able to deal with disputes in an effective and expedient manner. In a parallel development, the side agreements adopted at the Chicago Conference, notably the Transit Agreement[23] and the Transport Agreement,[24] reproduced the languages of Chapter VIII of the Convention. As a result, at least in the wording of the Convention, the ICAO Council stands out from other executive bodies of international organizations in assuming a judicial role as well as wider rule-making duties.[25]

The untested idea of the Council acting as an arbitral body quickly developed into a widely held expectation, prompting steps to prepare the Interim Council to handle any potential submission of a dispute, even those ones outside the scope of the Chicago Convention. The 1944 Interim Agreement on International Civil Aviation explicitly empowered the Council to address 'any differences arising among member States relating to international civil aviation matters'.[26] The extended mandate was endorsed and duplicated at the first ICAO General Assembly (1947) in its Resolution A1-23.[27] By 1947, a number of early postwar bilateral aviation agreements had already started designating the ICAO Council as their dispute settlement body,

[21] For instance, Mr. Steenberghe of the Netherlands Delegation stated 'we will have created an international body which... can assist in solving problems and disputes' *Verbatim Minutes of Joint Plenary Meeting of Committees I, III, and IV* (ibid at. 455).

[22] Michael Milde, 'The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?' (1994) 19, XIX Annals Air & Space L 402.

[23] *International Air Services Agreement* UNTS 389 (1951).

[24] *International Air Transport Agreement* UNTS 387 (1953).

[25] Jose Alvarez, *International Organizations as Law Makers* (Oxford University Press 2005) 447–50.

[26] Art III s 6(8) of the Interim Agreement on International Civil Aviation provides: 'When expressly requested by all the parties concerned, the Interim Council... act as an arbitral body on any differences arising among Member States relating to international civil aviation matters which may be submitted to it. The Council may render an advisory report or, if the parties concerned so expressly decide, they may obligate themselves in advance to accept the decision of the Council...'

[27] In its operative part, the ICAO General Assembly Resolution A1-23 states: '(1) That pending further discussion and ultimate decision by the Organization as to the methods of dealing with international disputes in the field of civil aviation, the Council be authorized to act as an arbitral party on any differences arising among contracting States relating to international civil aviation matters submitted to it, when expressly requested to do so by all parties to such differences, (2) That the Council may render an advisory report or, if the parties concerned so expressly decide, they may obligate themselves in advance to accept the decision of the Council...'

modeling themselves after the US–UK bilateral aviation agreement commonly called the 1946 Bermuda I Agreement.[28]

In addition to the said formal judicial mandates, the Chicago Convention obliges the Council to report any infractions of the Chicago Convention to the General Assembly and to consider any matter relating to the Convention referred to it by any contracting State.[29] Also, at the request of any contracting State, it may investigate any situation which may pose an obstacle to the development of international air navigation.[30] As will be shown later, the Council has addressed inter-State conflicts by means of mediation and fact-finding, but occasionally without the solid and explicit legal grounds such authority is based upon.

In summary, the ICAO Council has three hats which it can wear addressing inter-State conflicts with different procedures and end-products as follows.

Legal Basis (Delegation)	Chapter VIII Chicago Convention	Bilateral Aviation Agreements	Article 54 or Implied Powers under Chicago Convention
Subject	Legal Dispute (Interpretation and Application of the Convention: Right of Over-flight, Noise Standards, etc.)	Any Dispute relating to Bilateral Agreements (including Routes, Fares, Frequency, Capacity)	Any Matter a Contracting State refers to the Council
Nature and Methods	Judicial/Arbitration	Judicial/Arbitration	Political/ Fact-Finding/ Mediation
Procedures	Rules of Procedures for Settlement of Differences	*Ad hoc* Rules	General Council Rules of Procedure
Ultimate Result	Binding Decision	Decision, Recommendation	Declaration, Resolution, Decision
Performance Evaluation	Poor	None	Satisfactory

[28] *Air Service Agreement between the United States of America and the United Kingdom of Great Britain and Northern Ireland* signed at Bermuda on 11 February 1946. Art 9 of this Agreement stipulates: 'Except as otherwise provided in this Agreement or in its Annex, any dispute between the Contracting Parties relating to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation shall be referred for an advisory report to the Interim Council of the Provisional International Civil Aviation Organization . . . or its successor.'

[29] Art 54 (Mandatory functions of Council): The Council shall: . . . (j) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council; . . .(n) Consider any matter relating to the Convention which any contracting State refers to it.

[30] Art 55 (Permissive functions of Council): The Council may . . .(e) Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.

At the time of writing, the usage rate of the Council as a dispute resolution forum has been fairly low, especially under its judicial mandates: there have been five cases under Chapter VIII, none under any bilateral aviation agreements, and more than a dozen under Article 54 or implied authorities. However, even in the five disputes under Article 84 of the Convention, the Council has not issued any decisions on the merits of the disputes.

3. *Structural Defects: Composition, Competency and Orientation*

The low usage rate alone is not necessarily evidence of the Council's ineffectiveness as a dispute settlement body. Disputing contracting States might simply have preferred diplomatic channels to often lengthy and costly third-party adjudication.[31] However, the gradual shift from the ICAO Council to *ad hoc* arbitration as a choice of dispute settlement under recent bilateral aviation agreements[32] unequivocally indicates the lowered expectations of the Council on the part of contracting States.[33]

The most frequently cited deficiency is the Council's lack of judicial independence, a crucial element in upholding the legitimacy of adjudicative bodies, both international and domestic.[34] Just as on the domestic plane, the requirement for judicial independence and impartiality are commonly enshrined in the provisions governing the procedures of international tribunals as well as the qualifications of judges or arbitrators. An arbitrator may be challenged when there are justifiable doubts as to his or her independence or impartiality.[35] For example, the WTO's dispute settlement rules specifically forbid member States to instruct or influence panelists on pending matters.[36] In the context of the Chicago Convention, this could have been translated into imposing a duty on Council members to deliberate in their personal capacity and thus not to be susceptible to external pressure, even from their home governments. Professor Bin Cheng maintains in a similar vein that Council representatives should sit as neutral and unbiased judges when fulfilling their mission under Chapter VIIII.[37] However, there is no explicit provision to that effect in the Convention. Article 50 merely stipulates that no Council member may be actively associated with, or financially interested in, any air service operation.[38] More fundamentally, the ICAO Council is composed of

[31] Thomas Buergenthal, *Settlement of International Civil Aviation Disputes by ICAO* (Harvard Law Library 1966) 2; Gariepy and Botsford (n 7) 357–8.

[32] Paul Stephen Dempsey, 'Flights of Fancy and Flights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation' (2004) 32 Georgia J Int'l Comp L 69.

[33] Dimitri Maniatis, 'Conflict in the Skies: The Settlement of International Aviation Disputes' (1995) XXII Ann Air & Space L 201, 203.

[34] Ruth Mackenzie and Phillippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 Harv Int'l LJ 272.

[35] For instance, Art 12 (1) of the UNCITRAL Arbitration Rules (as revised in 2010) stipulates: 'Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.'

[36] Art 8 (9) of WTO Understanding on Rules and Procedures Governing the Settlement of Disputes reads: 'Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.'

[37] Bin Cheng, *Law of International Air Transport* (Stevens 1961) 101.

[38] Art 50 (c) of the Chicago Convention: 'No representative of a contracting State on the Council shall be actively associated with the operation of an international air service or financially interested in such a service.'

contracting States, as opposed to individuals in their personal capacity, elected by the General Assembly.[39] Individual members of the Council are called 'representatives' of their sovereign States to the Council.[40] Bound by the instructions of their home governments, those representatives essentially speak on behalf of their States and thus cannot claim to have full independence.[41] As an illustration, the Minutes of the Council deliberation on *Pakistan v India* in July 1971 depicts an odd moment when a few Council members did not even bother to pretend to be independent, requesting a delay of the vote pending the receipt of instructions from their home governments.[42]

In principle, the Council's apparent lack of judicial independence contradicts its role as a neutral and unbiased arbiter. In practice, however, the Council has not undergone any serious criticism of its impartiality caused by the absence of judicial independence. This is partly due to the fact that most of the disputes before the Council have been of such a localized or bilateral nature that the Council could be seen as neutral to an acceptable degree. Furthermore, the governments on the Council and their representatives may not behave in complete disregard of legal and political constraints. Any decisions must be buttressed by sound arguments, not only in the Council chamber but also eventually in terms of public justification. The procedures enshrined in the rules and subsequent deliberations ensure some degree of legitimacy.[43] It is also the Council as a whole, as opposed to its individual representatives, that takes a decision.[44] As such, the Council has tried its utmost to look impartial even in potentially polarizing conflicts in the past. Ultimately, any manifestly wrong decision on the part of the Council would clearly invite an appeal to the ICJ or an *ad hoc* arbitral tribunal, which would likely overrule the Council's decision, thus de-legitimizing it. Nonetheless, the concept of judicial independence is intertwined with the legitimacy of the whole dispute settlement regime. As Professor Fitzgerald bluntly called it 'a contradiction in terms',[45] an international agency composed of government representatives cannot be expected to maintain judicial detachment when considering any issues of relevance to national interests.[46]

Equally absent in the ICAO Council is judicial competency, specifically the ability on the part of Council representatives, individually and collectively, to deliver a judgment through legally sound reasoning and deliberation. International tribunals such as the ICJ, the International Tribunal for the Law of the Sea, and the International Center for Settlement of Investment Disputes (ICSID) require judges or arbitrators to be well-qualified with recognized

[39] Art 50 (a) of the Chicago Convention: '...[The Council] shall be composed of thirty-six contracting States elected by the Assembly...'

[40] Art 50 (c), for instance, refers to them as 'representative of a contracting State' and Rules of Procedure for the Council (ICAO Doc. 7559/8, 2007) mentions 'representatives' meaning 'a person designated and authorized by a Member of the Council to act on the Council, and holding credentials as evidence thereof.'

[41] Gerald Fitzgerald, 'Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council' (1974) 12 Can YB Int' L 158, 169.

[42] ICAO *Council Minutes* 74/6 (29 July 1971).

[43] Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 AJIL 306.

[44] RC Hingorani, 'Dispute Settlement in International Aviation' (1959) 14 Arb J 14, 21.

[45] Fitzgerald (n 41) 169.

[46] E Warner, 'The Chicago Air Conference' (1945) 23 Foreign Affairs 406; Hingorani (n 44) 15.

competence in the relevant field of law. In contrast, the Chicago Convention does not prescribe any qualifications, not to mention judicial competency, for Council representatives. A credential signed on behalf of a contracting State constitutes the sole requirement for an individual to be a representative.[47] In other words, the selection and tenure of the representatives is entirely subject to the whim of their own governments. Given its primary responsibility of setting the policy objectives of the ICAO, the Council is mainly composed of aviation bureaucrats and diplomats, rather than jurists capable of delivering coherent judicial decisions.[48] As a corollary, they are not so much influenced by legal discourse as by politics. Moreover, with its current size of 36 members as well as the absence of any working procedures, the Council cannot be expected to carry out its judicial function and render decisions which the contracting States would perceive to be entirely rule-based and judicially meaningful, let alone build a consistent body of jurisprudence on the interpretation and application of international aviation law.

In terms of orientation, the ICAO Council may be best characterized as an 'administrative' and 'political' organ of sovereign States working in a parliamentary setting.[49] As the Council's day-to-day deliberations are conducted in an assembly setting, ambiguous and general language is often preferred. Admittedly, the ICAO proved its usefulness by addressing with exemplary diplomatic dexterity several contentious issues such as the 2001 Gaza international airport destruction, the 1983 shooting down of a Korean airline, and the 1973 Libyan airline intervention.[50] Its records nonetheless indicate that the Council has been generally reluctant to be judgmental, namely, to positively determine that there has been a violation of the Convention and to expressly identify the contracting State in breach.[51] Even in those cases involving the shooting down of civilian aircraft, the Council was once nuanced,[52] merely 'deploring' the tragic incidents, and refrained from determining that there had been violations of the Chicago Convention.[53] Furthermore, although the Council is obliged under Article 54(j) to report to contracting States any infraction of the Convention and, failing any appropriate action, report it to the ICAO General Assembly,[54] the Assembly has not received such report so far.

[47] ICAO, *Rules of Procedure for the Council* (Doc 7559/8, 2007) at Section 1 Rule 2 at 3.

[48] Paul Stephen Dempsey, 'The Role of the International Civil Aviation Organization on Deregulation, Discrimination, and Dispute Settlement' (1987) 52 J Air L & Com 529, 568.

[49] Hingorani (n 44) 20.

[50] Ruwantissa Abeyratne, 'The Role of Diplomacy in Dispute Settlement in Civil Aviation' (2005) 5 Int'l J Applied Aviation Studies 196, 202.

[51] See ICAO Council C-WP/11186, 10/1199 (*Infractions of the Convention on International Civil Aviation*). The Council had made an explicit determination of violations of the Chicago Conventions only in (i) the shooting down of a Libyan civilian airliner in 1973, (ii) the Soviet shooting down of KAL 007 in 1983, (iii) the military interception of a Libyan aircraft in 1986, (iv) the shooting down of two US private aircrafts in 1996.

[52] Alvarez (n 25) 253.

[53] ICAO Council Resolution on Iran Airbus Incident (17 March 1989).

[54] Art 54 (Mandatory functions of Council) of the Chicago Convention provides: 'The Council shall: ... (j) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council; (k) Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction.'

In the following section, the article will examine the major cases before the Council and show how its lack of judicial competency and independence, as well as its political orientation, has made the Council reluctant, if not unwilling, to make rule-based decisions. These cases will be then contrasted with the Council's performance in resolving inter-State conflicts outside Article 84.

4. *The ICAO Council's Response to Disputes under Article 84 and Beyond*

The first case before the Council under Chapter XVIII concerned Pakistan's prohibition in 1952 of the use of certain airspace over which Indian airlines claimed a right of over-flight.[55] Despite the ICAO General Assembly's hurried adoption of the relevant resolution (A1-23) at its first session, the Council still did not have the rules of procedure for Chapter XVIII in place, even after five years of operation. In the absence of procedural rules, the Council had to consider simultaneously what procedures to take and how to deliberate on the merits of the case. Working Groups were established; in June of 1952 to consult with each party on matters of procedure,[56] and then in November to examine substantive arguments put forward by the parties.[57] The November Working Group concluded that the possibilities for a negotiated resolution had not been exhausted.[58] The Council then approved the Working Group's recommendation that India and Pakistan be requested to continue their negotiations with a set time limit for reporting to the Council. The proceedings were later discontinued when India accepted Pakistan's offer of a reduced no-fly zone.[59]

Faced with this first case of a disagreement under Article 84, the Council acted just as it had dealt with other matters: delegating the matter to an *ad hoc* Working Group. The Council appeared neither prepared nor confident of what role it should play under Article 84.[60] Prompted by *India v Pakistan*, another Working Group was tasked in 1952 by the Council with drafting the Rules for the Settlement of Differences between Contracting States. The Draft Rules were referred to the ICAO Legal Committee and finally adopted by the Council in 1957.[61] During the process, some legal experts pointed out the 'political' nature and make-up of the Council. However, the Rules were modeled after the ICJ's procedural rules and recommendations of the International Law Commission in the 1952 Draft Convention on Arbitral Procedures, thus making them 'strict, formalistic and legalistic procedures' more appropriate for a court of law.[62] Nonetheless, there were still several

[55] ICAO Council WP/1169 (*Request of the Government of India to the Council of the Organization*).
[56] ICAO Doc 7328-12 (C/853-12, 1/12/52).
[57] ICAO *Report of the Council* 74 (Doc 7367).
[58] ICAO Doc 7291 (C/845) 162–65 (1952) Report of the Working Group on the 'India/Pakistan Case; Council WP1341 (26/11/52), para 4. The Working Group was composed of five Council members; Canada (Chairman), Belgium, Brazil, Mexico, and Denmark.
[59] ICAO Doc 7361 (C/858) 15–26 (1953).
[60] Ross T Dicker, 'The Use of Arbitration in the Settlement of Bilateral Air Rights Disputes' ((1969–70)) 3 Vand Int'l 124, 133.
[61] ICAO *Rules of Procedure for the Settlement of Differences*, ICAO Doc 7782/2 (1975).
[62] Michael Milde, 'Dispute Settlement in the Framework of the International Civil Aviation Organization' in Bockstiegel (ed), *Settlement of Space Law Disputes: Studies in Air and Space Law* (Berlin 1980) 87, at 88; Hingorani (n 44) 25.

provisions in the Rules that could circumvent the path to adjudication. Negotiation between the parties to the dispute, attempted and failed, is a prerequisite before either party brings a complaint to the Council. Pursuant to the combined reading of Articles 6 and 14, the Council first shall decide whether to invite the parties to enter into direct negotiations and then may at any time during the proceedings invite the parties to do so.[63] When the parties accept the invitation to negotiate, the proceedings on the merits shall be suspended and the Council may render any assistance, for instance by designating a conciliator. In the cases following *Pakistan v India*, the Council resorted to these provisions and urged the parties into further negotiations instead of pursuing adjudication.

Another major dispute under Chapter XVIII occurred again between Pakistan and India in 1971. In the wake of a hijack incident, India unilaterally suspended Pakistani flights over its territory. Pakistan brought the issue before the Council for alleged violations of Article 5 of the Chicago Convention and Article 1 of the Transit Agreement. In May 1971, India challenged on a preliminary basis the jurisdiction of the Council, arguing that both the Convention and the Agreement had been suspended between India and Pakistan since 1965. In July 1971, the Council affirmed its own jurisdiction over the dispute. India then appealed the Council's preliminary decision to the ICJ. The ICJ reaffirmed the Council's jurisdiction in August 1972, ruling in essence that a party to a treaty may not escape its obligations under the dispute settlement clauses on the basis of unilateral denunciation.[64] Although the ICJ's decision removed an obstacle to the consideration of the merits of the case in July 1976, five years after the filing of the complaint, India and Pakistan jointly made an official statement discontinuing the ICAO Council proceedings.

The Council's apparent reluctance was clear from its repeated delays in the proceedings; it held at least five formal sessions before reaching its preliminary decision. Owing to its lack of judicial capacity, the Council had to rely on the ICAO's Secretariat throughout the process to decide upon major procedural and substantive issues: the analysis of the voting power of Council members under Article 84[65] and the interpretation of Article 86.[66] Although the Rules require the Council's decision to be in writing and contain its reasons for reaching the decision,[67] its decision amounted to no more than a short negative

[63] Art 6 (Action of Council on Procedure) of the Rules of Procedures for the Settlement of Differences: '(1) Upon the filing of the counter-memorial by the respondent, the Council shall decide whether at this stage the parties should be invited to enter into direct negotiations as provided in Article 14.'

Art 14 (Negotiations during proceedings): '(1) The Council may, at any time during the proceedings and prior to the meeting at which the decision is rendered as provided in Article 15 (4), invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiations have not been exhausted. (2) If the parties accept the invitation to negotiate, the Council may set a time-limit for the completion of such negotiations, during which other proceedings on the merits shall be suspended. (3) Subject to the consent of the parties concerned, the Council may render any assistance likely to further the negotiations, including the designation of an individual or a group of individuals to act as conciliator during the negotiations.'

[64] Fitzgerald (n 41) 153.

[65] ICAO, Council WP/5465 (*Voting in the Council on Disagreements and Complaints Brought under the Rules for the Settlement of Differences*).

[66] ICAO, Council WP/5433 (*Notes on Article 86 of the Chicago Convention Relating to Appeals from Decisions of the Council*).

[67] Art 15 (2) of the Rules of Procedures for the Settlement of Differences.

reply to the preliminary objections raised by India.[68] As ICJ Judge Petren pointed out in his separate opinion, the Council should have stated the legal grounds for its decision on the preliminary question.[69]

In the 1996 *Cuba v US* case,[70] Cuba submitted a complaint with regard to the right of Cuban-registered aircraft to overfly US territory during their flights in and out of Canada. In accordance with the aforementioned Rules, the authorized agents of both parties made presentations in the Council session on 20 November 1996. The Council members predominantly supported the procedural options under Article 14 of the Rules: inviting further direct negotiations between the two parties, setting the time-limit as the fall of 1997, and designating the President of the Council as the Conciliator. Despite the relative strength of its argument, Cuba chose a negotiated solution. In the subsequent negotiations, the Conciliator presented a proposal to Cuba, held further meetings with the parties, and came up with a modified proposal, while the time limit was extended. Cuba and the United States settled the dispute on the basis of the modified proposal the Conciliator transmitted to Cuba.[71]

The latest case between the United States and the European Union, namely the *Hushkit* case, was the first economic and environmental dispute; previous disputes were political, mainly involving prohibited zones.[72] The United States challenged the EU's new noise restrictions based on design rather than on performance. The EU raised preliminary objections to the ICAO's exercise of jurisdiction on the grounds of the lack of prior negotiation before filing an application, the non-exhaustion of local remedies, and the availability of the requested relief.[73] The Council again ruled in favor of the admissibility of the US application. While the substantive issues varied from those of *Cuba v USA*, the Council followed the identical course: inviting the parties to further negotiate and designating the ICAO President as the Conciliator.[74] One might find it premature to conclude from the previous small number of cases that the Council will behave in a similar way in the future cases. It is submitted, however, that the Council's future responses will be similar, as Article 14 of the Rules constitutes the only option available to the Council if it is unwilling to pursue adjudication.[75]

The Council's judicial actions under Article 84 of the Chicago Convention are marked by continual delays, lengthy proceedings, reliance on the Secretariat and confusion in its perceived role. In situations other than those related to Article 84, however, the Council has been prompt, flexible, effective

[68] Fitzgerald (n 41) 183.

[69] Judge Petren stated in his separate opinion that 'It is a striking fact that the decision is devoid of all statement of grounds and consists solely in a declaration to the effect that the Council did not accept the objection.' *Separate Opinion* [1972] ICJ Rep 84.

[70] ICAO Council DEC 149/7 (20 November 1996).

[71] ICAO Council DEC 153/14 (20 March 1998).

[72] Benedicte Claes, 'Aircraft Noise Regulation in the European Union: The Hushikit Problem' (2000) 65 J Air L & Com 329; Kriss Brown, 'The International Civil Aviation Organization Is the Appropriate Jurisdiction to Settle Hushkit Dispute Between the United States and the European Union' (2002) 20 Penn St Int'L L Rev 465.

[73] Sean D. Murphy, 'Contemporary Practice of the United States Relating to International Law: Admissibility of U.S.-EU "Hushkit" Dispute Before the ICAO' (2001) 95 AJIL 410.

[74] ICAO, Council WP/12075 (*Negotiations Regarding Settlement of Differences: United States and 15 European States*).

[75] Buergenthal (n 31) 109, 110.

and even preventive at times with a good sense of balance. A variety of dispute settlement measures, such as mediation, the use of 'good offices', and fact-finding, have been employed in accordance with the nature of the conflict.[76] The most illustrative instance is the mid-air destruction of Korean Airlines Flight 007 by a Soviet fighter on 1 September 1983. In response to the incident, the ICAO Council called an extraordinary session on 15 and 16 September 1983 and adopted a resolution deploring the destruction of a civilian aircraft. Even though the Chicago Convention did not specifically empower the ICAO to investigate aircraft incidents on its own, the Council instructed the ICAO Secretary-General to establish a fact-finding commission in order to investigate the factual disputes surrounding the incident.[77] The ICAO initiated and succeeded in amending Article 3 *bis* of the Convention, which expressly stipulated the prohibition of the use of weapons against civilian aircraft. As can be seen, the Council's intervention concerning the Korean Air incident was swift and relevant. Nonetheless, with regard to the perceived role of the Council, several Council representatives stated that the Council was not a tribunal 'seeking to reach a judgment on the facts'.[78] In their opinion, the Council was supposed to remain neutral and refrain from making any sort of determination.

Another similar instance concerned a conflict between the United States and Cuba in 1996 where the Cuban military shot down two private US aircrafts. While the US authorities requested the ICAO to investigate the incident, the Cuban side alleged that its airspace had been repeatedly violated by US aircraft. Throughout its deliberations on the issue, the Council 'traversed the diplomatic rope with a balanced sense of purpose'[79] and produced its final Resolution on 27 June 1996 to the effect that, while the principle of the sovereignty of airspace was upheld, States must refrain from the use of weapons against civilian aircraft regardless of the grounds.

The fact that the Council is not workable as an arbitral body does not necessarily mean it is useless or ineffective as a dispute settlement mechanism. This is a point where the appraisals of the Council diverge; while it is heavily criticized for its lack of 'legal' output, it is also favorably viewed for its contribution to the resolution of disputes. A detailed evaluation of whether the Council has been truly effective requires a set of criteria and empirical data and thus extends beyond the scope of this article.[80] Suffice it to say that, even under Chapter XVIII, the Council has facilitated conflict resolution between disputing parties and contributed to the ultimate settlement of all the disputes brought before it.[81] In cases such as *Cuba v USA* and *Hushkit*, the President of the Council played a crucial role in reaching a mutually agreeable solution.

[76] See Maniatis (n 33); Diederiks-Verschoor, *An Introduction to Air Law* (Kluwer Law International 2006) 48.

[77] The Council instead referred to Art 55(e), which stipulates 'the Council may investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable'.

[78] Abeyratne (n 50) 202.

[79] ibid at 206.

[80] Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale LJ 273, 276. The authors define effectiveness of international adjudicatory bodies 'in terms of [a tribunal's] ability to compel compliance with its judgment'.

[81] Dempsey (n 48) 569–70.

In all practicality, the negotiated settlements are no less desirable for the parties than arbitral awards. In the opinion of Professor Buergenthal, arbitration could not have achieved settlement comparable to that reached under the auspices of the Council in *Pakistan v India* in terms of duration and effectiveness.[82]

5. *Implications for Contracting States*

Overall, however, the early anticipation that the Council would serve as a proper arbitral body has gradually faded away. The ICAO Council considers itself tasked with assisting to settle, rather than adjudicating, disputes.[83] Member States no longer expect the Council to render legally valid decisions. What then can be expected of Article 84 of the Chicago Convention? Since the ICAO Council's judicial weakness is ascribed to its structural composition, the response pattern will remain unchanged. The Council is less likely to undertake an adjudicative role; it will instead encourage the parties to engage in further negotiation. The President will be appointed as a Conciliator with fixed but extendable time limits. Finally, the sanctions under Articles 86 and 87, drastic as they may look, will rarely be imposed.

The dispute settlement regime of the Chicago Convention nevertheless offers a viable avenue for a contracting State in dispute. With the submission of an application under Article 84, the State can bring an international dimension to an otherwise bilateral dispute; moving from the bilateral negotiating table to the Council chamber. Its strength and usefulness also come from the virtual universality of the Chicago Convention. As an alternative, a contracting State may bring a dispute before the Council pursuant to Article 54(n), which Dr Abeyratne viewed as a better choice in terms of expediency and flexibility.[84] Under Article 54(n), however, the Council is not obliged to take any concrete action, even though considerations of disputes under Article 54(n) have led in the past to the adoption of non-binding declarations and resolutions. In contrast, Chapter XVIII procedures are mandatory in the sense that the other party may not opt out, and the Council is not only obliged to accept the dispute but also, unless either party withdraws, to make a binding decision. Its existence encourages contracting States to resolve disputes without having to take this adversary legal route.[85]

Chapter XVIII can therefore be seen as deterrence for potential violators or leverage for a party injured by a breach. The contracting State with a stronger legal argument could put more pressure on the other State with the assistance of Article 84. The set time-limit and the conciliation of the Council President will certainly have a catalyzing impact on an otherwise reluctant party. The Council's involvement would constitute another external factor, which could be used to persuade the domestic audience. Non-compliance with such a decision could entail the penalties prescribed under Articles 87 and 88. However, there

[82] Buergenthal (n 31) 20.
[83] ibid at 24.
[84] R Abeyratne, 'The Settlement of Commercial Aviation Disputes under the General Agreement on Trade in Servies and the ICAO Council – A Comparative Analysis' in *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International 1997) 397, 410.
[85] Dempsey (n 48) 570; Gariepy and Botsford (n 7) 361–2.

are differing evaluations on the effectiveness of those penalties. It is true that such penalties would be unlikely in reality, but the potential legal consequences would nonetheless exert additional psychological pressure on the disputants.

It is interesting to note in this regard that all the parties involved in disputes under Chapter XVIII accepted the Council's offer to pursue further negotiation and consultation. Any of the parties could have declined the offer and sought a legally binding decision. However, it appears that all the parties thought it worth attempting diplomacy once more under the auspices of the Council and with a set time limit. An alternative view is that, from the Council's past handling of disputes and its inherent reluctance to articulate legal positions, they might have predicted that a decision of the Council would be an unlikely outcome.

6. *Challenge of a Potential EU-ETS Dispute before the Council*

Since a lot has been already written on the substantive issues of the legality of the EU-ETS,[86] this article confines itself to the jurisdictional and procedural aspects under Chapter XVIII. As explained earlier, the ICAO Council is likely to react in a manner similar to the *US v Cuba* or the *Hushkit* cases; endeavoring more to mediate than to adjudicate. Still, once a case is brought before the Council, the critical issue of legitimacy is expected to emerge. The Council has thus far managed to maintain apparent neutrality in addressing the disputes under Article 84. Such neutrality would be difficult to sustain when the dispute involves the national interests of plural Council members. As the EU Regulation affects all the flights in and out of any EU State, many of the contracting States on the Council have some degree of interest in the matter. In fact, the governments of more than 20 non-EU States signed, in New Delhi on 3 October 2011, a joint declaration opposing the EU-ETS.[87] In its consideration of the EU-ETS in the Council on 2 November 2011, 26 of the 36 Council members, virtually all non-European, tabled and adopted the same declaration urging the EU and its member States to reconsider the EU-ETS.[88] If the EU-ETS dispute were referred to the Council under Article 84, it is not difficult to predict how each Council member will vote, in view of the position their home governments have taken in public.

For this reason, the EU member States could raise a preliminary issue of jurisdiction or admissibility on the grounds of the lack of impartiality indicated in the said Council deliberations. Such a challenge is not likely to succeed in the absence of any explicit provision in the Chicago Convention prohibiting the contracting States from instructing or influencing their representatives sitting under the mandate of Article 84 of the Convention. Although there have been

[86] Martin Bartlik, 'The Extension of the European Union Emissions Trading Scheme to Aviation Activities' (2009), 34 Ann Air & Space L 151.

[87] Cathy Buyck, *More than 20 countries to declare joint opposition to EU ETS* Air Transport World (4 October 2011) <http://atwonline.com/international-aviation-regulation/news/more-20-countries-declare-joint-opposition-eu-ets-1003> accessed 10 October 2012.

[88] Cathy Buyck, *ICAO Council Reiterates Need for Global Approach on ETS* Air Transport World (4 November 2011) <http://atwonline.com/international-aviation-regulation/news/icao-council-reiterates-need-global-approach-ets-1103> accessed 10 October 2012.

several challenges in the past, the jurisdiction of the Council has been vindicated: once by the ICJ and twice on its own. The legality or 'legal' validity, however, should be distinguished from the legitimacy of the ICAO Council as a proper adjudicative organ. The former concerns a mere validation of the authority conferred upon it by the language of the Chicago Convention, while the latter relates to whether its authority in the form of a judicial decision would be perceived as justified in terms of the rule of law.[89] Without proper judicial detachment from political organs, any arbitral decision by the Council could be viewed as a manifestation of national interests rather than a consequence of rule-based deliberations.

The issue of legitimacy might present itself in a different form. Article 53 of the Chicago Convention forbids a Council member from exercising a vote when it is a party to a dispute. If a non-EU Council member submits the dispute against all EU member States, the eight EU States in the Council will be deprived of their votes in the deliberations and decisions.[90] On the other hand, even though they are affected by the EU-ETS, the non-EU States are entitled to a vote as long as they do not present themselves as parties to the dispute. The EU Council Members in turn might attempt to submit a disagreement or counter-claim for the purpose of depriving the non-EU Council members of votes.[91] This anomaly could even invalidate a number of voting rights enough to affect the quorum of a majority required for the decision.[92]

Another interesting issue is the scope of the subject matter over which the ICAO Council has jurisdiction. The subject matter under Article 84 of the Chicago Convention is limited to its interpretation and application.[93] However, the legal issues of the EU-ETS concern its compatibility with the Kyoto Protocol as well as the Chicago Convention. A special agreement of the parties to the dispute can enable an *ad hoc* tribunal or the ICJ to address any issues other than aviation. The Council, however, would find itself barely qualified to touch upon the Kyoto Protocol, which appears essential in comprehensively examining whether or not the EU-ETS is compliant with international law.

7. *Suggestions for a Better ICAO Dispute Settlement Regime*

Given the shortcomings of the ICAO Council as a quasi-judicial body, several modifications have been suggested: more frequent use of fact-finding methods,[94] resort to the ICJ or PCA[95]; inclusion of some procedural safeguards in order to deal with the current defects[96]; establishment of a

[89] Nienke Grossman, 'Legitimacy and International Adjudicative Bodies' (2009) 41 Geo Wash Int'l L Rev 116.

[90] The EU as a regional integration organization does not possess the status of a contracting State to the Chicago Convention.

[91] Hingorani (n 44) 21.

[92] Art 52 of the Chicago Convention stipulates: 'Decisions by the Council shall require approval by a majority of its members.'

[93] Buergenthal (n 31) 5–6.

[94] Dicker (n 60) 163.

[95] Isabella Diederiks Verschoor, 'The Settlement of Aviation Disputes in Settlement of Aviation Disputes' (1995) XX Ann Air & Space L 335.

[96] Fitzgerald (n 41) 171.

new and smaller body to settle legal disputes[97]; adoption of a WTO-like panel process in place of the current ICAO Council process[98]; or the addition of another body tasked with overseeing compliance.[99]

These proposals would be better understood if they were placed in the right context. Concerning those disputes arising from bilateral aviation agreements, the Council seems to have little role to play. The currently prevalent *ad hoc* arbitral tribunals thus will remain as a viable mode for resolving bilateral disputes. Alternatively, given the technical nature of such disputes regarding matters such as rates frequency, routes and capacity, the Council may, by promulgating the relevant regulations, facilitate the establishment of an expert panel or a WTO-like panel for an expedient and specialized resolution of such disputes.[100]

With regard to the Council's role under Chapter XVIII, an ideal and ambitious reform would be the establishment of a permanent International Tribunal of Air Law or a semi-formatted arbitral tribunal similar to the PCA in The Hague or the ICSID in Washington, DC. These proposals, however, entail a revision of the Chicago Convention, which would be hard to obtain and the cost of which is likely to outweigh the desired benefits.[101]

In spite of the said constraints, the Council still has room for improvement. First, the Council can concentrate on what it has done best so far: conflict resolution by means of 'good offices', mediation, and conciliation. As Maniatis rightly points out, different kinds of disputes may well require different and more effective settlement options.[102] The ICAO has encountered many sorts of disputes and adopted corresponding methods such as fact-finding, conciliation or even outright condemnation. The Council should retain and even expand such procedural flexibility as it deems most effective for any pending case. For instance, a fact-finding mission may be appropriate in case of an air incident,[103] whereas conciliation would be more appropriate for politically charged disputes. This ADR-type strategy will be particularly effective when the real purpose of the parties to the dispute is to settle rather than to seek legal guidance.

Second, when a dispute is of a legal nature and thus requires judicial resolution by the application of international law,[104] the ICAO Council should resort to Article 6(2) of the Rules for the Settlement of Differences. Instead of undertaking adjudication of the dispute on its own as a whole, the Council may appoint a committee composed of five Council representatives of 'member States not concerned in the disagreement' who also have legal competence.[105] The selection of qualified and impartial representatives of the Council will

[97] ibid 171.

[98] Maniatis (n 33) 229; Craig Canetti, 'Fifty Years after the Chicago Conference: a Proposal for Dispute Settlement under the Auspices of the International Civil Aviation Organization' (1994–95) 26 Law & Pol'y Int'l Bus 497, 516.

[99] ibid at 230.

[100] Buergenthal (n 31) 112.

[101] Brian F Havel and Gabriel S Sanchez, 'Do We Need a New Chicago Convention?' (2011) 11 Issues in Aviation Law and Policy 7.

[102] Maniatis (n 33) 223.

[103] Vernon Nase, 'ADR and International Aviation Disputes between States – Part 1' 6 (2003) ADR Bull Art 1 <http://epublications.bond.edu.au/adr/vol6/iss5/1> accessed 10 October 2012.

[104] For a detailed analysis and definition of a legal dispute, see H Lauterpacht, *The Function of Law in the International Community* (Archon Books 1966) 19–20.

[105] Buergenthal construes this essentially as none other than 'a party to the dispute'. Buergenthal, *Law-making of International Civil Avation Organization* (Syracuse University Press 1969) 128–9. Nonetheless, the

enhance its legitimacy and competency. The Council can further take an innovative step in revising the Rules to the effect that a panel of experts or jurists other than the Council representatives may be selected for the said Committee to further ensure its judicial soundness.[106] Such small and competent Committee or panel would then look into the dispute and submit a legal analysis to the Council. Alternatively, the Council may avail itself of Article 8(1) of the Rules and entrust external experts or an external commission with the task of an enquiry or giving an expert opinion.[107] Admittedly, the Council as a whole can override the conclusion of the Committee, the panel or the external experts. Nevertheless, such conclusion would certainly steer the Council's deliberations into a legally correct decision.[108]

8. *Conclusion*

Structure often determines function. While members of the ICAO Council are bound by their headquarters' instructions, they also have to serve as international legislators or administrators in pursuit of the common good. In the field of policy-making and legislation, the fulfillment of such dual functions (*dedoublement fonctionnel*)[109] appears to be tenable. The judicial duties, however, differ from other duties in that judicial competency as well as independence is essential for the legitimacy of authority. Although the Council has been acceptably effective in facilitating the resolution of inter-State conflicts and at times proactive in its mediating or conciliating roles, its performance under Chapter XVIII indicates its reluctance and inability to carry out its adjudicative function. In case of any future dispute before it under Article 84, the Council would likely repeat its previous pattern of facilitating a negotiated resolution instead of adjudicating on the matter.

For all its structural defects, the dispute settlement regime of the Chicago Convention can still serve as a critical factor for any contracting States in potential dispute. Its existence combined with stringent penalties can work as a pressure on any party in breach of the Chicago Convention to return to compliance. However, in order for the current regime to better perform, some reforms can be considered. The Council should be equipped with more flexibility so that a tailor-made method of dispute settlement may be adopted. In case a legal resolution is sought, the Council needs to consider delegating the first-instance review of the case either to the Committee or to a panel of experts and jurists.

Council could be precautious not to select any representative himself or his/her home government who might be directly or indirectly has vested interests in the dispute.

[106] While discussing the Rules at the 19th Council session, the UK Representative favored opening the composition of the Committee to outside 'qualified persons'. But the Secretariat maintained that the Council could delegate its judicial function only to a body made up of its own members. Buergenthal (n 32) 96.

[107] Art 8(1) of the Rules states that 'The Council may at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion…'

[108] Hingorani (n 44) 18.

[109] Georges Scelle, *Precis de deoit des gens: principes et systematique* (Librarie du Recueil Sirey 1932).

Annex 124

D. Bowett, J. Crawford, I. Sinclair & A. Watts, "Efficiency of Procedures and Working Methods: Report of the Study Group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law", (1996) 45 *International and Comparative Law Quarterly* 1

THE INTERNATIONAL COURT OF JUSTICE

EFFICIENCY OF PROCEDURES AND WORKING METHODS

REPORT OF THE STUDY GROUP ESTABLISHED BY THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW AS A CONTRIBUTION TO THE UN DECADE OF INTERNATIONAL LAW

INTRODUCTION

1 In September 1993 the Public International Law Section of the Advisory Board of the British Institute of International and Comparative Law, meeting in London, considered how the Institute might best mark the present UN Decade of International Law. It was decided to initiate a study of the International Court of Justice for this purpose and, accordingly, a Study Group was formed which at the conclusion of its work comprised the following members:[1]

Professor D. W. Bowett CBE, QC, FBA
Professor James Crawford
Sir Ian Sinclair KCMG, QC
Sir Arthur Watts KCMG, QC.

The Group was conscious that its approach might well reflect a tradition which was both Anglophone and "common law", and not shared by all students of the International Court. Nevertheless, the Group believed its concern for the success of the Court to be universally held, and that its recommendations might appeal to those who come from very different traditions.

2 At the same time, the Study Group was conscious that some of its recommendations may be controversial. It was therefore pleased to note that

1. The Study Group also had the benefit, informally, of the views of certain others with practical experience of the ICJ. In particular the Group would like to acknowledge the contribution to its work of Mr J. P. Gardner, the Director of the Institute, who attended the Group's meetings and provided much valuable guidance to the Group as it pursued its work.

the British Institute of International and Comparative Law has decided to hold a Conference on 23 and 24 February 1996 at which the concerns addressed in this Report may be discussed further: it is envisaged that this Report may serve as the basic paper providing a focus for the work of that Conference.

3 The Court today has an acknowledged place in the United Nations system and its role is widely accepted. Compared to the situation in the late 1960s, when few States appeared to want to use the Court,[2] the Court in recent years has tended to have a list of ten or more cases, attracting parties from every continent[3]—Europe, the Americas, Africa, the Middle East, the Far East. This greater use of the Court is a development to be encouraged.[4] It will be greatly assisted by growing confidence in the fairness and soundness with which the Court gives judgment. The current appeal which the Court undoubtedly has, has nevertheless brought with it certain problems, the most evident of which is the length of time now taken by the Court to dispose of many of the cases submitted to it.

4 In its examination of the future of the International Court of Justice the Study Group has identified a core issue requiring consideration, and which appears to have attracted little real analysis elsewhere: that of the efficient management by the Court of its case-load in the light of its resources and time. Consideration of this issue is supplemented by a consideration of the procedure of the Court in relation to both contentious proceedings and requests for advisory opinions. Finally, the Group has

2. The unpopularity of the Court's 1966 judgment in the *South-West Africa Cases* (Second Phase, Judgment, I.C.J. Rep. 1966, 6) is often seen as the cause of its decline at that stage, but this may be seen as too simple an explanation.

3. Against this one must record the fact that, of the permanent members of the Security Council, neither Russia nor China has seen fit to use the Court and, since the *Nuclear Tests Case* (Judgment, I.C.J. Rep. 1974, 253) France appears to have preferred arbitration. Cases with the UK (*Continental Shelf* (1977)), with Canada (*La Bretagne* (1986), *St Pierre et Miquelon* (1992)) and with New Zealand (*The Rainbow Warrior* (1990)) have all gone to *ad hoc* arbitrations. However, France did participate in preliminary hearings held by the Court in Sept. 1995 in response to New Zealand's requests relating to nuclear tests in the Pacific, if only to contest that there was a case to respond to. The US, since the *Nicaragua* case, has withdrawn its acceptance of the Court's compulsory jurisdiction, but has still continued to appear before the Court on an *ad hoc* basis (*USA* v. *Italy (E.L.S.I.)*; *Iran* v. *USA (Aerial Incident)*; *Iran* v. *USA (Oil Platforms)*; *Libya* v. *USA (Lockerbie)*). The UK alone among the permanent members of the Security Council maintains its acceptance of the Court's compulsory jurisdiction, although subject to various reservations.

4. Given the number of cases with which the Court has dealt in recent years concerning maritime boundaries, there must be a question whether the establishment of the Law of the Sea Tribunal will, in time, lead to a reduction in the number of cases being referred to the Court. It is by no means certain that this will happen, and even if it does, it is unlikely to produce noticeable effects for some years yet; and even then, the Court will still remain the international community's principal judicial institution, and the concerns addressed by the Study Group will remain very relevant to securing the most effective functioning of that institution.

referred to some broader issues which would involve more radical reform of the Court's role. Such issues include the extension of standing before the Court, proposals for the extension of the Court's jurisdiction and the question whether advisory opinions might be sought by States. The Study Group has noted that these latter issues have attracted a great deal of attention in academic writing, but felt that it would be beyond its present purposes to undertake a full-scale review of all of the possibilities of reform. Instead the Group has reviewed the implications of some of these proposals for reform in the light of its findings on the core issue.

I. THE CORE ISSUE

5 Briefly put, the core issue is whether the Court as it functions at present will be able to cope with the increasing pressure of work which States are now bringing to it. The list, or "case-load", currently stands at a dozen cases. The tempo of the Court's procedures is such that it tends to complete two, or at the most three, cases each year[5] and clearly, once cases begin to be brought before the Court at a faster rate than two or three a year, a backlog will inevitably build up (as is already happening). In Table I a comparison is given of the activity of the PCIJ over a ten-year period, 1925–1935, compared with the ICJ over a similar period, 1980–1990. The PCIJ was decidedly the busier court—37 decisions to 18 decisions by the ICJ—so there is nothing inherently unrealistic in expecting a faster work-rate from the ICJ. Moreover, if account is taken of the fact that there are now three times the number of States forming the international community, there is every reason to anticipate that the ICJ will be expected to handle more cases than its predecessor.

6 It is known that some States involved in cases are becoming restive at the delays in hearing their cases. To give two recent examples, in *Qatar* v. *Bahrain* where the application was filed in July 1991 and the first phase was, by agreement between the parties, limited to jurisdiction/admissibility, and in which a second round of pleadings was requested by the Court itself and not by either of the parties, an initial judgment was given in July 1994; following that judgment, the final judgment on jurisdiction/admissibility was not given until February 1995, some three and a half years after the filing of the application. In *Portugal* v. *Australia (East*

5. In 1994, two judgments only were given: *Libya/Chad* in Jan. (and therefore prepared in 1993) and *Qatar/Bahrain*, on the issue of jurisdiction only, in July. The current backlog would be worse except for the fact that two cases (*Nauru* v. *Australia* and *Finland* v. *Denmark*) were settled and withdrawn, and that a third (*Iran* v. *USA (Aerial Incident)*) was withdrawn from the list, in anticipation of settlement. Two judgments have already been given during 1995, as well as the Court's decision on the preliminary issue raised by New Zealand's requests relating to the French nuclear tests in the Pacific, but no others are expected. (Just by way of comparison, in the UK the House of Lords currently disposes of about 80 cases a year.)

Timor) the application was filed in February 1991: oral hearings were in February 1995, and judgment was given in June 1995.

7 At the same time it must also be recognised that the Court's schedule requires some flexibility, to enable provisional measures applications (and other urgent applications), of which there has been an increasing number in recent years,[6] to be dealt with. It should also be noted that such applications have the inevitable result of disrupting the Court's normal timetable. There are also cases in which the delays in fact suit the parties, either because this affords time to reach a political settlement or because the parties need time to prepare their pleadings.

II. FACTORS RELEVANT TO THE DURATION OF TIME REQUIRED BY THE COURT TO DISPOSE OF CASES

A. The Quality of the Judgments

8 The argument that the Court must maintain the quality of its judgments, and therefore cannot risk "hurried" deliberations, must surely be accepted. It would be folly to expedite cases at the cost of the quality of the judgments, and this would run counter to the need to consolidate the growing confidence States have in using the Court.

9 Nevertheless, the question is to decide what work-load can reasonably be expected without requiring the Court to "hurry". It is not clear that any marked change in quality has occurred over the years or as compared with the PCIJ, and, although the evaluation of the merits of particular judgments tends to be subjective, it is difficult to see that the current, rather extended, timetable is directly connected to an improvement in quality.

B. The Length of Written Pleadings

10 Certainly some judges privately complain of the length of written pleadings, and in comparison with pleadings during the inter-war years when the Permanent Court sat, it is true that pleadings tend to be longer. But it is by no means clear that it would be a simple solution to shorten them, or that, if shortened, this would lead directly to a faster work-rate by the Court.

6. Whereas in the period 1974–83 no provisional measures applications were made, in the period 1984–93 a total of nine such applications were made (in 1993 two were made in *Bosnia* v. *Yugoslavia (Serbia and Montenegro)*; in 1992 applications were made in *Libya* v. *UK* and *Libya* v. *USA*; in 1991 one was made in *Finland* v. *Denmark*; in 1990 one was made in *Guinea Bissau* v. *Senegal*; in 1988 one was made in *Nicaragua* v. *Honduras*; in 1986 one was made in *Burkina Faso/Mali*; in 1984 one was made in *Nicaragua* v. *USA*). One reason for this increase may be the awareness of the applicant State that a considerable period of time may elapse before judgment is given by the Court.

11 It has to be remembered that, for the litigant State, the matters put to the Court are of prime importance. States are not prepared to take risks by excluding material, whether argument or supporting documentation, which might in fact be important to their case. Counsel can never be sure which argument will appeal to the judges: while counsel have a professional responsibility not to press arguments they know to be bad, they are unlikely to advise a State to take the risk of excluding material. And, indeed, the volume of written pleadings, large though it may be, is not excessive by comparison with the written material filed with many municipal courts in commercial, planning or even criminal cases. Municipal courts have to cope with the same kind of pressure and yet achieve a higher work-rate than the International Court.

12 It is fair to note that municipal courts are only rarely faced with the burden of translation which is the norm for the Court. It is also fair to note that it is bound to take longer to reach decisions in a court with 15 members, drawn from different legal traditions, than it is in a much smaller municipal court whose members share the same legal tradition.

C. The Number and Timetable of Written Pleadings

13 Where proceedings are instituted by application and the pleadings are consecutive, two sets of pleadings by each party should suffice—memorials and counter-memorials, and then replies and rejoinders. This is normally what happens. In the ten-year period from 1 January 1985 to 31 December 1994 the Court was concerned with 17 contentious cases in which it was clear which States were the applicant and respondent States; in only one[7] of those cases did the parties agree to forgo having also replies and rejoinders after their initial memorials and counter-memorials.

14 Where proceedings are in form or substance instituted by agreement and the pleadings are concurrent so as to avoid putting either party formally in the position of applicant or respondent, four pleadings should similarly suffice—a pair of simultaneous memorials, followed by a pair of simultaneous counter-memorials. This is, however, an ideal to which States are unwilling to subscribe in practice. In the ten-year period referred to, there were six contentious cases arising from joint or simultaneous applications. One of those cases was untypical in its pattern of pleadings;[8] in four of them the parties required not only simultaneous

7. *Finland* v. *Denmark (Passage through the Great Belt)*. In that case Finland and Denmark agreed to a memorial and counter-memorial because of the urgency: the case was, in the end, withdrawn prior to hearing.

8. *Tunisia/Libya Continental Shelf (Revision and Interpretation)*: in this case there was only a request by Tunisia for revision and interpretation of a previous judgment, and written observations thereon by Libya.

memorials and counter-memorials but also a third round of pleadings in the form of simultaneous replies; and in only one[9] were the parties content to forgo replies. In these cases where the parties file their pleadings simultaneously, there is often a particular difficulty, in that there is a tendency for the two parties at the outset, in their initial memorials, to withhold part of their argument until they can see what arguments the other party is advancing. Also, each party is likely, in its memorial, to place particular emphasis on different parts of the case. Thus, it is often only at the counter-memorial stage that the issues are fully joined, and a third, "reply" stage becomes necessary.

15 Moreover the number of rounds of written pleadings will tend to affect either the total length of the pleadings or the timing of the oral argument, or both. As to the first, as suggested above, the total length of pleadings is not unusual in comparison with municipal courts, or for that matter international arbitration.

16 As to the second, it has recently been suggested by a former President of the Court[10] that the main factor producing delay in bringing cases to hearing is the frequency of requests by parties for more time to prepare their written pleadings. In fact over the last decade there have been 10 contentious cases (out of 23 considered by the Court during that time) in which the Court has granted extensions of time or requests for "extra" rounds of pleadings. Four of those were the requests for the "extra" round of replies just referred to, and in one of those four there was also an extension of the time limits originally laid down.[11] In the other six cases the extensions varied from one week to one year, with an average of about 11 weeks.[12] While the reasons for such extensions of time vary, and not all can

9. *Burkina Faso/Mali.*

10. Sir Robert Jennings, "New Problems at the International Court of Justice", in *International Law in an Evolving World, Essays in tribute to Eduardo Jiminez de Arechaga* (1994), Vol.II, p.1061, at p.1062. For other recent contributions by members of the Court, discussing the Court's working methods, see also Oda, "The International Court of Justice Viewed from the Bench (1973–93)" (1993-vii) 244 Hag. Rec. 13–190; and Bedjaoui, "La 'Fabrication' des Arrêts de la Cour Internationale de Justice", in *Le Droit International au Service de la Paix, de la Justice et du Développement. Mélanges Michel Virally* (1991), pp.87–107.

11. *El Salvador/Honduras*, extending the time for simultaneous counter-memorials by 10 days (1 to 10 Feb. 1989), and for simultaneous replies by over 5 months (1 Aug. 1989 to 12 Jan. 1990).

12. *Nicaragua* v. *Costa Rica*, time limit for Nicaragua's memorial extended from 21 July to 10 Aug. 1987, and for Costa Rica's counter-memorial from 21 Apr. to 2 June 1988; *Nicaragua* v. *Honduras*, time limit for Nicaragua's memorial extended from 19 Sept. to 8 Dec. 1989, and extending *sine die* the time limit for Honduras's counter-memorial originally set for 19 Feb. 1990 (the case being subsequently discontinued); *Iran* v. *USA (Aerial Incident)*, time limit for Iran's memorial extended from 12 June to 24 July 1990, and for the US's counter-memorial from 10 Dec. 1990 to 4 Mar. 1991, and then time limit for Iran's observations on US preliminary objections extended from 9 Dec. 1991 to 9 June 1992, and then further extended until 9 Sept. 1992; *East Timor (Portugal* v. *Australia)*, time limit for Australia's rejoinder extended

be attributed to dilatoriness on the part of the parties, it is indisputable that if the parties are granted extensions of time, or "extra" rounds of pleadings, the result must be to delay the time at which the oral hearings could otherwise be held. On the other hand, it must be added that (as will be shown below) the Court shows no great urgency in moving to the oral hearings once the written pleadings (however many or delayed they may eventually prove to have been) have been completed.

17 Consideration of the question whether the Court takes a long time because the parties require it, or the Court's procedures necessarily have that result, is likely to have a strong element of circularity about it. A balance has to be struck. There is an initial attraction in the idea of the Court seeking, as a matter of policy, to shorten the time limits for written pleadings. But it has to be accepted that for a small State with limited resources—and perhaps relying on geographically dispersed counsel[13]—generous time limits are essential. A further reason supporting longer time limits may also arise in respect of translation needs: a State may often face a heavy burden of translating documents in its own language into English or French before its own counsel can use them. Moreover, there is little point in impressing the parties with a sense of urgency if the Court itself is not ready to hear the case, or if the Court itself displays no similar urgency in preparing its judgment. Thus if the Court is able to avoid long delays in its own procedure, it is likely to have greater success in imposing stricter limits on the parties.

D. The Length and Timetabling of Oral Arguments

18 Before dealing with the length of oral arguments, two preliminary points need to be made. The first is that the Court appears to engage in little or no forward planning of the oral hearings due to come before it, preferring to deal with one case at a time, as and when that case is ready for oral hearing. This practice would seem to have little to commend it, while carrying with it the significant disadvantage that when the Court does come to fix the dates for oral hearings those dates may only with great difficulty, if at all, be fitted into the busy work schedules of those who need to be present for the hearings—who are not only often large in numbers, but frequently have many other pressing commitments (thus, apart from

from 1 June to 1 July 1993; *Iran* v. *USA (Oil Platforms)*, time limit for Iran's memorial extended from 31 May to 8 June 1993, and for US counter-memorial from 30 Nov. to 16 Dec. 1993; *Bosnia-Herzegovina* v. *Yugoslavia (Genocide)*, time limit for Bosnia-Herzegovina's memorial extended from 15 Oct. 1993 to 15 Apr. 1994, and for Yugoslavia's counter-memorial from 15 Apr. 1994 to 15 Apr. 1995 (this extension was largely the result of intervening proceedings on requests by both parties for provisional measures).

13. The "international Bar" consists predominantly of English- and French-speaking lawyers, largely because these are the two working languages of the Court.

counsel, parties are often represented at oral hearings by senior government personnel who have other government functions to attend to). Once the Court has fixed the time limit for the submission of the last written pleading, it would seem possible, and reasonable, for the Court to assume that the time limit will be observed and, on that basis, to fix, at least provisionally, the timing of the ensuing oral hearings. If the number of cases before the Court required it, there would seem to be no reason why the Court should not in this way plan some two or three cases ahead.

19 The second preliminary point to be made is that, when the Court comes to fix the date of oral hearings, a significant delay between the close of written pleadings and the oral hearings may result from the Court's internal arrangements for the translation of the written pleadings. The Registry has only limited translation facilities, and it will depend on the total translation burden on the Registry at any given time as to how soon it can start translations of the written pleadings into French or English. And since the oral arguments cannot start until all the pleadings are translated, the need to translate two or even three sets of written pleadings necessarily risks increasing the delay before oral hearings can begin.[14] Ideally cases should be scheduled for hearing as soon as they are ready to be heard, and there should in any event be a delay of, in principle, no more than six months between close of pleadings and the commencement of oral argument. It is accepted that a strict "six months" rule might be impractical: other factors could dictate otherwise, such as how many cases are ready for hearing, the order in which they were filed, whether the hearings concern merits or jurisdiction or provisional measures or an advisory opinion, or whether they involve requests to intervene. But an indicative "six months maximum" would still offer a useful target, which in practice it should seldom, if ever, be necessary to exceed.

20 Complaints are frequently made (and usually by the judges in private conversations) about the length of the oral arguments.[15] Given the tenden-

14. There is of course a risk that if translations were prepared earlier the costs of doing so would be wasted if the case were later settled. But this risk is inherent in any procedure which allows for the discontinuance of proceedings, and may, even under present arrangements, arise if proceedings are discontinued after the close of written proceedings—or indeed at any time before judgment is delivered. Further, discontinuance at such late stages is far less frequent than the risk of delay caused in all other cases by the present arrangements; the risk of "wasted" translation work is the lesser risk, which should thus be taken in order to avoid the risk of delay.

15. For published comment about the loquacity of counsel see Bedjaoui, *op. cit. supra* n.10, at pp.94–95.

cy to make the written pleadings lengthy, it might be thought that oral arguments—like those before the US Supreme Court—could be brief.

21 The main factor which militates against shortening the oral arguments is that parties and their counsel have the impression that some of the judges have not really studied the written pleadings prior to the oral arguments. They are therefore disinclined to curtail their oral arguments because they cannot, with confidence, take the view that the entire Court is so familiar with the written pleadings that they need only to supplement, or emphasise, the main points already made in writing (this point is considered further below at paras.36–43). Nevertheless the oral arguments are long by the standards of many judicial systems. Further, the practice of some parties of having large numbers of counsel to represent them may lead to a measure of repetition in the presentation of oral arguments to the Court. If a party could be confident that the written pleadings had been carefully read by the entire Court, and if, as suggested below, the Court developed a practice of indicating before the start of the oral arguments which points would benefit from development in oral argument, parties could be invited to curtail the length of oral argument (and would almost certainly respond).

22 It is probable that boundary cases, particularly land boundary cases, present special problems. Where there are many maps, and where events have to be related to places, counsel may often provide clarity in an oral argument, illustrated by maps or diagrams, which cannot be so easily conveyed in writing.

23 In any event, the fact of the matter is that the public sittings of the Court devoted to listening to oral arguments take up quite a small fraction of the working year. For example, in 1991 the full Court held 21 sittings (i.e. 21 half-days) and a chamber of the Court 50. In 1992 the figures were five sittings for the full Court, and none for the chambers.[16] Thus, the fact is that oral arguments take up only a small fraction of the Court's working time, so that whatever the reasons for the long delays, they cannot be the length of oral arguments.

E. The Frequency and Length of Sittings

24 It must be axiomatic that for any court, particularly one which is required to be "permanently in session" (Article 23 of the Statute) and whose members are normally "to hold themselves permanently at the disposal of the Court" (*ibid*), its judicial functions have priority over any

16. See Bekker (1993) 87 A.J.I.L. 430–432.

other considerations. The ways in which the Court operates are partly a matter of public record, and partly a matter of private deliberation, of which, inevitably, much less is publicly known. But any consideration of the various ways in which the Court carries out its judicial functions has to be seen against the background that its judicial work must always have priority.

25 The Court sits both in public—to hear oral argument—and in private for the purpose of its deliberations. As noted above, the number of public sittings is low for a court under pressure of work. Perhaps the most striking feature of the Court's work schedule is the relatively low number of the days used each year for formal sittings. In 1991, with 21 public sittings and 37 private sittings—assuming these occurred on different days—the likely total for the full Court is 58 days. In 1992 (with 5 public and 26 private) it is likely to have been 31 days. Admittedly, for judges serving also on a chamber this would add perhaps 78 sittings of chambers in 1991, and 19 sittings of chambers in 1992.[17] But, as a rough rule of thumb, it looks as though one-third of the year is spent with the judges functioning as a collegiate court, and two-thirds spent by the judges otherwise. It must be noted here that the judges have a number of other functions, including the administrative aspects of the running of the Court and the preparation of separate and dissenting opinions, and individual study of the pleadings and proceedings.

26 It is believed that for some of the judges, but by no means all, a period without sittings affords an opportunity to return home, and since Article 22 of the Statute requires only the President and the Registrar to reside in The Hague, this is permissible. The provision in Article 23, that the Court "shall remain permanently in session", is therefore somewhat misleading. The working conditions in The Hague are good: there is an excellent library and each judge has an attractive private study. There is bound to be a question whether the long absences from The Hague, enjoyed by some judges, are not one factor contributing to the Court's delays.[18] Certainly

17. See *idem*, pp.429–432. These years are therefore cited simply as examples, though they do not appear untypical. The figures over the past decade, as given in the Court's Yearbook for successive Court terms (i.e. 1 Aug.–31 July), are as follows: 1984–5, the Court held 45 public and 36 private sittings, chambers 2 public and 9 private; 1985–6, the Court held 13 public and 49 private sittings, a chamber 14 public and 10 private; 1986–7, the Court held 1 public and 26 private sittings, chambers 1 public and 12 private; 1987–8, the Court held 11 public and 28 private sittings, chambers 2 public and 3 private; 1988–9, the Court held 2 public and 21 private sittings, a chamber 13 public and 13 private; 1989–90, the Court held 7 public and 34 private sittings, a chamber 5 public and 3 private; 1990–1, the Court held 13 public and 20 private sittings, a chamber 51 public and 24 private; 1991–2, the Court held 17 public and 25 private sittings, a chamber 27 private; 1992–3, the Court held 34 public and "a number of" private sittings, a chamber 1 public and 20 private; and in 1993–4, the Court held 11 public and "a number of" private sittings.

18. One possible solution might be to pay judges a basic annual stipend, but with a gener-

the benefit of informal discussion between the judges (which can well lead to a shortening of the time required for deliberations among the judges) is lost if the Court is scattered over the five continents.

27 There is also a wider issue here, which has to be addressed. It is that over the years it has become quite usual for judges of the Court to undertake commitments outside The Hague, either of a brief and occasional kind, such as the delivery of lectures, or of a more time-consuming kind, such as participation in an arbitral tribunal. Such activities can be of undoubted value, both for the Court and for the international legal community at large, and no one would suggest that such eminent jurists as those who constitute the Court should be forced to stay, in idleness, in The Hague when—as at one time was probably the case—there was an insufficient case-load at the Court fully to occupy them. Times, however, have changed, and the Court is now much busier than it was; and it must be the case that the requirements of the Court have to be accorded priority. There is some evidence that, on a few occasions in recent years, the Court fixed the timetable for cases it was considering by reference to the personal convenience of judges rather than the wishes of the States parties. Thus, hearings may begin or end, or may be suspended, so as to take account of a judge's commitments extraneous to the Court's functions. The priorities ought to be, first, the needs of the case; second, the convenience of the States involved; and, last, personal commitments of members of the Court.

28 There are two further features of the Court's work that strike any observer familiar with the work-load of a busy national court. The first is the shortness of the Court's working day. The second is that the Court deals with only one case, which has reached an advanced stage (i.e. after pleadings have closed), at a time.

29 In relation to the first the Court sits for only half the day, usually in the mornings. Although the Court will occasionally sit both in the mornings and in the afternoons, this occurs rarely, and even then only because the Court itself insists that oral arguments must conclude on a certain day. Thus, a "day in Court" means 2 hours 40 minutes: that is, 10 a.m. to 1 p.m., with a 20-minute break for coffee.

30 The shortness of the Court's working day could be remedied in one of three ways. First, the Court could sit in plenary for oral hearings both

ous "attendance allowance" for each day spent in The Hague and available for Court business. Cf. Art.18.1 of Annex VI to the Law of the Sea Convention 1982, relating to the remuneration of members of the International Tribunal for the Law of the Sea. However, the Study Group did not enter into any consideration of questions of the judges' remuneration.

mornings and afternoons; second, the afternoons could be devoted to private deliberations on a case other than that in which oral arguments had been heard in the morning; and, third, a chamber could use the afternoons to hear oral arguments in another case.

31 As to the first of these remedies, the reluctance to sit both mornings and afternoons has several explanations. The least persuasive is that two sessions would tire the judges, for in most national systems a judge would regard this as normal. It is true that, for many judges, there is the additional strain of having to listen in a foreign language if the working languages—English and French—are not their own. But, of course, each judge will receive by the end of the day a verbatim record of the argument heard that morning to assist him. It may be that the fact that there is no age limit for judges aggravates the problem of concentrating over two sessions.

32 Another reason, which has considerable force, is that the Court's staff, the Registry, is not adequate (either in numbers or available office space) to cope with the additional translation burdens, and the problems of interpretation and reproduction of the verbatim record for two sessions daily. Staff can, in theory, always be increased, and should be increased, if only on a temporary basis, if there is a real shortage. If this were the sole reason for being unable to sit twice daily, the Fifth Committee of the UN General Assembly might be persuaded that it was cost-effective to finance more staff: but it must be recognised that in the present financial circumstances this will be no easy task.

33 If the Court is not to sit both mornings and afternoons in plenary, one of the other two remedies should be considered—namely, the Court holding private deliberations in the afternoons on a case different from that in which oral argument had been heard in the morning, or a chamber using the afternoons to hear oral arguments in another case.

34 The first of these alternatives appears preferable to the Study Group. It would certainly involve the Court in dealing with two cases at the same time, although, obviously, if one case was at the stage of oral argument and the other was under deliberation, the second would be at a far more advanced stage. If this proposal were to be adopted it would also mean that where a case settles just before it is due to be heard, the Court would still have other cases to work on, and would not have the problem of further delay (which might be lengthy) before being able to hear the next case listed. However, although the Court has operated in this way on occasion, there appears to be a marked reluctance in the Court to do this, although the reasons for this reluctance have not, at least to the knowledge of this

Group, been publicly articulated. Certainly the work-load would increase, but then that is the object of the exercise. The objection can scarcely be that the judges do not wish to think about more than one case at one time, for that is a luxury few courts can enjoy.

35 The second alternative imposes a heavy work-load on a judge sitting in the full Court and the chamber, so that up to five judges of the 15 would certainly be hard-pressed. However, as seen earlier, this would last for only a small part of the year.

F. The Procedure for Elaborating a Judgment

36 This is now an established, and formalised, procedure which is set out in a 1976 Resolution on Practice.[19] This envisages the following stages:

(1) A meeting before the oral arguments begin for an exchange of views on the written pleadings and to identify points on which explanations need to be solicited from the parties (Article 1).

Comment

37 This assumes that all judges have read the written pleadings before the oral arguments start. In practice, parties do not feel they can make that assumption. The idea that the Court should identify points on which further clarification is necessary is excellent. But this presupposes that the meeting should take place some weeks before oral arguments begin, so that the parties could prepare their responses to the specific requests for clarification. It is not known when, in fact, these meetings do take place (although it is understood that for practical reasons they are usually held very shortly before the opening of the hearings). Nor is it known to this Study Group whether the Court has ever used this sensible means to ensure that oral arguments do clarify points of obscurity or difficulty.

38 The more normal practice is for questions to be put to the parties at the end of the first round of oral argument, so that the parties can answer them in their second round of argument. Although this has the advantage of allowing the Court to delay questions until after it knows whether the parties have addressed them spontaneously in their opening oral presentations, it gives the parties relatively little time to respond (although they are usually allowed to answer in writing, after the arguments close). It also has the drawback that questions are put by individual judges: a party therefore has no means of knowing whether the question reflects a general concern of the Court, or simply the views of the one judge.

19. See Guyomar, *Commentaire du Règlement de la C.I.J.* (1983), pp.85–89; and *ICJ: Acts and Documents concerning the Organisation of the Court, No.5* (1989), p.165.

39 One suggestion might be that, on the basis of the written pleadings, the judges should each prepare, prior to their first meeting, a short note on the issues raised by the parties—i.e. before oral arguments began: this note would form the basis for a note to be agreed by the Court of the issues (or at least the principal issues) raised by the parties. This could have many advantages. The judges would know the case better, the parties could rely on this and shorten their oral arguments, and a long delay later after the close of oral argument for the preparation of a note (see below at paras.48–55) could be shortened. Collective discussion of these issues by the Court in advance of the oral arguments would also allow the Court to give advance notice to the parties of the points on which the Court would welcome clarification in oral argument.

40 Such a suggestion appears to the Study Group to put into sharp relief some important questions about the current procedures of the Court, and the role played by the oral hearings. If it were adopted, States and their representatives would need to be sure that the written arguments had been considered carefully by all the judges, before they would be willing to shorten their oral arguments. Obviously the members of an international bench are drawn from a variety of legal traditions and cultures, and may as a result attach different weight to the written and oral proceedings. It is hoped that a uniform approach, requiring careful study of the written proceedings in advance of the oral hearings, might be achieved by the President impressing on colleagues the need for such preparation and ensuring that it was in fact undertaken, so that it might be established as part of the working ethic of the Court.

41 The Group is also concerned that a reduction in the length of oral arguments should not also be accompanied by a reduction in their importance. The experience of other international tribunals suggests that there may be a trade-off in emphasis between the written and oral submissions of the parties. At the moment it appears to the Group that the Court has "the worst of both worlds" in that it is usually faced with long written pleadings but also comparatively long oral argument.

42 Comparisons with the method of work of other international tribunals also suggest that, if the Court were to meet in advance of the oral hearings and to form a view of the issues it considered to be of prime importance, it may encourage a stronger collegiate view to be established. This may result in fewer dissenting and separate opinions. On the other hand, there is an obvious danger that views initially formed at this stage, in

advance of oral arguments, may become entrenched, so that the Court may be less receptive to the oral arguments.

43 It would also be important to ensure that this would genuinely result in more efficient use of the Court's time. It is to be anticipated that the preparation of a collectively agreed note of the issues would be a time-consuming exercise in itself; the identification of the principal issues might be more practical.

44 (2) After the close of oral arguments there is a period to give the judges time to study the oral arguments (Article 2).

Comment

45 They are following these arguments on a daily basis throughout the hearings, so that this period is presumably primarily to enable the judges to refresh their minds on the basis of the verbatim daily records. Accordingly, it should be possible to keep this period short.

46 (3) A meeting is held to discuss the case (Article 3).

Comment

47 This is clearly essential if the Court is to function as a collegiate court. At this meeting the President outlines the issues which in his opinion will require discussion and decision by the Court. By long-established practice this is done in writing in the form of a "President's Outline of Issues", a detailed document prepared in the first instance by the Registry, and approved by the President. There is a question whether the preparation of this detailed document might be drafted by a member of the Court, acting as the equivalent of a *juge rapporteur* in some other systems.

48 (4) There is then a further period to allow each judge to prepare a written note on the case (Article 4).

Comment

49 This period is fixed by the President and is usually quite long, varying from four to six weeks,[20] and it is at this stage that many judges return to their homes. Some opinion has it that it is only at this late stage that some judges give the written pleadings real attention. A possible disadvantage to the note at this stage is that, if it is long and well prepared, it may begin to represent an entrenched position, and thus become the basis for a separate or even dissenting opinion. Might it be that a judge working on his or

20. Oda, *op. cit. supra* n.10, at p.120; Bedjaoui, *op. cit. supra* n.10, at p.97, puts the time at between two and four weeks.

her note in The Hague, in daily, informal contact with his colleagues, would be less inclined to form an entrenched view of the case than a judge working in isolation at home?

50 The tendency is for these written notes to be quite long, "anything between forty and a hundred or more pages",[21] so that, with 15 or 17 judges there is a total of about 1,000 pages of notes to be translated, and then read by each judge. It thus appears that many notes will be far more detailed than the eventual judgment. For if one excludes the "formal" part of a judgment—i.e. the recitals of the procedure by which the case came before the Court, and the submissions and arguments of the parties—few judgments will, in their "substantive parts" containing the Court's reasoning, exceed 40 pages (see paras. 63–64, below).

51 Apparently the Court usually dispenses with the notes in cases in which time is of the essence, such as applications for interim measures, and this has led to the question being raised whether notes by each individual judge might be dispensed with in all cases.[22]

52 The possibility of a single note being prepared for the whole Court has been mooted,[23] this note being prepared either by a single judge appointed as rapporteur or by a select committee of judges. However, the difficulty with both these solutions, as is rightly pointed out, is that representation of the principal legal systems of the world would be impossible with a single rapporteur, and difficult with a select committee. A further drawback might be that, if it is true that some judges give the pleadings close scrutiny only when they prepare their notes, to dispense with individual notes might be to dispense with careful and close scrutiny of the pleadings.

53 As an alternative the possibility of a "neutral" note being prepared by the Registry has been mooted.[24] But, although this may save time, the

21. Jennings, *op. cit. supra* n.10, at p.1065; Oda, *ibid*, says that 40–50 pages are normal, but the notes can extend to 100 pages or more.
22. Jennings, *idem*, p.1066.
23. *Ibid.*
24. *Idem*, p.1067. Cf. the "President's Outline of Issues" referred to *supra*, para.47, which is initially prepared by the Registry: this may be as far in the suggested direction as it is likely to be acceptable to go.

idea has few attractions. A note by the Registry would certainly not represent the principal legal systems of the world. More important, such a "neutral" note would not significantly move the Court further towards forming a view on the central issues in the case, which by their very nature are not "neutral". Again, the incentive given by the individual note to each judge to give the pleadings close scrutiny would be lost. There is yet a further concern over this idea, and this lies in the possibility that the parties may object to a note being submitted to the Court by the Registry, addressing the legal issues in the case, which the parties have not seen or had an opportunity to comment on.

54 Nevertheless, it seems right to focus on the "note phase" of the procedure as one which engages excessive time and effort. If the impression suggested above is right, and the notes are in fact a good deal lengthier than the judgments, then it may be that, as "notes", they are simply too long. As an alternative the Court might gradually move to a new form of note in which each judge restricts himself or herself to a concise expression of a view on each of the issues earlier identified by the Court as relevant in the deliberation prior to the note phase.

55 After all, when the Court reconvenes, each judge is required to state his or her views orally, and a condensed version of a long written note the other judges have already read seems unproductive. On the other hand, an oral exposition of a short written note would be of greater interest and would fully reflect the judge's familiarity with the pleadings.

56 (5) The Court then reconvenes in The Hague, after a period of weeks or even months, for deliberations on the judgment and, each judge having read the notes of the other judges, the judges give their opinion on the case orally in the reverse order of seniority (Article 5).

Comment

57 No period is fixed for this stage, which presumably takes as long as it takes—a complex and difficult case may justifiably take a considerable time before a trend in the Court's view can be discerned.[25]

25. It has been said that this stage may take the members of the Court four or five days, meeting mornings and afternoons: Bedjaoui, *op. cit. supra* n.10, at p.98.

58 (6) A Drafting Committee is then formed (normally the President plus two elected members chosen from those representing the "majority" opinion) (Article 6).

Comment

59 This stage can be very time-consuming (possibly "several weeks"[26]—the period being fixed by the Court in the light of the circumstances of the case), with some passages being argued over, word by word.

60 (7) There is a three-stage process for preparing the text of the Court's decision (Article 7).[27] First, a preliminary draft of the decision is circulated, on which the judges may submit amendments in writing. These are considered by the Drafting Committee, which, in its second stage, revises the draft and then submits that revised draft for discussion by the Court in first reading. After the first reading has been concluded the judges who wish to deliver separate or dissenting opinions make their texts available within a time limit fixed by the Court. The third stage involves the Drafting Committee preparing an amended draft, which takes it a few weeks to prepare, and which is put before the Court for second reading. Amendments may be proposed; and individual judges may amend their separate or dissenting opinions to the extent that changes have been made to the draft decision itself, and inform the Court of their amendments.

61 (8) The Court then proceeds to a vote on the draft, with the judges being allowed to demand a separate vote on each point (Article 8).

Comment

62 This system is long, and careful, and aims at maximising the opportunity for each judge to play an active part in the formulation of the judgment. The process of drafting and redrafting, at each stage aware of the views of other judges, is sensible: and even the drafts of separate and dissenting opinions are reviewed and amended as the process continues. To the extent that a judge remains indifferent to the views of his colleagues, this stems from the individual judge rather than from the process, which is designed to provide a judgment fully reflecting the collegiate character of the Court.

26. Oda, *op. cit. supra* n.10, at p.121; Bedjaoui, *idem*, p.99, who gives three to six weeks as the kind of period involved.
27. See Bedjaoui, *idem*, pp.98–103.

63 But it is slow. Given that the "routine" parts of the judgment—the recitals of fact, the summaries of the arguments of the parties, etc.—are drafted by the Registry staff, the Court itself (even though it closely scrutinises these "routine parts") provides its judgment slowly. For example, in *Qatar* v. *Bahrain* it took three and a half months (arguments closed on 11 March 1994, judgment was given on 1 July) to provide a judgment of 21 pages, of which only seven and a half pages are reasoning. In *Libya/Chad* it took six and a half months (arguments closed on 14 July 1993, judgment was given on 3 February 1994) to give a judgment of 42 pages, of which only 17 pages are reasoning. As a current member of the Court has clearly recognised, for the Court to handle more cases each year, "reform of the deliberation procedure will become inevitable".[28]

64 The judgments of the ICJ are also markedly longer than those of the PCIJ. The average judgment of the PCIJ was 38.2 pages long, and that of the ICJ 60.9 pages long: these figures are based on a comparison over the same ten-year periods as for Table I. The same appears true of advisory opinions: 26.3 pages for the PCIJ, compared with 34.4 pages for the ICJ.[29] Clearly, cases differ in complexity, but over a ten-year period differences ought largely to cancel each other out, and unless it can be shown that the ICJ faces generally more complex cases than the PCIJ, the generalisation seems valid. However, the Study Group would obviously not support a reduction in the length of reasoning in the Court's judgments for its own sake, if this resulted in less thorough consideration of the issues and arguments raised.

G. The Practice as regards Separate and Dissenting Opinions

65 Not all courts allow these, but it is likely that they must remain as part of the judicial process in the International Court. On one view they enrich the jurisprudence considerably.

28. Oda, *op. cit. supra* n.10, at p.126.

29. The statistics should not be treated as entirely scientific; clearly the differences in typefaces etc. will mean that the number of words which constitute a page in the ICJ reports will be different from the number which constitutes a page in the PCIJ reports. No attempt to correct this problem has been made, though, in fact, the number of words per page in the ICJ reports is greater than that for the reports of the PCIJ, so that correction would tend to accentuate the disparity between the length of judgments of the two Courts. In calculating the number of pages, a part of a page is counted as a whole page. A "judgment" for these purposes is what is described by the Court as a judgment rather than an order, e.g. a judgment includes a decision on jurisdiction and admissibility and on an application to intervene, but not a request for provisional measures. It may be worth noting that in respect of orders of the Court there would appear to be more occasions on which the ICJ judges have found it necessary to attach separate opinions than the PCIJ judges.

66 The disquiet usually expressed relates to their length, or their relevance. The comparison between the PCIJ and ICJ over ten years is again illuminating.[30] In the PCIJ there were 59 individual opinions, separate or dissenting, with an average length of 10.5 pages, and spread over 37 decisions. With the ICJ, and spread over only 18 decisions, there were 92 separate and dissenting opinions with an average length of 18.5 pages. Thus separate or dissenting opinions are now more frequent, and longer—a trend which has its origins, it has been suggested, only since the time of Judges Jessup and Fitzmaurice in the 1960s.[31] A practice seems to have developed of allowing judges complete freedom, so that some opinions read like extended essays on some theme or other, perfectly acceptable as a monograph or published article, but questionable in a judicial opinion.[32] Judicial freedom of expression should not be subject to censorship, but it would be a welcome change if the Court returned to the tradition that such opinions should be short, and directed to the points on which the judge differs from the majority. How far the length of these opinions affects the total time taken by the Court to deliver judgment is difficult to assess, but it would seem likely that they add to it, even if only marginally. If that is so, the remedy lies in the hands of the Court itself.

H. The Election of Judges

67 The system of election is a carefully balanced one and, coupled with the "conventions" that have arisen regarding the distribution of seats, seems to work well. Moreover, it does not affect the core issue of the time taken by the Court to deliver judgment save, perhaps, in one respect: this is the absence of any age limit. The experience that comes with age is an advantage that has to be set against the loss of energy and powers of concentration that may accompany old age. It is no surprise that an elderly bench will find a whole day in court, in public or private sittings, tiring and there may be a tendency for some judges to lose concentration during the oral hearings.

68 An age limit of 75 might seem wise. Obviously, people vary and some judges may remain vigorous and fully active beyond this age. However, a rule should cater for the average rather than the exceptional judge, and with this in mind 75 seems right. But even without amending the Statute as such, a less radical change might be achieved if the General Assembly

30. For details see *infra* Table II. Where more than one judge has joined in a single separate or dissenting opinion, for the purposes of these statistics this has been considered as one dissenting opinion (since the object of the exercise is how concisely, or otherwise, decisions and opinions are expressed). The expression "separate opinion" also includes for these purposes individual opinions and observations and declarations appended by individual judges.

31. Oda, *op. cit. supra* n.10, at p.125.

32. But see *idem*, p.126.

were to indicate a general reluctance to elect judges who, at the time of election, would be older than, say, 70. The normal nine-year term would bring them to no more than 79 on retirement.[33]

69 A related issue (into the details of which it is not appropriate for this Report to enter) is the financial, and in particular the pension, regime for judges. To the extent that the judges' pension regime falls below current standards,[34] it may serve to encourage judges to stay on at their full salary rather than retire more readily at an earlier age.

I. The Constitution of Chambers

70 The use of chambers is now well established: it has attracted favourable judicial comment,[35] and the Court itself in 1994 established a chamber specifically to deal with environmental cases.

71 The extent to which the use of chambers assists in expediting the Court's work is very doubtful[36] and will remain so as long as the Court

33. The question of the number of terms for which a judge may seek re-election is different, for it has no necessary connection with age. But there is at least a case for having two full terms as a maximum. Again, this could be achieved without amendment of the Statute if the General Assembly (and possibly the Security Council as well) were to indicate that this was an opinion which would motivate the Assembly in elections.

34. Thus it is understood that whereas the UN Joint Pension Fund has indexation and currency adjustment provisions, the pension arrangements for judges have neither.

35. Schwebel, "*Ad Hoc* Chambers of the ICJ" (1987) 81 A.J.I.L. 831; Oda, "Further Thoughts on the Chambers Procedure of the ICJ" (1988) 82 A.J.I.L. 556–562. For other comments see also McWhinney, "Special Chambers within the International Court of Justice: The Preliminary, Procedural Aspect of the Gulf of Maine Case" (1985) 12 Syracuse J.Int.L. and Commerce 1, and also Letter to the Editor in Chief (1988) 82 A.J.I.L. 797; Zoller, "La première constitution d'une Chambre spéciale par la Cour Internationale de Justice" (1982) 86 R.G.D.I.P. 305; Mosler, "The *ad hoc* Chambers of the International Court of Justice: Evaluation after Five Years of Experience", in Dinstein (Ed.), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (1989); Ostriansky, "Chambers of the International Court of Justice" (1988) 37 I.C.L.Q. 30; Bedjaoui, "Universalisme et régionalisme au sein de la Cour Internationale de Justice: la constitution de chambres 'ad hoc' ", in *Liber amicorum: Colección de estudios jurídicos en homenaje al Prof. Dr. D. José Pérez Montero* (1988). For critical comment see the dissenting opinions of Judges Morozov and El-Khani attached to the Court's order of 20 Jan. 1982 (Constitution of Chamber) in *Delimitation of the Maritime Boundaries in the Gulf of Maine Area (Canada* v. *USA)* I.C.J. Rep. 1982, 3, 11 and 12; and also those of Judges Elias, Tarassov, and Shahabuddeen to the Court's order of 28 Feb. 1990 (Application to intervene) in *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* I.C.J. Rep. 1990, 3 at pp.9, 11 and 18 (respectively).

36. The statistics over the last decade are inconclusive. In *Burkina Faso/Mali* the application to the Court was made on 14 Oct. 1983, and judgment was delivered on 2 Dec. 1986—some three years and two months later; in *USA* v. *Italy (E.L.S.I.)* the application made on 6 Feb. 1987 led to a judgment delivered on 20 July 1989, nearly two and a half years later; and in *El Salvador/Honduras (Nicaragua Intervening)* the application was made on 11 Dec. 1986, and judgment delivered only some five years and nine months later—but the case was, of course, complicated and lengthened by the intervention of Nicaragua.

insists on dealing with only one case at a time: time allocated to a chamber simply means that judges not on the chamber and not residing in The Hague can return home. It must also be remarked that Article 92 of the Rules of Court stipulates that in proceedings before chambers the written proceedings "shall consist of a single pleading by each side". Use of chambers would help the Court to deal with cases more speedily if this rule were applied: but in practice it is not.[37]

72 Obviously, if the idea mooted above were adopted—i.e. the full Court dealing with one case in the morning, and a chamber dealing with a different case in the afternoon—there would be a beneficial impact on the work-rate. So, too, if two chambers (ideally of wholly different composition: but in practice this may be unlikely) worked on two different cases at the same time, with each chamber using half the day for oral arguments.

73 A quite separate idea would be to use a chamber rather than the full Court for review of UN administrative tribunal judgments. Given the increasing pressure on the Court, the wisdom of requiring the whole Court to deal with these reviews is questionable. A more fundamental change would be to remove this role from the Court entirely.[38] One might envisage a review tribunal, comprising members from the various administrative tribunals—UN, ILO, Bank—excluding in any case a member who had participated in the judgment under review. This could be achieved only by a revision of the statutes of the various administrative tribunals.

III. ASPECTS OF THE JURISDICTION OF THE COURT WITH IMPLICATIONS FOR THE COURT'S RESOURCES

74 More has been written on jurisdiction than perhaps on any other aspect of the Court's functioning, and ideas for increasing the Court's jurisdiction have not been wanting. Many of these ideas reveal originality and subtlety of legal technique, and it is tempting to rehearse, and perhaps even suggest improvements to, the ideas on record.

75 However, the Group's feeling is that the basic barrier to increased acceptance of the Court's jurisdiction lies in State attitudes. No amount of

37. Oda, *op. cit. supra* n.10, at pp.60–61.

38. The Court is believed to be "somewhat hesitant" about having to play this appellate role, and divesting the Court of that function is a suggestion already made by a member of the Court: *idem*, p.100.

legal inventiveness will change deep-rooted, political opposition to binding third-party settlement, or to the use of a standing court as opposed to carefully selected arbitrators.

76 The signs are that gradually, and perhaps more from necessity than for any other reason, States are making greater use of the Court. If they do so piecemeal, via special agreements or under the dispute-settlement provisions of treaties, rather than via acceptance of the Court's jurisdiction under the optional clause, in the end it matters little. The important point is that more and more States are using the Court, and in the Study Group's view this trend will be encouraged more by the merits—in terms of fairness, soundness and expedition—of the Court's procedures and judgments than by more ingenious schemes for widening the acceptance of the Court's jurisdiction.

77 There is, however, one aspect of the Court's jurisdiction in relation to which improvements might be made: this is the incidental jurisdiction to authorise intervention. The Court's decision to allow Nicaragua to intervene in the *El Salvador/Honduras* case[39] is to be welcomed, and the Study Group hopes that the full Court will follow this when it has occasion to do so. After the Court's rejection of all previous applications to intervene, there was some basis for fearing that intervention under Article 62 or even Article 63 of the Statute might never be possible. The Court's distinction between cases where the intervenor intervenes as a party—and where a jurisdictional link is required—and cases where the intervention is simply to safeguard a State's legal interests, and where no such jurisdictional link is necessary, is sensible, and helpful.

78 But there would be advantage, now, in spelling out this distinction in the Statute, or perhaps in the Rules, and requiring a State to specify in which capacity it seeks to intervene, so that existing parties know what they are asked to consent to. Then there is the question of timing. Article 81 of the Rules allows intervention "as soon as possible and not later than" the closure of the written pleadings. But, if the intervenor intervenes as a party, this is really too late. As a party it may have a right to an *ad hoc* judge and a right to file pleadings. But the existing parties will need to respond to these so, in a sense, the written pleadings will start all over again when, on the original schedule, they had been completed. There is a clear argument for requiring a State wishing to intervene as a party to do so within a reasonable time after it has seen the initial memorials and annexed documents: but it is faced with the "Catch 22" situation that

39. *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, application by Nicaragua for permission to intervene, judgment of 13 Sept. 1990.

although it can *ask* to see the memorials and annexed documents under Article 53 of the Rules, under Articles 85(1) and 86(1) of the Rules it has no *right* to see the initial memorials and annexed documents until the intervention is allowed. A putative intervening State ought to have the *right* to see the memorials, at least once it had made out a *prima facie* interest in the case. The case could proceed as a three-party dispute from that point, with counter-memorials and any replies/rejoinders taking account of the intervenor's first filing.

79 The situation in which a case has more than two parties is not really anticipated in the Court's Statute and Rules: they are designed for a two-party contest. Yet current disputes—one can think of maritime delimitation disputes in an enclosed sea—could have several parties, and some thought needs to be given to how pleadings should handle the multi-party case when the parties have divergent interests.

IV. STANDING BEFORE THE COURT (ARTICLE 34)

80 The principle reflected in Article 34 of the Court's Statute—that only States may appear before the Court in contentious cases—is long established and it has not been a main focus of criticism. Yet, since neither international personality nor the capacity to bring claims is restricted to States, as the Court itself affirmed in the *Reparations* case, the logic of excluding the United Nations and specialised agencies from using the Court as parties is not self-evident. These organisations are compelled to use arbitration in their disputes with States, or else use the device of the "binding" advisory opinion.[40] From the perspective of the rule of law, this device is evidently inadequate. It is a significant gap in institutional arrangements that public international organisations cannot be held legally accountable to States in the principal judicial organ of the international community, nor can States be held legally accountable to such organisations. This is the more odd in that, in substance, public international organisations are nothing other than States acting collectively.

81 On the other hand, there seems to be little demand for direct standing from the organisations themselves, and there is the difficulty that such a change would require an amendment of Article 34 of the Statute. If disputes between States and international organisations were to go to the ICJ, they would, of course, add to the pressure on the Court's list, and so make it all the more important that the "core" problem identified above

40. This device is used in the system for review of UN administrative tribunal judgments, in disputes arising from the 1946 UN Convention on Privileges and Immunities, the 1986 Vienna Convention on Treaties between States and International Organisations, and the 1988 UN Convention against the Illicit Traffic in Narcotic Drugs. For criticism of the artificiality of this system see Ago (1991) 85 A.J.I.L. 439.

be effectively addressed. In addition, a number of specific issues would have to be faced.

82 Assuming that the necessary amendment to Article 34 could be made, the first is the issue of how, exactly, such jurisdiction would be established. It could be established *ad hoc*, by express consent given by both State and the organisation concerned, for the purposes of a specific dispute. Or it could be a "conventional" jurisdiction, deriving from a compromissory clause in treaties like headquarters agreements, agreements on privileges and immunities, loan agreements, technical assistance agreements, and the like. Or it might be via some protocol to the Statute, defining the range of matters on which direct standing was conferred, which States could accept or not: a form of "optional clause".

83 For the organisations themselves there would be several issues to be resolved.[41] Which organ, or organs, would initiate proceedings? What should be the categories of disputes to be referred to the Court? This is a particularly delicate issue. Conferment of standing would open up a two-way process, so organisations could sue and be sued. The possibility of States using the Court to challenge the constitutionality of decisions by UN organs would have to be considered. Which organs would control the actual conduct of litigation? States might be reluctant to give to the organisation's legal office total discretion, and yet the tactics of litigation are scarcely a matter for public debate: confidentiality would be important. And how would organisations become bound by any decision? By becoming parties to the Statute, under an amended Article 94, or in some other way?

84 Although, in the past, academic criticism of the "only States" provision in Article 34 has sometimes ventured to suggest that individuals should be given *locus standi*, there is no strong support for this idea in current thinking. Indeed, if the contemporary concern is over how the Court can cope with inter-State disputes, it would be counterproductive to compound the problem by opening up the Court to individuals—and there are in any case other fora in which human rights cases by individuals can be pursued.

V. THE ADVISORY JURISDICTION

85 Advisory opinions are part of the overall problem of pressure on the Court's time and resources; but because of key differences between the

41. See Bowett (1992) 86 A.J.I.L. 342. This was an appeal for organisations themselves to take up some of the issues raised by Judge Ago, as part of their contribution to the UN Decade of International Law.

procedure for advisory opinions and for contentious litigation, some separate issues arise. Usually only an initial round of "pleadings" in the form of written observations on the request is offered to interested States,[42] and then a further round to make comments on the observations entered by other States. In the 21 opinions that the Court has handed down since 1948, the average time from request to the rendering of its opinion is 254 days. This period seems to have been lengthening in comparison with earlier periods in the Court's work, though the increasing number of UN members who may wish to submit observations, and the disproportionate effect of the *Yakimetz* case,[43] undoubtedly are an important part of the reason.

86 The handling of advisory opinions by the International Court during the period 1980–1990 is notably slower[44] than during the period 1925–1935 before the PCIJ (though during this ten-year period the International Court dealt with many fewer opinions). Again, there were fewer States making written or oral statements in advisory cases before the Permanent Court. The Court is also to a considerable degree in the hands of the UN Secretariat for the timely receipt of relevant background materials and documentation.

87 It is important that advisory opinions continue to be handled briskly, in terms of the time limits allowed for written statements, the gap before the opening of oral proceedings and the length of time between the closure of oral proceedings and the giving of the opinion.[45] Generally speaking, and even with an increasing number of States wanting to participate, it should be possible to answer a request for an advisory opinion within six to eight months.

88 In principle, the procedures prescribed by the 1976 Resolution concerning the Internal Judicial Practice of the Court apply to advisory proceedings as much as to contentious cases: Article 10. But in practice there are some differences, since in advisory proceedings both pleadings and oral argument tend to be much shorter. In those proceedings where the issue is urgent and relatively simple the preparation of a note may be dispensed with, and in any case the notes and the time given to prepare them are likely to be shorter because the record to be reviewed is less extensive, and the number of questions at issue tends to be fewer than in contentious cases.

42. In four advisory opinions of the ICJ a second round was either ordered or allowed.
43. Which took 990 days from request until opinion; see I.C.J. Rep. 1987, 18.
44. Even discounting the *Yakimetz* case.
45. The figures in fact show a remarkable consistency—with one or two understandable exceptions—in this regard.

89 The practice in relation to advisory opinions, including the short time allowed to States for oral argument, and the short period of time usually elapsing between the conclusion of oral proceedings and delivery of the opinion,[46] indicates that this is a realistic prospect.

90 There are suggestions being made at the present time that increased use should be made of advisory opinions, whether by more frequent recourse by presently authorised organs as a contribution to "settling disputes",[47] or by giving authority to the Secretary General, or by allowing States to request advisory opinions. The Study Group sees considerable difficulty in these proposals, but in any event, if they were adopted, they would clearly have implications for the Court's work-load and the problems of management which are addressed in this Report. In particular the Study Group notes that if any of them are implemented the Court's caseload will become considerably heavier and all the existing problems of management and throughput will become accentuated. Not only will there be yet more cases to contribute to the Court's backlog, but if States are allowed to seek advisory opinions they are unlikely to be satisfied with the time presently allotted to them for entering written observations and the oral phase. Further, if organs are to be encouraged to bring requests for opinions "to resolve disputes", the States that regard themselves as targeted will (if they do not refuse to participate) surely also demand opportunities more extended than those presently afforded to States under Article 66 of the Statute.

91 It is the present practice for advisory opinions to be accorded a certain priority, although the true accelerated procedure provided by Article 103 of the Rules applies only to advisory opinions requested as a matter of urgency. An increased recourse to advisory opinions will thus have implications for the (already often long-delayed) bringing on of the oral hearings in contentious cases before the Court. If the use of opinions becomes more general, it may be that priority should henceforth be given only to

46. A mere 15 days in the 1950 advisory opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*; and a mere eight days in the 1988 advisory opinion on the *Applicability of the Obligation to Arbitrate under s.21 of the UN HQ Agreement of 26 June 1947.*

47. See UN Doc.A/45/1, 16 Sept. 1990, Pt.III, p.7; A/46/1, 16 Sept. 1991; A/47/277, S/24111, 17 June 1992; GA Res.43/51, para.15, 15 Dec. 1988; *I.C.J. Yearbook (1990–91)*, pp.204–219. See also speech of President Bedjaoui at the UN Congress on International Law, 14 Mar. 1995: "Les resources offertes par la fonction consultative de la Cour Internationale de Justice, bilan et perspectives."

those urgently needed for organs of the United Nations to be able to carry out their functions.

VI. WRITTEN PLEADINGS AND DOCUMENTATION

92 Article 52 of the Statute and Article 56 of the Rules envisage the filing of documents after the close of the written pleadings, and the latter says that the Registry shall communicate the new (and late) document to the other party and "inform the Court". If this means that the actual document is disclosed to the judges, then the point of any objection to the late document is largely lost, because the judges will have seen it. It is, however, understood to be the usual practice for the Registry merely to inform the judges what the disputed documents are, but without revealing their contents (except sometimes to the President): but it has sometimes (though rarely) happened that the Court has decided that it cannot rule on the admission of the document without seeing it, thus giving rise to the problem adverted to. A way to avoid this would be to require the Registry to withhold communication to the Court until the other party's position is known and, if this is an objection, to allow the President alone to see the document for the purpose of deciding whether it should be admitted.

93 A different concern arises from the role of the Registry with regard to the task of ensuring that any filing by a party conforms to the Rules, especially with regard to the submission of documents. Article 50, paragraph 1 of the Rules provides: "There shall be annexed to the original of every pleading certified copies of any relevant documents adduced in support of the contentions contained in the pleadings."

94 The current view of the Registry appears to be that compliance with this rule is a matter for the parties, not the Registry. In other words, it is for the other party to verify whether documents are missing and, if so, to pursue the matter. The difficulty with this approach is that time runs from the date of filing, so that with a limited time in which to prepare and file its counter-memorial, reply or rejoinder, a party is handicapped by not having seen documents referred to in its opponent's pleading (and therefore clearly adduced "in support of the contentions contained in the pleadings"), and perhaps not having sight of them until very late in its preparation of a reply.

95 It is difficult to understand why ensuring compliance with the Rules should not be the task of the Registry. A faulty filing could then be recti-

fied on the initiative of the Registrar, and without needing to involve the parties in long, and possibly acrimonious, correspondence, with the Registry acting as little more than a post-box.

96 The problem of too much documentation is different. It is probably true that with the facilities for photocopying available today it is all too easy for States to file voluminous annexes which, in the event, are scarcely relevant. It is not easy to see how the Court can control a party's freedom to annex documentation in advance of the hearings, for relevance will depend upon the argumentation made. Thus it is the parties who need to exercise restraint.

97 There is, however, the separate question of the subsequent publication of the documentation supplied by the parties. The present practice is that, except for cases withdrawn before decision,[48] *all* the documentation is usually eventually published in the *Pleadings Series*. This is extravagant, and there may be a case for the Registry seeking to agree with a party, after the case is over, that some documents need not be reproduced in the published pleadings.[49]

VII. THE PROVISION OF EVIDENCE

98 By and large, the Court relies on the parties to provide all necessary evidence, although the Court has the power to make an on-site inspection[50] and to appoint its own experts.[51] The Court's difficulties will most frequently arise when one party does not appear,[52] or, having appeared to contest jurisdiction, declines to appear on the merits.[53] Exceptionally, the difficulty may stem from the fact that a State is not a party, although very much involved in the subject matter of the litigation.[54]

99 However, the difficulties in the way of giving to the Court an independent fact-finding power are considerable. Who would act as "investigator"

48. However, in relation to *Finland* v. *Denmark (Passage through the Great Belt)* the memorial and counter-memorial will appear in the Court's *Pleadings Series*, see Koskinniemi, "L'Affaire du Passage par le Grand-Belt" (1992) XXXVIII A.F.D.I. 405, 406.

49. The Court has on occasion sought agreement with the parties to do this where the documentation was excessively voluminous: see Bedjaoui, *op. cit. supra* n.10, at p.92.

50. Rules, Art.66. The procedure is not often used. Guyomar, *op. cit. supra* n.19, at pp.424–429 cites no instance of its use by the ICJ.

51. Rules, Art.67. And see White, *The Use of Experts by International Tribunals* (1965), pp.43–49.

52. See Arangio-Ruiz, "Non-Appearance before the ICJ", *Annuaire de l'Institut de D.I.* (1991), Vol.64-I, pp.193–376, esp. the sixth *considerandum* to the Resolution, at p.374.

53. See the dissenting opinion of Judge Schwebel in *Case concerning Military and Paramilitary activities etc.* I.C.J. Rep. 1986, 321–331.

54. See the separate opinion of Judge Fitzmaurice, referring to the absence of Canada, in the *Barcelona Traction Case: Second Phase* I.C.J. Rep. 1970, 80, para.28.

on behalf of the Court? Would a State declining to appear—or not a party, as such—be likely to co-operate?

100 On balance, there seems little alternative to leaving matters as they stand. Litigants must accept the risks of evidence being unobtainable.

VIII. COURT FACILITIES

101 Although the Court's main courtroom is adequate for oral argument, it is poorly equipped for complex boundary cases, or indeed any other case in which a party might wish to use some form of visual display—maps, charts, diagrams, illustrations of texts, etc. Usually parties import their own technology, often at great expense, and it could be said that the time has come for the Court to provide such equipment so that a party may use it, if it chooses to.

IX. RECOMMENDED CHANGES

102 There is an understandable reluctance on the part of governments to contemplate revision of the Statute of the Court which, since it is an integral part of the Charter, could open the door for much wider and more politically controversial matters. However, not all the changes suggested in this Report need such revision. Most of the changes could, for example, be made within the Rules, or by practice direction issued by the Court, or by General Assembly resolution, or even by an optional agreement (consistent with the Statute) to which some States would be party and which would bind only themselves in their relations with the Court.

103 The suggestions for change made in this Report can conveniently be grouped together according to the appropriate ways in which they could be effected.

104 *Amendment of the Rules of the Court*

(1) Requiring a State wishing to intervene to specify whether it seeks to intervene as a party or simply to safeguard its legal interests.
(2) Allowing a State which can establish *prima facie* that it has an interest in the case to have sight of the memorials and annexed documents in the case, and requiring a State wishing to intervene to do so within a reasonable time after it has seen the initial memorials.
(3) Making proper provision for multi-party litigation.
(4) Requiring the Registry to ensure that written pleadings conform to Article 50 of the Rules.
(5) Modifying Article 56 of the Rules (on "late" documents), so that any such document as might be filed should not be communicated by the Registry to the judges until it is known that the other party does not object, and if it does object the Registry should show it only to the President for a decision whether it can be admitted even though late.

105 *Amendment to the Court's internal judicial practice, or other internal direction as to the Court's procedure*

(6) Requiring judges, on the basis of the written pleadings, to prepare a note on the issues raised, so that the Court can agree a list of issues raised before the start of the oral hearings.

(7) Requiring the Court to plan its schedule of oral hearings as far in advance as reasonably possible, and in any event to hold the oral hearings no more than six months after the closure of written pleadings.

(8) Requiring parties, where possible, to shorten the time required for their oral presentations.

(9) Establishing the practice for the Court to sit in both the morning and the afternoon when hearing oral argument; or when sitting during the morning for oral argument, to devote the afternoon to private deliberations on another case or to oral hearings by a chamber in another case.

(10) Encouraging judges to abbreviate the notes which they at present prepare in the course of the elaboration of the judgment.

(11) Requiring judges delivering separate or dissenting opinions to keep them short, and directed to the points on which the judge in question differs from the majority.

(12) Requiring the Registry to seek to agree with the parties, after a case is over, that some documents need not be reproduced in the published proceedings.

106 *Administrative measures*

(13) Employing more temporary staff during the oral hearings so as to ensure that if (see recommendation (9) above) the Court sits both morning and afternoon, the interpretation and reproduction of the daily verbatim records can keep up with the Court's requirements.

(14) Making arrangements for the Court to have its own visual demonstration facilities, for use by the parties in presenting oral arguments.

107 *General Assembly resolutions*

(15) Stating that the Assembly will be reluctant to elect as judges persons who at the time of election are older than a stated age (say, 70). (The Security Council, which is also involved in the electoral process, might also adopt a similar resolution.)

(16) Stating that the Assembly will be reluctant to elect a person as judge who has already served two full terms. (Again, the Security Council might act to similar effect.)

(17) Amending the present provision in the Statute of the UN Administrative Tribunal (GA Resolution 351A(IV) of 24 November 1949 as subsequently amended) for the Court to have jurisdiction in certain

appeals from the Tribunal, so as in future to require appeals to be heard by a chamber of the Court (in conjunction with action by the Court under Article 26(1) of the Statute), or, more radically, to replace such appeals to the Court by a new appellate system separate from the Court. (In relation to appeals to the Court from the ILO Administrative Tribunal, a decision of the ILO General Conference would seem to be necessary to amend that Tribunal's Statute.)

108 *Amendment of the Statute of the Court*

(18) Giving international organisations standing in contentious cases.

(19) Other matters which could be dealt with in other ways could of course be the subject of a new or amended provision in the Statute if that were thought appropriate (e.g. questions relating to intervention pursuant to Article 62 or 63 of the Statute, and aspects of the election procedure for judges).

109 *Other treaty provision, or optional protocol to the Statute*

(20) Making provision for establishing the modalities of the Court's jurisdiction in contentious cases involving international organisations (if the necessary change to Article 34 of the Statute were first made).

(21) [Possibly] establishing a new tribunal to replace the Court's present function in reviewing decisions of certain administrative tribunals, if co-ordinated amendment of the relevant instruments currently providing for this aspect of the Court's jurisdiction were considered insufficient.

110 *Next steps*

A practical suggestion for moving matters forward is that the General Assembly should be invited to adopt a resolution which would, after suitable preambular paragraphs:

(a) take the decisions which are appropriate for it to take (i.e. recommendations (15) and (16) and the UN's part in (17));

(b) invite the Court to give urgent consideration to the various matters which are within the Court's powers to decide; and

(c) invite other bodies involved in recommendation (17) to join in discussions with a view to establishing a separate review tribunal.

Annex 125

T. Buergenthal, *Law-making in the International Civil Aviation Organization*, 1969, Part III

Law-Making in the International Civil Aviation Organization

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SYRACUSE UNIVERSITY PRESS

Part III

ICAO and the Settlement of International Civil Aviation Disputes

Introduction

The Convention on International Civil Aviation and its two companion agreements—the International Air Services Transit Agreement and the International Air Transport Agreement—establish an elaborate machinery for the settlement of disputes between the Contracting States. In addition, a host of international aeronautical agreements, both multilateral and bilateral, confer arbitral jurisdiction on the ICAO Council or some other body established by the Organization.

This machinery for the settlement of international aviation disputes has been invoked on very few occasions.[1] It may well be that the very existence of this adjudication procedure has been a contributing factor in encouraging the Contracting States to resolve their differences without resorting to it. The availability of international tribunals with jurisdiction to hear a particular dispute no doubt discourages the uncompromising assertion of questionable legal claims. States often have little to gain politically and a great deal to lose economically by engaging in lengthy litigation of international aviation disputes. They are thus probably more willing to resolve these disagreements through the ordinary diplomatic processes. It may also be that many states doubt that a political body such as the ICAO Council would be able to exercise adjudicatory functions with

[1] The dispute between the United Kingdom and Spain, which was referred to the ICAO Council for adjudication on 6 September 1967, could not be discussed in this study because the case has not as yet been decided and because most documents relating to it have thus far not been published. It is known, however, that in this dispute the United Kingdom, in reliance on Article 9 of the Convention, has challenged the legality of a prohibited area established by Spain in the vicinity of Gibraltar. See Annual Report of the Council to the Assembly for 1967 (hereinafter cited as [1967] Report of the Council), ICAO Doc. 8724 (A16–P/3), p. 116 (1968).

the requisite judicial impartiality. Not to be overlooked, furthermore, is the fact that the ICAO Council itself has shown very little enthusiasm for the exercise of the judicial functions that have been conferred upon it. Finally, the dispute-settling machinery established by the Convention and the Transit and Transport Agreements is by no means a model of legal draftsmanship. It leaves too many important questions unresolved, and these uncertainties may well have discouraged some states from resorting to it, lest they find themselves embroiled in lengthy litigation costlier than the object of the dispute. The sparse literature on this subject has, furthermore, done little to dispel these doubts.

Accordingly, it may be of value to analyze the provisions of various international agreements which vest arbitral powers in ICAO, and to explore the manner in which the Council has and might exercise them.

Settlement of Disputes under the Chicago Acts

Under the Convention on International Civil Aviation

The Convention on International Civil Aviation confers on the ICAO Council extensive judicial functions for the settlement of disputes between the Contracting States.[2] Under Chapter XVIII (Arts. 84–88) of the Convention, the Council is empowered to adjudicate any disagreement between two or more Contracting States relating to the interpretation or application of the Convention and its Annexes which cannot be settled by negotiation.[3] The Council is vested with jurisdiction to decide such a dispute "on the application of any State concerned in the disagreement."[4] Its deci-

[2] See, on this subject, Erler, Rechtsfragen der ICAO: die Internationale Zivilluftfahrtorganisation und ihre Mitgliedstaaten 185–96 (1967); Cheng, The Law of International Air Transport 100–05 (1962) [hereinafter cited as Cheng]; Hingorani, *Dispute Settlement in International Civil Aviation,* 14 Arb. J. 14 (1959) [hereinafter cited as Hingorani]; Mankiewicz, *Organisation Internationale de l'Aviation Civile,* [1957] Ann. Français de Droit International 383 [hereinafter cited as Mankiewicz]; Kos-Rabcewicz-Zubkowski, *Le Règlement des differends internationaux relatifs à la Navigation aérienne civile,* 2 Rev. Française de Droit Aérien 340 (1948) [hereinafter cited as Kos-Rabcewicz-Zubkowski]; Domke, *International Civil Aviation Sets New Pattern,* 1 Int'l Arb. J. 20 (1945) [hereinafter cited as Domke].

[3] Convention, Art. 84.

[4] *Ibid.*

sion may be appealed either to the International Court of Justice or to an *ad hoc* international tribunal,[5] whose judgment "shall be final and binding." [6] The Convention provides two types of sanctions for non-compliance with these decisions. The first applies to cases of non-compliance by airlines. Here, if the Council renders a decision noting such non-compliance, each Contracting State is under an obligation to bar the airline in question from operating through the airspace above its territory.[7] The second type of sanction applies to states. If they are found to be in default of their obligations, the ICAO Assembly must suspend their voting power both in the Assembly and the Council.[8]

Jurisdiction

By adhering to the Convention, each Contracting State has recognized the compulsory jurisdiction of the Council to adjudicate disagreements between it and any other party to the Convention. This jurisdiction is subject to four conditions, however.[9] First, there must be a disagreement between the parties. Second, this disagreement must relate to the interpretation or application of the Convention or its Annexes. Third, only a Contracting State "concerned in the disagreement" can refer the case to the Council for adjudication. Finally, before the Council may assume jurisdiction to decide the case, it must appear that the disagreement "cannot be settled by negotiation." A showing that any one of these requirements is absent would necessarily divest the Council of jurisdiction to hear the case.

The Disagreement

Since Article 84 of the Convention empowers the Council to decide disagreements between the Contracting Parties, its jurisdiction is necessarily limited to contentious as distinguished from advi-

[5] Convention, Arts. 84, 85. While the Convention refers to the Permanent Court of International Justice, it is clear that the International Court of Justice is to be regarded as the judicial institution contemplated by the Convention to exercise this function. See ICAO Doc. 4039 (A1–CP/12), p. 22 (1947). See also, I.C.J., Statute, Art. 37.

[6] Convention, Art. 86.

[7] Convention, Art. 87.

[8] Convention, Art. 88.

[9] Convention, Art. 84.

sory proceedings. The term "disagreement," although not defined in the Convention, is no doubt synonymous with what in other international agreements is referred to as a "dispute." According to the International Court of Justice, to make out a case that a justiciable dispute exists, "it must be shown that the claim of one party is positively opposed by the other." In the Court's view ". . . it is not sufficient for one party to a contentious case to assert that a dispute [disagreement] exists with the other party. . . . Nor is it adequate to show that the interests of the two parties to such a case are in conflict." [10] A disagreement within the meaning of the Convention could therefore be characterized as a dispute between two or more Contracting States, in which one state asserts a legal right or claim against another state that contests the validity of the claim.[11]

Jurisdiction over the Subject Matter

The requirement of Article 84 that the disagreement relate to the interpretation or application of the Convention or its Annexes goes to the jurisdiction over the subject matter of the dispute. While this is a basic jurisdictional requirement, a plea based on it will not always be disposable at the procedural stage of the proceedings unless the complaint on its face relates quite clearly to some other subject matter.[12] It may be assumed that complaints *prima facie* devoid of any such jurisdictional basis will rarely be submitted to the Council. The Council may, therefore, in some cases be unable to dispose of an objection based on this ground without examining the

[10] South West Africa Cases (Preliminary Objections), [1962] I.C.J. Rep. 319, 328.

[11] In this connection, see Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, [1950] I.C.J. Rep. 65, 74 (advisory opinion), where the Court reasoned as follows:

> Whether there exists an international dispute is a matter for objective determination. . . . There has . . . arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.

[12] For the form and contents of the application (complaint) to the Council under Chapter XVIII of the Convention, see ICAO Council, *Rules for the Settlement of Differences* [hereinafter cited as 1957 Rules], Art. 2, Doc. 7782 (1959). These Rules were approved by the Council on 9 April 1957.

merits of the case.[13] In doing so, it may find that the dispute or, what is more likely, some of its elements are outside the scope of its jurisdiction.

Here it should be remembered that the jurisdiction of the Council to decide disputes between the Contracting States is not limited to those that arise under the Convention, for various other multilateral and bilateral international agreements relating to international civil aviation also bestow adjudicatory functions on the Council. Since a dispute submitted to it may thus call for the interpretation or application of more than one of these agreements, and since the scope of the Council's judicial powers varies under these agreements, substantial jurisdictional significance attaches to the various elements comprising a given dispute.

Standing

The Council acquires jurisdiction under Article 84 only if the dispute has been submitted to it by a Contracting State "concerned in the disagreement." This requirement resembles the notion of "standing" which has been developed in domestic law to bar suits by persons lacking a recognizable interest in their adjudication. A Contracting State will therefore have to show that the action or inaction on the part of another Contracting State violates or directly and adversely affects its rights under the Convention or one of the Annexes thereto.[14]

[13] 1957 Rules, Art. 5 deals with objections to the jurisdiction of the Council. While Art. 5(3) provides that "upon a preliminary objection being filed, the proceedings on the merits shall be suspended," it is submitted that this provision can have reference only to those instances where a plea to the jurisdiction can in fact be decided at the preliminary stage. That this is not always possible is evidenced by the practice of the Permanent Court of International Justice and the International Court of Justice. These tribunals have on numerous occasions found it necessary to consider the merits of the case before deciding the jurisdictional plea. See Shihata, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION 113–16 (1965); Rosenne, THE INTERNATIONAL COURT OF JUSTICE 348–59 (1957) [hereinafter cited as Rosenne]; Hudson, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920–1940, at 418 (1943) [hereinafter cited as Hudson]. In fact, Article 62(5) of the Rules of the International Court of Justice codifies this practice. See, *e.g.*, Case Concerning the Administration of the Prince von Pless (Preliminary Objection), P.C.I.J., Ser. A/B, No. 52, p. 15 (1933). See also, Shihata, *op. cit. supra*, at 114; Rosenne 350.

[14] See South West Africa Cases (Judgment), [1966] I.C.J. Rep. 6.

Moreover, the applicant state will have to show that it is a *party* to the dispute. This requirement is implicit in the notion of standing as articulated in the Convention, even though Article 84 speaks of a Contracting State "concerned in the disagreement" rather than of one that is a "party" to it. A state can be "concerned in" a "disagreement" with another state only if there is a disagreement within the meaning of the Convention which "cannot be settled by negotiation." This in turn presupposes that the applicant state has previously addressed to the respondent, through diplomatic channels, a legal claim that the latter has refused to honor.[15] In other words, some sort of diplomatic confrontation—some sort of negotiations—must have taken place between the applicant and the respondent before the former may submit the matter to the Council. If that has not been done, the applicant cannot be said to be "concerned in the disagreement," for it has no justiciable disagreement with the respondent state.[16] One may accordingly conclude that a state has no standing to submit to the Council a disagreement between two other states, unless it too was a party to the negotiations between them.

It might be argued, of course, that this proposition overlooks the fact that one state may be profoundly affected by a dispute between two other states and that its interests may, for all practical purposes, be identical with those of one of the disputing parties. To require this state to join the negotiations merely to enable it to submit the case to the Council might appear to be unduly formalistic. The answer to this argument is that there is considerable wisdom in letting the parties decide when to submit their dispute to adjudication, because their negotiations—even if otherwise unsuccessful—may enable them to narrow or define the issues of their dispute. It must also be recognized that a state may, for political reasons, be unwilling to accede to the demands of one state, although it might be prepared to comply with these same demands if made by another state.

Admittedly, there may be cases where it would make little sense to require a state to go through the motions of negotiations merely to establish itself as a party concerned in the disagreement. This would be true of a dispute which had been the subject of protracted

[15] See Case of the Electricity Company of Sofia and Bulgaria (Preliminary Objection), P.C.I.J., Ser. A/B, No. 77, p. 83 (1939).

[16] See ICAO Doc. GE/RSD/WD#3, p. 14 (1955).

and unsuccessful negotiations or discussions within the ICAO Assembly, for example. In cases of this type, there no longer exist any compelling reasons for denying any interested Contracting State the right to submit the dispute to the Council, particularly when such parliamentary diplomacy has crystallized the issues of the dispute and demonstrated the futility of further direct negotiations by individual states.[17] "Diplomacy by conference or parliamentary diplomacy," the International Court of Justice emphasized in 1962, "has come to be recognized in the past four or five decades as one of the established modes of international negotiation." [18]

That a Contracting State seeking to refer a dispute to the ICAO Council under Article 84 of the Convention must itself have been a party to the negotiations finds support in the Council's disposition of Afghanistan's complaint against Pakistan. This complaint was directly related to the India-Pakistan dispute of 1952, which will be discussed below. Here it is only relevant to note that after India formally invoked Article 84,[19] Afghanistan addressed a communication to the ICAO Council [20] in which it charged that Pakistan was illegally interfering with flights between India and Afghanistan. Although this complaint contained allegations identical in substance to those made by India, the Council concluded that it could not be regarded as an application for the settlement of a disagreement within the meaning of Article 84. If Afghanistan wished to file such an application, the Council stated in a note addressed to that country, Afghanistan would have to furnish the Council, *inter alia* "with a more detailed and explicit statement . . . of the extent to which efforts have been made to settle *its* disagreement with the Government of Pakistan." (Emphasis added.)[21] Since the Indian application, which was found to be *prima facie* in order, spoke of unsuccessful negotiations between that country and Pakistan, it is apparent that the Council believed that Afghanistan lacked the

[17] See South West Africa Cases (Preliminary Objections), [1962] I.C.J. Rep. 319, 346.

[18] *Ibid.* On this subject generally, see Sohn, *The Function of International Arbitration Today,* 108 Recueil des Cours 9, 12–14 (1963); Jessup, *Parliamentary Diplomacy: An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations,* 89 Recueil des Cours 185 (1956).

[19] The Indian Application can be found in ICAO Doc. C–WP/1169 (1952).

[20] ICAO Doc. C–WP/1222 (1952).

[21] ICAO Council, 16th Sess., Doc. 7291 (C/845), p. 195 (1952).

requisite standing to file its application against Pakistan because Afghanistan had not made a preliminary showing that it was a party to those negotiations.[22]

Prior Negotiations

Before the Council can assume jurisdiction to decide a dispute, it must appear that it "cannot be settled by negotiation." [23] This requirement corresponds in some measure to the principle found in domestic administrative law that a controversy must be ripe for adjudication, which usually means that all available administrative remedies must have been exhausted before the courts will assume jurisdiction. On the international plane, the requirement of prior negotiations, if made a jurisdictional prerequisite,[24] is designed to prevent unnecessary litigation between states and to narrow the issues of their dispute.

Under Article 84 of the Convention, a preliminary showing that prior negotiations to settle the dispute have failed has a dual jurisdictional significance. The first relates to the issue of standing. It has already been discussed in connection with the question whether a state which has a vital interest in a dispute between two other Contracting States can submit the case to the Council without having itself become a party to their negotiations. The other jurisdictional significance of the requirement of prior negotiations has to do with the content or nature of these negotiations.

In principle, the ICAO Council lacks jurisdiction to decide a case submitted to it by a state that has made no effort, beyond going through certain diplomatic formalities, to enter into *bona fide* negotiations with the respondent state. As a practical matter, however, a plea based on this ground will rarely—if ever—succeed, because such an allegation is extremely difficult to prove. Moreover, the Council cannot and probably should not substitute its judgment for that of the applicant state in deciding whether the dispute could

[22] In this connection, see 1957 Rules, Art. 2, which also proceeds on the assumption that only a party to the dispute may submit the case to the Council under Article 84 of the Convention.

[23] Convention, Art. 84.

[24] It is generally assumed that no rule of customary international law compels negotiations as a condition precedent to the submission of a dispute to an international tribunal. See Simpson & Fox, INTERNATIONAL ARBITRATION 126 (1959) [hereinafter cited as Simpson & Fox]; Hudson 413. Various international agreements do impose this requirement, however.

have been settled by negotiations, for in the final analysis that decision is political in nature. This was recognized by the Permanent Court of International Justice which, in rejecting a similar plea to its jurisdiction, emphasized that ". . . in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation." [25]

In determining, for strictly jurisdictional purposes, when a dispute is one that cannot be settled by negotiations, it is reasonable to assume that the respondent cannot defeat the Council's jurisdiction by simply asserting, at some stage of the proceedings, that it is prepared to reach a friendly settlement. This decision must be made by reference to the situation as it existed at the time the case was submitted to the Council for adjudication.[26] If at that stage the negotiations were deadlocked, the Council's jurisdiction will have vested.

The requirement of prior negotiations does not necessarily demand that the parties engage in direct negotiations. It could undoubtedly also be satisfied by negotiations carried on in a parliamentary or conference forum, provided both parties to the dispute participated therein on opposite sides.[27] The dispute between the United States and Czechoslovakia over the launching of balloons demonstrates how, within the ICAO framework, parliamentary diplomacy can take the place of direct negotiations.

In January of 1956 the Government of Czechoslovakia informed ICAO that leaflet-carrying balloons released in other countries were observed in its airspace. It charged that these balloons were a hazard to air navigation, that this action violated Articles 1 [28] and 8 [29] of the Convention, and requested the Council to take all neces-

[25] Case of the Mavrommatis Palestine Concessions, P.C.I.J., Ser. A, No. 2, p. 15 (1924).

[26] See South West Africa Cases (Preliminary Objections), [1962] I.C.J. Rep. 319, 344.

[27] *Id.* at 346.

[28] Convention, Art. 1 provides that "the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

[29] The relevant part of Article 8 of the Convention reads as follows: "No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization."

sary measures to have it stopped.[30] A few months later the United States, in response to an ICAO inquiry, informed the President of the Council that the U.S. Air Force had discontinued the launching of large weather balloons from the Federal Republic of Germany and that the U.S. ". . . understood that the Free Europe Committee, a privately sponsored enterprise, was limiting itself to the use of balloons of characteristics approximating those of the standard radiosonde balloons, which had never been considered to constitute a hazard to aircraft, even in dense traffic areas." [31] Czechoslovakia promptly reiterated its charges, alleging further violations of its airspace, and again urged the Organization to "take effective steps, vis-à-vis the Governments concerned" to end this practice.[32]

When the ICAO Assembly convened a month later the Czech Delegation, after noting that the Council had made no reference to the balloon controversy in its report to the Assembly, introduced a draft resolution with an explanatory memorandum restating its previous charges, and alleging that a Czech aircraft had crashed after colliding with one of the balloons in question.[33] The preamble to the Czech draft resolution defined a balloon as a pilotless aircraft which, under the Convention, may not be flown over the territory of a Contracting State without its authorization. The operative clause of the resolution "invited" all Contracting States ". . . to refrain from sending uncontrolled balloons over the territory of other States who gave no authorization thereto, and to prevent such activity on the part of persons, organizations or other subjects over which they exercise their sovereignty." [34]

This document died in the Executive Committee of the Assembly, where the United States Delegation took issue with the legal assumptions of the draft resolution and the factual allegations set forth in the Czech explanatory memorandum. And, while expressly refusing to move for an adjournment of the debate, the Delegate of the U.S. indicated that he would welcome such a motion because, apart from the safety aspect of this question which was already before the Council, ICAO was not the proper forum for dealing with

[30] [1956] Report of the Council, ICAO Doc. 7788 (A11/P/1), p. 49 (1958).
[31] As reported in ICAO Doc. C–WP/2371, p. 2 (1957).
[32] *Ibid.*
[33] ICAO Doc. A10–WP/87 (EX/24) (1956).
[34] *Id.* at 6.

the other aspects it raised.[35] A motion to adjourn the debate was promptly introduced by the Philippines. It was adopted by 13 votes to 8, with 24 abstentions.[36]

Czechoslovakia thereupon brought the matter formally to the attention of the ICAO Council.[37] In the Council, Czechoslovakia argued among other things that the balloons which were being released by the Free Europe Committee were larger than meteorological balloons and that, even if they were not, they were in a different category and that their release consequently violated the Convention. Invoking Articles 54(j) [38] and 55(e) [39] of the Convention, Czechoslovakia requested the Council to take effective steps against the release of these balloons.[40] In reply, the U.S. Representative denied the Czech assertion that the U.S. Air Force had launched espionage balloons over Czechoslovakia and that the Free Europe Committee was a U.S. Government agency.[41] Following a lengthy debate, the Council took no action on the Czech complaint beyond instructing the ICAO Secretary General to prepare a study "to establish the actual facts on aspects of the situation falling within the scope of the Convention. . . ." [42]

While this study was still in progress, the U.S. Representative notified the President of the ICAO Council that the Free Europe Committee had discontinued its balloon-launching program.[43] At the subsequent Council meeting the U.S. Representative furthermore stated that to his Government's knowledge no other leaflet balloons were being launched by any U.S. citizens or Government agencies.[44] But when the Czech Representative asked whether the U.S. Repre-

[35] ICAO Assembly, Executive Committee, 10th Sess., Doc. A10–WP/150 (MIN. EX/1–17), pp. 138–39 (1956).

[36] *Id.* at 142.

[37] See ICAO Docs. C–WP/2248 (1956) and C–WP/2251 (1956).

[38] Convention, Art. 54(j), requires the Council to "report to contracting States any infraction of this Convention."

[39] Under Convention, Art. 55(e), the Council may "investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable."

[40] ICAO Council, 29th Sess., Doc. 7739 (C/894), pp. 36–38 (1956).

[41] *Id.* at 39.

[42] *Id.* at 33–34.

[43] ICAO Doc. C–WP/2350 (1957).

[44] ICAO Council, 30th Sess., Doc. 7766 (C/897), p. 36 (1957).

sentative was "prepared to give the Council a firm assurance that the release of free balloons would not be renewed in [the] future," the latter replied that ". . . he would be happy to supply the Representative of Czechoslovakia with a copy of the statement he had read, which contained all the information his office had on this problem. Beyond that he had nothing further to say at this time." [45] Since the Secretary General's study was not as yet before it, the Council decided to take no action until his report had been received.

A few weeks later this study was presented to the Council.[46] In it the Secretary General concluded, *inter alia,* that "the launching of the balloons in question contravenes the provisions of the Convention as mentioned above [Articles 1, 3(c) and 8]. . . ." He reserved judgment, however, on "the question of specific responsibility in respect thereof." [47] For its part, the U.S. submitted a memorandum to which was attached a lengthy brief prepared by counsel for the Free Europe Committee. The brief described the activities of that organization, its balloon-launching program, and its views on the legal and technical aspects of the controversy.[48] The U.S. memorandum, after calling attention to the fact that Czechoslovakia had filed a diplomatic claim against the U.S. seeking damages for the loss of its aircraft, submitted that in view of these developments it would be improper for the Council to consider the questions raised by the report of the Secretary General.[49] The Representative of Czechoslovakia urged, on the other hand, that the Council was duty-bound to adopt a resolution similar to the one his Government had previously introduced in the Assembly.[50] This the Council was not prepared to do. Having been assured by the U.S. that the Free Europe Committee had discontinued its balloon-launching program, the Council decided merely to consider this matter again during its next session.[51]

Thereafter, in November of 1957, the Representative of Czechoslovakia informed the Council that no balloons had been observed in Czechoslovak airspace since March, 1957. This notwithstanding,

[45] *Id.* at 37–38.
[46] ICAO Doc. C–WP/2371 (1957).
[47] *Id.* at 8.
[48] See ICAO Doc. C–WP/2402, Appendix A (1957).
[49] ICAO Doc. C–WP/2402, pp. 1–2 (1957).
[50] ICAO Council, 30th Sess., Doc. 7766 (C/897), p. 116 (1957).
[51] *Id.* at 121–23.

however, he urged the Council to adopt a general resolution to ensure against future balloon launchings.[52] While the Council agreed that ICAO should explore the legal and technical problems bearing on the release of balloons across international boundaries, it concluded that such a study should not be linked to the specific case under consideration.[53] This case having become moot, the Council decided "to take no further action on the particular request made by the Government of Czechoslovakia." [54]

In 1960, Czechoslovakia again informed the Council that balloons launched from the territory of the Federal Republic of Germany had penetrated Czechoslovak airspace.[55] Taking note of these charges and the assurances received from the Federal Republic that it was making every effort to prevent this practice, the Council finally adopted a resolution in this matter. In its operative part, the Council

> DECLARES that the flight of uncontrolled balloons not released under appropriate safeguards and conditions may constitute a definite hazard to the safety of air navigation;
>
> DRAWS THE ATTENTION of Contracting States to Article 8 of the Chicago Convention; and
>
> URGES Contracting States to take whatever action they may deem appropriate or necessary to ensure the safety of flight.[56]

Although the ICAO Council did not regard the Czech complaint against the U.S. as an application for adjudication under Article 84 of the Convention because Czechoslovakia had not invoked that provision, this case demonstrates, albeit only partially, that parliamentary diplomacy within the ICAO framework could readily satisfy the requirement of Article 84 for prior negotiations. Here, of course, one could argue that the two Governments were still engaged in bilateral diplomatic negotiations,[57] and that the Council lacked

[52] ICAO Council, 31st Sess., Doc. 7815 (C/900), p. 111 (1957).
[53] *Id.* at 111–19.
[54] *Id.* at 108.
[55] ICAO Council, 40th Sess., Doc. 8078 (C/924), p. 61 (1960).
[56] *Id.* at 59–60. This resolution was unanimously adopted.
[57] See *U.S. Replies to Czechoslovak Charges Concerning Free Europe Committee Balloons,* 38 Dep't State Bull. 1010 (1958).

jurisdiction to hear the case under Article 84 until these negotiations had been unsuccessfully concluded.

At various stages of the discussion the issues separating the parties were, however, rather clearly drawn. The U.S. denied the Czech charges that the balloons were a hazard to air navigation, that their launching violated the Convention, and that the U.S. was responsible for the activities of the Free Europe Committee. The Government of Czechoslovakia demanded assurances that no further balloons would be released into its airspace; the U.S. refused to give them. Hence, if both sides had remained adamant in their respective positions, and if Czechoslovakia had thereupon referred the dispute to the ICAO Council under Article 84 of the Convention, it could properly have pointed to the proceedings in the Council and Assembly to sustain the jurisdictional requirement that the dispute "cannot be settled by negotiation."

The Role of the ICAO Council

In examining the manner in which the Council discharges its functions under Article 84 of the Convention, it should be remembered that the Council is not a court of law in the strict sense of the word. It is therefore free to adopt very flexible procedures for dealing with disputes that are referred to it. Illustrative of the conception which the Council has of the role it performs is Article 14(1) of its 1957 Rules for the Settlement of Differences. It provides that "the Council may, at any time during the proceedings and prior to the meeting at which the decision is rendered . . . invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiations have not been exhausted." [58] This provision indicates that the Council considers that its main task under Article 84 of the Convention is to assist in *settling* rather than in *adjudicating* disputes. Up to the moment of final decision, the Council in fact acts more like a mediator than a court. This conclusion is supported by Article 14(3) of the Rules which empowers the Coun-

[58] See 1957 Rules, Art. 6(1) which provides that "upon filing of the counter-memorial by the respondent, the Council shall decide whether at this stage the parties should be invited to enter into direct negotiations as provided in Article 14."

cil to "render any assistance likely to further the negotiations, including the designation of an individual or a group of individuals to act as conciliator during the negotiations."

Although Article 14 envisages a procedure that is not strictly in keeping with judicial proceedings, it does not violate the Convention because the Council may only "invite" but not "compel" the parties to enter into further negotiations. Any party to the dispute thus retains the right to force the Council to adjudicate the dispute by declining to accept the Council's "invitation" to negotiate.[59] The experience which the Council gained in dealing with the dispute between India and Pakistan—it prompted Article 14 of the Rules [60] —indicates, moreover, that this flexible procedure is best calculated to result in the settlement of disputes arising under Article 84 of the Convention.[61]

The complaint by India against Pakistan [62] was formally submitted to the Council by India in April of 1952.[63] The complaint charged Pakistan with acts violating Articles 5, 6, and 9 of the Convention, and with violations of the International Air Services Transit Agreement. India alleged, in particular, that Pakistan refused to permit Indian aircraft engaged in commercial air service between India and Afghanistan to fly over West Pakistan.[64]

When the Indian complaint was submitted to the Council, no rules of procedure had as yet been enacted for the settlement of

[59] The fear expressed by Cheng 103, that "such a liberal interpretation may well . . . lead one of the parties to employ obstructionist tactics in order to frustrate the jurisdiction of the ICAO Council," overlooks two considerations. The first is that the Council's jurisdiction cannot be frustrated, for it already has jurisdiction when it invites further negotiations. The second consideration which Cheng overlooks is that Article 14(2) of the 1957 Rules stipulates that "the Council may set a time-limit for the completion of such negotiations." This rule provides an adequate safeguard against obstructionist tactics.

[60] See Oral Report to the Council by the Chairman of the Working Group on the Rules Governing the Settlement of Disagreements, ICAO Council, 19th Sess., Doc. 7390 (C/861), p. 5 (1953).

[61] See Hingorani 16 n.15.

[62] For a summary of the India-Pakistan case, see [1952] Report of the Council, ICAO Doc. 7367 (A7–P/1), pp. 74–76 (1953).

[63] The Indian Application is reprinted in ICAO Doc. C–WP/1169 (1952).

[64] For a discussion relating to the legal issues involved in this dispute, see Bhatti, Drion & Heller, *Prohibited Areas in International Civil Aviation—the Indian-Pakistani Dispute,* [1953] U.S. & Can. Av. 109. See also, Schenkman, THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 376–80 (1955).

disputes under Article 84 of the Convention.[65] Recognizing that it would initially have to decide what rules of procedure were to be applied,[66] the Council invited India and Pakistan "to designate representatives to consult with the Council on the future course of action to be followed." [67] This invitation was designed to produce an acceptable procedure for the disposition of this case.[68] The Council recognized that more time would be needed before any generally applicable rules could be drafted.

In the meantime, the Council granted Pakistan's request for a 30-day period within which to file an answer to the Indian complaint.[69] When Pakistan's reply had been received,[70] the Council appointed a Working Group of three Council Representatives to consider and recommend to the Council "what steps could properly be taken by the Council during the remainder of the . . . session." [71]

After consulting with the parties, the Working Group presented a report containing two basic recommendations.[72] The first suggested

[65] The Interim Council of the Provisional International Civil Aviation Organization (PICAO) had in 1946 promulgated the "Rules Governing the Settlement of Differences between Contracting States." These Rules were issued as PICAO Doc. 2121 (C/228). They were approved by the Interim Council on 10 September 1946. These Rules were promulgated mainly to enable the Interim Council to discharge the arbitral functions assigned to it under the Interim Agreement on International Civil Aviation, Art. III, Sec. 6, para. 8. The PICAO Rules did not apply to disputes submitted to the Council under the Convention, however. See Rules Governing the Settlement of Differences between Contracting States [hereinafter cited as 1946 Rules], Art. 1, PICAO Doc. 2121 (C/228) (1946). Besides, they had not been reissued by the ICAO Council and were thus no longer in force. ICAO Doc. C–WP/1171, p. 1 (1952); ICAO Council, 16th Sess., Doc. 7291 (C/845), p. 11 (1952).

[66] Interestingly enough, both India and Pakistan were mistakenly proceeding under the 1946 Rules. See ICAO Council, 16th Sess., Doc. 7291 (C/845), p. 11 (1952).

[67] *Id.* at 48.

[68] This invitation for consultation was based on a proposal submitted to the Council by Canada which suggested that the two Governments should be invited "to designate representatives to consult with the Council on the question of the *method of procedure to be adopted.*" (Emphasis added.) ICAO Doc. C–WP/1192 (1952). This language was revised because a number of Council Representatives voiced the sentiment that it was undignified to say to the parties, to use the words of the French Representative, "you have something for us to arbitrate. . . . We have no rules ready. How do you think we should proceed?" See ICAO Council, 16th Sess., Doc. 7291 (C/845), pp. 49–55 (1952).

[69] ICAO Council, 16th Sess., Doc. 7291 (C/845), p. 48 (1952).

[70] See ICAO Doc. C–WP/1205 (1952); Doc. C–WP/1299 (1952).

[71] ICAO Council, 16th Sess., Doc. 7291 (C/845), p. 96 (1952).

[72] ICAO Doc. C–WP/1214 Rev. (1952).

that the parties provide the Council with certain additional information relating to the dispute. The second proposed that the parties be urged "to enter into further direct negotiations as soon as possible with a view to limiting to the greatest possible extent the outstanding issues." [73] This proposal was prompted by the consideration that the Working Group had concluded, after consulting with the parties, that Pakistan and India were receptive to the possibility of reaching a negotiated settlement.[74] The Council accepted these recommendations,[75] and shortly thereafter appointed another Working Group to study the case with a view to ascertaining what further action should be taken.[76]

The new Working Group informed the Council that Pakistan was prepared to discuss with India the possibility of opening two air routes over West Pakistan in exchange for certain concessions by India,[77] and suggested that "no possibility of settlement by direct negotiations should be missed." The Council accepted this suggestion and set a time limit within which the parties were requested to submit a progress report on their negotiations.[78] Before this deadline had expired, the parties informed the Council that they had reached an amicable settlement of their dispute.[79]

It is noteworthy that these consultations between the parties and the Council's Working Groups, which never formally touched upon the merits of the dispute, produced a mutually satisfactory settlement of the dispute. This settlement was worked out in less than nine months. It was achieved mainly because the Council, having brought the parties together, eschewed adjudication in favor of mediation. Had the Council constituted itself immediately into an arbitral tribunal, a few years might have elapsed before the case

[73] In his oral report to the Council in explaining these recommendations, the Chairman of the Working Group noted that his committee "felt that there might not have been negotiations to the extent contemplated by Article 84 of the Convention. . . ." ICAO Council, 16th Sess., Doc. 7291 (C/845), p. 163 (1952). Technically, the correctness of this explanation may be doubted, for the Council had already accepted jurisdiction over the dispute.

[74] *Id.* at 164–65.

[75] *Id.* at 162.

[76] ICAO Council, 17th Sess., Doc. 7328 (C/853), p. 129 (1952).

[77] ICAO Doc. C–WP/1341 (1952).

[78] ICAO Council, 17th Sess., Doc. 7328 (C/853), p. 203 (1953).

[79] See ICAO Council, 18th Sess., Doc. 7361 (C/858), pp. 15–26 (1953); [1952] Report of the Council, ICAO Doc. 7367 (A7–P/1), pp. 74–76 (1953). The exchange of notes constituting the agreement that was reached by India and Pakistan can be found in 164 U.N.T.S. 3 (1953).

could finally have been decided, given the right of the parties to appeal the Council's judgment either to the International Court of Justice or to an *ad hoc* international tribunal.[80] The manner in which the dispute between India and Pakistan was resolved confirms the wisdom of the policy embodied in Article 14 of the Council's Rules for the Settlement of Disagreements. This policy seeks to avoid the full exercise, except as a last resort, of the Council's adjudicatory powers under the Convention. Of course, it also prevents the aggravation of disputes through protracted litigation, which cannot but adversely affect the best interests of international civil aviation generally.

The Decision

A dispute submitted to the Council under Article 84 of the Convention is decided by a majority vote of all Council Members not parties to the dispute.[81] Unless reversed or modified on appeal, the decision of the Council must be deemed to be final and binding on the parties, as well as on any other state that has intervened in the proceedings.[82] This conclusion follows, despite the fact that the Convention is silent on the question of the binding effect of such decisions and merely provides that "the decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding."[83] It must be assumed, however, that if the parties fail to avail themselves of their right of appeal, the decision of the Council takes the place of the final and binding judgment that would otherwise be rendered on appeal.

The contrary conclusion would make little sense, for it would admit that a losing party could, by failing to appeal a Council decision, avoid a final and binding adjudication of the dispute. That the draftsmen of the Convention did not intend to establish such ineffective adjudicatory machinery is apparent from the language of Article 86 of the Convention. It provides in part that "unless the Council decides otherwise, any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on

[80] Convention, Arts. 84, 85.
[81] Convention, Arts. 84, 52, 53; 1957 Rules, Art. 15.
[82] 1957 Rules, Art. 19.
[83] Convention, Art. 86.

appeal. On any other matter, the decisions of the Council shall, if appealed from, be suspended until the appeal is decided." Implicit in this provision is the assumption that Council decisions are final and binding unless they have been modified or reversed on appeal. This view is shared by the Council, for it has stipulated in its Rules for the Settlement of Differences that a state wishing to intervene in a dispute submitted to the Council "shall undertake that the decision of the Council will be *equally* binding upon it." (Emphasis added.) [84]

All Council decisions, except those relating to the question "whether an international airline is operating in conformity with the provisions" of the Convention, are automatically suspended pending final disposition on appeal. Decisions dealing with the operation of airlines remain in force unless the Council agrees to suspend them.[85] This difference in treatment was prompted by the consideration that the automatic suspension of decisions falling into the latter category might endanger the safety of international air transport.[86] Where such danger does not exist, the Council would probably suspend its decision in order to avoid the serious economic hardship that the requirement of immediate compliance by the airline might entail.

The Appeal

A decision rendered by the Council in a dispute submitted to it under Article 84 of the Convention is appealable by the parties either to an *ad hoc* arbitral tribunal or to the International Court of Justice.

Notice of Appeal and Time Limits

The Convention does not contain an express provision establishing a time limit within which an appeal must be lodged. All it provides is that "any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council." [87] This language indicates that a party, to reserve its right

[84] 1957 Rules, Art. 19(1).

[85] Convention, Art. 86.

[86] See 1 Proceedings of the International Civil Aviation Conference, (Chicago, Illinois, November 1–December 7, 1944) [hereinafter cited as Proceedings] 480–81 (1948).

[87] Convention, Art. 84.

of appeal, must notify the Council within this period of its intention to file an appeal. It can also be said to imply, and the International Court of Justice might so find, that an appeal to the Court must be lodged within the same period.[88] This interpretation would not necessarily apply to a party wishing to appeal to an *ad hoc* tribunal, however, for the tribunal will probably first have to be constituted.

It must therefore be asked whether there is any time limit within which an appeal to such a tribunal must be lodged. In theory, the answer would seem to be in the negative. There are certain practical considerations, however, which overcome this drafting omission. In addressing ourselves to them, reference should be made to a statement of the Group of Experts appointed by the ICAO Council to finalize the Council's Rules for the Settlement of Differences. In its report to the Council, this committee took the position that Article 84 of the Convention implies "that an appeal to the International Court of Justice has to be filed within the same period of 60 days. . . ." And, after noting that this interpretation was far from being "self-evident," the Group of Experts expressed the opinion that ". . . in the case of an appeal to an *ad hoc* arbitral tribunal no time limit is fixed within which the tribunal shall be set up or have started its work, and consequently the case may remain pending *ad infinitum*." [89]

Of course, if the parties desire to have the case remain pending before the arbitral tribunal indefinitely, their wishes will probably prevail.[90] That is stating the obvious because, if one of the litigants wants the tribunal to be constituted promptly, it need only invoke Article 85 of the Convention which stipulates that, whenever one of the parties fails to name an arbitrator "within a period of three months from the date of appeal," the President of the Council shall exercise that power on its behalf. Article 85 also provides that if the arbitrators cannot agree within another 30-day period on the choice of an umpire, he will be designated by the President of the Council.

[88] See I.C.J., Rules of Court, Art. 67(2); ICAO Doc. C–WP/2271, p. 7 (1956).

[89] ICAO Doc. C–WP/2271, p. 7 (1956).

[90] Even here it might be possible for the Council to step in. It could do so under Article 85 of the Convention, which authorizes the Council "to determine procedural questions in the event of any delay which in the opinion of the Council is excessive." The Council could invoke this power to prevent an indefinite suspension of its decision.

It must accordingly be concluded that, assuming the President of the Council acts promptly, it will take a maximum of four to five months, following the notice of appeal under Article 84, for the tribunal to be constituted. The absence of an express time limit within which an appeal must be filed cannot therefore have the effect of indefinitely delaying the establishment of the arbitral tribunal or the conduct of the proceedings.

Choice of Appellate Tribunal

The Convention is not entirely clear whether the parties to a dispute have a choice in submitting their appeal to the International Court of Justice[91] or to an *ad hoc* arbitral tribunal.[92] Article 84 provides in part that "any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice." Article 85 states that "if any contracting State party to a dispute . . . has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each . . . shall name a single arbitrator who shall name an umpire." Obviously, the appeal cannot be submitted to the Court if one of the parties to the dispute has not accepted the Statute and is unwilling to consent to its jurisdiction to decide this particular case.[93] Articles 84 and 85 also compel the conclusion that the parties, even if they adhere to the Statute, may by mutual agreement bypass the Court,[94] for these provisions speak of the Court and the *ad hoc* tribunal as alternative appellate fora without expressing a preference for one or the other.

It is less clear whether, in the absence of an agreement to submit the case to an arbitral tribunal, each state is free to take the appeal to the International Court of Justice whenever all parties to the dispute adhere to the Statute of the Court. In other words, it must be asked whether the Contracting States which have accepted the

[91] Due to the provisions of Article 37 of the Statute of the International Court of Justice, the reference in Articles 84 and 85 of the Convention to the Permanent Court of International Justice must be understood to apply to the I.C.J. See note 5 *supra*.

[92] See Kos-Rabcewicz-Zubkowski 347.

[93] See I.C.J., Statute, Arts. 35 and 36.

[94] Kos-Rabcewicz-Zubkowski 347; Domke 21 n.6. *But see* Cheng 104.

Statute have, in Articles 84 and 85, consented to the compulsory jurisdiction of the Court to hear such appeals. While the Convention does not expressly so provide, its language compels an affirmative reply.[95]

The procedure envisaged by Article 85 for the establishment of an *ad hoc* tribunal is applicable only if two conditions are met. It must appear that the parties have not accepted the Statute of the Court and that they cannot agree on the composition of the tribunal, but no provisions are made for its establishment if the parties adhere to the Statute but cannot agree on the *ad hoc* tribunal. This would be a serious and inexplicable oversight, unless it was understood that in these circumstances each party to the dispute would have the right to take the case to the Court. The distinction made in Article 85 between states that have and those that have not accepted the Statute would be meaningless, moreover, unless it was intended to have the jurisdictional significance contemplated by Article 36(1) of the Statute,[96] for even a state not a party to the Statute can submit to the Court's jurisdiction in a particular case.[97]

Finally, since Article 36(1) of the Statute provides an independent jurisdictional basis,[98] it can hardly be contended that the appeal under Article 84 of the Convention is subject to a Contracting State's acceptance of the Court's jurisdiction under Article 36(2) of the Statute. It must accordingly be concluded that, if all parties to the dispute have accepted the Statute, each of them has the right to appeal the Council's decision to the International Court of Justice.

Composition of ad hoc *Tribunal*

Article 85 of the Convention provides that, when the parties have not accepted the Statute of the International Court of Justice and cannot themselves agree on the choice of an *ad hoc* tribunal, each of

[95] See Cheng 104.

[96] I.C.J., Statute, Art. 36(1) provides in part that "the jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force." See Institut für ausländisches öffentliches Recht und Völkerrecht, STATUT ET RÈGLEMENT DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE: ELÉMENTS D'INTERPRÉTATION 256–66 (1934).

[97] See I.C.J., Statute, Art. 35(2); Rosenne 238–39.

[98] Guggenheim, *L'élaboration d'une clause modèle de compétence obligatoire de la Cour internationale de Justice*, 44/1 Annuaire de l'Institut de Droit International 458, 466 (1952).

them has the right to name an arbitrator. The arbitrators, in turn, designate an umpire. The President of the Council has the power to exercise a party's right to name an arbitrator, if the arbitrator has not been appointed within a period of three months from the date of the appeal. The President must, however, make his selection "from a list of qualified and available persons maintained by the Council." [99]

The list in question, consisting of names submitted to the Council by Member States, was formally established by the Council in 1963.[100] This list has been left open to enable the President to add any new names that the Contracting States might wish to submit.[101] The Council apparently proceeds on the assumption, although Article 85 does not compel it, that this list should consist of names submitted by the Member States. The Council has at the same time recognized that, if it should prove necessary to designate a particular individual whose name is not on the list, the President of the Council may invite his formal designation.[102] Finally, whenever the arbitrators cannot agree on the choice of an umpire within 30 days, that individual will also be designated by the President of the ICAO Council from the list previously referred to.

Scope of Appeal

The Convention does not specify what questions the appellate tribunal may review.[103] All we are told is that "any arbitral tribunal established under this or the preceding Article [84] shall settle its own procedure and give its decisions by majority vote. . . ." [104] Since the Convention does not, however, limit the powers of the appelate tribunal, it can be concluded that the tribunal may review any findings of law and/or fact made by the ICAO Council. Whether new issues—that is, questions of law or fact not argued before the ICAO Council—may be considered by the appellate tribunal is more doubtful. Unless all the parties involved consent

[99] Convention, Art. 85.

[100] See [1963] Report of the Council, ICAO Doc. 8402 (A15–P/2), p. 92 (1964).

[101] ICAO Council, 15th Sess., Doc. 8373 (C/948), p. 142 (1964).

[102] *Id.* at 146–48.

[103] The appellate jurisdiction of international tribunals varies considerably depending upon the treaty that establishes them. See generally on this subject, Simpson & Fox 247–50; Hudson 430–33.

[104] Convention, Art. 85.

thereto, these issues would seem to be *ultra vires* the jurisdiction of the appellate tribunal. This is so not because of any formalistic notions of estoppel, but because the consent to the jurisdiction of the appellate tribunal is limited to the review of those issues that were submitted to the ICAO Council for adjudication. However, except for this limitation, the appellate tribunal may hear the case *de novo,* unless the parties agree to limit the scope of review.

While the Convention authorizes the appellate tribunal to fix its own rules of procedure,[105] it reserves to the Council the power to "determine procedural questions in the event of any delay which in the opinion of the Council is excessive." [106] Questions regarding the scope of the appellate tribunal's jurisdiction, while technically procedural in nature, are probably not encompassed by this provision, which in all likelihood applies only to the difficulties that the *ad hoc* tribunal might encounter in the actual conduct of its proceedings.[107]

Enforcement of Decisions

Articles 87 and 88 of the Convention establish certain enforcement measures to bring about compliance with the decisions rendered under Article 84. Two distinct types of sanctions are provided for.[108]

Penalty for Non-Compliance by Airlines

The first, set out in Article 87, stipulates that "each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the

[105] For the procedure that will be followed by the International Court of Justice, see its Rules of Court, Art. 67.

[106] Convention, Art. 85.

[107] In this connection, it is interesting to note that Art. 30 of the 1946 Rules provided:

> (1) In the event of any delay which in the opinion of the Council is excessive, the Council shall determine the rules of procedure of the arbitral tribunal.
>
> (2) These rules shall include the provisions of the Articles 5, 6, 7, 9, 10, 11, 13 and 14 of the present rules.
>
> (3) The Council shall also fix the seat of the arbitral tribunal.

The rules to which Article 30(2) referred deal with questions relating to the actual conduct of the proceedings. See Domke 28–29.

[108] See Mateesco Matte, Traité de Droit Aérien-Aéronautique 222–23 (2d ed. 1964).

Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article." [109] The sanction envisaged by this provision cannot be imposed until the Council "has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article." The "previous Article" is Article 86 of the Convention, which provides that the decisions of the International Court of Justice or the *ad hoc* arbitral tribunal are final and binding. It also stipulates that a Council decision relating to the question whether an international airline is operating in conformity with the provisions of the Convention "shall remain in effect unless reversed on appeal," provided that the Council has not authorized its suspension. Reading these two provisions together, a number of conclusions and problems emerge.

Initially, it will be noted that it is not for the Contracting States themselves to determine whether the airline in question has failed to comply with a final judgment. A Council decision to that effect is a condition precedent to the application of this penalty, but any Contracting State, even if not a party to the dispute, may request the Council to take this action because Article 54(n) of the Convention empowers the Council to "consider any matter relating to the Convention which any contracting State refers to it."

The determination that an airline is in default of its obligations under a final decision is bound to have serious economic consequences for the airline. The Council should therefore not act without giving the airline or the state of its nationality an opportunity to be heard. In some cases, such a hearing might reveal difficult questions of law or fact bearing directly on the issue of compliance. There may be defenses justifying non-compliance,[110] or differences of opinion relating to the interpretation of the judgment. Neither

[109] Since only Contracting States can be applicants and respondents in an action under Article 84, the original decision will have been rendered in a proceeding to which the airline was not a formal party.

[110] As one commentator rightly notes, "rarely, if ever, is the failure to comply unsupported by a legal claim; the decision it will be argued, cannot be binding if it is invalid under law or unenforceable in practice." Schachter, *Enforcement of International Judicial and Arbitral Decisions,* 54 Am. J. Int'l L. 1, 3 (1960). See, in this connection, International Law Commission, Model Rules on Arbitral Procedure, Art. 35, [1958] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. 2, p. 83, which recognizes four grounds upon which the validity of a decision of an arbitral tribunal may be challenged.

the Convention nor the present Rules for the Settlement of Differences contain any provisions relating to the procedure to be followed in disposing of these questions.[111] They might, however, be treated in a number of ways. Because Article 87 of the Convention empowers the Council to decide upon the existence of a default, it is arguable that the Council alone is competent to pass on these issues. In doing so, the Council could seek an advisory opinion from the International Court of Justice pursuant to Article X of the Agreement between the United Nations and ICAO.[112] Where the existence of a default depends upon the interpretation of the underlying judgment, or when it is sought to be justified on the ground of newly discovered evidence, the state of the airline's nationality should be given an opportunity to obtain an interpretation or revision of the judgment from the appellate tribunal that rendered it. This could easily be done if the case was appealed to the International Court of Justice.[113]

On the other hand, if the appeal was taken to an *ad hoc* tribunal, an interpretation or revision of the judgment will not always be obtainable, because it may be impossible to reconstitute the tribunal. Besides, even if this hurdle can be surmounted, it must be remembered that "the general rule is that an international tribunal has no power to interpret its award, unless it is expressly authorised

[111] Articles 19 and 20 of the Rules for the Settlement of Differences Between Contracting States, ICAO Doc. 7392 (C/862), provisionally promulgated by the Council in 1953, provided for the revision and interpretation of Council decisions. These provisions were not incorporated in the 1957 Rules because the Group of Experts concluded that "the Council would have no authority to revise or interpret a decision given by it." ICAO Doc. C–WP/2271, p. 6 (1956). This conclusion can be traced to the opinion expressed by the ICAO Legal Bureau, which asserted that these provisions were "outside the competence of the Council to promulgate." In its view, "powers of 'revision' or of 'interpretation of decisions' do not exist unless they are provided for in the Statute constituting the tribunal (in the present case Chapter XVIII of the Chicago Convention) or are included in the *compromis* from which an arbitral tribunal derives its powers." ICAO Doc. C–WP/1685 (1954). This conclusion is no doubt true as far as it goes, but its proponents seem to have overlooked the fact that, unlike other international arbitral tribunals, the ICAO Council also has the express power to determine the existence of a default and to impose sanctions for non-compliance with its decisions. It would therefore seem that this power presupposes the authority to interpret the decision which is to be applied and, in proper cases, to sustain defenses justifying non-compliance.

[112] 8 U.N.T.S. 316 (1947).

[113] See I.C.J. Statute, Arts. 60–61; and Rules of Court, Arts. 78–81.

to do so by its constitutive instruments, or unless the parties reach a fresh agreement inviting it to do so." [114]

Assuming, however, that such an interpretation or revision can be obtained from the International Court of Justice or the *ad hoc* tribunal, it would still have to be ascertained whether the Council must follow it in passing on the question of non-compliance. The Council, not being a party to the proceedings, is not bound by the decision of the appellate tribunal in the sense that a party would be. It should not be forgotten, however, that the Council's decision imposing a penalty for non-compliance with a final judgment must be based on a finding that the judgment is not being complied with. So long as the competent appellate tribunal interprets or revises that judgment,[115] the Council will have to take that interpretation into account before deciding whether a default does in fact exist. These problems will not arise in cases where the parties to the dispute failed to appeal the original decision of the Council. Since decisions rendered by the Council under Article 84 become final when no appeal has been taken, it would follow that in this context the power to decide all issues of law and fact relating to non-compliance rests exclusively with the Council.

It remains to be noted that no appeal can be taken against a determination by the ICAO Council that an airline is in default of the obligations incumbent upon it under a final decision. Once this ruling has been made, all Contracting States are bound to bar the airline from operating through the airspace above their territory.

Penalty for Non-Compliance by States

Article 88 of the Convention provides that "the Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter." The language of Article 88 indicates that this provi-

[114] Simpson & Fox 245. The same view was expressed by the Permanent Court of International Justice. See Advisory Opinion regarding the delimitation of the Polish-Czechoslovak Frontier (Question of Jaworzina), P.C.I.J., Ser. B, No. 8, p. 38 (1923).

[115] See Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), P.C.I.J., Ser. A, No. 13, p. 21 (1927), where the Court stated that an interpretation of a judgment "adds nothing to the decision, which has acquired the force of *res judicata*, and can only have binding force within the limits of what was decided in the judgment construed."

sion can be invoked against a state party to a dispute which has failed to comply with a final judgment, as well as against any other Contracting State which continues to allow a defaulting airline, contrary to a decision of the Council under Article 87, to operate through the airspace above its territory.[116] It is thus readily apparent that Article 88 gives the Organization considerable leverage for the enforcement of decisions rendered under Chapter XVIII of the Convention.

Unlike Article 87, Article 88 does not specifically identify the ICAO organ that is empowered to determine the existence of the default to which Article 88 applies. All it provides is that "the Assembly shall suspend" the voting powers of the state found to be in default of its obligations under Chapter XVIII. A number of considerations do support the conclusion, however, that this power is vested in the ICAO Assembly.

The only other body which could have been empowered to make this decision is the Council. Since Article 87 gives the Council similar powers expressly, it is only reasonable to assume that if Article 88 had contemplated like functions for the Council it would have contained a clause to that effect. The question to be decided by the Council under Article 87 is in all respects a legal question. Since the Council has been given judicial powers, it is only proper that it should also be competent to decide the legal questions which might arise under Article 87. Article 88, on the other hand, presents issues which are not strictly legal in nature. True, the question whether a state is in default of its obligations under Chapter XVIII is legal in character, but the resultant obligation placed upon the Assembly to suspend a state's voting power in the Organization cannot be divorced from the political and economic implications inherent in such action.[117]

Accordingly, since the Assembly *must* impose this penalty once the state has been found to be in default,[118] it may be assumed that

[116] Hingorani 23.

[117] Analogous considerations will have to be taken into account by the Security Council in applying Article 94 of the U.N. Charter. See Schachter, *supra* note 110, at 20–21.

[118] *Compare* Convention, Art. 88 *with* Art. 62. Under Article 62 the Assembly "may" suspend the voting powers of a state that has defaulted in its financial obligations to the Organization. Article 88, on the other hand, makes such action mandatory, since it provides that the Assembly "shall" do so.

the Assembly was also assigned the function of ascertaining the existence of the default. This would enable it to appreciate the various non-legal considerations involved in depriving a state of its vote without appearing to condone lawlessness by refusing, for example, to implement a Council recommendation that sanctions should be imposed. In other words, if it should deem the imposition of the sanction politically unwise, the Assembly could simply find that the alleged default has not been proved or that the state should be given more time to discharge its obligations.

Since the draftsmen of the Convention were undoubtedly aware of these considerations, it is only reasonable to assume that they took them into account in formulating Article 88. This conclusion is not weakened by the fact that Article 54(k) requires the Council to report to the Assembly "any infraction of this Convention," for the Council's report to the Assembly concerning an infraction of the Convention does not *ipso facto* deprive the Assembly of the power to verify the Council's findings.[119]

Before suspending a state's voting powers in accordance with Article 88, the Assembly will no doubt adopt a policy of restraint similar to that it has followed in applying Article 62 of the Convention, which calls for the suspension of the voting powers of states found to be in default of their financial obligations.[120] While it is true that under Article 62 the Assembly "may" impose this sanction, whereas Article 88 provides that it "shall" do so, it has already been shown that as a practical matter Article 88 gives the Assembly considerable discretion in applying these enforcement measures. The difference between Articles 62 and 88 may therefore be more apparent than real. It is accordingly unlikely that a state will be deprived of its vote under Article 88 unless it has made no effort to persuade the Assembly of its attempts in good faith to remedy the default.[121] Such considerations as *bona fide* delays resulting from the lack of implementing legislation, serious economic dislocations that might result from too rapid a compliance with the decision in

[119] The argument made by Hingorani 23, who asserts that the Assembly should exercise its powers under Article 88 in accordance with the Council recommendation, would deprive the Assembly of the flexibility it needs to appreciate the political considerations implicit in the exercise of this power.

[120] See discussion in Part I, pp. 47–51 *supra*.

[121] See Assembly Res. A9–6, ICAO Doc. 7595 (A9–P/12) (1955).

question, lack of requisite technical skills or equipment, and so on, will undoubtedly be factors which the Assembly would take into account before ruling on the existence of a default.

If the Assembly does find, however, that a state has not discharged the obligations incumbent upon it under Article 88, it will have to suspend that state's voting powers in the Council and in the Assembly. Should that state remain recalcitrant, the Assembly will no doubt proceed in a manner analogous to the practice it has developed under Article 62. That is to say, its next step might be to extend the suspension to all or only some of the subsidiary bodies of the Council and the Assembly.[122] This action might in due time be supplemented by a resolution authorizing the Council to withhold the general services furnished by the Organization to that state.[123] Ultimately, the Assembly might even recommend that the delinquent state be barred from participation in some or all meetings or conferences convened by the Organization.[124]

One final point bearing on the application of Article 88 has to do with a problem that could arise if a case submitted to the Council under Article 84 was appealed to the International Court of Justice, and the successful party sought to seize the U.N. Security Council under Article 94 of the Charter with a request for assistance in implementing the judgment of the Court. Article 94 of the Charter of the United Nations provides that

> 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[125]

[122] *Compare* Assembly Res. A2–1, ICAO Doc. 5692 (A2–P/37) (1948), *with* Assembly Res. A3–6, ICAO Doc. 6459 (A3–P/28) (1949).

[123] See Assembly Res. A5–2, ICAO Doc. 7173 (A5–P/3) (1951).

[124] See ICAO Assembly, Commission No. I, ICAO Doc. 4013 (A1–CP/1), p. 5, para. 10(b) (1947).

[125] Under Article 93(2) of the U.N. Charter, states which are not Members of the United Nations may become parties to the Statute of the International Court of Justice "on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." See also, I.C.J.

While much has been written about the role of the Security Council under Article 94 of the Charter,[126] the question here under consideration does not seem to have been explored.

In answering this question, it would appear that an appeal taken to the International Court of Justice from a Council decision rendered under Article 84 of the Convention, while subject to the Court's Statute and its Rules of Court [127]—and therefore implicitly also to Article 94 of the Charter—should not be divorced from the general scheme of the Convention. A party to such a dispute should therefore have to resort initially to the enforcement measures which the Convention provides. Only if they have failed to produce compliance with the Court's judgment would it be proper for the successful party to seek the assistance of the Security Council. In short, since the Convention establishes enforcement measures applicable to disputes under Article 84, they should first be exhausted.

While the possibility of a Security Council intervention under Article 94 of the Charter might prompt certain states to bypass the Court by submitting their appeal to an *ad hoc* tribunal, this step will not necessarily enable them to escape U.N. involvement. True, Article 94 of the Charter, unlike Article 13(4) of the Covenant of the League of Nations, does not apply to arbitral awards.[128] This does not mean, however, that the Security Council, the General Assembly, or some other international institution is without power, in a proper

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Statute of the Court, Art. 35(2). On 15 October 1946, the U.N. Security Council resolved that the adherence of such non-Member States to the Statute of the Court should be conditioned, *inter alia,* on their undertaking "to accept all obligations of a Member State of the United Nations under Article 94 of the Charter." U.N. Security Council, Off. Rec., 1st year, 2d Ser., No. 19, pp. 467–68 (1946). The General Assembly has imposed this condition. See, *e.g.,* U.N. Gen. Ass. Res. 91 (I), of 11 December 1946, U.N. Gen. Ass. Off. Rec., 1st Sess., 2d pt., RESOLUTIONS 182–83 (A/64 Add. 1) (1947), relating to the adherence of Switzerland to the Statute of the Court. Accordingly, even states that are not Members of the United Nations might be subject to the provisions of Article 94 of the U.N. Charter.

[126] See, *e.g.,* Schachter, *supra* note 110, at 17–24; Tuncel, L'EXÉCUTION DES DÉCISIONS DE LA COUR INTERNATIONALE DE JUSTICE SELON LA CHARTE DES NATIONS UNIES (1960); Rosenne 102–15; Vulcan, *L'Exécution des Decisions de la Cour Internationale de Justice d'Après la Charte des Nations Unies,* 51 Revue Générale de Droit International Public 187 (1947).

[127] See I.C.J., Rules of Court, Art. 67.

[128] For an analysis of Article 13(4) of the Covenant, see Hambro, L'EXÉCUTION DES SENTENCES INTERNATIONALES 68–95 (1936).

case, to take appropriate action designed to obtain compliance with a judgment rendered by an arbitral tribunal.[129] On this score, there is therefore little to be gained from preferring an arbitral tribunal to the Court.

Under the International Air Services Transit and Air Transport Agreements

The International Air Services Transit Agreement[130] and the International Air Transport Agreement[131] are companion agreements to the Convention on International Civil Aviation. Approximately seventy states are parties to the Transit Agreement, while the Transport Agreement is in force only with regard to a dozen countries. This is not at all surprising, because the former is much less burdensome than the latter. The Transit Agreement provides for the reciprocal exchange of transit rights—the so-called Two Freedoms.[132] That is to say, it stipulates in part that

> Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:
>
> (1) The privilege to fly across its territory without landing;
>
> (2) The privilege to land for non-traffic purposes.[133]

The Transport Agreement, on the other hand, contemplates the reciprocal exchange of the Five Freedoms of the Air. It accords the transit rights set forth in the Transit Agreement and, in addition, recognizes three more. These are:

> The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
>
> The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;
>
> The privilege to take on passengers, mail and cargo destined for the

[129] See Sohn, *The Role of International Institutions as Conflict—Adjusting Agencies,* 28 U. Chi. L. Rev. 205, 225–27 (1961); Simpson & Fox 268; Rosenne 108–09.

[130] The International Air Services Transit Agreement, 59 Stat. 1693, E.A.S. No. 487, 84 U.N.T.S. 389 (1951), entered into force on 30 January 1945.

[131] The International Air Transport Agreement, 59 Stat. 1701, E.A.S. No. 488, 171 U.N.T.S. 387 (1953), entered into force on 8 February 1945.

[132] For an analysis of the Freedoms of the Air, see Cheng 8–17.

[133] Transit Agreement, Art. I, Sec. 1.

territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.[134]

The Transit and Transport Agreements contain identical provisions for the settlement of differences between the Contracting States. These provisions establish one procedure for the adjudication of disputes, and another for the disposition of complaints.

DISPUTES

Disputes between the Contracting Parties to the Transit and Transport Agreements are subject to the same procedure that applies to differences arising under the Convention on International Civil Aviation. Thus both Agreements provide:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the . . . Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the . . . Convention.[135]

Although we already considered Chapter XVIII (Articles 84–88) of the Convention and thus do not have to restate the procedure it establishes, it should be noted that the adjudicatory machinery provided for under the Transit and Transport Agreements presents certain special problems which need to be discussed.

The most serious problem results from the language of Article 66 of the Convention. It reads as follows:

> (a) The Organization shall also carry out the functions placed upon it by the International Air Services Transit Agreement and by the International Air Transport Agreement . . . in accordance with the terms and conditions therein set forth.
>
> (b) Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement or the International Air Transport Agreement . . . shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreement.

[134] Transport Agreement, Art. I, Sec. 1. A state not wishing to accord the Fifth Freedom may indicate its intention by a reservation or subsequent notice. Transport Agreement, Art. IV(1).

[135] Transit Agreement, Art. II, Sec. 2; Transport Agreement, Art. IV, Sec. 3.

On its face, Article 66(b) of the Convention applies also to the judicial functions which the Transit and Transport Agreements assign to the ICAO Council. If that conclusion is valid, a number of Council Members would be disqualified from rendering a decision under the Transit Agreement. Moreover, there would not even be a quorum in the Council to discharge its functions under the Transport Agreement.[136] This result can be avoided only if it can be shown that Article 66(b) does not apply to the judicial functions assigned to the Council by these two Agreements. Since the Transit and Transport Agreements stipulate that ". . . the provisions of Chapter XVIII of the . . . Convention shall be applicable *in the same manner as provided therein* . . ." (emphasis added),[137] it can be contended that the phrase "in the same manner" equates disputes under these Agreements to those arising under the Convention, thus excluding the application of Article 66(b).[138] This is a permissible interpretation because Article 66(a) of the Convention requires ICAO to carry out the functions assigned to it under the Transit and Transport Agreements "in accordance with the terms and conditions therein set forth."

The ICAO Council has apparently adopted this interpretation, since its Rules for the Settlement of Differences do not disfranchise those Members of the Council which are not parties to these Agreements.[139] Furthermore, in many cases it would be extremely difficult to do so. As the dispute between India and Pakistan indicates, one case may call for the application of the Convention as well as one or both of the Agreements. The elements of the dispute may accordingly be so interrelated that it would make little sense, if it were possible at all, to establish different voting patterns for their adjudication.

If disputes under the Transit and Transport Agreements are to be handled in exactly the same manner as those arising under the Convention, can the sanctions provided for in Articles 87 and 88 of

[136] ICAO Council, Rules of Procedure, Rule 34, Doc. 7559/3, Rev. 3 (1959), provides that "a majority of the Members of the Council shall constitute a quorum for the conduct of the business of the Council."

[137] Transit Agreement, Art. II, Sec. 2; Transport Agreement, Art. IV, Sec. 3.

[138] Cheng 455.

[139] 1957 Rules, Art. 15(5) provides merely that "no Member of the Council shall vote in the consideration by the Council of any dispute to which it is a party."

the Convention also be imposed for non-compliance with decisions relating to the Transit and Transport Agreements? Article 87 of the Convention, it will be recalled, deals with the measure that may be taken against an airline which has failed to comply with a final decision. Once the ICAO Council has ruled that such a default exists, "each contracting State" is under an obligation to bar the airline from operating through the airspace above its territory. But if the dispute is one relating to the Transit or Transport Agreements, to whom does the phrase "each contracting State" apply? Since Chapter XVIII of the Convention applies to disputes arising under these Agreements "in the same manner" as it does to disputes under the Convention, the phrase "each contracting State" can be said to refer to the parties to the Convention. This interpretation would create the somewhat anomalous, albeit not entirely novel, situation whereby states not parties to a treaty would be required to assist in its implementation. On the other hand, it is by no means impermissible to assume that in this context the phrase "each contracting State" refers only to the State Parties to the Transit and Transport Agreements. Valid arguments can thus be adduced in favor of either result although, if a dispute relates both to the Convention and one of these Agreements, it would not be unreasonable for the Council to require all parties to the Convention to impose the prohibition envisaged by Article 87.

Similar difficulties might arise in the application of the sanctions provided for in Article 88 of the Convention. It authorizes the suspension of a state's voting power in the Assembly and the Council for non-compliance with a decision rendered under Chapter XVIII. In applying this provision to disputes arising under the Transit or Transport Agreements we face two problems. The first is attributable to the language of Article 66(b) of the Convention and presents the question, discussed earlier, whether only parties to these Agreements may vote on the imposition of this penalty.

The second problem concerns the scope of the voting suspension. If the dispute arises under one of the Agreements, may the non-complying state be deprived of its vote in these bodies on all matters or only on those that relate to these Agreements? While the Assembly might in such a case initially impose the more limited suspension, it would seem to be authorized to disfranchise the state altogether. Since both the Transit and Transport Agreements refer to

Chapter XVIII as a whole, they can be said to incorporate by reference the entire enforcement machinery envisaged in Articles 87 and 88. Even if it be accepted that these provisions are modified by Article 66(b) and that certain countervailing considerations may be applicable to Article 87, this in no way affects the enforcement measures of Article 88. Had the draftsmen of the Agreements intended to limit the application of Article 88, they could easily have done so. That this was not an oversight on their part is apparent from the enforcement machinery they established for complaints, where they expressly stipulated that, if a state fails to take the corrective action recommended by the Council, it may be "suspended from its rights and privileges *under this Agreement*. . . ." (Emphasis added.) [140]

Complaints

The Transit and Transport Agreements establish the following identical procedure for dealing with complaints: [141]

> A contracting State which deems that action by another contracting State under this Agreement is causing injustice or hardship to it, may request the Council to examine the situation. The Council shall thereupon inquire into the matter, and shall call the States concerned into consultation. Should such consultation fail to resolve the difficulty, the Council may make appropriate findings and recommendations to the contracting States concerned. If thereafter a contracting State concerned shall in the opinion of the Council unreasonably fail to take suitable corrective action, the Council may recommend to the [ICAO] Assembly . . . that such contracting State be suspended from its rights and privileges under this Agreement until such action has been taken. The Assembly by a two-thirds vote may so suspend such contracting State for such period of time as it may deem proper or until the Council shall find that corrective action has been taken by such State.[142]

[140] Transit Agreement, Art. II, Sec. 1; Transport Agreement, Art. IV, Sec. 2.

[141] The term "complaint" is here used to designate this action because it is so described in the Council's Rules for the Settlement of Differences. See 1957 Rules, Art. 1(2).

[142] Transit Agreement, Art. II, Sec. 1; Transport Agreement, Art. IV, Sec. 2. For an extensive analysis of these provisions, see Cheng 479–81; Kos-Rabcewicz-Zubkowski 352–56.

The Nature of the Proceedings

The language of the Transit and Transport Agreements is sufficiently unambiguous to indicate that Article 66(b) of the Convention applies to the complaint procedure that these Agreements establish.[143] Accordingly, only parties to these Agreements will have a vote in the ICAO Council and Assembly on matters relating to the functions which the Agreements assign to these ICAO organs.

Notwithstanding the silence of the Agreements on this question, Council Members which are parties to a complaint proceeding may not vote on Council decisions relating thereto.[144] Dr. Cheng, in reliance on the maxim *nemo debet esse judex in propria sua causa,* argues that this disqualification also extends to the functions assigned to the Assembly.[145] The validity of this contention is open to doubt. There is first the consideration that Article 53 of the Convention expressly disqualifies Council Members from voting in any dispute to which they are parties. No corresponding provision applies to the Assembly. Second, the functions which the Transit and Transport Agreements assign to the Assembly are not, strictly speaking, judicial in character. They merely empower, but do not require, the Assembly to impose sanctions for non-compliance. Here, as a result, the Assembly exercises the same political judgment that characterizes its work generally. Furthermore, the merits of the case will already have been decided by the Council. It is therefore rather doubtful whether the Assembly is exercising adjudicatory functions within the meaning of the principle that no one shall be a judge in his own case.

A state which "deems that action by another contracting State under this [Transit or Transport] Agreement is causing injustice or hardship to it, may request the Council to examine the situation." That is to say, it may file a complaint. The facts justifying the submission of a complaint could include questions relating to the interpretation or application of the Agreements. The states involved thus have a choice between filing a complaint or instituting a formal action under Chapter XVIII of the Convention.[146] In other words,

[143] See Cheng 455.

[144] Convention, Art. 53 provides that "no Member of the Council shall vote in the consideration by the Council of a dispute to which it is a party."

[145] Cheng 481.

[146] Kos-Rabcewicz-Zubkowski 355.

an "injustice or hardship" may be caused by action on the part of a Contracting State which is in violation of the Agreements, but it is not limited thereto. An "injustice or hardship" may encompass measures which, while otherwise permissible, are in a particular case improper or inequitable because of the effect they have or because of the manner in which they are applied.

Under Article I, Section 3, of the Transit Agreement, for example, airlines enjoying the privilege of stopping for non-traffic purposes in the territory of a Contracting State, may be required by the granting state "to offer reasonable commercial service at the points at which such stops are made." The exercise of this right is subject, *inter alia,* to the requirement that it not "involve any discrimination between airlines operating on the same route." The determination of the question whether or not a state is exercising this right in a discriminatory manner calls for the interpretation of the Agreement. It could accordingly form the basis for a formal application under Chapter XVIII of the Convention. If the measure were discriminatory, it would *ipso facto* be an injustice justifying the filing of a complaint.

These alternative remedies will not always be available. Under the Transit Agreement, for example, each Contracting State "reserves the right to . . . revoke a certificate or permit to an air transport enterprise of another State . . . where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State. . . ." [147] If such effective control is in fact not vested in nationals of a Contracting State, a state would be free to revoke the permit it had granted to the airline in question. If the case were submitted for adjudication to the ICAO Council, the legal right to take this action would have to be sustained. This would be true, notwithstanding a showing that the permits of other airlines equally situated were not withdrawn, and that this particular airline was singled out because certain political disagreements had developed between the state of its nationality and the granting state. This situation is one in which an action lawful in itself might be characterized as being unjust by virtue of the motives that prompted it.[148]

[147] Transit Agreement, Art. I, Sec. 5.

[148] In some legal systems, notably the French and that governing the European Communities, it could be set aside as an abuse of power (*détournement de pouvoir*). See Buergenthal, *Appeals for Annulment by Enterprises in the Euro-*

If the permit were to be withdrawn on very short notice, it might cause the airline severe economic hardship. Here, no other remedy but that provided by the complaint procedure could be invoked.

This example indicates that the complaint procedure is designed primarily to provide a machinery for the adjustment of frictions of an economic or political type that might otherwise disrupt the orderly operation of the system established by the Transit and Transport Agreements. The role which the ICAO Assembly and Council here perform, and the nature of the complaint procedure, were well described by Dr. Cheng in the following passage:

> The jurisdiction which these two multilateral agreements confer on the Assembly and the Council of the ICAO is not strictly arbitral. The recommendations of the Council and the decisions of the Assembly are to be based not exclusively on the legal rights and duties of the parties. They may take into account considerations of equity and convenience, and their function, from this point of view, is not unlike that which the International Court of Justice is entitled to discharge . . . under Article 38(2) of its Statute, that is to say, settlement of a dispute *ex aequo et bono*.[149]

It should be noted, however, that the Council has rather limited powers when it deals with complaints. After it has received a complaint, the Council must inquire into the matter by consulting with the states concerned. If these consultations fail to resolve the controversy and the Council concludes that a given measure is causing injustice or hardship, it "may make appropriate findings and recommendations to the contracting States concerned." [150] The state to which a recommendation for corrective action is addressed has no clear obligation to comply with it, because the Transit and Transport Agreements provide that the Council may recommend enforcement measures only if "a contracting State concerned shall in the opinion of the Council unreasonably fail to take suitable corrective

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pean Coal and Steel Community, 10 Am. J. Comp. L. 227, 239–42 (1961). Under French law an administrative act will be set aside as an abuse of power if it was prompted by illegal motives, even though the act is within the administrator's granted powers and all objective legal requirements have been complied with in promulgating it. Rohkam & Pratt, STUDIES IN FRENCH ADMINISTRATIVE LAW 37 (1947); Odent, CONTENTIEUX ADMINISTRATIF 615–16 (1953–54).

[149] Cheng 481–82.

[150] Transit Agreement, Art. II, Sec. 1; Transport Agreement, Art. IV, Sec. 2.

action." [151] At most, therefore, a state has undertaken not to be unreasonable in its refusal to comply with the recommendation of the Council. It is thus probably under no legal obligation to take the specific action recommended by the Council or, for that matter, to take any action, provided it can adduce valid reasons in support of its position. In deciding whether to seek enforcement measures, the Council will therefore have to balance the equities. Since the reasons justifying non-compliance apparently need not be related to international civil aviation,[152] enforcement measures will rarely be forthcoming. As a practical matter, they will probably be granted only if a state makes no effort to cooperate or to participate in the consultations that the Agreements envisage.

The primary role which the Council thus performs in dealing with complaints is to provide a forum where difficulties between Contracting States can be ironed out in an institutional setting that is particularly well suited for compromise solutions. This is illustrated by a dispute which arose between Jordan and the United Arab Republic in 1958. It was brought to the attention of ICAO by Jordan, which requested the Council to "review the charges imposed by Syria for use of aeronautical services and facilities and report and make the necessary recommendations to Syria, in accordance with Article 15 of the Convention." [153] In its communication to the Council, Jordan also charged that it was subjected to great inconvenience and hardship because Syria was illegally requiring Jordanian air carriers in transit over Syria to land in that territory.[154] Shortly thereafter, the newly established United Arab Republic prohibited Jordanian planes to fly over or land in the U.A.R.[155] This action was ostensibly based on the charge that substantial ownership and effective control of the Jordanian airlines in question was not vested in Jordanian nationals as required by a bilateral agree-

[151] Transit Agreement, Art. II, Sec. 1; Transport Agreement, Art. IV, Sec. 2.

[152] This follows from the fact that the Council may recommend enforcement measures only if the state concerned "shall in the opinion of the Council *unreasonably* fail to take suitable corrective action. . . ." (Emphasis added.) Transit Agreement, Art. II, Sec. 1; Transport Agreement, Art. IV, Sec. 2.

[153] ICAO Doc. C–WP/2661, p. 5 (1958).

[154] It was never clear whether Jordan was submitting this matter to the Council as a complaint or dispute under the Transit Agreement, to which it and Syria, but not Egypt, were parties.

[155] Cable No. 1, ICAO Doc. C–WP/2743, p. 5 (1958).

ment between the two countries.[156] Jordan immediately retaliated by issuing a decree excluding U.A.R. carriers from its territory [157] and, shortly thereafter, requested the ICAO Council to intervene.[158] The U.A.R. followed suit. In a communication addressed to the Council, which charged Jordan with a violation of the Convention and the bilateral agreement, the U.A.R. asked the Council to "take the necessary measures to obtain a quick cancellation of the decision taken by Jordan against U.A.R. Carriers." [159]

The ICAO Council considered this matter on a number of occasions.[160] The orderly review of the charges and countercharges was hampered by the manner in which they had been submitted to the Council because, while the parties either expressly or implicitly relied on the Convention, the Transit Agreement, and their bilateral air agreement, they never formally invoked the jurisdiction of the Council under Chapter XVIII of the Convention or filed the requisite complaint under the Transit Agreement. Not wishing to transform this case—which was closely related to the then-prevailing explosive political situation in the Middle East [161]—into a formal dispute unless forced to do so, the Council simply asked the parties for more information on their respective positions.[162] The U.A.R. responded with the previously mentioned communication in which it charged Jordan with a violation of the Convention and the bilateral agreement.[163]

After discussing the matter again at some length,[164] the Council concluded that it was still not clear what specific action it was being requested to take, and instructed the Secretary General to ascertain

[156] Cable No. 3, ICAO Doc. C–WP/2743, p. 5 (1958).

[157] Cable No. 2, ICAO Doc. C–WP/2743, p. 5 (1958).

[158] Letter by Jordan to ICAO Secretary General, ICAO Doc. C–WP/2743, pp. 7–9 (1958).

[159] Letter from the U.A.R. Representative to the President of the ICAO Council, ICAO Doc. C–WP/2743, pp. 3–4 (1958).

[160] See ICAO Council, 33rd Sess., Doc. 7878 (C/905), pp. 243–46 (1958); ICAO Council, 34th Sess., Doc. 7902 (C/910), pp. 38–41, 60–67 (1958); ICAO Council, 35th Sess., Doc. 7934 (C/912), pp. 11–19 (1958).

[161] See ICAO Council, 35th Sess., Doc. 7934 (C/912), pp. 17–18 (1958).

[162] See Action of the Council, 33rd Sess., ICAO Doc. 7895 (C/908), p. 18 (1958); Action of the Council, 34th Sess., ICAO Doc. 7903 (C/911), p. 24 (1958).

[163] Letter from the U.A.R. Representative to President of the ICAO Council, ICAO Doc. C–WP/2743, pp. 3–4 (1958).

[164] ICAO Council, 35th Sess., Doc. 7934 (C/912), pp. 12–19 (1958).

whether the parties wished the Council to decide the dispute under Chapter XVIII of the Convention or under the arbitral clause of their bilateral agreement. At the same time, the Council invited Jordan and the U.A.R. "to permit air service between their countries to be resumed" and authorized its President "to offer his own good offices or those of the Secretary General towards finding a settlement of the difference." [165] The President of the Council entered into consultations with the two parties, and shortly thereafter informed the Council that both had agreed to permit the temporary resumption of air services between their respective countries.[166] Once air services were reestablished, the parties did not pursue the matter further.

While this case was not, of course, submitted to the Council as a formal complaint within the meaning of the Transit or Transport Agreements, it does indicate how difficulties arising under these Agreements might for the most part be resolved. Since the Council will usually succeed in getting the parties to reestablish the *status quo ante,* it will thereby be able to create an atmosphere conducive to compromise. The Council will therefore rarely have to rely on sanctions to obtain compliance with any recommendations that it might address to the parties. It is accordingly not surprising that the Council's Rules for the Settlement of Differences do not, in dealing with complaints,[167] contain any provisions relating to sanctions. But since the availability of sanctions may well make a state more receptive to compromise solutions, this topic merits consideration.

The Sanctions

The Transit and Transport Agreements both provide that, after the Council has made appropriate findings and recommendations, "if thereafter a contracting State concerned shall in the opinion of the Council unreasonably fail to take suitable corrective action, the Council may recommend to the Assembly . . . that such contracting State be suspended from its rights and privileges under this Agreement until such action has been taken." [168] The wording of this

[165] Action of the Council, 35th Sess., ICAO Doc. 7958 (C/914), p. 20 (1958).
[166] ICAO Doc. C–WP/2788, p. 5 (1958); [1958] Report of the Council, ICAO Doc. 7960 (A12–P/1), p. 60 (1959).
[167] 1957 Rules, Arts. 21–26.
[168] Transit Agreement, Art. II, Sec. 1; Transport Agreement, Art. IV, Sec. 2.

provision indicates that the Council may not seek these enforcement measures simply because the state concerned has not complied with the Council recommendation as such. Enforcement measures may be imposed only if the Council concludes that the state has "unreasonably" failed to take "suitable corrective action." A state thus runs no risk when it disregards the Council's recommendation, provided the steps it takes are intended to ameliorate the injustice or hardship complained of.[169] Accordingly, before the Council may recommend to the ICAO Assembly that the state be suspended from its rights and privileges under the applicable Agreement, three elements must be present. It will have to appear that the injustice or hardship persists, that the state has made no effort to mitigate it, and that it has advanced no valid reasons for its inaction. The Council is under no obligation, however, to request these sanctions, because both Agreements provide merely that the Council "may" do so.[170]

The power to impose enforcement measures is reserved to the ICAO Assembly. To demonstrate how difficult it will be in practice to obtain the sanctions provided for by the Transit and Transport Agreements, it should be noted initially that the Assembly may impose them only if they have been recommended by the Council. Second, even if the Council makes this recommendation, the Assembly is free to disregard it for it has the power, but not the obligation, to give effect to it. The victim of an injustice or hardship thus has no standing to compel the appropriate relief.[171] Finally, a majority of two-thirds is required in the Assembly to implement the Council's recommendation. For political reasons this may be extremely difficult to achieve, even assuming that the requisite quorum could be obtained.

However, the sanctions that may be imposed are quite severe, for the delinquent state can be suspended from its rights and privileges under the applicable Agreement. Thus, if the Transit Agreement is involved, its scheduled airlines will for the duration of the suspension no longer enjoy the right to fly over or to land for non-traffic

[169] If the measure which led to the submission of the complaint is lawful in itself, the state in question has the obligation only to mitigate its effect, but if it violates the Transport or Transit Agreement it will have to be rescinded.

[170] Transit Agreement, Art. II, Sec. 1; Transport Agreement, Art. IV, Sec. 2. See Kos-Rabcewicz-Zubkowski 355.

[171] See Kos-Rabcewicz-Zubkowski 355.

purposes in the territory of another Contracting State. A suspension under the Transport Agreement would have the effect of depriving those airlines of the Five Freedoms it guarantees. In theory, the delinquent state would at the same time have to accord these very rights to all Contracting States, because the suspension does not relieve it of its duties under the applicable Agreement.[172] It would be unrealistic, however, to believe that a state which has shown such a degree of recalcitrance as to warrant the imposition of sanctions would discharge this obligation. Instead, it would probably withdraw from the Agreement and decline to comply with any provision of the Agreement even before the effective date of its denunciation.[173]

In the final analysis, the effectiveness of the complaint procedure established by the Transit and Transport Agreements depends in large measure upon the willingness of the Contracting States to compromise for the sake of enjoying the benefits these Agreements confer. Because of its expertise in matters relating to international civil aviation, the ICAO Council can quite often provide the assistance necessary to achieve these compromise solutions. If the complaint machinery is viewed in this light, it hardly matters that the enforcement measures are for all practical purposes little more than an illusory remedy.

Judicial Functions Assigned to ICAO by Other International Agreements

In addition to the Convention and the Transit and Transport Agreements, some multilateral and a large number of bilateral agreements confer judicial functions on the ICAO Council.

Under Multilateral Agreements

In three multilateral agreements, concluded under the auspices of and administered by ICAO, some ICAO Member States have undertaken to share in the financial support of air navigation facilities and services deemed vital to the safety of international air services

[172] *Id.* at 354.

[173] Both Agreements may be denounced on one year's notice to be given to the United States as depositary Government. Transit Agreement, Art. III; Transport Agreement, Art. V.

flying the busy North Atlantic air routes.[174] Two of these agreements provide for the joint financial support of certain ground stations operated by Iceland [175] and Denmark.[176] The third, entitled "Agreement on North Atlantic Ocean Stations," [177] deals with the financing, operation, and maintenance of ocean-station vessels providing navigational assistance to international air services.

Each of these agreements provides, in a substantially identical provision, that "any dispute relating to the interpretation or application of this Agreement . . . which is not settled by negotiation shall, upon the request of any Contracting Government party to the dispute, be referred to the Council for its recommendation." [178] The stipulation that the dispute may be "referred to the Council for its recommendation," indicates that the decision of the Council is not intended to be binding on the parties to the dispute.[179] Under these

[174] The Convention on International Civil Aviation contemplates the effectuation under ICAO auspices of such arrangements for the joint support of air navigation services. See Convention, Ch. XV. For a description of these services, see ICAO Secretariat, MEMORANDUM ON ICAO 31–37 (5th ed. 1966); Cheng 76–98.

[175] Agreement on the Joint Financing of Certain Air Navigation Services in Iceland [hereinafter cited as Joint Financing–Iceland], ICAO Doc. 7727 (JS/564) (1957), 334 U.N.T.S. 13 (1959). It was concluded at Geneva on 25 September 1956, and entered into force on 6 June 1958.

[176] Agreement on the Joint Financing of Certain Air Navigation Services in Greenland and the Faroe Islands [hereinafter cited as Joint Financing–Denmark], ICAO Doc. 7726 (JS/563) (1957), 334 U.N.T.S. 89 (1959). This agreement was concluded at Geneva on 25 September 1956, and entered into force on 6 June 1958.

[177] The Agreement on North Atlantic Ocean Stations, ICAO Doc. 7510 (JS/559), Appendix 8 (1954), 215 U.N.T.S. 268 (1955), was concluded at Paris on 25 February 1954, and entered into force on 1 February 1955.

[178] Agreement on North Atlantic Ocean Stations, Art. XV; Joint Financing–Denmark, Art. XVIII; Joint Financing–Iceland, Art. XVIII. The Agreement on North Atlantic Ocean Stations speaks of "any dispute relating to . . . this Agreement or [its] Annex II. . . ." The Joint Financing Agreements with Denmark and Iceland both refer to "any dispute relating to . . . this Agreement or the Annexes thereto."

[179] Article 15 of the Convention, which deals with airport and other charges, confers a similar advisory function on the Council. It provides in part that "upon representation by an interested Contracting State, the charges imposed for the use of airports and other facilities shall be subjected to review by the Council, which shall report and make *recommendations* thereon for the consideration of the State or States concerned." (Emphasis added.) See Cooper, *The Chicago Convention—After Twenty Years*, 14 Zeitschrift für Luftrecht und Weltraum—Rechtsfragen 273, 286–88 (1965).

agreements the ICAO Council thus has the power to render only advisory opinions.[180]

Much more extensive judicial powers are vested in the ICAO Council by the (Paris) Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe.[181] The Paris Agreement, concluded under the auspices of the European Civil Aviation Conference,[182] regulates the reciprocal grant of commercial rights for the non-scheduled air services of the Member States of the ECAC. Article 4 of the Paris Agreement establishes an elaborate machinery for the settlement of disputes. It provides:

> (1) If any dispute arises between Contracting States relating to the interpretation or application of the present Agreement, they shall in the first place endeavour to settle it by negotiation between themselves.
>
> (2) (a) If they fail to reach a settlement they may agree to refer the dispute for decision to an arbitral tribunal or arbitrator.
>
> (b) If they do not agree on a settlement by arbitration within one month after one State has informed the other State of its intention to appeal to such an arbitral authority, or if they cannot within an additional three months after having agreed to refer the dispute to arbitration reach agreement as to the composition of the arbitral tribunal or the person of the arbitrator, any Contracting State concerned may refer the dispute to the Council of the International Civil Aviation Organization for decision. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. If said Council declares itself unwilling to entertain the dispute, any Contracting State concerned may refer it to the International Court of Justice.

[180] See ICAO Doc. C–WP/1457, p. 1 (1953).

[181] The Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe [hereinafter cited as Paris Agreement], ICAO Doc. 7695 (1956), 310 U.N.T.S. 229 (1958), was concluded at Paris on 30 April 1956, and entered into force on 21 August 1957.

[182] The European Civil Aviation Conference, a regional affiliate of ICAO, was brought into being by ICAO and the Council of Europe. See Conference on Coordination of Air Transport in Europe, ICAO Doc. 7575 (CATE/1) (1954); European Civil Aviation Conference, Report of the First Session (Strasbourg, 29 November–16 December 1955), Res. No. 1, ICAO Doc. 7676 (ECAC/1), p. 5 (1956). On the organizational structure and functions of the ECAC, see Wheatcroft, THE ECONOMICS OF EUROPEAN AIR TRANSPORT 311–20 (1956); Cheng 56–62.

(3) The Contracting States undertake to comply with any decision given under paragraph (2) of this Article.[183]

Article 4 indicates that the jurisdiction of the Council to decide a dispute referred to it under the Paris Agreement is contingent, apart from the requirement of prior negotiations, on the failure of the parties to agree on the submission of the dispute to arbitration or on the composition of the tribunal. The ICAO Council thus has compulsory jurisdiction under Article 4 only when the parties cannot find a mutually acceptable forum.[184] If this happens, the case may be referred to the Council under Article 4(2)(b) by "any Contracting State concerned." In the context of the Paris Agreement, "any Contracting State concerned" can be read to include states not parties to the dispute.[185] True, we reached the opposite conclusion in interpreting the almost identical language found in Article 84 of the Convention, but that construction was justified by considerations which are inapplicable in the present context.

Article 4(2)(b) of the Paris Agreement specifies a definite time limit within which the parties must proceed to arbitration after one of them has given notice of its intention to do so. When such notice has been given, it is clear that at least one of them has concluded that further *inter partes* talks would serve no useful purpose. Article 84 of the Convention does not fix such a time limit. A state not involved in the negotiations is consequently in no position to judge whether the dispute is ripe for adjudication under Article 84. Here it would be unwise to give a third state standing to submit the dispute to the ICAO Council. No such countervailing considerations arise under Article 4 of the Paris Agreement.

If this interpretation of Article 4 of the Paris Agreement is correct, it must be asked to what states the phrase "any Contracting States concerned" applies. Dr. Cheng takes the position that, since all states adhering to a multilateral treaty are in some way "concerned" in its interpretation or application, each of them has the

[183] This Article provides further that "if and so long as any Contracting State fails to comply with a decision given under paragraph (2) of this Article, the other Contracting States may limit, withhold or revoke any rights granted to it by virtue of the present Agreement." Paris Agreement, Art. 4(4).

[184] It can be assumed, of course, that the parties could agree to select the Council, instead of some other body, to settle their dispute.

[185] Cheng 223.

right to submit the dispute to the Council.[186] The language of Article 4(2)(b) may neither compel nor permit this result, however, for under Cheng's construction the word "concerned" after "any Contracting State" becomes superfluous. To avoid this result, one could construe this clause as according standing to the parties to the dispute and to those states directly affected by it.[187] This construction may in some cases—*e.g.*, cost-sharing—include all Contracting States.

The most interesting feature of Article 4 is the provision in paragraph 2(b) which permits the reference of the dispute to the International Court of Justice, if the ICAO Council "declares itself unwilling to entertain the dispute." [188] This clause was prompted by the consideration that, although the ICAO Assembly authorized the Council in 1947 "to act as an arbitral body on any differences arising among Contracting States relating to international civil aviation matters submitted to it, when expressly requested to do so by all parties to such differences," [189] the Council never accepted this broad grant of power.[190] Moreover, the Council's Rules for the Settlement of Differences, provisionally promulgated by it in 1953,[191] like the present 1957 Rules, apply only to disputes arising under the Convention and the Transit and Transport Agreements. And despite the fact that the Council, in adopting these Rules,

[186] *Ibid.*

[187] See 1957 Rules, Art. 19(1), where the right to intervene in a dispute submitted to the Council under Article 84 of the Convention is limited to Contracting States "directly affected by the dispute." The Council would probably reach a similar conclusion in applying Article 4 of this Agreement.

[188] The original draft of Article 4 contained the words "unwilling or unable." See European Civil Aviation Conference, Report of the First Session (Strasbourg, 29 November–16 December 1955), ICAO Doc. 7676 (ECAC/1), p. 34 (1956). The words "or unable" were dropped at a subsequent conference, which accepted a German draft of Article 4. See European Civil Aviation Conference, Report of the First Intermediate Meeting (Paris, 26 April 1956), ICAO Doc. 7696 (ECAC/IMI), p. 10 (1956). No reasons are given for this deletion.

[189] Assembly Res. A1–23, ICAO Doc. 4411 (A1–P/45) (1947).

[190] Here it should be noted, however, that the functions conferred on the Council by the Agreement on North Atlantic Ocean Stations was accepted by it on 7 April 1954. Action of the Council, 21st Sess., ICAO Doc. 7484 (C/872), p. 18 (1954). On 28 November 1956, it accepted the same obligations arising under the Agreements on the Joint Financing of Certain Air Navigation Services in Greenland and the Faroe Islands as well as in Iceland. Action of the Council, 29th Sess., ICAO Doc. 7763 (C/896), p. 27 (1957).

[191] ICAO Doc. 7392 (C/862) (1953).

reserved the right to apply them to disputes arising under other agreements,[192] the draftsmen of the Paris Agreement nevertheless had no real guarantee that the Council would accept the judicial functions assigned by Article 4 of the Agreement.

It is therefore interesting to note that when the ICAO Council reviewed the Report of the First Session of the European Civil Aviation Conference,[193] which contained the draft of the Paris Agreement,[194] most of the discussion centered on Article 4, even though the Paris Agreement confers a number of other functions on the Organization. In this debate, the Representative of the United States suggested that "the Council should consider very carefully, and should certainly have the advice of the Legal Bureau, before accepting the responsibility, placed upon it by Article 4 . . . to arbitrate disputes over the interpretation or application of the Agreement." He took this position, the U.S. Representative explained, because "he doubted very much whether the Council would be able to consider such disputes, which would be between European States, when European States formed such a high proportion of its [the Council's] membership." [195]

When it was pointed out that the possibility that the Council might lack a quorum to decide a dispute was not a serious problem, since Article 4(2)(b) left the Council free not to adjudicate a particular case, the U.S. Representative replied that "it was not only the ability of the Council to arbitrate disputes under the Agreement about which he was doubtful. He wondered whether the Council had the right to take on any quasi-judicial functions beyond those given to it by the Convention." [196] Although the other Council Representatives apparently did not share these constitutional doubts, they agreed to a suggestion that the Council reserve its position with regard to Article 4 of the Agreement at least until after the Assembly had considered the relationship between ICAO and ECAC. The Council accordingly decided to inform ECAC "that ICAO will assume responsibility for the performance of the functions assigned to the Organization in Articles 5, 6, 7, 8 and 9 of the proposed Agree-

[192] Action of the Council, 19th Sess., ICAO Doc. 7408 (C/864), p. 29 (1953).
[193] ICAO Doc. 7676 (ECAC/1) (1956).
[194] *Id.* at 31.
[195] ICAO Council, 27th Sess., Doc. 7662 (C/890), p. 163 (1956).
[196] *Ibid.*

ment, but for the time being reserves its position in relation to the functions assigned to it in Articles 4 and 10." [197]

When the ICAO Assembly convened a few months later, it adopted a resolution in which it decided "to assume, on behalf of ICAO, the responsibilities that will devolve upon the Organization as a result of acceding to the request of ECAC. . . ." [198] This resolution prompted the Council to reconsider its earlier position and to accept the functions assigned to it under Article 4 of the Paris Agreement.[199]

Mention should also be made of the role assigned to the ICAO Council by a multilateral agreement on private international air law, namely, the (Rome) Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface.[200] The Rome Convention establishes uniform rules governing liability for surface damage inflicted by foreign aircraft. Paragraph (7) of Article 15, which deals with the recognition of certificates of financial responsibility issued to aircraft operators, contains the following provision:

> (a) Where the State overflown has reasonable grounds for doubting the financial responsibility of the insurer, or of the bank which issues a guarantee under paragraph 4 of this Article, that State may request additional evidence of financial responsibility, and if any question arises as to the adequacy of that evidence the dispute affecting the States concerned shall, at the request of one of those States, be submitted to an arbitral tribunal which shall be either the

[197] *Id.* at 162. Article 10 of the Agreement deals with the role of ICAO in convening a conference to consider amendments to the Agreement. No reasons are given in the Council debates for the reservation relating to Article 10.

[198] Assembly Res. A10–5, ICAO Doc. 7707 (A10–P/16) (1956).

[199] See Action of the Council, 29th Sess. [1956], ICAO Doc. 7763 (C/896), p. 25 (1957).

For the view that the ICAO Council is not properly equipped to perform the judicial functions under the Paris Agreement, see Riese, *Das mehrseitige Abkommen über gewerbliche Rechte im nichtplanmässigen Luftverkehr in Europa,* 8 Zeitschrift für Luftrecht 127, 136 (1959).

[200] The Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface [hereinafter cited as Rome Convention], 310 U.N.T.S. 181 (1958), was signed in Rome, on 7 October 1952, and entered into force on 4 February 1958. See generally Rinck, *Damage Caused by Foreign Aircraft to Third Parties,* 28 J. Air L. & Com. 405 (1961–62); Kistler, DAS RÖMER HAFTUNGSABKOMMEN VON 1952 (1959).

> Council of the International Civil Aviation Organization or a person or body mutually agreed by the parties.[201]

Article 15(7)(a) indicates that if the parties to the dispute fail to agree upon its submission to a different tribunal, each of them may seize the ICAO Council with jurisdiction to decide it. This result was clearly intended by those who drafted Article 15. Thus, when the Chairman of the "Committee on Article 15" was asked at the Rome Conference whether "it was the intention of the Conference in the case covered by this provision [Article 15(7)(a)] that, if the parties did not agree on an arbitrator, it would be compulsory for them to accept the arbitration of the ICAO Council if either party so requested," [202] he replied that

> in accordance with the decision of the Conference, the arbitration procedure was compulsory if one of the States concerned requested it. The other State would have to submit its dispute to arbitration with the State so requesting. The objective of this provision was to have the parties submit to the decision of the ICAO Council or of a court specially appointed by common agreement between the parties.[203]

It is therefore surprising to find a statement in the Report of the U.S. Delegation to the Rome Conference that it is not clear under Article 15(7)(a) "whether, in the event of the failure of the parties to agree upon another person or body, the Council of the ICAO automatically becomes the arbitral tribunal." [204] This statement is valid only if it is interpreted to mean that the Council's jurisdiction seems to be contingent on the case being submitted to it by one of the parties to the dispute. It cannot be doubted, however, that upon the failure of the parties to reach agreement on some other arbitral tribunal, each of them has the right to seize the Council with jurisdiction to decide the dispute.

[201] Pursuant to Article 15(7)(b) of the Rome Convention, the insurance or guarantee is to be considered "provisionally valid by the State overflown" until the tribunal envisaged in paragraph (7)(a) has rendered its decision.

[202] 1 CONFERENCE ON PRIVATE INTERNATIONAL AIR LAW (ROME, SEPTEMBER–OCTOBER 1952), ICAO Doc. 7379 (LC/34), p. 527 (1953).

[203] *Ibid.*

[204] United States Delegation to the International Conference held at Rome, Italy, September 9–October 7, 1952, *Summary Analysis of Convention on Damage Caused by Foreign Aircraft to Third Persons on the Surface—Annex to Delegation Report,* 20 J. Air L. & Com. 92, 99 (1953).

Whether the ICAO Council has the requisite professional qualifications to adjudicate disputes arising under Article 15 may well be doubted. Here it would have to pass upon the "adequacy" of the evidence of financial responsibility of the aircraft operator's insurer or guarantor, as certified by the state of the aircraft's registry or by the state where the insurer or guarantor has its principal place of business.[205] The Council's competence in matters of international air law might well be of little value in deciding questions closely related to the law and economics of the banking and insurance business. It is therefore surprising that the Council accepted the judicial functions assigned to it under the Rome Convention.[206]

Under Bilateral Agreements

In 1952, when the dispute between India and Pakistan was before the Council, the ICAO Secretariat prepared a paper on the rules of procedure applicable to disputes that might be submitted to it.[207] In it the Secretariat examined over 200 bilateral aeronautical agreements registered with ICAO up to the year 1951, and classified them according to the dispute-settling machinery they envisaged.[208] Using the Secretariat's classifications, its findings may roughly be summarized as follows.

Conventions and Agreements recognizing the exclusive competence of Council: Final binding decision, 2; Decision subject to appeal, 1; Advisory report, 12.

Agreements recognizing competence of the Organization for matters covered by provisions of Chapter XVIII [of the Convention] and providing for submission of other matters to arbitration: [Type of decision not specified by Secretariat], 5.

Agreements recognizing competence of Council with possible alternative choice of arbitral tribunal, body, or person: Final binding decision, 60; Decision subject to appeal, 9.

Agreements recognizing competence of Council after failure of an

[205] See Rome Convention, Arts. 15(1)–(4). The dispute envisaged by Article 15(7)(a) would be between the Contracting State overflown and the Contracting State or States certifying the insurer's or guarantor's financial responsibility.

[206] The Council accepted this responsibility on February 10, 1953. Action of the Council, 18th Sess., ICAO Doc. 7388 (C/860), p. 16 (1953).

[207] ICAO Doc. C-WP/1171 (1952).

[208] *Id.* at 15–20.

agreement between the parties on choice of an arbitral tribunal, body, or person: Final binding decision, 8; Advisory report, 11.

Agreements recognizing competence of Council after failure of an agreement between the parties on an arbitral tribunal, body, or person, and if there is no special tribunal established in ICAO for the purpose: Final binding decision, 30.

Agreements recognizing competence of a special tribunal established in ICAO for the purpose, after failure of agreement between parties on an arbitral tribunal, body, or person (without reference to the Council): Final binding decision, 7.

Agreements recognizing competence of an arbitral tribunal (without reference to Council nor any body of the Organization, but with the possible participation of the President of the Council in appointing arbitrators): Final binding decision, 5; Advisory opinion, 13.

Agreements recognizing competence of an arbitral tribunal (without reference to the Council, other body of the Organization, or President): Decision, 23; Advisory opinion, 1.

Agreements recognizing competence of the Interim Council [of PICAO] (with no reference to ICAO Council), or of arbitral tribunal, or other body or person: [Type of decision not specified by Secretariat], 10.

Agreements where there is no provision on settlement of disagreements: 18.

Between 1952 and 1965, approximately 2,000 bilateral aeronautical agreements and protocols thereto have been registered with ICAO.[209] Although it would therefore be a monumental task to update the Secretariat's statistical findings,[210] it might nevertheless be instructive to examine aeronautical treaties registered with ICAO in the year 1960, for example, to ascertain to what extent more recent agreements still look to the Council as an arbitral tribunal for the settlement of disputes arising thereunder.[211]

[209] See AERONAUTICAL AGREEMENTS AND ARRANGEMENTS REGISTERED WITH THE ORGANIZATION (1 JANUARY 1946–31 DECEMBER 1964), ICAO Doc. 8473 (LGB/215) (1965).

[210] For a more recent, but for our purposes not very helpful, survey of arbitral clauses found in bilateral air transport agreements, see HANDBOOK ON ADMINISTRATIVE CLAUSES IN BILATERAL AIR TRANSPORT AGREEMENTS, ICAO Circular 63–AT/6, pp. 72–83 (1962).

[211] I selected the year 1960 for two reasons. First, it is sufficiently removed in time from the period covered by the Secretariat's study to permit the discern-

About forty bilateral air treaties registered by the Organization in 1960 contain a provision relating to the settlement of disputes. None of these confers exclusive judicial competence on the ICAO Council. By far the largest number of these agreements provide for the settlement of disputes through diplomatic channels,[212] or by an arbitral tribunal. Those contemplating arbitration can be divided into four groups.

The first makes no provisions for the composition of the tribunal, if the parties are unable to agree thereon.[213] The second envisages the appointment of a tribunal of three arbitrators by mutual agreement among the parties. It provides further, however, that, if the parties fail to reach such an agreement, the arbitrators may be designated by the President of the ICAO Council.[214] The third group follows for all practical purposes the pattern just described, except that the functions conferred therein on the President of the ICAO Council are assigned in these agreements to the President of the International Court of Justice.[215] The fourth group calls for arbitration by a tribunal mutually agreed upon by the parties, and provides that the dispute may be referred to the International Court of Justice if no such agreement can be reached.[216]

Among those bilateral agreements—approximately one-third of the total registered in 1960—which call for some sort of arbitration

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ment of a trend. Second, most of the bilateral agreements registered with ICAO in 1960 have in the meantime also been published in the United Nations Treaty Series and are thus accessible.

[212] These are mainly agreements concluded with Communist Bloc countries. See, *e.g.*, Agreement (with Annexes) between the United Arab Republic and Bulgaria concerning Civil Air Services, Article XVIII. This agreement was signed at Cairo on 9 July 1959, and is reprinted in 411 U.N.T.S. 185 (1961).

[213] See, *e.g.*, Air Transport Agreement (with schedule of routes) between Thailand and France, Article 7. This Agreement was signed at Bangkok on 26 February 1960, and may be found in 392 U.N.T.S. 279 (1961).

[214] See, *e.g.*, Agreement (with schedule) between the United Kingdom and Czechoslovakia for air services between and beyond their respective territories, Article 12, 374 U.N.T.S. 207 (1960). This agreement was signed at Prague on 15 January 1960.

[215] See, *e.g.*, Agreement (with schedule and exchange of notes) between Sweden and Sudan on air services between and beyond their respective territories, Article IX. This agreement was signed at Khartoum on 17 February 1958, and may be found in 393 U.N.T.S. 161 (1961).

[216] See, *e.g.*, Air Transport Agreement (with annex) between the Netherlands and Guinea, Article 9. This Agreement was signed at Conakry on 9 March 1960. It is reproduced in 392 U.N.T.S. 242 (1961).

under the auspices of ICAO, a mere handful vests judicial function in the Council. Illustrative of provisions which do is Article 15 of the Air Services Agreement between Denmark and Ceylon.[217] It reads as follows:

> If the Contracting Parties fail to reach agreement on any question relating to the interpretation or application of this Agreement or of the Annex thereto, the dispute shall be referred for decision to the Council of the International Civil Aviation Organization, unless the Contracting Parties agree to settle the dispute by reference to an Arbitral Tribunal appointed by agreement between the Contracting Parties, or to some other person or body. The Contracting Parties undertake to comply with the decision rendered.

Interestingly enough, the remaining agreements falling in this category provide for the settlement of disputes by an arbitral tribunal or, in the alternative, a competent tribunal established by ICAO. They usually stipulate further that, if such a tribunal has not been established by the Organization, the case may be referred to the Council. Thus the Air Services Agreement between Ghana and the Netherlands,[218] after providing in Article 10(1) for the settlement of the dispute through direct negotiation, stipulates further that

> (2) If the Contracting Parties fail to reach a settlement by negotiation,
>
> (a) they may agree to refer the dispute for decision to an arbitral tribunal appointed by agreement between them or to some other person or body; or
>
> (b) if they do not so agree or if, having agreed to refer the dispute to an arbitral tribunal, they cannot reach agreement as to its composition, either Contracting Party may submit the dispute for decision to any tribunal competent to decide it which may hereafter be established within the International Civil Aviation Organisation or, if there is no such tribunal, to the Council of the said Organisation.
>
> (3) The Contracting Parties undertake to comply with any decision given under paragraph (2) of this Article.

[217] Agreement (with annex, Protocol, and exchange of letters) between Denmark and Ceylon relating to air services, signed at Colombo on 29 May and 8 September 1959, 348 U.N.T.S. 225 (1960).

[218] Agreement (with annex) between Ghana and the Netherlands for air services between and beyond their respective territories, signed at The Hague on 30 July 1960, 412 U.N.T.S. 51 (1961).

Even some of these agreements bypass the Council. They provide that, if the parties are unable to agree on an arbitral tribunal and if none has been established by ICAO, the dispute may be submitted to the International Court of Justice. The language employed in the Air Services Agreement between Sweden and Pakistan [219] is characteristic of this approach. Article XI of this agreement provides:

> (B) If the Contracting Parties fail to reach a settlement by negotiation,
>
> (i) they may agree to refer the dispute for decision to an arbitral tribunal or some other person or body appointed by agreement between them; or
>
> (ii) if they do not so agree or if, having agreed to refer the dispute to an arbitral tribunal they cannot reach agreement as to its composition, either Contracting Party may submit the dispute for decision to any tribunal competent to decide it established within the International Civil Aviation Organization, or, if there be no such tribunal, to the International Court of Justice.

On the assumption that the year 1960 is fairly characteristic of recent state practice, the proportion of bilateral air agreements vesting adjudicatory functions in the ICAO Council has been declining. A superficial perusal of similar agreements registered with the Organization in the years 1961–64, reveals that this trend may well have gained even greater momentum since 1960.[220] One reason for this trend may be that some states have concluded that the ICAO Council would be unwilling to act as an arbitral tribunal. Another reason might be that these states do not believe that a political body like the ICAO Council is a proper forum for the adjudication of legal disputes.[221]

It is therefore interesting to note that some of the bilateral agreements anticipate the possibility that ICAO might establish a

[219] Agreement (with annex and exchange of notes) between Sweden and Pakistan relating to air services, signed at Stockholm on 6 March 1958, 393 U.N.T.S. 181 (1961).

[220] This trend may either be the cause or the result of the fact that Article 13 of the Standard Clauses for Bilateral Agreements, adopted by the European Civil Aviation Conference, envisages no arbitral functions for the ICAO Council. See ECAC, Report of the 3rd Session, Records of the Session, Vol. I, ICAO Doc. 7977 (ECAC/3–1), p. 61 (1959).

[221] See Goedhuis, *Problems of Public International Air Law,* 81 Recueil des Cours 205, 223–25 (1952).

special arbitral tribunal to decide disputes relating to the interpretation or application of these agreements. The Organization does not seem to have considered this step. Suggestions to that effect, however, have come from various commentators.[222] A permanent ICAO arbitral tribunal would avoid the difficulties that are usually encountered in establishing *ad hoc* tribunals. It might furthermore develop a substantial body of law and thus clarify many of the current uncertainties relating to the application of international aviation agreements. The varied and complicated technical issues that are raised by disputes relating to multilateral and bilateral air agreements may, on the other hand, demand considerable flexibility in the selection of arbitrators especially qualified to adjudicate a particular case. This consideration may outweigh the benefits to be derived from a permanent tribunal. Here the list of available arbitrators maintained by the ICAO Council since 1963 [223] performs a useful service. It may, of course, also be that these bilateral agreements can be read as authorizing the ICAO Council or the Organization to establish an *ad hoc* tribunal to decide such disputes.[224] ICAO should therefore promulgate appropriate rules for the establishment of such tribunals.

The ICAO Rules for the Settlement of Disputes

Evolution and Scope of the Rules

The Interim Council of the Provisional International Civil Aviation Organization promulgated on September 24, 1946, the "Rules Governing the Settlement of Differences between States." [225] They were expressly made applicable [226] to disputes and complaints arising under the Transit and Transport Agreements; to the review of

[222] See, *e.g.*, *id.* at 300–01.

[223] See [1963] Report of the Council, ICAO Doc. 8402 (A15–P/2), p. 92 (1964).

[224] Article 17 of the Draft Multilateral Agreement on Commercial Rights in International Civil Air Transport, prepared by the PICAO Air Transport Committee, PICAO Doc. 2866 (AT/169) (1947), reissued as ICAO Doc. 4014 (A1–EC/1) (1947), contemplated the establishment of such an *ad hoc* tribunal to be designated by the President of the ICAO Council. For an analysis of Article 17, see Cooper, *New Problems in International Civil Aviation Arbitration Procedure*, 2 Arb. J. 119 (1947).

[225] Rules Governing the Settlement of Differences between States [hereinafter cited as 1946 Rules], PICAO Doc. 2121 (C/228) (1946).

[226] 1946 Rules, Art. 1.

charges imposed for the use of airports and other facilities as contemplated in the Interim Agreement on International Civil Aviation; [227] to the settlement of disputes relating to international air matters as envisaged in Article III, Section 6(8) of the Interim Agreement; [228] and to "any differences referred to the Interim Council under provisions of other agreements relating to international civil aviation matters concluded by the States concerned." [229]

These Rules did not apply to disputes under Article 84 of the Convention because it had not as yet entered into force. And, since no cases were submitted to the Interim Council for adjudication, they were never applied. They were, furthermore, not reissued when ICAO was established.[230] On May 21, 1952, the ICAO Council established a Working Group to review the set of draft rules which the ICAO Secretariat had prepared for the Council's consideration in connection with the India-Pakistan case.[231] This Working Group submitted a revised set of draft rules to the Council on March 31, 1953.[232] These rules were extensively debated in the Council and then remanded to the Working Group for reexamination in the light of the comments made in the Council.[233] A few weeks later, after receiving the Working Group's second report containing the necessary revisions,[234] the Council provisionally adopted these rules [235] and ordered them to be circulated to the Member States for their comments.[236]

The 1953 Rules which, with some changes,[237] formed the basis for

[227] See Interim Agreement, Art. VIII, Sec. 9.

[228] Interim Agreement, Art. III, Sec. 6(8) read in part that "when expressly requested by all parties concerned, [the Council shall] act as an arbitral body on any differences arising among member States relating to international civil aviation matters which may be submitted to it."

[229] 1946 Rules, Art. 1(g).

[230] For an analysis of the 1946 Rules, see Kos-Rabcewicz-Zubkowski 356–65.

[231] Action of the Council, 16th Sess., ICAO Doc. 7314 (C/849), p. 26 (1952). The Rules prepared by the Secretariat can be found in ICAO Doc. C–WP/1171 Appendix A (1952).

[232] ICAO Doc. C–WP/1457 (1953).

[233] ICAO Council, 19th Sess., Doc. 7390 (C/861), pp. 5–13 (1953).

[234] ICAO Doc. C–WP/1503 and Corr. (1953).

[235] Rules for the Settlement of Differences between Contracting States [hereinafter cited as 1953 Rules], ICAO Doc. 7392 (C/862) (1953).

[236] ICAO Council, 19th Sess., Doc. 7390 (C/861), p. 103 (1953).

[237] The specific amendments to the 1953 Rules which were taken over by the 1957 Rules can be found in ICAO Doc. C–WP/2271 (Annex B) (1956).

the present Rules, were made applicable to disputes under the Convention and its Annexes, and to disagreements and complaints under the Transit and Transport Agreements.[238] In its first report, the Working Group on the Rules for the Settlement of Disputes between Contracting Parties gave the following reasons for limiting the Rules to these disputes:

> The Working Group explored the possibilities of preparing rules which may apply to any case which may be submitted to the Organization. In addition to the provisions of the Chicago Acts, there are also in a number of bilateral and multilateral aeronautical agreements provisions relating to the settlement of disputes by the Organization or its Council. But the responsibility placed upon the Organization or the Council by these agreements has not yet been accepted except in the case of the Ocean Weather Stations Agreement and the Rome Convention [on Damage Caused by Foreign Aircraft to Third Parties on the Surface]; in the first case, Council is to give only an advisory opinion, and in the second the differences which may be referred to the Council are of a special nature which would not readily fit into general rules. In respect of other bilateral and multilateral agreements, it is believed that if and when cases arise, it will be more appropriate to decide then what rules of procedure should apply.[239]

When this report was submitted to the Council, a number of Representatives expressed the view that the Rules should be made applicable to all disputes that might be submitted to the Council.[240] The Director of the ICAO Legal Bureau counseled against this course, however, on the ground that the arbitral proceedings envisaged for the settlement of disputes arising under bilateral agreements ". . . were of a different character than judicial proceedings (the kind involved in the settlement of disputes under the Chicago Acts). For example, in the former there would be an agreed presentation of the facts and the issues by the two parties concerned; in the latter there would not." [241]

Of course, neither the reasons nor the example given by the Director of the Legal Bureau compel the conclusion that the Rules should not be applicable to disputes arising under bilateral agree-

[238] 1953 Rules, Art. 1.
[239] ICAO Doc. C-WP/1457, p. 1 (1953).
[240] See ICAO Council, 19th Sess., Doc. 7390 (C/861), pp. 5–8 (1953).
[241] *Id.* at 7.

ments. The addition of one or two provisions to the Rules could readily have overcome the problems he anticipated, even assuming that they are more than distinctions without a difference. Be that as it may, his arguments did not persuade those Council Representatives who favored making the Rules applicable to all disputes. To prevent further delays, however, they agreed to a compromise under which the Council, in its resolution promulgating the 1953 Rules, decided that "as far as practicable and appropriate, these Rules would be applied to any disputes other than those specifically provided for therein, submitted to the Council." [242]

The Council's 1957 resolution adopting the present Rules makes no reference to the possible applicability of these Rules to disputes other than those arising under the Chicago Acts.[243] The 1957 Rules are expressly limited to disputes arising under the Convention and its Annexes, and to disagreements and complaints under the Transit and Transport Agreements.[244] During the four-year period that elapsed between the provisional adoption of the 1953 Rules and the promulgation of the present Rules, the Council never considered the question of their applicability to disputes arising under other agreements. It is therefore not clear whether the 1953 resolution was superseded by the resolution adopting the present Rules. It matters little what conclusion is accepted, for if the Council decided to act as an arbitral tribunal under some other agreement it would in all likelihood apply these Rules, provided such a course proved to be "practicable and appropriate."

Before analyzing the provisions of the present Rules, it should be asked why their final adoption was delayed for almost four years. Contrary to what one might assume, this delay cannot be attributed to any controversies in the Council relating to the substance of the Rules. Rather, apart from the time that was consumed in obtaining and analyzing the comments of the Contracting States,[245] the delay was caused by the insistence of some Council Representatives that the Rules not be adopted until they had been carefully studied by a committee of qualified legal experts. After debating the composition

[242] Action of the Council, 19th Sess., ICAO Doc. 7408 (C/864), p. 29 (1953).

[243] See Action of the Council, 30th Sess., ICAO Doc. 7818 (C/901), p. 33 (1957).

[244] 1957 Rules, Art. 1.

[245] An analysis of these comments, prepared by the ICAO Secretariat, can be found in ICAO Doc. C–WP/1685 (1954).

of this committee at two sessions,[246] the Council decided to entrust the "finalization" of the Rules to a group of legal experts nominated by the Chairman of the ICAO Legal Committee in consultation with the President of the Council.[247] The Group of Experts presented its report and revisions of the 1953 Rules to the Council in 1956.[248] These Rules, as revised by the Group of Experts, were then promulgated by the Council without any amendments at its next session on April 9, 1957.[249]

Contents of the Rules

The 1957 Rules[250] consist of one set of rules that applies to disputes and another which governs complaints. They also contain some general provisions applicable to both types of proceedings.[251]

Rules Applicable to Disputes

The Pleadings

The Rules envisage the usual exchange of pleadings, commencing with an application and memorial,[252] followed by a counter-memorial,[253] a reply by the applicant state, and the respondent's rejoinder.[254] If the respondent state questions the Council's jurisdiction, it must file the appropriate objections in a "special pleading" before the time limit set for the submission of the counter-memorial has expired. This step will have the effect of suspending the proceedings on the merits until the Council, after hearing the parties, has passed on the question of jurisdiction.[255]

As far as the pleadings are concerned, three points should be noted. First, after the application has been filed with the Secretary

[246] See ICAO Council, 21st Sess., Doc. 7464 (C/871), pp. 4–6 (1954); ICAO Council, 23rd Sess., Doc. 7525 (C/875), p. 204 (1955).

[247] Action of the Council, 23rd Sess., ICAO Doc. 7556 (C/877), p. 36 (1955).

[248] ICAO Doc. C–WP/2271 (1956).

[249] Action of the Council, 30th Sess., ICAO Doc. 7818 (C/901), p. 33 (1957). They were subsequently issued as ICAO Doc. 7782 (1959).

[250] For an analysis of the 1957 Rules, see Hingorani 15–21; Mankiewicz 388–94.

[251] See 1957 Rules, Art. 1.

[252] 1957 Rules, Art. 2.

[253] 1957 Rules, Art. 4.

[254] 1957 Rules, Art. 7.

[255] 1957 Rules, Art. 5.

General of ICAO, who under the Rules performs the functions of a court registrar, he must inform all parties to the particular agreement that the action has been instituted.[256] This provision is undoubtedly designed, among other things, to give these states an opportunity to consider the advisability of intervening in the proceedings. Second, the Rules do not contain any time limits for the pleadings. This matter is left to the Council, or to its President if the Council is not in session, subject to the stipulation that "any time-limit fixed pursuant to these Rules shall be so fixed as to avoid any possible delays and to ensure fair treatment of the party or parties concerned." [257] Third, under Article 4(2) of the Rules, the respondent state may in its counter-memorial assert "a counter-claim directly connected with the subject matter of the application provided it comes within the jurisdiction of the Council." If such a counter-claim is presented, the Council must accord the parties a hearing before passing on its admissibility.

Article 4(2) was recommended in 1956 by the Group of Experts who patterned it on Rule 63 of the I.C.J. Rules of Court.[258] Although the Group's report does not explain the intended scope of this provision, Article 4(2) would seem to be broad enough to encompass counter-claims based on agreements other than the three Chicago Acts. This would mean that if a dispute arising under the Convention, for example, is directly related to a claim based on a bilateral air transport agreement, the Council will have to decide the counter-claim, provided that the bilateral agreement confers the requisite jurisdiction on the Council or that the parties consent thereto.[259]

The Proceedings

The Council's policy of encouraging the Contracting States to settle their disputes by direct negotiations finds expression in two separate provisions of the Rules. Under Article 6(1) of the Rules the Council, after receipt of the counter-memorial, may decide "whether at this stage the parties should be invited to enter into

[256] 1957 Rules, Art. 3.
[257] 1957 Rules, Art. 28(1).
[258] ICAO Doc. C–WP/2271, p. 4 (1956).
[259] See Asylum Case, [1950] I.C.J. Rep. 266, 280–81.

direct negotiations as provided in Article 14." Under Article 14(1) this invitation may be extended to the parties at any time during the proceedings before the decision is rendered, "if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiations have not been exhausted." As soon as the parties accept this invitation the proceedings are suspended. The Council may, however, fix a time limit within which the negotiations are to be completed.[260] With the consent of the parties, moreover, "the Council may render any assistance likely to further the negotiations, including the designation of an individual or a group of individuals to act as conciliator during the negotiations." [261] A settlement of the dispute by the original parties prior to the Council's decision terminates the proceedings.[262] This result obtains even if other states have intervened, although the dismissal of the dispute under these circumstances is without prejudice to the intervenor's right to lodge its own application.[263] The terms of a settlement are recorded and communicated to all states that are parties to the instrument under which the dispute arose.[264]

If the Council does not invite the parties to enter into further negotiations after receipt of the counter-memorial, or if these negotiations were unsuccessful, the Council will either consider the case itself or delegate this task to a "Committee . . . of five individuals who shall be Representatives on the Council of Member States not concerned in the disagreement." [265] Since it is highly unlikely that the Council as a whole will conduct the proceedings itself, the Committee will no doubt perform this role in most, if not all, cases. The functions assigned to the Committee are set forth in Article 13 of the Rules, which provides that the Committee

> shall, on behalf of the Council, receive and examine all documents submitted in accordance with these Rules and, in its discretion, hear evidence or oral arguments, and generally deal with the case with a view to action being taken by the Council under Article 15. The

[260] 1957 Rules, Art. 14(2).
[261] 1957 Rules, Art. 14(3).
[262] 1957 Rules, Arts. 14(4) and 20(1)(a).
[263] 1957 Rules, Art. 20(1)(b).
[264] 1957 Rules, Art. 20(2).
[265] 1957 Rules, Art. 6(2).

> procedures governing the examination of the case by the Committee shall be those prescribed for the Council when it examines the matter itself.[266]

The "action" envisaged under Article 15 refers to the decision in the case which only the Council may render. When considering the Committee's report, the Council does have the power, however, to "make such further enquiries as it may think fit or obtain additional evidence." [267] This provision was inserted in the 1957 Rules by the Group of Experts to emphasize that, while the Committee could deal with the case up to the final decision, "the Council should, in all stages, be in final control of the proceedings, and that the right to give a decision must be reserved to the Council." [268]

The Committee's report, which must contain a summary of the evidence, findings of fact, and the Committee's recommendations, becomes a part of the record of the proceedings.[269] After receipt of a copy of the report, the parties may submit to the Council their written comments and, if the Council consents, they may also be given an oral hearing.[270]

The Committee, as we have seen, is to consist of "five individuals who shall be Representatives on the Council of Member States not concerned in the disagreement." [271] The same language was employed in the 1953 Rules.[272] This provision was adopted by the Council after an extensive debate that was sparked by the Representative of the United Kingdom, who wondered whether the Convention and the Transit and Transport Agreements precluded the appointment of a Committee consisting of individuals other than Council Representatives.[273] The 1946 Rules spoke of a Committee consisting either of Interim Council Representatives or of "qualified persons" chosen from a list that was to be maintained for that purpose by the Interim Council.[274] The U.K. Representative and

[266] 1957 Rules, Art. 14(1) further provides that "while the Committee has charge of the proceedings, the functions of the President of the Council under these Rules shall be exercised by the Chairman of the Committee."

[267] 1957 Rules, Art. 13(4).

[268] ICAO Doc. C–WP/2271, p. 4 (1956).

[269] 1957 Rules, Art. 13(2).

[270] 1957 Rules, Art. 13(3).

[271] 1957 Rules, Art. 6(2).

[272] 1953 Rules, Art. 6(2).

[273] ICAO Council, 19th Sess., Doc. 7390 (C/861), p. 8 (1953).

[274] 1946 Rules, Art. 8(2).

some of his colleagues favored a similar approach,[275] but this view did not prevail because the Director of the Legal Bureau asserted that the Council could lawfully delegate a part of its judicial functions only to a body composed of its own members.[276]

The fact that the Committee must be composed of Council Representatives does not preclude the Council or the Committee from seeking outside expert advice. Article 8(1) therefore provides that "the Council may at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." This provision to some extent overcomes the disadvantages which inhere in the requirement that the Committee must be composed of Council Representatives, for it permits the Council to seek the assistance of any specially qualified person who might otherwise have been asked to serve on the Committee. Article 8(1) is broad enough, furthermore, to permit the Council to request an advisory opinion from the International Court of Justice on difficult questions of international law.

The right of intervention, while recognized by the Rules, is strictly delimited.[277] To qualify as an intervenor, a state must be a party to the agreement under which the dispute arose and be "directly affected by the dispute." The intervenor must also "undertake that the decision of the Council will be equally binding upon it." [278] The parties have a right to object to the admissibility of the intervention, in which case the matter is decided by the Council.[279]

Strangely enough, Article 19(4) of the Rules provides that

> if no objection has been notified . . . or if the Council decides in favour of the admissibility of an intervention, as the case may be, the Secretary General shall take the necessary steps to make the documents of the case available to the intervening party.

This provision could be taken to mean that if no objections to the intervention have been received, the intervention is automatically admissible. It can be argued, however, that this may well be a drafting oversight, for it would seem that the Council must in any

[275] ICAO Council, 19th Sess., Doc. 7390 (C/861), p. 9 (1953).
[276] *Id.* at 8.
[277] See Hingorani 18–20.
[278] 1957 Rules, Art. 19(1).
[279] 1957 Rules, Art. 19(2).

event inquire whether the intervenor is a party to the particular instrument and directly affected by the dispute.[280] This conclusion finds support in the legislative history of Article 19, which indicates that this provision was designed to discourage interventions as much as possible. Under an earlier draft of Article 19, any state was permitted to intervene in the proceedings provided it was a party to the agreement giving rise to the dispute.[281] When that provision was considered by the Council, three different views relating to intervention were advanced. The U.S. Representative proposed that only states "directly affected by the dispute" should be permitted to intervene.[282] India urged that no provision should be made for interventions, because it was "not conducive to expeditious action."[283] The Representatives of Canada[284] and France[285] felt that every State Party to an instrument had a right to intervene in the dispute because it had an interest in its interpretation and application.

Eventually the view of the United States prevailed, mainly, it seems, because it was a compromise between the two extreme positions that had been advanced and because it permits the Council to limit interventions to a minimum.[286] This decision may also have been prompted by the consideration that the intervention of too many states might deprive the Council of the requisite quorum to decide the dispute.[287] It cannot therefore be doubted that the Council has an obligation to limit interventions *sua sponte* in accordance with the standards set forth in the Rules.[288]

To be admissible, the intervention must come from a state which is "directly affected by the dispute." That state must, of course, also be a party to the instrument to which the dispute relates, but while the latter requirement is self-explanatory, the former is not. What standard will the Council employ in deciding whether a state is "directly affected by the dispute"? The discussions in the Council do

[280] See Statement by Mr. Söderberg, Chairman of the 1953 Working Group on the Rules for the Settlement of Differences, ICAO Council, 19th Sess., Doc. 7390 (C/861), pp. 11 and 113 (1953).

[281] See Article 16(1) of the Draft Rules prepared by the Working Group on Rules for the Settlement of Differences, ICAO Doc. C–WP/1457, p. 9 (1953).

[282] ICAO Council, 19th Sess., Doc. 7390 (C/861), p. 11 (1953).

[283] *Ibid.*

[284] *Ibid.*

[285] *Id.* at 113.

[286] *Id.* at 111–13.

[287] See ICAO Doc. GE/RSD/WD#3, pp. 14–15 (1955).

[288] See Mankiewicz 393.

not throw much light on this question, although they indicate that the intervenor's interest in the Council's decision must be more immediate or greater than the general interest which all other parties to the instrument have.

This consideration, taken together with the fact that the Council was motivated by a desire to limit interventions as much as possible, permits the conclusion that a state will be deemed to be "directly affected by the dispute," if it can show (1) that its interest in the dispute is distinguishable from the general interest which all parties to the particular agreement have, and (2) that this special interest might be jeopardized by disallowing the intervention. A state, for example, which is a supplier of certain aircraft or navigational instruments might qualify as intervenor in a dispute relating to their airworthiness. This would equally be true of a state such as Afghanistan, whose air link to India was at stake in the India-Pakistan dispute. Needless to say, one can imagine cases that could not be as easily decided. Considering the Council's professed policy against interventions, any doubts will probably be resolved against the intervenor.

An interesting feature of the Rules is their emphasis on written proceedings.[289] The parties do not have a right to an oral hearing, although the Council may in its discretion accord it. Even the final arguments of the parties must be presented in writing, "but oral arguments may be admitted at the discretion of the Council." [290] This policy against oral proceedings is probably designed to reduce the time that the Council would have to devote to a given case.[291]

The 1957 Rules, unlike those provisionally enacted in 1953,[292] do not provide for the interpretation or revision of a Council decision.[293] They do, however, contain a provision not found in the 1953 Rules, which empowers the Council to render a default judgment if one of the parties does not appear or fails to defend the case.[294] Before taking this action, the Council must "satisfy itself not only that it has jurisdiction in the matter but also that the claim is well founded in fact and law." [295]

[289] See 1957 Rules, Arts. 9, 12(2), and 13(3).
[290] 1957 Rules, Art. 12(2).
[291] See ICAO Doc. C-WP/2271, p. 4 (1956).
[292] See 1953 Rules, Arts. 19 and 20.
[293] The reasons for this change are discussed in note 111 *supra.*
[294] 1957 Rules, Art. 16(1).
[295] 1957 Rules, Art. 16(2).

The power to render a decision in a dispute submitted to the Council cannot be delegated by it.[296] The decision must be in writing and must be motivated.[297] Dissenting opinions are permissible.[298] And, as previously noted, "no Member of the Council shall vote in the consideration by the Council of any dispute to which it is a party." [299] This provision is identical to the language found in Articles 84 and 53 of the Convention. Its meaning is by no means clear, however. Obviously, a state represented on the Council may not vote in a case in which it is the applicant, respondent, or intervenor. But a state could well be "a party to the dispute" in all but name whenever its interests are identical or closely related to those of one of the litigants. This would have been true of Afghanistan, for example, had it served on the Council at the time of the India-Pakistan dispute.[300]

On the other hand, all states adhering to the particular instrument to which the dispute relates have some, albeit not always the same, interest in the outcome of the controversy. In order to assure elementary fairness without paralyzing the Council's power to render a decision, the applicable test should be the same that the Rules employ to limit interventions. Thus, a state which could have intervened in the proceedings because it was "directly affected by the dispute," should not have a vote in the case. This test will not always be easy to apply, and it may be open to the charge that it substitutes one vague standard for another. But the fact of the matter is that it does articulate with somewhat greater precision the policy inherent in Article 84 of the Convention, while recognizing that the principle of strict judicial impartiality cannot be fully applied to a political body like the Council.

When submitting their report to the Council, the Group of Experts called attention to a subject that is closely related to the issue which has just been discussed. They explained this problem in the following terms:

> According to Article 52 of the Convention: "Decisions by the Council shall require approval by a majority of its members." In the opinion of the Group, this provision requires 11 votes for a decision. However, since, according to Articles 53 and 84, no member of the

[296] *Compare* 1957 Rules, Art. 13(1), *with* Art. 15(4).
[297] 1957 Rules, Art. 15(2).
[298] 1957 Rules, Art. 15(3).
[299] 1957 Rules, Art. 15(5).
[300] See Hingorani 21.

> Council may vote in the consideration by the Council of a dispute to which it is a party, it may well happen that the Council finds itself unable to give a decision. The possibility of a tie vote has also to be taken into account in this connection.[301]

While the Council has in the meantime been enlarged from a membership of 21 to 27,[302] these problems could still arise although the odds are somewhat reduced. How might these problems be resolved? The Group of Experts did not offer any solutions, and when its chairman, Mr. Loaeza of Mexico, was asked in the Council whether it would be desirable to amend the Convention to anticipate these problems, he replied that "the difficulties inherent in them could be resolved quite easily in practice, and in the opinion of the Group certainly would not justify going through the complicated and protracted process of amendment." [303] The practical solution Mr. Loaeza apparently had in mind would consist of a ruling that the parties to the dispute, if they are Council Members, will not be counted in ascertaining the votes required for a Council decision on the ground that for this purpose they are not deemed to be "Members of the Council." [304] This seems to be but another way of saying that a dispute would be decided by a simple majority of those Council Members who are qualified to vote in deciding the particular case. Since the draftsmen of the Convention would probably have adopted this solution had the problem occurred to them, the Council may be expected to resort to it should the occasion arise.[305]

The problem that might arise in case of a tie vote is dealt with by the Council's Rules of Procedure.[306] Rule 53 of these Rules provides:

> In the event of a tie vote, a second vote on the motion concerned shall be taken at the next meeting of the Council, unless a majority of

[301] ICAO Doc. C–WP/2271, p. 6 (1956).

[302] This amendment to Article 50(a) of the Convention was adopted by the ICAO Assembly on 17 July 1961. See Assembly Res. A13–1, ICAO Doc. 8167 (A13–P/2) (1961). It came into force on 17 July 1962.

[303] ICAO Council, 30th Sess., Doc. 7766 (C/897), p. 107 (1957).

[304] See Hingorani 21, who attributes this suggestion to Mr. Loaeza.

[305] Support for the legality of this interpretation can be found in the jurisprudence of the Permanent Court of International Justice. See Advisory Opinion Concerning the Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), P.C.I.J., Ser. B, No. 12, p. 32 (1925). See also, Hexner, *Interpretation by Public International Organizations of their Basic Instruments*, 53 Am. J. Int'l L. 341, 367–70 (1959).

[306] ICAO Doc. 7559/3, Rev. 3 (1953).

> its Members represented at the meeting decides that such second vote be taken during the meeting at which the tie vote took place. Unless there is a majority in favour of the motion on this second vote, it shall be considered lost.

Under Rule 53, the decision would turn on the form in which the motion is presented. It may therefore be assumed that, to prevent such an unsatisfactory result, one or two Council Members might change their vote and support the recommendations that the Committee of Five made in the case. This solution would not be unreasonable under the circumstances, especially since the parties have an opportunity to appeal the Council's decision.

The Rules make no provisions relating to the enforcement measures that may be imposed to implement Council decisions rendered in disputes arising under the Convention, its Annexes, and the Transit or Transport Agreements. With regard to the appeal that is open to the parties under Article 84 of the Convention, the Rules merely stipulate that notice of such appeal shall be given within sixty days after the Council's decision has been communicated to the parties.[307]

Complaints

The Rules prescribe the same process of pleadings for complaints that applies to disputes, except that in the case of complaints the formal pleading stage ends with the submission of the counter-memorial.[308] When the counter-memorial has been received, a meeting of the Council must be convened for the purpose of formally deciding "whether the matter falls under the category of complaints" within the meaning of the Transit or Transport Agreement.[309] If the decision is in the affirmative,[310] the Council must appoint the previously described Committee of Five and refer the case to it.[311] Thus, whereas the reference of a dispute to the Committee rests in the Council's discretion, it is mandatory in the case of a complaint.

In dealing with a complaint, the Committee acts very much like

[307] 1957 Rules, Art. 18(2).
[308] 1957 Rules, Arts. 21 and 22.
[309] 1957 Rules, Art. 23(1).
[310] A negative decision results of necessity in a dismissal of the case, although the Rules are silent on this question.
[311] 1957 Rules, Art. 23.

a fact-finding and conciliation commission. The Rules require the Committee to begin its consideration of the case by calling the states concerned into consultation.[312] The Committee must "arrange the procedures for the consultation as far as possible in agreement with the parties, and on an informal basis in accordance with the circumstances of each case." [313] It may ask the parties for additional information,[314] and will no doubt explore with them the possibility of reaching a mutually satisfactory solution of their differences. Thereafter the Committee must report to the Council "as expeditiously as possible" on the outcome of the consultations.[315] If the consultations proved unsuccessful, the Committee "may" also include in its report "proposed findings and recommendations to the States concerned." [316] If the Committee obtained a settlement, its terms are recorded and communicated to the parties.[317] If the difficulties have not been resolved, "the Council may make appropriate findings and recommendations to the States concerned." [318] The use of the permissive "may" is intentional because neither the Transit nor the Transport Agreement requires the Council to exercise this power.[319]

The provisions of Article 15, which relate to the procedure that the Council must follow when rendering a decision in a dispute submitted to it, also apply to complaints.[320] This means that the recommendation which the Council may address to the parties must be motivated, that dissenting opinions will be permissible, and that parties to the complaint will not be able to vote in the Council on questions relating to their case.

General Provisions

Part III of the Rules contains certain general provisions applicable to disputes as well as to complaints. They regulate the appointment of agents and provide, among other things, that Council Rep-

[312] 1957 Rules, Art. 24(1).
[313] 1957 Rules, Art. 24(2).
[314] *Ibid.*
[315] 1957 Rules, Art. 25(1).
[316] 1957 Rules, Art. 25(2).
[317] 1957 Rules, Art. 26(2).
[318] 1957 Rules, Art. 26(3).
[319] See Transit Agreement, Art. II, Sec. 1; Transport Agreement, Art. IV, Sec. 2.
[320] 1957 Rules, Art. 26(3).

resentatives may not serve in this capacity.[321] They stipulate that the proceedings may be conducted in any of the three official languages of the Organization (English, French, and Spanish),[322] and that the record of the proceedings shall be open to the public unless the Council decides otherwise.[323] Further provisions stipulate that each party is to bear its own costs, although the Council's right to provide otherwise is reserved,[324] and that the costs of the proceedings may be assessed to the parties in a manner to be fixed by the Council.[325]

Of these general provisions, the most interesting one is Article 32. It provides that "subject to agreement of the parties, any of these Rules may be varied or their application suspended when, in the opinion of the Council, such action would lead to a more expeditious or effective disposition of the case." It is not inconceivable that the parties to a dispute might, in reliance on this provision, seek to waive their right to a Council decision and agree instead to accept as binding upon them a decision rendered by the Committee of Five. There is no reason to assume that the Council would reject such a motion so long as it is acceptable to the parties. This approach would be entirely consistent with the Council's policy, which favors settlement of disputes by negotiation. Moreover, the granting of such a motion would not be contrary to Article 84 of the Convention, for if the parties are free by mutual agreement to terminate the litigation at any stage of the proceedings,[326] they would seem to be equally free to do so with a view towards a final disposition of the case by the Committee.[327] Article 32 of the Rules might thus be utilized to avoid some of the shortcomings inherent in the ICAO

[321] 1957 Rules, Art. 27(1).
[322] 1957 Rules, Art. 29(1).
[323] 1957 Rules, Art. 30.
[324] 1957 Rules, Art. 31(1).
[325] 1957 Rules, Art. 31(2).
[326] See 1957 Rules, Art. 20(1).
[327] To reserve their right to invoke the enforcement measures provided for in the Convention, the parties would be wise to include a stipulation to this effect in their motion under Article 32 of the Rules. But if the Group of Experts is correct in its conclusion that the Council may not under the Convention delegate its power of decision, see ICAO Doc. C–WP/2271, p. 4 (1956), then it is doubtful whether the enforcement measures envisaged under Articles 87 and 88 of the Convention could validly be imposed for non-compliance with a Committee decision stipulated under Article 32 of the Rules.

dispute-settling machinery. It could streamline the proceedings and substantially de-politicize the adjudicatory process.

Conclusion

In dealing with disputes arising under the Chicago Acts, the ICAO Council has been guided by a policy that favors settlements by political and diplomatic rather than judicial means. This policy has thus far proved to be effective and will probably remain so in the future. Its effectiveness may be attributed, in part at least, to the fact that the Council does possess rather extensive adjudicatory powers, which place the Council in a much stronger position to compel negotiated settlements than a body lacking this authority. Thus, when the Council "invites" the parties to enter into further negotiations, for example, it is rather difficult for them to decline such an invitation, for there is always the possibility—real or imagined—that this uncompromising stance might affect the Council's decision in the case.

Disputes arising under the Convention and the Transit or Transport Agreements are often the by-product of temporary political frictions between the parties. Here the chances for an amicable adjustment improve in proportion to the Council's ability to delay the institution of formal arbitral proceedings. As we have seen, the Council has used this method most effectively. It is thus readily apparent that the Council disposes of strong institutional pressures that can be employed to discourage litigation and to encourage settlement.

Furthermore, most Council Representatives are better qualified to assist the parties in adjusting their dispute than they are in adjudicating it. They are appointed to the Council by their governments because of their technical, administrative, and diplomatic experience in civil aviation matters. It is often only a coincidence that some of them happen to have legal training as well. And, since the Council has very extensive legislative and administrative functions to perform, it is not surprising that those serving on it, because of their training, temperament, and the pressure of their work, are more interested in having differences resolved than in adjudicating them.

All of these factors tend to produce a result probably not anticipated when the Chicago Acts were drafted. The Council's *modus*

operandi in dealing with disputes has, for all practical purposes, done away with the legal distinction between disputes and complaints. Since the conciliator's role which it performs when dealing with complaints is in greater harmony with its institutional character, the Council prefers to use the same approach when a dispute is submitted to it, although in this context it was intended to act as an arbitral tribunal. By remaining adamant the parties can, of course, force the Council to adjudicate their dispute. But the institutional pressures to which the litigants are subjected, together with the ambiguities surrounding the appellate remedies and enforcement measures provided for in Chapter XVIII of the Convention, all tend to make it very difficult for the parties to "buck" the system.

It may seriously be doubted, however, whether this system, which is so well calculated to preserve harmony within the Organization, should also be employed in dealing with disputes arising under other international agreements conferring arbitral jurisdiction on the Council. The balloon controversy between the United States and Czechoslovakia indicates that the legal issues presented in disputes relating to the Convention and the Transit or Transport Agreements can probably be resolved more effectively by the Organization without litigation. This can be accomplished because ICAO has at its disposal other methods—such as ICAO studies, reports, debates, and eventually resolutions—which tend to clarify doubtful legal issues and provide some impartial fact-finding machinery.

These alternative methods are for the most part not available for the interpretation or application of other international aeronautical agreements. The bilateral air transport agreements, for example, usually contain rather complicated and ambiguous standard capacity [328] and route clauses.[329] They are widely used, although there is little agreement on their meaning. It would therefore undoubtedly be in the interest of international civil aviation to have a body of case law upon which states could draw in drafting or adopting such clauses. Since adjudication would here seem to be more important in the long run than negotiated settlements, the

[328] See HANDBOOK ON CAPACITY CLAUSES IN BILATERAL AIR TRANSPORT AGREEMENTS, ICAO Circular 72-AT/9 (1965).

[329] See Decision of the Arbitration Tribunal Established Pursuant to the Arbitration Agreement signed at Paris on 22 January 1963, between the United States of America and France, decided at Geneva on 22 December 1963, 3 Int'l L. M. 668 (1964).

Council's predilection for the latter should give way when it is seized with disputes arising under agreements other than the Chicago Acts.

These same considerations also justify the conclusion that the best interests of international civil aviation are not served by the Council's generally negative attitude toward the arbitral functions assigned to ICAO by various multilateral and bilateral agreements. It may be that the Council lacks the requisite competence and time to discharge this role properly. If so, it should nevertheless respond to the need for appropriate arbitral tribunals—the arbitral provisions found in many of these agreements envisage such tribunals—by promulgating rules for the establishment of such institutions under ICAO auspices. The Council's Rules for the Settlement of Differences could be applied to these proceedings with minor adjustments. It would therefore be relatively easy for ICAO to establish such an arbitral system to enable states to obtain judicial determinations on disputed questions of law or fact. The present practice, which puts a premium on negotiated settlements that often leave the underlying legal issues unresolved, is certainly far from satisfactory.

Annex 126

G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", (1974) 12 *Canadian Yearbook of International Law* 153

The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council

GERALD F. FITZGERALD*

1. *Introduction*

On August 18, 1972, the International Court of Justice delivered its Judgment in the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* in which:

(a) By thirteen votes to three, it rejected Pakistan's objections on the question of its competence, and found that it had jurisdiction to entertain India's appeal from a series of decisions of the ICAO Council which had found that the Council had jurisdiction to entertain the application and complaint made before the Council by Pakistan on March 3, 1971, the details of the application and complaint being given below.

(b) By fourteen votes to two, it held the ICAO Council to be competent to entertain the above-mentioned application and complaint.[1]

The purpose of this paper is to describe the procedure established in ICAO for the settlement of differences arising, in particular, under the Convention on International Civil Aviation[2] and the

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[1] [1972] I.C.J. Rep. 46, 70.

[2] Doc. 7300/4; 15 U.N.T.S. 295. The Chicago Convention contains the constitution of the International Civil Aviation Organization (ICAO), which has its headquarters in Montreal. A specialized agency of the United Nations, ICAO had, as at December 1, 1974, 129 member states. Unless otherwise indicated herein, all document numbers given in this paper refer to ICAO documents.

International Air Services Transit Agreement;[3] to describe the incident leading up to the application and complaint laid before the ICAO Council by Pakistan; to examine the proceedings in, and certain problems faced by, the ICAO Council in respect of Pakistan's application and complaint; to discuss the procedure followed by the Council on July 28-29, 1971, in arriving at its decisions concerning India's attack on its jurisdiction; to summarize, and discuss briefly, the judgment of the Court; and, finally, to draw some general conclusions.

2. *Procedure established in ICAO for the settlement of differences arising, in particular, under the Convention on International Civil Aviation and the International Air Services Transit Agreement*[4]

The Interim Agreement on International Civil Aviation (Chicago, December 7, 1944)[5] gave the Interim Council of the Provisional International Civil Aviation Organization (PICAO) broad functions concerning the settlement of disputes especially under Article III, section 6(8) (whereby the Interim Council would "act as an arbitral body on any differences arising among member States

[3] Doc. 7500; 84 U.N.T.S. 389. This is the so-called "Two Freedoms" Agreement. See note 10 *infra*.

[4] A bibliography of the role of the ICAO Council in the settlement of differences includes the following items: Bhatti, D., Drion, H., and Heller, P., "Prohibited Areas in International Civil Aviation — The Indian-Pakistan Dispute," [1953] *U.S. & Can. Av. R.* 109; Buergenthal, Thomas, *Law-making in the International Civil Aviation Organization* (Syracuse, 1969), Part III, "ICAO and the Settlement of International Civil Aviation Disputes," 123-97; Cheng, Bin, *The Law of International Air Transport* (London and New York, 1962), 100-04; Domke, M., "International Civil Aviation Sets New Pattern," (1945) 1 *Arbitration Journal* 20; Hingorani, R. C., "Dispute Settlement in International Civil Aviation," (1959) 14 *Arbitration Journal* 14; Kos-Rabcewicz-Zubkowski, L., "Le règlement des différends internationaux relatifs à la navigation aérienne civile," (1948) 2 *Revue française de droit aérien* 340; Mankiewicz, R., "Pouvoir judiciaire du Conseil et règlement pour la solution des différends," (1957) 3 *Annuaire français de droit international*, 384-94; Morel-Fatio, L., "La juridiction internationale en droit aérien. International jurisdiction and air transport law," in *Union internationale des avocats. Les juridictions internationales/International courts* (Paris 1959), 412-47; Münch, J.-B., "Le règlement des différends dans une organisation spécialisée des Nations Unies; l'Organisation de l'Aviation civile internationale," *Association suisse de droit aérien*, Bulletin No. 48, 2-16; Tymms, F., "Le différend Inde-Pakistan," (1953) 16 *Revue générale de l'air*, 207-13; Whiteman, M. M., *Digest of International Law*, (Washington, 1968), Volume 9, 395-97.

[5] Doc. 2187, pp. 24-38; 171 U.N.T.S. 345.

relating to international civil aviation matters which may be submitted to it") and Article VIII, section 9 (whereby the Council could review charges imposed for the use of airports and other facilities and "report and make recommendations thereon for the consideration of the State or States concerned"). The Interim Organization was also empowered to consider differences concerning state actions alleged to have caused injustice or hardship to another state under certain provisions of the International Air Services Transit Agreement and the International Air Transport Agreement,[6] and differences concerning the interpretation or application of the said agreements.[7] There is no need, for the purposes of this discussion, to go into the details of these matters except to state that the Interim Council adopted in 1946 the PICAO "Rules Governing the Settlement of Differences between States,"[8] which covered a wide spectrum of matters that could be submitted to the Council. These Rules continued to exist after ICAO came into existence on April 4, 1947.

Chapter XVIII (Articles 84-88) of the Chicago Convention contains an elaborate machinery for the settlement of disputes by the Council, and provides specifically in Article 84 as follows:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

There are also provisions for an arbitration procedure (Article 85), appeals (Article 86), a penalty for non-conformity by an airline (Article 87), and a penalty for non-conformity by a state (Article 88) contained in Chapter XVIII.

[6] Doc. 2187, pp. 71-75; 171 U.N.T.S. 387. This is the so-called "Five Freedoms" Agreement. See note 9 *infra*.

[7] Interim Agreement, note 5 *supra*, Article VI, first paragraph:
The Organization shall also carry out the functions placed upon it by the International Air Services Transit Agreement and by the International Air Transport Agreement drawn up at Chicago on December 7, 1944, in accordance with the terms and conditions therein set forth.

[8] Doc. 2121 C/228 24/9/46.

After ICAO came into being, the provisions of the International Air Services Transit and International Air Transport Agreement concerning disagreements and complaints under those agreements continued to exist. However, the Air Transport Agreement, concerned with the grant of the so-called "Five Freedoms"[9] on a multilateral basis, was found by states to provide for too generous an allocation of air rights and became a dead letter, being accepted by only twelve states as at December 1, 1974. On the other hand, as at the same date, the Air Transit Agreement, concerned only with the grant of the so-called "Two Freedoms" had eighty-seven parties.[10]

When a disagreement arose between India and Pakistan in 1952 concerning the interpretation or application of the Chicago Convention, India brought it to the ICAO Council under Chapter XVIII. The matter was ultimately settled by negotiation between the parties and the settlement was duly recorded in an agreement filed with the ICAO Secretariat.[11]

[9] The Five Freedoms are thus described in Article 1, Section 1, of the Transport Agreement:

Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

(1) The privilege to fly across its territory without landing;

(2) The privilege to land for non-traffic purposes;

(3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;

(4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;

(5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

[10] The Transit Agreement (Article 1, Section 1) provides for freedoms (1) and (2) listed in note 9 above.

[11] For information concerning this disagreement, see Doc. 7367 A7-P/1, *Report of the Council to the Assembly for 1953*, 74-76; (1952) 7 *ICAO Bulletin*, No. 7, pp. 14-15; No. 9, p. 4; No. 10, p. 4; (1953) 8 *ICAO Bulletin*, No. 1, pp. 3-4, 26; Buergenthal, Thomas, *op. cit.*, note 4 *supra*, 123-97; Cheng, Bin, *op. cit.*, note 4 *supra*, 101-03; Whiteman, M. M., *op. cit.*, note 4 *supra*, 395-97. The Council has in the past entertained only two disputes under Chapter XVIII of the Chicago Convention: (1) The above-mentioned dispute, *India v. Pakistan* (1952-53), concerning a prohibited area established by Pakistan in a region lying along the Afghanistan border. As indicated above, this dispute was settled by negotiation between the parties. (2) *United Kingdom v. Spain* (1967-1969), concerning a prohibited area in the vicinity of Gibraltar. On November 28, 1969, consideration of the matter by the Council was deferred *sine die* at the request of the parties. (Doc. 8903-C/994 Action of the Council, 68th Session (1969), 27.)

At that time, the ICAO Council realized that the old PICAO "Rules Governing the Settlement of Differences between States" were inadequate and steps were taken to prepare provisional ICAO rules for the settlement of differences. These rules were adopted in 1953. Comments of states were solicited, and a group of experts, which met at The Hague in 1955, drew up draft rules which were approved by the Council in final form on April 9, 1957.[12] It cannot be too strongly emphasized that the Council's experience with the earlier India-Pakistan dispute of 1952-53, in which the promotion of negotiation between the parties to the dispute had played such a large part in the settlement, prompted the Council in the preparation of the new rules to insist on provision for negotiation between the parties at all stages. Apparently, the Council was even at that time aware of its possible inadequacy as a judicial body, and was reluctant to discharge the judicial functions conferred on it by the Chicago Convention. The Council was also conscious of the difficulty of having evidence heard by a twenty-one member body (it now has thirty members), and therefore made provision for the establishment of a committee of five who would represent member states not concerned in the disagreement, and would undertake the preliminary examination of the matter.[13]

The "Rules for the Settlement of Differences" adopted by the Council on April 9, 1957, are intended to take care of situations arising under Article 84 of the Convention on International Civil Aviation,[14] sections 1 and 2 of Article II of the International Air Services Transit Agreement,[15] and sections 2 and 3 of Article IV of

[12] Doc. 7782. For an indication of some of the basic philosophy behind the 1957 Rules, see Doc. GE RSD No. 3 6/5/55 a working paper prepared for the Group of Experts which met at the Hague in 1955 to prepare the draft "Rules for the Settlement of Differences."

[13] Article 6(2) of the "Rules for the Settlement of Differences."

[14] The text of Article 84 is given earlier in this paper.

[15] Sections 1 and 2 of Article II of the Transit Agreement read as follows:

Section 1

A contracting State which deems that action by another contracting State under this Agreement is causing injustice or hardship to it, may request the Council to examine the situation. The Council shall thereupon inquire into the matter, and shall call the States concerned into consultation. Should such consultation fail to resolve the difficulty, the Council may make appropriate findings and recommendations to the contracting States concerned. If thereafter a contracting State concerned shall in the opinion of the Council unreasonably fail to take suitable corrective action, the Council may recommend to the Assembly of the above-mentioned Organization that such con-

the International Air Transport Agreement.[16] The latter two agreements provide for both disagreements concerning interpretation or application of the treaty and complaints of injustice or hardship. The Rules as drawn provide for a different procedure in the handling of disagreements on the one hand and complaints on the other.

One question during the discussions before adoption of the "Rules for the Settlement of Differences" was whether or not the Rules could properly include a provision pursuant to which a committee of five could undertake the preliminary examination of a disagreement. The difficulty was whether or not the Council could in fact delegate its functions under Article 84 to a committee of its members. While a certain degree of uneasiness was expressed in this regard, such a provision was ultimately adopted by the Council.[17]

Another question arose concerning voting.[18] In its 1955 report, the Group of Experts pointed out that, according to Article 52 of the Convention, "Decisions by the Council shall require approval by a majority of its members." In the opinion of the Group, this provision required eleven (out of the then twenty-one Council members) votes for a decision. However, since according to Articles 53 and 84 no member can vote in the consideration of a dispute to which it is a party, the Council might find itself unable to give a decision. The possibility of a tie vote also had to be taken into account in this connection. Today the Council has thirty members and the required majority would be sixteen.

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tracting State be suspended from its rights and privileges under this Agreement until such action has been taken. The Assembly by a two-thirds vote may so suspend such contracting State for such period of time as it may deem proper or until the Council shall find that corrective action has been taken by such State.

Section 2

If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the above-mentioned Convention [on International Civil Aviation] shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention.

[16] The provisions of Article IV, Sections 2 and 3, of the Transport Agreement are the same as the provisions of Article II, Sections 1 and 2, of the Transit Agreement.

[17] For a full discussion of this point, see Doc. GE RSD WD/3 9/5/55.

[18] GE Report RSD WD No. 9 30/1/56. *Group of Experts on the Rules for the Settlement of Differences. Report of the Group.*

3. *Incident leading up to application and complaint laid before the ICAO Council by Pakistan*

On January 30, 1971, an Indian Airline's Fokker Friendship aircraft on a scheduled flight from Srinagar to Jammu, with twenty-eight passengers and four crew members, was hijacked at gunpoint and diverted to Lahore in Pakistan. The aircraft was blown up on the evening of February 2, 1971. India alleged that Pakistan had been unwilling to assist the innocent passengers and crew, to restore possession of the aircraft to its commander, to allow the passengers and the crew to continue their journey promptly to India, to make an investigation into the act of unlawful seizure of the aircraft, to take the hijackers into custody, or to save the aircraft, cargo, mail, and property from being destroyed.

India protested against the alleged conduct of Pakistan in the incident and claimed damages for the destroyed aircraft, cargo, baggage, and mail, and for the loss resulting from the detention of the aircraft in Pakistan. Accordingly, it decided on February 4, 1971, "to suspend, with immediate effect, the overflight of all Pakistani aircraft, civil or military, over the territory of India." The effect of this suspension on Pakistan was devastating, as the shortest link between the eastern and western wings of Pakistan lay through Indian air space. (Of course, since that time, due to other events, the eastern wing of Pakistan has ceased to exist, having been replaced by the independent state of Bangladesh.) At the same time, the Indian government suspended flights of its own aircraft over Pakistan territory "in view of the present and imminent danger to civil aviation created by the conduct of" Pakistan.[19]

4. *Proceedings in the ICAO Council in respect of application and complaint laid before it by Pakistan*

On March 10, 1971, Pakistan filed with ICAO an application under Article 2 of the "Rules for the Settlement of Differences"

[19] *Keesing's Contemporary Archives,* April 24-May 1, 1971, pp. 24561-62, contains a very full factual description of the events between the date of the hijacking, January 30, 1971, and March 15, 1971. For a report of the Pakistani inquiry into the hijacking incident, see *Keesing's Contemporary Archives,* August 7-14, 1971, p. 24755. See also India's Application Instituting Proceedings, in *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council, Sales Number 391* (hereinafter referred to as *"I.C.J. Pleadings (ICAO Council's Jurisdiction")*, 6-7; Agrawala, S.K., *Aircraft*

regarding the suspension by India of flights by Pakistani aircraft over India's territory following the incidents described earlier. The application related, *inter alia*, to "disagreements" between the two governments within the meaning of clauses (a) and (b) of paragraph (1) of Article 1 of the ICAO "Rules for the Settlement of Differences."[20]

Clause (a) reads as follows:

Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation (hereinafter called "the Convention") and its Annexes (Articles 84-88 of the Convention).

Clause (b) reads as follows:

Any disagreement between two or more Contracting States relating to the interpretation or application of the International Air Services Transit Agreement and of the International Air Transport Agreement (hereinafter respectively called "Transit Agreement" and "Transport Agreement") (Article II, Section 2 of the Transit Agreement; Article IV, Section 3 of the Transport Agreement).

On April 8, 1971, the Council invited the two parties to negotiate directly in order to settle the dispute or narrow the issues; decided to render any assistance to further the negotiations, with the consent of the parties concerned; and fixed eight weeks as the period within which India was invited to present its Counter-Memorial.[21]

On March 10, 1971, Pakistan also filed a "complaint" under Article 21 of the ICAO "Rules for the Settlement of Differences." The disposal of the complaint was subject to special rules.[22] A complaint could be filed under the Transit Agreement regarding an action taken by a state party to that Agreement which another state, party to the same Agreement, deems to cause injustice or hardship to it (Article II, Section 1), or regarding a similar action under the Transport Agreement (Article IV, Section 2).[23] At that

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Hijacking and International Law (Dobbs Ferry, N.Y., 1973). Chapter 10 of this latter book contains a description of the incident of January 30, 1971, as well as a discussion of the legal issues arising therefrom.

[20] Doc. 7782.

[21] Doc. 8985-C/1002, Action of the Council, 72nd Session (1971), 47-51.

[22] Doc. 7782, "Rules for the Settlement of Differences" (April 9, 1957), Parts II and III.

[23] See Article 1(2) of the "Rules for the Settlement of Differences".

time, the President of the Council, acting under Article 28(3) of the Rules, fixed eight weeks as the period for the filing of the Counter-Memorial relating to the complaint.[24]

At the outset, when the Council met on April 7, 1971, the President, citing Article 52 of the Chicago Convention, stated that decisions by the Council in the cases before it would require approval by the majority of its members.[25] Here it may be noted that the Rules of Procedure for the Council, as revised on November 28, 1969,[26] provide that in some cases decisions may be taken by less than a majority of Council members — this in spite of the provisions set forth in Article 52. However, it is quite understandable that in its day-to-day work the Council would often take routine decisions by a quick show of hands, and that in the case of relatively unimportant matters there would be no particular desire to insist on the application of the rule of Article 52. But it is equally understandable that, when called upon to act in a judicial capacity, the Council should be seen to act strictly in accordance with the Convention. It is also noted that the "Rules for the Settlement of Differences" themselves contain no provisions on voting and that, for these matters, even though it is acting in a judicial capacity, the Council is thrown back upon its regular Rules of Procedure. In this case, the President of the Council chose to found himself solidly on the rule in Article 52 rather than leave decisions to the varying majorities specified in the Rules of Procedure.

On June 1, 1971, just before the Council was scheduled to meet in Vienna at the time of the regular triennial session of the ICAO Assembly, India filed preliminary objections[27] in which it questioned the jurisdiction of the Council to handle the above-mentioned disagreement and complaint.

In its preliminary objections, India contended that the Council had no jurisdiction, arguing that the matter of the disagreement raised by Pakistan's application concerned the *suspension or term-*

[24] Doc. 8918 A18-P/3 *Annual Report of the Council to the Assembly for 1971*, p. 84.

[25] Doc. 8985-C/1002 Action of the Council, 72nd Session (1971), 47. In this regard, it is observed that Article 52 of the Chicago Convention provides that: "Decisions by the Council shall require approval by a majority of its members."

[26] Doc. 7559/4. Revised.

[27] See Preliminary Objections of India as reproduced in *I.C.J. Pleadings (ICAO Council's Jurisdiction)*, 98-122.

ination of the Chicago Convention and the Transit Agreement, whereas the Council was empowered to deal solely with disagreements concerning their *interpretation or application.* India took the position that the two instruments had been suspended as between India and Pakistan ever since the hostilities between them in 1965, and that since 1966 the matter of overflights between the two countries had been governed by a special regime. These instruments, India insisted, had not been revived by the Tashkent Declaration of January 10, 1966, or, at all events, since 1971, when or because of the hijacking incident Pakistan had committed a material breach which justified India's suspension or termination of the two instruments with regard to Pakistan. India also stated that a complaint by Pakistan was inadmissible, as India had not taken any decision under the terms of the Transit Agreement.

In its reply,[28] Pakistan contended that the Chicago Convention and the Transit Agreement had not been suspended, that there had not been any material breach on its part, and that India was not entitled to evade its obligations by unilateral action.[29]

After hearing arguments of India and Pakistan, the Council, after deliberations, decided, on July 29, 1971, not to accept the preliminary objections and hence reaffirmed its competence to consider the application and complaint of Pakistan.[30] On August 30, 1971, India filed an application in the International Court of Justice appealing from the Council decisions of July 29.[31]

5. *Problems of a procedural nature faced by the Council in respect of Pakistan's Application and Complaint and in respect of the subsequent appeal of India to the I.C.J.*

(1) *Voting in the Council on disagreements and complaints brought pursuant to the Rules for the Settlement of Differences*

The President of the Council pointed out on April 7, 1971, that all decisions of the Council taken with respect to Pakistan's application and complaint would require approval by a majority of the

[28] See Reply of Pakistan as reproduced in *op. cit.*, note 27 *supra*, 123-27.

[29] See, in this regard, Briggs, Herbert W., "Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice," 68 *Am. J. Int'l L.* 51, 57-61 (1974) where the I.C.J. Judgment in respect of the jurisdiction of the ICAO Council is examined.

[30] Doc. 8987-C/1004 Action of the Council, 74th Session (1971), 42-46.

[31] *I.C.J. Pleadings (ICAO Council's Jurisdiction)*, 3-21.

Council, which at the time had twenty-seven members (Article 52 of the Chicago Convention). This majority would apply even in the case of Pakistan's complaint under the Transit Agreement, on which eight members of the Council could not vote — India as the interested party, the other seven because they were not parties to the Transit Agreement.

As a result of a request by a Council representative, the Council had before it on November 17, 1971, a paper[32] presented by the Secretary-General which examined the provisions of the Convention [Articles 53, 84, 66(b) and 62] under which the voting power of a member of the Council could be withdrawn or suspended.[33] The conclusion was that there was nothing in them reducing the membership from the twenty-seven then specified in Article 50(a)[34] on occasions when voting power was taken away from some member or members, or affecting the requirement in Article 52 for decisions of the Council to be taken by a majority of its members (i.e., fourteen). Several members, though not challenging the legal position, found practical reasons for following the normal Council practice of taking decisions by a simple majority when considering disagreements and complaints submitted under the Transit and Transport Agreements. No proposal was made, but it was understood that if any representative wished to pursue the matter it would be returned to the work programme.[35]

(2) *Problem caused for the Council by India's appeal to the I.C.J.*

On October 18, 1971, the Council met to consider its next step in view of India's appeal to the I.C.J. against the Council's decision

[32] C-WP/5465, 21/10/71. *Voting in the Council on Disagreements and Complaints Brought under the Rules for the Settlement of Differences.*

[33] Article 53 provides that no member of the Council shall vote in the consideration by the Council of a dispute to which it is a party. Article 62 provides for the suspension of voting power of a contracting state in the Council for failure to discharge within a reasonable period its financial obligations to ICAO. Article 66(b) provides that a member of the Council who has not accepted the Transit Agreement or Transport Agreement shall not have the right to vote on any questions referred to the Council under the provisions of the relevant agreement. Article 84 provides that no member of the Council shall vote in the consideration by the Council of any dispute to which it is a party.

[34] In 1973, the Council's membership rose to thirty. In October 1974, the Assembly adopted an amendment (not yet in force) to increase the membership to thirty-three. (Resolution A21-2).

[35] Doc. 8987-C/1004 Action of the Council, 74th Session (1971), 46.

that it had jurisdiction to consider Pakistan's application and complaint. At that time, the Secretary-General presented a paper[36] in response to a request for an interpretation of Article 86 of the Chicago Convention, that article reading as follows:

> Unless the Council decides otherwise, any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal. On any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding.

The paper traced the evolution of Article 86, concluding that if there were an appeal from any decision taken by the Council under Article 84 on any matter other than whether an international airline was operating in conformity with the provisions of the Convention, that decision would be suspended until the appeal had been decided.

The examination of Article 86 in the working paper was a general one, not made in the context of the India-Pakistan dispute. However, the Director of the ICAO Legal Bureau indicated that the conclusion reached in the paper applied to decisions on disputes brought to the Council under the Transit Agreement as well as to decisions on disputes brought under the Convention (as the Transit Agreement had no existence separate from the Convention), and that the Indian appeal mentioned both instruments, disputing the Council's jurisdiction on the ground that the Convention and the Transit Agreement had not been in force between India and Pakistan since 1965. On October 18, 1971, the Council decided to defer further consideration of the matter until later, and had not taken up the matter again by late 1974.[37]

6. *Decision-making procedure followed by the Council in respect of hearings held from 27 to 29 July 1971*

(1) *The sequence of the hearings*

There were five meetings of the Council from July 27-29, 1971, to hear the parties and decide on the preliminary objections filed

[36] C-WP/5433, 9/9/71. *Notes on Article 86 of the Chicago Convention Relating to Appeals from Decisions of the Council.*

[37] Doc. 8987-C/1004 Action of the Council, 74th Session (1971), 45-46.

by India.[38] The hearing took up the first three meetings and most of the fourth, after which, on July 28, the chief counsel and agents for India and Pakistan withdrew. But the two countries continued to be represented by other members of their delegations while the council considered the preliminary objections. There is little point in reproducing the arguments of both sides as they will be found in the records of the I.C.J.[39] It is interesting, however, to examine the decision-making procedure followed by the Council with regard to the preliminary objections.

Four propositions based on the preliminary objections of India were put to the Council by its President:[40]

Case No. 1: (Application of Pakistan under Article 84 of the Convention and Article II, Section 2 of the International Air Services Transit Agreement)

(i) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation.

(ii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the International Air Services Transit Agreement.

(iii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the bilateral agreement between India and Pakistan.

Case No. 2: (Complaint of Pakistan under Article II, Section 1 of the International Air Services Transit Agreement)

(iv) The Council has no jurisdiction to consider the Complaint of Pakistan.

The Indian delegation objected to this formulation as prejudicial to India and contrary to Article 5 of the "Rules for the Settlement

[38] Doc. 8987-C/1004 Action of the Council, 74th Session (1971), 42-46. The minutes of the five meetings are reproduced in *I.C.J. Pleadings (ICAO Council's Jurisdiction)*, 138-293.

[39] *Ibid.*

[40] The following summary is based on that found in Doc. 8987-C/1004 Action of the Council, 74th Session (1971), 42-46. The full details of the discussions are found in the *I.C.J. Pleadings (ICAO Council's Jurisdiction)* 138-293.

of Differences," Article 5 being concerned with the preliminary objection and action thereon. In particular, it may be pointed out that Article 5(4) of the Rules reads as follows: "If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules." The President of the Council explained that the Council had so far been proceeding on the assumption that it did have jurisdiction. India had challenged the Council's jurisdiction, and the Council had now to take a decision on the challenge. The President was supported by the representatives of Canada, the United States of America, Tunisia, and the People's Republic of Congo, who maintained that the purpose of the vote was to determine whether the challenge of India was upheld, not whether the Council had jurisdiction.[41]

The result of the vote on the first proposition was none in favour, 20 opposed and 4 abstentions (the Czechoslovak Socialist Republic, Japan, the Union of Soviet Socialist Republic, and the United Kingdom). The Indian delegation protested that the manner in which the vote had been taken was incorrect and inadmissible under the "Rules for the Settlement of Differences," and requested a roll-call on the remaining propositions.

The President noted that only parties to the Transit Agreement (except, of course, India) were eligible to vote on the second proposition,[41a] but the majority required by Article 52 of the Chicago Convention would still be required for a decision. The following nineteen Council members were at that time parties to the Transit Agreement: Argentina, Australia, Belgium, Canada, the Czechoslovak Socialist Republic, the Federal Republic of Germany, France, India, Japan, Mexico, Nicaragua, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic, the United Kingdom, and the United States of America. The total membership of the Council at that date was twenty-seven. The results of the roll-call vote (in which India was disqualified from voting, because it was a party to the case and Nicaragua was absent) on the second proposition was as follows:

For: None

[41] For the full discussion on this point, see part of the minutes of the 6th Meeting of the 74th Session of the Council in *I.C.J. Pleadings (ICAO Council's Jurisdiction)*, 279-82.

[41a] Section 66(b) of the Chicago Convention.

Against: Argentina, Australia, Belgium, Canada, the Federal Republic of Germany, France, Mexico, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic, and the United States

Abstained: the Czechoslovak Socialist Republic, Japan, and the United Kingdom

At this stage a discussion took place concerning the Bilateral Air Services Agreement of 1948 between India and Pakistan. Several representatives questioned both the necessity and the desirability of putting the third proposition to the Council and, indeed, whether Pakistan had really sought relief from the Council under the Bilateral Agreement. The representative of Pakistan, after consulting his country's chief counsel, stated that it had not, and that the Bilateral Agreement had been mentioned simply to reinforce the case being made for action by the Council under the Convention and the Transit Agreement. The Indian delegation protested, calling attention to the frequent references to the Bilateral Agreement in Pakistan's application and to the fact that in the preliminary objections India had denied the Council's jurisdiction to handle any dispute under a Bilateral Agreement. India did not, however, insist upon the third question being put, having already gone on record as considering any decision taken at the Council meeting to be improper.

A roll-call vote was then taken on the fourth proposition, only parties to the Transit Agreement (except India) being eligible to participate. The result was:

For: the United States of America

Against: Argentina, Australia, Belgium, Canada, the Federal Republic of Germany, France, Mexico, Nigeria, Norway, Senegal, Spain, Tunisia, and the United Arab Republic

Abstained: the Czechoslovak Socialist Republic, Japan, and the United Kingdom.

The result of the foregoing votes was the rejection of propositions (i), (ii), and (iv), and hence the reaffirmation of the Council's competence to consider the application and complaint of Pakistan. The Indian delegation gave notice that India would appeal the decisions just taken to the I.C.J. because the manner and method of the voting had been wrong, and expressed the view that until

judgment had been rendered by the Court no further action was possible.

In reply to questions, the President indicated that the period given to India for the filing of its Counter-Memorial, interrupted by the filing of the preliminary objections, would start to run again immediately and would expire in ten days; if the Counter-Memorial was not filed by the deadline, the Council would be informed by the Secretary-General in a memorandum examining the consequences.[42]

(2) *Certain aspects of the decision-making procedure followed by the Council on July 28-29, 1971*

In deciding that it had jurisdiction to consider the application made by Pakistan, the Council was, in effect, taking a judicial decision since, *inter alia*, it was taking a decision concerning an important element of a disagreement brought under Article 84 of the Chicago Convention and under the relevant provision of the Transit Agreement. It would seem that the complaint filed by Pakistan under section 1 of Article II of the Transit Agreement would also, in so far as the challenge to jurisdiction was concerned, elicit a judicial decision from the Council, because upon the filing of a complaint the Council is obliged to enquire into the matter and to call the states concerned into consultation.

All of the foregoing having been said, it would then be for the Council to be seen to act judicially. Now here a serious difficulty arises. National courts, the International Court of Justice, and arbitral tribunals are composed of individuals. True, in some cases individual members of an arbitral tribunal may be nominees of parties to a dispute, but once nominations are accepted the individuals become arbitrators. Likewise, although the judges of the I.C.J. are, at first, nominees of states sponsoring them, they are eventually elected as judges by the General Assembly of the United Nations (save for the *ad hoc* judges appointed in particular cases).[43] Thus, in spite of the fact that some individuals may be initially nominated by a state, they lose their character as mere nominees, become arbitrators or judges, and are expected to act judicially and impartially.

In the case of the ICAO Council, the persons sitting on the bench are demonstrably the national representatives of the respective

[42] Doc. 8987-C/1004 Action of the Council, 74th Session (1971), 45.

[43] Under Article 31 of the Statute of the I.C.J.

member states. They are not, for the purposes of considering disagreements or complaints, divested of their character as national representatives. Hence, there is at the outset a contradiction in the ICAO procedure for the settlement of disputes which provides that representatives of states sitting as such will be called upon to act in a judicial capacity. Indeed, a perusal of the minutes of the Council meetings of July 28-29, 1971,[44] shows that some of the members wanted to defer decisions because they wished to await instructions from their governments.[45] Other representatives had already apparently received their instructions. But it is a contradiction in terms to say that one will act as a judge and yet receive instructions. The best that can be said is that, in the case of the settlement of disputes in ICAO, the states as such act as judges and their representatives speak on behalf of the states, and not as individuals. This is not to imply any criticism whatsoever of those Council representatives who were called upon, on July 28-29, 1971, to take a decision. Rather it is to point out the inherent defect which exists in the machinery for the settlement of disputes contained both in the Chicago Convention and in the Transit Agreement, which require a state to act judicially in circumstances where it is practically impossible to divorce the state from its political context.

In short, it is a contradiction in terms to say that a state can be a judge. It is also a contradiction to hold that a representative who receives instructions from a state as to how he should act with respect to a particular disagreement could be seen to act judicially.

The Indian representative to the Council pointed out that the transcript of the proceedings of the meetings during which the actual hearing took place was not available, and that a decision taken by the Council in the absence of such a transcript would be a hasty one.[46] He submitted that:

[44] *I.C.J. Pleadings (ICAO Council's Jurisdiction)*, 234-93; Doc. 8987-C/1004 Action of the Council, 74th Session (1971), 42-46.

[45] For example, Air Vice-Marshal Russell (United Kingdom) and Mr. Svoboda (Czechoslovak Socialist Republic) led off a lengthy debate on this point. *I.C.J. Pleadings (ICAO Council's Jurisdiction)*, 258. The Canadian position was that Canada was prepared to proceed to an immediate decision "and would not think that a lengthy delay of several months to allow correlation and distribution of a complete verbatim record would be upholding the responsibility of this body to ensure fair treatment of both parties." (*Ibid.*, 272).

[46] *Ibid.*, 270.

the decision of the Council would be vitiated if it is arrived at without waiting for the verbatim records . . . the Council . . . is here acting as a judicial court, and some of the judges, i.e., members of the Council, were not present throughout the oral hearing from beginning to end. They can join in the discussion only after reading the verbatim records; and if they join in the decision without considering the verbatim records, then, Mr. President, the whole decision of the Council would stand vitiated on the ground that some of the judges had not applied their minds to the entire case of both sides.[47]

The point raised by India was well taken. During the hearing, the arguments presented on both sides were lengthy and complex. In such circumstances, it is hard to envisage that the Council could have been expected to act judicially on July 29, 1971, and take decisions without considering the transcript. Moreover, the decisions on jurisdiction consisted merely of voting on propositions, with no reasons for the decisions. Later, when the I.C.J. dealt with the question of its own and the Council's jurisdiction, its various judgments contained reasons.

Finally, it is interesting to contrast the relatively primitive decision-making procedure followed by the ICAO Council when acting as a judicial body, as evidenced by the minutes of the 5th and 6th meetings held on July 28-29, 1971,[48] with the elaborate and lengthy decision-making procedure of the I.C.J.[49] Curiously enough, although the agents and chief counsel for India and Pakistan withdrew after the presentation of oral arguments, India, a member of the Council, had its representative and alternate present for the discussion on the decisions to be taken. Likewise, Pakistan was represented by observers. But neither India nor Pakistan had the right to vote. The Indian alternate intervened frequently in the discussion, being particularly insistent on the procedure to be followed and on how the questions concerning jurisdiction should be put, although his point of view was not accepted by the Council. The Pakistan delegation was also given an opportunity to speak and did so. The foregoing procedure may be contrasted with the I.C.J. practice, where the deliberations of the judges are in private, without the parties being present.

That secrecy is considered an important element of judicial delib-

[47] *Ibid.*

[48] *I.C.J. Pleadings (ICAO Council's Jurisdiction)*, 256-93.

[49] See Dillard, Judge Hardy C., "The World Court — An Inside View" (1973) 67 *Proc. Am. Soc. Int'l L.* 296, 301-04.

erations is evident from the strong resolution adopted by the I.C.J. on March 21, 1974, in response to certain newspaper items in Australia, the Netherlands, and elsewhere which predicted "the probable number of the judges voting with the majority and minority" in connection with the cases *Nuclear Tests: Australia v. France*[50] and *New Zealand v. France*.[51] The Court was "mindful of the need to protect the integrity of the international judicial process as well as the dignity of the principal judicial organ of the United Nations."[52] If the I.C.J. feels so strongly about the integrity of the judicial process, then surely the constitution of any international organization (such as ICAO) which requires one of its bodies to act judicially should include such safeguards as would preserve the integrity of the judicial process in that body. Hence, it is submitted, Chapter XVIII of the Chicago Convention might well bear examination with a view to: (a) revision, so as to provide for a new and smaller body to settle disputes arising with respect to the interpretation or application of the Chicago Convention, its Annexes, and the Transit and Transport Agreements; or (b) amendment, so as to provide, *inter alia*, for the inclusion of appropriate safeguards. Among these safeguards might be: the exclusion of the parties from deliberations once oral and written proceedings have terminated and the cases are, in effect, closed; a requirement that, at least in difficult cases, the verbatim record of oral proceedings be available for study before the Council renders its decision; and, finally, a requirement that the Council give necessary supporting reasons for its decisions. Similar observations could be made with respect to complaints arising under the Transit and Transport Agreements.

The foregoing comments have not been made as a criticism of any of the persons involved. Rather, they point to some inherent weaknesses in the procedures for the settlement of disputes arising under the Chicago Convention and the Transit Agreement in circumstances where the council is given the constitutional function of

[50] *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973*, [1973] I.C.J. Rep. 99; *Nuclear Tests (Australia v. France), Application to Intervene, Order of 12 July 1973*, [1973] I.C.J. Rep. 320.

[51] *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973*, [1973] I.C.J. Rep. 135; *Nuclear Tests (New Zealand v. France), Application to Intervene, Order of 12 July 1973*, [1973] I.C.J. Rep. 324.

[52] *U.N. Monthly Chronicle*, Vol. IX, No. 4, April 1974, p. 25.

acting judicially without having a structure that would effectively permit it so to act.

7. *Submissions of the parties in the case before the I.C.J.*

India

In its Memorial, India requested the Court to adjudge and declare that the Council's decision that it had jurisdiction to consider the application and complaint filed by Pakistan was illegal, null and void, or erroneous, and to reserve and set aside that decision on the following grounds or any others:

A. The Council has no jurisdiction to handle the matters presented by the Respondent in its Application and Complaint, as the Convention and the Transit Agreement have been terminated or suspended as between the two States.

B. The Council has no jurisdiction to consider the Respondent's Complaint since no action has been taken by the Applicant under the Transit Agreement; in fact no action could possibly be taken by the Applicant under the Transit Agreement since that Agreement has been terminated or suspended as between the two States.

C. The question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed by the Special Agreement of 1966 and not by the Convention or the Transit Agreement. Any dispute between the two States can arise only under that Bilateral Agreement, and the Council has admittedly no jurisdiction to handle any such dispute.

D. The manner and method employed by the Council in reaching its decision render the decision improper, unfair and prejudicial to India, and bad in law.[53]

Pakistan

In reply, Pakistan requested the Court to reject the appeal of India and to confirm the decisions of the Council and to adjudge and declare as follows:

A. That the question of Pakistan aircraft overflying India and Indian aircraft overflying Pakistan is governed by the Convention and the Transit Agreement.

B. That the contention of the Government of India that the Council has no jurisdiction to handle the matters presented by Pakistan in its Application is misconceived.

[53] [1972] I.C.J. Rep. 49.

C. That the Appeal preferred by the Government of India against the decision of the Council in respect of Pakistan's Complaint is incompetent.

D. That if the answer to the submission in C above is in the negative then the contention of the Government of India that the Council has no jurisdiction to consider the Complaint of Pakistan, is misconceived.

E. That the manner and method employed by the Council in reaching its decisions are proper, fair and valid.

F. That the decisions of the Council in rejecting the Preliminary Objections of the Government of India are correct in law.[54]

8. *Examination of the judgment of the I.C.J.*

(1) *The facts and main contentions of the parties (paragraphs 1-12).*

Under the Convention on International Civil Aviation and the International Air Services Transit Agreement, to which both India and Pakistan were parties, civil aircraft of Pakistan had the right to overfly Indian territory. The former instrument gave the right of non-scheduled flight under Article 5 thereof, while the latter gave the so-called "Two Freedoms"[55] to international scheduled flights — namely, the privilege to fly across the territory of India without landing, and the privilege to land in India for non-traffic purposes. There was also a bilateral Air Services Agreement (1948) covering rights of overflight, and stops for traffic and non-traffic purposes.

In August 1965, overflights were interrupted when hostilities broke out between India and Pakistan, but the Tashkent Declaration of January 10, 1966, called for the immediate resumption of all flights on the same basis as before August 1, 1965. Before the ICAO Council and the I.C.J., Pakistan interpreted that undertaking as meaning that overflights would be resumed on the basis of the Chicago Convention and the Transit Agreement, while India maintained that those two instruments had been suspended during the 1965 hostilities, had never as such been revived, and that all flights had been resumed on the basis of a special regime according to which they could take place only after permission had been granted by India. Pakistan denied that any such regime had ever come into existence and maintained that the two instruments had never ceased to be

[54] *Ibid.*, at 50.

[55] See Note 10 *supra.*

applicable since 1966. Pakistan alleged in its submission of March 3, 1971, to the ICAO Council that when on February 4, 1971, following the hijacking incident, India suspended overflights of its territory by Pakistani civil aircraft, India was in breach of the Chicago Convention and the Transit Agreement. Pakistan then submitted to the Council an application under Article 84 of the Chicago Convention and under Article II, section 2, of the Transit Agreement, as well as a complaint under Article II, section 1 of the Transit Agreement. After India's preliminary objections to the Council's jurisdiction, the Council declared itself competent by its decision of July 29, 1971, and, on August 30, 1971, India appealed from those decisions, founding its right to do so and the Court's jurisdiction to entertain the appeal on Article 84 of the Chicago Convention and Article II, section 2, of the Transit Agreement.[56]

(2) *Jurisdiction of the Court to entertain the appeal (paragraphs 13-26)*

It was not until the stage of oral pleadings that counsel for Pakistan challenged the jurisdiction of the Court.[57] Pakistan claimed that:

> . . . since it is one of India's principal contentions that the Treaties are not in force at all (or at any rate in operation) between the Parties, (*a*) India cannot have any *ius standi* to invoke their jurisdictional clauses for the purpose of appealing to the Court, and (*b*) India must admit that the Court in any event lacks jurisdiction under its own Statute because, in the case of disputes referred to it under treaties or conventions, Article 36, paragraph 1 of the Statute requires these to be "treaties and conventions *in force*" (emphasis added), — and India denies that the treaties and conventions here concerned are in force, in the sense that she alleges that they are at least suspended as between Pakistan and herself, or their operation is.[58]

Pakistan also pleaded the principle of the *compétence de la compétence* as making the Council's jurisdictional decisions conclusive and unappealable.[59]

As to the first contention of Pakistan, the Court held that it was

[56] I.C.J. Communiqué No. 72/17, August 18, 1972; [1972] I.C.J. Rep. 46.

[57] [1972] I.C.J. Rep. 52 (para. 13).

[58] *Ibid.*, 52-53 (para. 14).

[59] *Ibid.*, 53 (para. 15).

not well founded for the following reasons, *inter alia*: (a) India had not said that the treaties in question were not in force in the definitive sense, or even that they had wholly ceased to be in force as between the two parties concerned. (b) In any case, a merely unilateral suspension *per se* could not render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested. Otherwise, all jurisdictional clauses would become potentially a dead letter if a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat such clauses. (c) The question of the Court's jurisdiction was necessarily an antecedent and independent one — an objective question of law — which could not be governed by preclusive considerations capable of being so expressed as to tell against either party — or both parties. (d) The parties must be free to invoke jurisdictional clauses, where otherwise applicable, without the risk of destroying their case on the merits by means of that process itself, for their case could never either be established or negatived by means of a judicial decision unless a clause conferring jurisdiction on a Court to decide the matter could be invoked on its own independent, and purely jurisdictional, foundations.[60]

The Court then turned to Pakistan's contention — to which it attached greater weight — that in the case of the treaties in question, the jurisdictional clauses themselves did not allow of India's appeal because, on their correct interpretation, they provided for appeal to the Court only against the final decision of the Council on the merits of any disputes referred to it, and not against decisions of an interim or preliminary nature. The jurisdictional clauses concerned were Article 84 of the Chicago Convention and section 2 of Article II of the Transit Agreement.[61]

The Court considered that a decision of the Council relative to its jurisdiction to entertain the dispute did not come within the same category as procedural or interlocutory decisions concerning time limits, the production of documents, and similar matters. The Court considered that, for the purposes of the jurisdictional clauses of the treaties, final decisions of the Council as to its competence should not be distinguished from final decisions on the merits. In support of this view, the Court adduced the following further

[60] *Ibid.*, 53-54 (para. 18).

[61] The texts are reproduced above.

points: (a) Although a jurisdictional decision did not determine the "ultimate merits" of the case, it was a decision of a substantive character, inasmuch as it might decide the whole affair by bringing it to an end, if the finding was against the assumption of jurisdiction. A jurisdictional decision was unquestionably a constituent part of the case, viewed as a whole, and should, in principle, be regarded as being on a par with decisions on the merits as regards any right of appeal that might be given. (b) For the party raising a jurisdictional objection, the significance of the objection would also lie in the possibility it might offer of avoiding not only a decision, but even a hearing on the merits — a factor which was of prime importance in many cases. (c) Many cases before the Court had shown that although a decision on jurisdiction could never directly decide any question of merits, the issues involved might be by no means divorced from the merits. (d) Not only did issues of jurisdiction involve questions of law, but these questions might well be as important and complicated as any that arose on the merits and sometimes more so. It would be hard to accept the view that even the most routine decisions of the Council on the interpretation or application of treaties should be automatically appealable, while decisions on jurisdiction, which must *ex hypothesi* involve important general considerations of principle, should not be appealable, despite the drastic effects which they were capable of having. (e) Lastly, supposing an appeal were made to the Court from the final decision of the ICAO Council on the merits of a dispute, it would hardly be possible for the Court either to affirm or reject that decision if it found that the Council had all along lacked jurisdiction to go into the case. This indicates that questions relating to the Council's jurisdiction could not in the last resort be excluded from the Court's purview. It is merely a question of at what stage the Court's supervision in this respect should be exercised.[62]

A special jurisdictional issue existed, however, not on Pakistan's application to the Council, but on her complaint ostensibly made under and by virtue of section 1 of Article II of the Transit Agreement.[63]

Pakistan's special objection to the Court's jurisdiction was in effect that the right of reference to the Council, and thence by way of appeal to the Court, given by section 2 of Article II of the Transit

[62] *Ibid.*, 55-57 (para. 18).

[63] Reproduced above.

Agreement, applied, in the context, only to a "disagreement ... relating to the interpretation or application" of section 1 itself, and not to the substance of the complaint which the Council was requested to examine by reason of that section, or to the outcome of what the Council did about it. In other words, according to Pakistan's argument, if the Council applied section 1 correctly, with the prescribed courses and the prescribed steps, the result would be non-appealable, and so, *a fortiori*, would any decision of the Council to assume jurisdiction in respect of a complaint made by virtue of this section. The decisions taken by the Council on the basis of section 1 of Article II were not appealable because, unlike decisions taken under Article 84 of the Chicago Convention or section 2 of Article II of the Transit Agreement, they did not concern illegal action or breaches of treaty, but action lawful yet prejudicial. The Court found that Pakistan's complaint did not, for the most part, relate to the kind of situation for which section 1 of Article II was primarily intended, inasmuch as the injustice and hardship alleged therein were such as resulted from action said to be illegal because in breach of the two treaties concerned. Hence the Court stated that the complaint as framed could be assimilated to the application for the purposes of appealability.[64]

In view of the foregoing, objections to the Court's jurisdiction based on the alleged inapplicability of the Convention or Transit Agreement as such or of their jurisdictional clauses were not sustained. The Court found that it was invested with jurisdiction under those clauses.

A further interesting observation of the Court was that while the case was presented to the Court in the guise of an ordinary dispute between states, yet, in the proceedings before the Court, it was the act of a third entity — the Council of ICAO — which one of the parties was impugning and the other defending.[65] In providing for judicial recourse by way of appeal to the Court against decisions of the Council concerning interpretation and application, the Chicago Convention and the Transit Agreement gave member states, and through them the Council, the possibility of ensuring a certain measure of supervision by the Court over those decisions. If nothing

[64] [1972] I.C.J. Rep. 57-60 (paras. 19-24).

[65] As pointed out by Judge Dillard in an address to the American Society of International Law in 1973, "the Court, except to a very limited extent (as in the ICAO case), is not an appellate court but both a court of first instance and a final court." (Dillard, Judge Hardy C., *op. cit.*, note 49 *supra*, at 303.)

in the text required a different conclusion, the Court stated, an appeal against the decision of the Council as to its own jurisdiction must therefore be receivable since, from the standpoint of supervision by the Court of the validity of the Council's acts, there was no ground for distinguishing between supervision as to jurisdiction and supervision as to merits.[66]

(3) *Jurisdiction of the Council to entertain the merits of the case (paragraphs 27-45)*

The Court then turned to the substantive issue of the correctness of the decisions of the Council dated July 29, 1971. The question was whether the Council was competent to go into and give a final decision on the merits of the dispute in respect of which, at the instance of Pakistan, and subject to the appeal to the Court, the Council had assumed jurisdiction. The answer to this question clearly depended on whether Pakistan's case, considered in the light of India's objections to it, disclosed the existence of a dispute of such a character as to amount to a "disagreement . . . relating to the interpretation or application" of the Chicago Convention or of the related Transit Agreement. If so, then, according to the Court, *prima facie* the Council was competent.[67] The legal issue that had to be determined by the Court was really whether or not the dispute, in the form in which the parties placed it before the Council, and had presented it to the Court, was one that could be resolved without any interpretation or application of the relevant treaties at all. If it could not, then the Council must be competent.[68]

The main contentions of India were as follows: (1) The treaties were not in force, or they were suspended, because (a) they were or became terminated or suspended as between the parties upon the outbreak of hostilities in 1965 and had never been revived, but were replaced by a "special regime" in respect of which the Council could have no jurisdiction, and according to which Pakistani aircraft could only overfly India with prior permission; (b) India in any case became entitled under general international law to terminate or suspend the treaties as from January 1971, by reason of a material breach of them, for which Pakistan was responsible, arising out of the hijacking incident that then occurred. (2) The issue

[66] [1972] I.C.J. Rep. 60-61 (para. 26).

[67] *Ibid.*, 61 (para. 27).

[68] *Ibid.*, 61-62 (para. 28).

presented to the Council by Pakistan involved the termination or suspension of the treaties, not their interpretation or application, which alone the Council was competent to deal with under the relevant jurisdictional clauses. This contention postulated that the notion of interpretation or application did not comprise that of termination or suspension.[69]

The Court found, with respect to the first of the contentions, that although they belonged to the merits of the disputes, (a) such notices or communications as there were on the part of India appeared to be related to overflights rather than to the treaties as such; (b) India did not appear at the time of the hijacking incident to have indicated which particular provisions of the treaties — more especially of the Chicago Convention — were alleged to have been breached by Pakistan; (c) the justification given by India for the suspension of the treaties in 1971 was not said to lie in the provisions of the treaties themselves, but in a principle of general international law, or of international treaty law, allowing of suspension or termination on this ground — and the 1969 Vienna Convention on the Law of Treaties was in particular invoked. In consequence, so the argument of India ran, the Chicago Convention and the Transit Agreement were irrelevant and had no bearing on the matter because the Indian action had been wholly outside them, on the basis of general international law.[70]

The Court paid particular attention to contention (c), which was to the effect that since India, in suspending overflights in February 1971, was not invoking any right that might be afforded by the treaties but was acting outside them on the basis of general international law, the Council, whose jurisdiction was derived from the treaties, and which was entitled to deal only with matters arising under them, must be incompetent. The Court noted that exactly the same attitude had been evinced in regard to the contention that the treaties were suspended in 1965 and never revived, or were replaced by a special regime. The Court continued:

> The Court considers however, that for precisely the same order of reason as has already been noticed in the case of its own jurisdiction in the present case, a mere unilateral affirmation of these contentions — contested by the other party — cannot be utilized so as to negative the Council's jurisdiction. The point is not that these contentions are

[69] *Ibid.*, 62 (para. 29).

[70] *Ibid.*, 62-64 (para. 30).

necessarily wrong but that their validity has not yet been determined. Since therefore the Parties are in disagreement as to whether the Treaties ever were (validly) suspended or replaced by something else; as to whether they are in force between the Parties or not; and as to whether India's action in relation to Pakistan overflights was such as not to involve the Treaties, but to be justifiable *aliter et aliunde* — these very questions are in issue before the Council, and no conclusions as to jurisdiction can be drawn from them, at least at this stage, so as to exclude *ipso facto* and *a priori* the competence of the Council.[71]

The Court then proceeded to consider the Indian contentions to the effect that Article 84 of the Chicago Convention, and hence by reference section 2 of Article II of the Transit Agreement, only allowed the Council to entertain disagreements relating to the "interpretation or application" of these instruments — whereas (according to India) what was involved in the case was not any question of the interpretation or application of the treaties, but of their termination or suspension — and since (so India contended) the notion of interpretation or application did not extend to that of termination or suspension, the Council's competence was automatically excluded. In other words, non-existing treaties could not be interpreted or applied.[72] But the Court considered that until it had determined by proper means that what was involved was indeed an issue solely of termination or suspension of the treaties, and further that no question of their interpretation or application arose or could arise (and the Court stated that this was the only real issue involved), the problem of whether the one notion was comprised by the other could, for present purposes, be regarded as hypothetical.[73]

Thus the Court disposed of the negative aspects of the case, that is, the reasons why the various contentions did not have any real bearing on the question of the competence of the Council.[74]

The Court then turned to the positive aspects, from which it proceeded to demonstrate not only that Pakistan's claim disclosed the existence of a "disagreement . . . relating to the interpretation or application" of the treaties, but also that India's defences equally involved questions of their interpretation or application.[75]

[71] *Ibid.*, 64 (para. 31).

[72] *Ibid.*, 65 (para. 33).

[73] *Ibid.*, 65-66 (para. 34).

[74] *Ibid.*, 66 (para. 35).

[75] *Ibid.*

Firstly, Pakistan had cited specific provisions of the treaties (in particular Article 5 of the Convention and section 1 of Article I of the Agreement) as having been infringed by India's denial of overflight rights. The existence of a "disagreement" relating to the application of the treaties was affirmed. Pakistan's case was essentially a charge of breaches of the treaties and, in order to determine these, the Council would inevitably be obliged to interpret and apply the treaties, and thus to deal with matters unquestionably within its jurisdiction.[76]

Moreover, India had made charges of a material breach of the Chicago Convention by Pakistan, as justifying India in purporting to put an end to it, or suspend its operation and that of the Transit Agreement. In order to determine the validity of these charges and counter-charges, the Council would inevitably be obliged to interpret or apply the treaties.[77]

What would be involved was an examination of the treaties in order to see whether, according to the definition of a material breach of treaty contained in Article 60 of the 1969 Vienna Convention on the Law of Treaties, there had been [paragraph 3(b)] a violation by Pakistan of "a provision essential to the accomplishment of the object or purpose of the Treaty."[78]

Secondly, India had claimed that the treaties had been replaced by a special regime. But it seemed clear to the Court that Articles 82 and 83 of the Chicago Convention (relating respectively to the abrogation of inconsistent arrangements and the registration of new agreements) must be involved whenever certain parties purported to replace the Convention or some part of it by other arrangements made between themselves. It followed that any special regime, or any disagreement concerning its existence, would immediately raise issues calling for the interpretation and application by the Council of Articles 82 and 83.[79]

Finally, the Court took up the argument which formed the substratum of the whole Indian position, namely that the treaties were or had become terminated or suspended between the parties. Here the Court noted that Pakistan, in the course of the proceedings before the Court, had contended that these matters by no means lay

[76] *Ibid.*, 66 (para. 36).

[77] *Ibid.*, 66-67 (para. 37).

[78] *Ibid.*, 67 (para. 38).

[79] *Ibid.*, 67-68 (para. 39).

outside the ambit of the treaties but were, on the contrary, regulated at least implicitly by Articles 89 (War and Emergency Conditions) and 95 (Denunciation of Convention) and the similar Articles I and III of the Transit Agreement, but that the two parties had given diverse interpretations of those provisions.

However, the Court refrained from pronouncing on the validity or otherwise of the opposing views of the parties as to the object and correct interpretation of Articles 89 and 95, since, in the view of the Court, this touched directly upon the merits of the case. But the Court was of the opinion that this opposition could not but be indicative of a direct conflict of views as to the meaning of the Articles, or in other words of a "disagreement ... relating to the interpretation or application of [the] Convention." And, the Court stated, if there was even one provision — and especially a provision of the importance of Article 89 — as to which this was so, then the Council was invested with jurisdiction, were it but the only such provision to be found, which was clearly not the case. But the Court having thus decided that the Council was competent, was not called upon to define further the exact nature of that competence, beyond what had already been indicated.[80]

India had also argued that the Council's decisions assuming jurisdiction in the case had been vitiated by various procedural irregularities and that the Court should accordingly declare them null and void and send the case back to the Council for re-decision. The Court considered that the alleged irregularities, even supposing they were proved, did not prejudice in any fundamental way the requirement of a just procedure, and that whether the Council had jurisdiction was an objective question of law, the answer to which could not depend on what had occurred before the Council.[81]

[80] *Ibid.*, 68-69 (paras. 40-43).

[81] *Ibid.*, 69-70 (paras. 44-45). The Court brushed aside the Indian arguments about procedural irregularities and it is a pity that it did not consider this matter in detail. See, in this regard, the discussion earlier in this paper under the heading "Certain aspects of the decision-making procedure followed by the Council on July 28-29, 1971." Indeed, Judge Lachs, in a declaration appended to the Judgment of the Court regretted that the Court had not gone into the matter of India's objections. He stated, *inter alia*, that "the contracting States have the right to expect that the Council will faithfully follow these rules [Rules for the Settlement of Differences], performing as it does, in such situations, quasi-judicial functions, for they are an integral part of its jurisdiction." ([1972] I.C.J. Rep. 74-75). He noted the need of the Council, in view of its composition, for "guidance" and that "it is surely this Court which may give it." (*Ibid.*) Judge Petrén, in his separate

(4) *Comments on the judgment*

On the question of the jurisdiction of the Court to entertain the appeal, the Court's reasoning is sound. However, Judge Petrén filed a separate opinion in which he did not concur that the Court had jurisdiction. He considered that the provisions of Articles 84 and 86 of the Chicago Convention concerning the exercise of a right to appeal, with suspensory effect, from decisions of the Council on disagreements relating to the interpretation or application of the Convention were not intended to apply to decisions rendered by the Council in preliminary objections.[82] In his view, the conclusion to which Article 5 of the "Rules for the Settlement of Differences" pointed was that the Rules did not admit of any direct appeal from a decision whereby the Council rejected a preliminary objection.[83] Nevertheless, having set forth his grounds for considering that India's appeal was not admissible, Judge Petrén bowed before the opposite position, adopted by the majority, in accordance with which the Court had declared itself competent to entertain the appeal.[84]

Judge Onyeama was unable to concur in the decision that the Court was competent to entertain India's appeal.[85] He considered Article 84 of the Chicago Convention as the only source of the jurisdiction of the Court to hear the appeal. He said:

The jurisdiction conferred on this Court by Article 84 of the Convention to hear an appeal from a decision of the Council is, in my view, confined to an appeal from a decision of the Council on a disagreement on a substantive issue of merits placed before it by the application of a State concerned in the disagreement.[86]

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opinion, noted, in particular, in referring to the Council's decision of July 29, 1971: "It is a striking fact that the decision is devoid of all statement of grounds and consists solely in a declaration to the effect that the Council did not accept the objection." (*Ibid.*, 84).

[82] *Ibid.*, 79.

[83] *Ibid.*, 81. Also, the President of the Court, Sir Muhammad Zafrulla Khan, while not agreeing that the Court was competent to entertain the appeal, considered his dissent on the question of the admissibility of India's appeal to be academic in view of the Court's finding that the ICAO Council had jurisdicton to entertain Pakistan's application and complaint, a finding with which he was in entire agreement.

[84] *Ibid.*, 84.

[85] *Ibid.*, 86.

[86] *Ibid.*, 86-87.

In spite of what Judges Petrén and Onyeama stated, the Court has made out a good case for entertaining the appeal. Here a distinction may be drawn between a preliminary objection raised with the Council on such a procedural matter as the time limits for filing documents and a fundamental preliminary objection (such as that raised before the Council by India) as to jurisdiction of the Council. A decision on the latter subject is of such fundamental importance that it should be appealable to the Court.

It is important that the Court has made it clear that the unilateral denunciation of a treaty will not enable a party to escape the application of the clauses in the treaty pertaining to the settlement of disputes relating to the treaty.[87]

What strikes the reader of the proceedings and judgment is the great emphasis placed by all concerned on the sacrosanct nature of the Vienna Convention on the Law of Treaties, whose influence has been all pervasive since its adoption in 1969. That the United Nations machinery has produced such a document is alone worth the price of its existence.

Unfortunately, the Court might have said more about the procedural difficulties raised by India, and, indeed, by the ICAO Council representatives themselves during the deliberations on July 28-29, 1971. Judges Lachs and Petrén attempted to deal with this matter in some detail, but they were voices crying in the wilderness. The Council badly needs the "guidance" suggested by Judge Lachs[88] and, as suggested by Judge Petrén, should state the grounds for its decisions.[89]

9. *Conclusion*

Examination of the proceedings in the ICAO Council and in the I.C.J. concerning the dispute between Pakistan and India has brought out a number of useful points, some of which may be highlighted here:

(1) Bedrock principles of law as contained in the Chicago Convention, the Transit Agreement, and the Vienna Convention on the Law of Treaties, as well as the general principles of international law, were there in abundance for the use of the

[87] See Briggs, *op. cit.*, note 29 *supra.*

[88] See note 81 *supra.*

[89] *Ibid.*

parties and the I.C.J. The latter made effective use of these principles in disposing of the case.

(2) The lacunae in the procedure for disposal of disputes before the ICAO Council are such that an early study should be made in ICAO to ensure that the questions raised by Council representatives (while engaged in the process of deliberation) on July 28-29, 1971, as well as India's objections concerning defects in procedure, will find an early answer in the form of appropriate rules. As Judge Petrén has said, the Council needs "guidance." This guidance could be given — and unfortunately this has not yet been done — by a supervisory body like the I.C.J. in appeal proceedings or, what is even better, by a carefully prepared set of rules of procedure governing the deliberative process of the Council in disputes.

(3) Lastly (and this list of conclusions is by no means exhaustive), it is for consideration whether the Council, now on the eve of still another expansion,[90] should not be relieved of the burden of judicial functions which, by its very structure, it can carry out only with great difficulty.

[90] See note 34 *supra*.

Annex 127

M. Milde, *International Air Law and ICAO*, 3rd ed., 2016,
pp. 198 - 209

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- *Convention on Compensation for Damage to Third parties, Resulting from Acts of Unlawful Interference involving Aircraft*, done at Montreal on 2 May 2009.[174]
- *Convention on Compensation for Damage to Third Parties*, Montreal on 2 May 2009.[175]
- *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, done at Beijing on 10 September 2010.[176]
- *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, done at Beijing on 10 September 2010.[177]
- *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, done at Montreal on 4 April 2014.[178]

Legal work in the framework of ICAO deserves a more formal recognition and regulation in the basic constitutional structure of ICAO – perhaps in a future amendment of the Chicago Convention. It also deserves a much higher profile in the Strategic Action Plan of the Organization.

7.3.5.5 Settlement of Differences in ICAO

In the field of civil aviation like in other international activities conflicts of interests of the States are bound to occur. Conflicting interests may clash to amount to a conflict – a dispute. In general, a dispute may be defined as a situation where one party asserts a claim (entitlement, fact creating liability...) while the other party denies such claim. Peaceful settlement of international disputes has been, at least since the times of the League of Nations, one of the basic aims of the international community.

The 1919 Paris Convention Relating to the Regulation of Aerial Navigation contemplated, for its time, innovative method of the settlement of disagreements between two or more States.[179] Differences relating to the interpretation of the Convention were to be referred to the Permanent Court of International Justice (to be established by the League of Nations and, until it was established, by arbitration); this amounts to acceptance of compulsory jurisdiction of the Permanent Court of International Justice. Disagreements relating to the technical regulations annexed to the Convention were to be settled by the decision of the International Commission for Air Navigation (ICAN) by a majority of votes.

The Paris Convention thus made a difference between interpretation of the Convention and interpretation of the technical Annexes to the Convention. This difference seems to

174 ICAO Doc. 9920.
175 ICAO Doc. 9919.
176 <www.icao.int/DCAS2010/>.
177 <www.icao.int/DCAS2010/>.
178 ICAO Doc. 10034.
179 Article 37 of the Paris Convention.

be justifiable – interpretation of the Convention is a "legal" dispute to be properly adjudicated by a "judicial" (independent, impartial, non-political) body. The current Statute of the International Court of Justice includes among the "legal disputes":[180]

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

Nevertheless, it must be admitted that even a disagreement on the interpretation of the technical Annexes may amount to a "legal" issue. Any preliminary question whether the difference involves interpretation of the Convention or that of a regulation was to be decided, under the Paris Convention, by arbitration.

The Chicago Convention devotes to the settlement of disputes Chapter XVIII – Articles 84-88. It will be noted that the Convention gives a mandatory power to decide on the disputes to the ICAO Council. The Convention does not make any difference between the interpretation of the Convention and the interpretation of the Annexes. The Council of ICAO is thus – unlike the governing bodies of other specialized agencies – also a quasi-judicial body. Only an appeal from the Council's decision would be referred to the International Court of Justice which is thus vested with obligatory jurisdiction.[181]

Article 84
Settlement of disputes

If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to

180 Article 36, 2 of the Statute of the International Court of Justice.

181 Since the Chicago Convention was drafted prior to the acceptance of the UN Charter, it refers to the Permanent Court of International Justice. Article 37 of the Statute of the International Court of Justice explains: "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice".

> the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.
>
> *Article 85*
> *Arbitration procedure*
>
> If any contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting states parties to the dispute shall name a single arbitrator who shall name an umpire. If either contracting State party to the dispute fails to name an arbitrator within a period of three months from the date of the appeal, an arbitrator shall be named on behalf of that State by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council shall designate the umpire from the list previously referred to. The arbitrators and the umpire shall then jointly constitute an arbitral tribunal. Any arbitral tribunal established under this or preceding Article shall settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive.

Under Article 66 of the Convention the Organization also assumes functions placed upon it by the International Air Services Transit Agreement and by the International Air Transport Agreement drawn up at Chicago on 7 December 1944[182] that refer to the ICAO machinery for the settlement of differences. Similar functions have been assumed by ICAO under the Joint Financing agreements with Denmark and with Iceland.[183] The Paris Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe[184] also referred to the ICAO machinery for the settlement of differences.

Even some very early post-war bilateral agreements on air services – perhaps in the euphoria favoring international organizations by the end of World War II – provided for the settlement of any differences by the Council of ICAO. However, the Chicago Convention does not contain any constitutional basis for the settlement of differences arising from

182 ICAO Doc. 7500 and PICAO Doc. 2187, pp. 71-75.
183 Docs. 9585-JS/681 and 9586-JS/682.
184 Doc. 7695.

bilateral agreements and on the basis of the Convention the Council would not be competent to consider disputes based on bilateral agreements. This matter was addressed by the very first session of the Assembly in 1947 in Resolution A1-23[185] named "Authorization to the Council to Act as an Arbitral Body". That Resolution authorized the Council to act as an arbitral body on any differences arising among contracting States relating to civil aviation matters submitted to it, when expressly requested to do so by all parties to such difference. On such occasions the Council would be authorized to render an advisory report, or a decision binding upon the parties, if the parties expressly decide to obligate themselves in advance to accept the decision of the Council as binding. It is interesting to note that in the more than sixty years of ICAO's existence no dispute was ever referred to the Council for arbitration under the terms of Resolution A1-23.

It is an imperative function of the Council to decide on the disputes referred to it. The words "shall ... be decided" in Article 84 make this role of the Council mandatory – however, as will be seen later – it may not always be practicable. The Convention does not define the procedure to be followed by the Council in the consideration of the disputes and the Council's Rules of Procedure would not adequately cover the necessary specifics. The Council realized the lack of proper procedural guidance in this respect when the very first case under Article 84 of the Convention was brought before it in April 1952 by India against Pakistan.[186] Apart from exhorting the parties to negotiate further and reach an amicable solution, the Council did nothing but engaged in long discussions of the proper procedure; finally it agreed on the need to draft special Rules for the Settlement of Differences and such Rules were adopted on 9 April 1957 – five years after India filed its case with the Council![187]

It is a matter of opinion whether the Rules for the Settlement of the Differences are most appropriate for the Council of ICAO. They have been drafted in close alignment with the Rules of the Court of the International Court of Justice[188] and that may be a problem. The Rules of the Court of the ICJ are rules for a truly judicial body composed of independent and (arguably) impartial Judges bound by their oath of office and obliged to follow international law and their conscience. Such is not the situation in the Council of ICAO. The "members" of the Council are sovereign States elected by the Assembly; their representatives on the Council are not independent individuals acting in their personal capacity but they are diplomatic agents of their respective States and are obliged to follow any instructions received from their States. There is no "judicial detachment" in the Council of ICAO and the Council cannot be compared with the International Court of Justice. Under Article 84 (which is unnecessarily duplicated in the last sentence of Article

185 Doc. 9848, p. I-19.
186 Doc. 7367, p. 74.
187 Doc. 7782, amended on 10 November 1975. See the full text in Appendix 4.
188 <www.icj-cij.org/documents/index.php?pl=4&p2=3&p3=0>.

53 of the Convention), no representative may vote on a dispute to which his State is a party. Under Article 66 b) members of the Council whose State is not a party to the Transit or Transport Agreements cannot vote in the Council on matters relating to those Agreements. Moreover, in the Council members may abstain from a decision or absent themselves from a meeting – a liberty not available to the Judges of the Court. It could thus happen that the Council would not even have a sufficient quorum to take any decision.

The Rules for the Settlement of Differences provide a detailed, formal and legalistic procedure suitable for a court of law. The procedure is initiated by the applicant State by filing an application to which is attached a "memorial" indicating the name of the "applicant" and the name of the "respondent", name of the plenipotentiary agent for the applicant, statement of the facts with supporting data, statement of law, the relief desired by action of Council on the specific points submitted and a statement that negotiations to settle the disagreement had taken place between the parties but were not successful. Thereafter, within the time-limit determined by the Council, the respondent State is expected to file a "counter-memorial" answering the points raised in the applicant's memorial, listing additional facts and supporting data and its statement of law. The counter-memorial may also present a counter-claim directly connected with the subject matter of the application.

The respondent is entitled to question the jurisdiction of the Council to handle the matter presented by the applicant and may file a preliminary objection. When such a preliminary objection is filed, the proceedings on the merits are to be suspended until the objection is decided by the Council after hearing the parties.

After the filing of the counter-memorial by the respondent, the Council should decide whether the parties should be invited to enter into direct negotiation. In fact, throughout the procedure and prior to the final decision of the Council the parties are to be urged to engage in direct negotiation to settle their dispute or to narrow the issues.[189]

The written proceedings follow the submission of the counter-memorial by additional pleadings which may be filed by the parties within the time-limits determined by the Council: reply to be filed by the applicant and rejoinder to be filed by the respondent. These filings should include copies or originals of all relevant documents which the parties wish to have considered – and the experience shows that the files of the written proceedings can be extremely voluminous. After the last written pleading no further documents may be submitted by any party except with the consent of the other party or by permission of the Council granted after hearing the parties.

There may follow an oral hearing with testimonies of witnesses or experts and oral arguments of the parties. The decision of the Council should summarize the proceedings and spell out the conclusions of the Council together with its decisions and the reasons for reaching them and a statement of the voting. A member of the Council who voted

189 Article 14 of the Rules.

against the majority opinion may have its views recorded in the form of a dissenting opinion which shall be attached to the decision of the Council.

While the Rules for the Settlement of Differences appear to be rigid, there is one element of flexibility: the Council, subject to agreement of the parties, may suspend or amend the Rules if in its opinion such act would lead to a more expeditious or effective disposition of the case.[190]

It is submitted, with reference to Article 85 of the Convention, that any appeal can be directed only to the International Court of Justice since all ICAO member States are also members of the United Nations, parties to the Charter of the UN and thus have accepted the Statute of the International Court of Justice; the arbitration alternative is no longer available.

The Convention contains, in Articles 87 and 88, very rigorous sanctions. Under Article 87 contracting States accepted an obligation not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to a final decision rendered by the Council or, on appeal, by the ICJ. There has not been any instance when this provision would be applied.

Under Article 88 the Assembly "shall" (*i.e.*, must) suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of Chapter XVIII of the Convention. Again, this provision was never tested in the practice of ICAO and it would have to be taken by the majority of the Assembly and would be undoubtedly motivated by many policy considerations.

Some commentators have asserted that the Council of ICAO has a true judicial power under Chapter XVIII of the Chicago Convention and that "the Council must consider itself an international judicial organ and act in accordance with rules of international law governing judicial proceedings. Thus, *inter alia*, members of the Council, even though they may be national representatives nominated by Governments must, when functioning under Chapter XVIII of the Chicago Convention, act in an impartial and judicial capacity".[191]

Although this is a view of the most distinguished authority in international law and air law, it cannot be shared since it overlooks not only the wording of the Convention but also the working realities of all international organizations, including those specific for ICAO as observed over the years by this author. In the first place, members of the Council are the sovereign States, not the physical individuals representing them. Such representatives cannot act in an "impartial and judicial capacity"; they are obliged to follow the instructions of their Government.

190 Article 32 of the Rules.

191 B. Cheng, *The Law of International Air Transport* (1961), p. 101.

In any case, a predominant majority of the representatives on the ICAO Council are diplomats or aviation experts rather than lawyers. The Council cannot be considered to be a true judicial body composed of judges who would be acting in their personal capacity and deciding strictly and exclusively on the basis of international law. Since the Council is a policy making body composed of States, the procedure for the settlement of differences under Chapter XVIII of the Convention is not and cannot be a true international adjudication on the basis of international law but rather a sort of "qualified international arbitration" – arbitration *sui generis* – "diplomatic arbitration" conducted by sovereign States. Their decisions may be based on policy or political considerations or equity, rather than on strictly legal rules.

Support for such conclusion comes from the first President of the ICAO Council – Dr Edward Warner – who wrote in April 1945 – full two years before ICAO came into existence: "No international agency composed of representatives of States could be expected to bring judicial detachment to the consideration of particular cases in which large national interests were involved... The Council as a whole can hardly be expected to act judicially".[192] His successor as President of the Council – Walter Binaghi – stated in his farewell speech to the Council in June 1976 that he "had always had doubts about the role assigned to the Council by Chapter XVIII of the Convention".[193] These views are also shared by leading scholars in the field of international law and air law.[194]

A convincing illustration that the Representatives on the Council do not act in "an impartial and judicial capacity" may be found, *e.g.*, in the Minutes of the Council meeting held on 29 July 1971, where several Representatives requested a postponement of a vote (re *Pakistan v. India*) to consult with their respective administrations to obtain instructions.[195] It would be unthinkable for a judge to request "instructions" from a national administration or anybody else.

The history of the attempts within ICAO to apply the machinery of Chapter XVIII during the past more than sixty years is not encouraging. It may be said that the mechanism does not work to anybody's satisfaction and that it has been a failure. Only five cases were presented to the Council during sixty years of ICAO under Chapter XVIII and in none of them did the Council issue a decision on the merits of the case. The brief history of the cases is as follows:

India v. Pakistan (1952): the Government of Pakistan established in early 1952 a prohibited zone along its western border with Afghanistan and thereby effectively prevented Indian

192 Dr E. Warner, "The Chicago Air Conference", Foreign affairs, April 1945.

193 C-Min. 88/5, pp. 40-41.

194 The priority in this respect belongs to Professor D. Goedhuis – *see* his "Questions of Public International Air Law", in *Recueil des Cours*, Academie de Droit International (1952-II), p. 205 and pp. 222-225.

195 C-Min 74/6, 29 July 1971.

aircraft from flying from the Indian territory to Kabul over Pakistani territory. The Indian Government claimed that the Pakistani action was discriminatory since the airline of Iran was permitted to cross the prohibited area and to fly between Teheran, Kabul and points in Western Pakistan. The Government of India in its submission alleged that Pakistan violated Article 5 (Right of non-scheduled flight), Article 9 (Prohibited zones) of the Convention and the Transit Agreement. It must have been clear to the Council that it was not faced with a simple aeronautical problem but with an issue originating from the tense political relations between India and Pakistan. At the time of the dispute the Council did not have any rules of procedure for the settlement of differences under Chapter XVIII of the Convention and its first step was to create a Working Group to elaborate such Rules and in the meantime invited the Governments of Pakistan and India to negotiate an amicable settlement with the assistance, if required, of the Council members. Such a settlement was reached in early 1953 and the Council was informed accordingly. The substance of the settlement was the establishment by Pakistan of special corridors leading across the prohibited zone and enabling Indian aircraft to reach Kabul with minimum re-routement. On 19 January 1953 the Council noted that the disagreement had been settled.[196] While the Council took no steps or decisions on the merits of the case, its good offices to bring the parties together could be credited with some success.

U.K. v. Spain (1967): the application and memorial submitted by the Government of the United Kingdom claimed that the Government of Spain established a prohibited zone in the Bay of Algeciras directly opposite to the British airport of Gibraltar and that the extent and location of the prohibited zone would effectively prevent safe take-off and landing manoeuvres to and from the airport of Gibraltar; that was claimed to be a violation of Article 9 of the Chicago Convention since the extent and location of the prohibited zone was not "reasonable" and that it interfered unnecessarily with air navigation. The root of the dispute was a political problem and the prevailing tension between the United Kingdom and Spain with respect to the legal status of Gibraltar that was dealt with also on a bilateral basis and in other fora, including the United Nations.

The ICAO Council was well aware of the underlying political problem and proceeded very slowly, without discussing the substance, through all the formal written proceedings – Memorial by the United Kingdom, Counter-Memorial by Spain, Reply by the United Kingdom and Rejoinder by Spain with additional written submissions. It must have been clear to the parties that due to the patently political nature of the issue underlying the "aeronautical" aspects no decision could be expected from the ICAO Council. In November 1969, the Council noted the following statement by its President: "At the request of the United Kingdom and Spain consideration of the disagreement between those two States

196 Doc. 7388-C/860, pp. 30-31.

relating to the interpretation and application of Article 9 of the Convention would be deferred *sine die*; the question would not be included in the work program for any future session unless there was a request to that effect by a Council member and the Council agreed to it."[197] (After "BREXIT" the relations of the United Kingdom with Spain may be further complicated.)

This 'inconclusive conclusion" is very unorthodox and technically this case is still pending before the Council; it could be revived at any time. It would have been more appropriate for the parties and for the Council to record discontinuance of the proceedings or to adopt a decision on the merits of aeronautical nature regardless of any political underlying elements. Again, the policy considerations prevailed and the adversarial type of proceedings were not pressed by the parties or by the Council. This procedure may appear to be incorrect in theory but the prudent approach of the Council in this matter helped to achieve or preserve an acceptable international *modus vivendi* in the matter without a direct confrontation which any adjudication based exclusively on legal considerations would have undoubtedly entailed. The political sensitivities between the United Kingdom and Spain concerning Gibraltar continue to be alive till the present time, albeit in less confrontational manner.

Pakistan v. India (1971): in this submission Pakistan in fact presented two cases as one – case I: Application under Article 84 of the Convention and Section 2 of the Transit Agreement; case II: Complaint under Section 1 of Article II of the Transit Agreement. The underlying facts – apart from the continuing political tensions between Pakistan and India were as follows: on 4 February 1971 India suspended all overflight rights of the Indian territory by Pakistani aircraft. Thereby India effectively cut off any economically feasible air communications between West and East Pakistan (as then existing).

This situation arose against the background of armed hostilities between the two neighboring countries in 1965 (terminated by the Tashkent Declaration in 1966), continuing tensions relating to the Indian State of Jammu and Kashmir and flared up as a result of a "hijacking", on 30 January 1971, of an Indian aircraft flying on a domestic flight to Jammu (India) and landing it in Lahore (Pakistan). The hijackers were pro-Pakistan Kashmiri nationalists, they asked asylum in Pakistan and requested the release of Kashmiri nationalists imprisoned in India. The hijackers released the passengers and crew of the Indian aircraft but threatened to blow up the aircraft if their demands were not met. It was alleged that the hijackers were actually granted asylum in Pakistan, the local authorities gave them full support, aid and comfort and allegedly supplied them with explosives. Eventually, the hijackers blew up the aircraft with full view and publicity on Pakistani television – a serious provocation for India.

197 Doc. 8903-C/994, p. 27.

In this case India did not file a counter-memorial but lodged a preliminary objection questioning the jurisdiction of the ICAO Council to handle the matter. The main contention of India was that the operation of the basic treaties (Chicago Convention and Transit Agreement) had been suspended because of the hostilities in 1965 and their application was not fully revived after the Tashkent Declaration. Furthermore, India relied on Article 89 of the Convention that would grant it "freedom of action" in case of war or national emergency. India also submitted that there was no "dispute" on the interpretation or application of the Conventions since the suspension of those legal instruments was not a matter of "interpretation" or "application". The Council considered this preliminary objection during five tedious meetings in July 1971 and eventually decided to reject the Indian preliminary objection and to confirm that it had jurisdiction to consider the matter.[198] The decision is reflected only in the Minutes of the Council meeting, not in a special document as a "decision" under Article 84 of the Convention. The Minutes indicate the result of the vote but do not spell out any arguments or reasons for the decision.

India appealed this decision on the preliminary objection to the International Court of Justice which issued its decision on 18 August 1972.[199] The Court did not deal with the merits of the case but, by a vote of 14 to 2, held that the ICAO Council was competent to deal with the merits of the Application and Complaint since there was a disagreement on the interpretation and application of the legal instruments; the decision is also critical of the ICAO procedure, in particular the lack of reasons for the Council's decision.[200] India in due course filed its Counter-Memorial on the merits accompanied by a counter-claim; however, the proceedings did not continue. In the meantime Bangladesh emerged as a new State replacing East Pakistan and the case became to a large degree moot. On 20 July 1976 India and Pakistan by a joint statement discontinued the proceedings before the Council and the case is closed without any decision of the Council or the ICJ on the merits.

Like in the previous two cases it is apparent that the centre of gravity of the dispute was of a political nature and that the "aviation" aspect could not be meaningfully addressed without a more general solution of the underlying political issues. That, of course, is not within the purview of the ICAO Council.

Cuba v. United States (1998): the decades of tense relations between Cuba and the United States brought about one of the crises on 26 February 1996. On that day, Cuban Air Force MIG-29 and MIG-23 shot down two US registered Cessna 337 over the high seas killing three US citizens and one US resident. The light US aircraft were operated by "Hermanos al Rascate" (Brothers to the Rescue) – an organization of Cuban émigrés who from time

198 C-Min. 74/6.

199 International Court of Justice, Reports of Judgments, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*.

200 Paragraph 44 of the Judgment and opinions of Judges Lachs and Petren.

to time operated flights over Cuba to distribute anti-Castro leaflets; however, on this particular day the aircraft did not enter the Cuban airspace.

Reprisals followed in the form of legislation tightening the commercial embargo and overflights of US territory by Cuban aircraft were prohibited. That patently violated Article 5 of the Chicago Convention and the International Air Services Transit Agreement to which both Cuba and the United States are party. In fact, in spite of the tense relations over a long time, US carriers have been operating scores of flights daily over Cuban airspace and duly paid for the air navigation services rendered. Cuba filed a complaint under the Transit Agreement with the Council of ICAO.

On the request of the UN Security Council ICAO investigated the incident of 26 February 1996 and reached a conclusion that the US aircraft were destroyed over the high seas and not in the Cuban airspace. However, that was unrelated to the substance of the Cuban claim before the Council. The political overtones of the situation discouraged the Council from direct dealing with the dispute and it called on and the parties agreed to discontinuation of the proceedings.[201] It is gratifying to note that in spite of this isolated incident Cuba has, by the turn of the century, adhered to all aviation security conventions and ratified Article 3*bis* of the Chicago Convention.[202]

Yet another example that Chapter XVIII does not offer an effective mechanism for the settlement of international disputes within ICAO!

United States v. Fifteen States of the European Union (2000): the last formal dispute so far presented to the ICAO Council under Chapter XVIII of the Convention was directed by the United States against (then) all fifteen members of the European Union since the EU itself could not be a respondent under Article 84 of the Chicago Convention, although it was the EU Regulation that triggered the dispute.[203] That Regulation had a long name "...on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertified as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993)". In plain language the subject of the Regulation was a flagrant departure from ICAO Annex 16 that would not prevent aircraft of "Chapter 2" noise level to be modified (*e.g.*, through the so called "hush kitting") to achieve the "Chapter 3" noise certification. The EU wished to eliminate from its air space as of 1 April 2002 any "recertified civil subsonic jet aeroplanes" that it defined as "civil subsonic jet aeroplane initially certified to Chapter 2 or equivalent standards or initially not noise-certified which has been modified to meet Chapter 3 standards either directly through technical measures or indirectly

201 C-Min/161-6, C-Min 163-17, C-Min 164-11 and C-Min 166-12.

202 See <icao.int/secretariat/legal/status%20individual%States/Cuba_es.pdf>.

203 Council Regulation (EC) No. 925/1999 of 29 April 1999; Official Journal of the European Communities L.115/1-4.

through operational restrictions".[204] While the direct idea may have been to reduce the noise level in the European air space, it did not concern the aircraft fleets of European States manufactured by European manufacturers specifically to meet Chapter 3 standards.

On the other hand, all B-707, most B-727 and the initial B-737 and DC-9 of US manufacture – although hush kitted to comply with Chapter 3 noise certification and having still a long, economic and meaningful operational life – would not be admissible in Europe if their engines' by-pass ratio was lower that "three to one". The core of the dispute in fact was whether the "by-pass" ratio of the engines was the real benchmark for the assessment of the noise level. Many US air carriers' aircraft would have been directly facing elimination from the European air space; similarly, some US manufacturers of aircraft, engines and hush kits would have suffered economic losses.

The States of the EU filed a preliminary objection to the jurisdiction of the Council, *inter alia* claiming that negotiations have not been exhausted. The Council unanimously asserted its jurisdiction; European States did not appeal that decision and submitted their counter-memorial on the merits. However, negotiations continued with the "good offices" of the President of the Council and the parties reached an agreement. The EU repealed the Regulation 925/1999 by Directive 2002/30 0f 26 March 2002 and the parties agreed to discontinuation of the proceedings.[205] Global policy on the matter of noise was adopted by the 33rd session of the ICAO Assembly[206] that called for "balanced approach" to issues of noise that would take account of the underlying economic implications.

Thus again, the ICAO machinery did not produce a decision in the dispute of major proportions and economic and operational implications. Did Chapter XVIII of the Convention prove useless? Should it be drastically amended if and when a review conference is convened? Could the current machinery of the Council be replaced by a body of elected arbitrators or judges who would be able to act with due judicial detachment? In theory many variants can be considered but it is in practice quite unlikely that States would be ready to submit their differences to any form of final adjudication on a compulsory basis. However imperfect the current machinery may be, it is available to States and its existence can act as a "deterrent" that it could be used with all the undesirable publicity and further inflame the adversarial attitudes – unless States use their best effort to find a solution through their direct negotiation. Even under the current deficient machinery the Council can act in a positive manner if it provides "good offices" or acts as a quasi-mediator.

204 Article 2 (2) of the Council Regulation 925/1999.
205 C-Min/161-6, C-Min 163-17, C-Min 164-11 and C-Min 166-12.
206 Resolution A33-7.

Annex 128

E. Warner, "Notes from PICAO Experience",
(1946) 1 *Air Affairs* 30

NOTES FROM PICAO EXPERIENCE

By Edward Warner

The Provisional International Civil Aviation Organization has been operating for nearly a year. Its development has taken place very largely along the lines foreseen at the Chicago Conference of 1944; but those who worked at Chicago failed to anticipate some of the needs that have manifested themselves in practice. The texts of the Interim Agreement and the Convention failed to foretell the indispensable role of the regional meeting, such as those recently held in Dublin and in Paris. They show no appreciation of the special importance of air navigation services operated on the high seas. It was inevitable that there would have been such omissions in agreements prepared under such pressure and with the world still at war; and fortunately they have done no harm, for the documents contain language broad enough to cover almost any action that the nations may agree would raise the standards of safety and regularity in air navigation. Such phrases as:

> take all possible steps to secure the application of minimum requirements and standard procedures;[1]

and

> If the Council is of the opinion that the airports or other air navigation facilities . . . are not reasonably adequate for the safe, regular, efficient, and economical operation of international air services . . . the Council shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied.[2]

are far-reaching. Even though the specific reference on the shepherding of air navigation services is to

> the airports or other air navigation facilities . . . of a contracting State;[2]

the Interim Council had no difficulty in concluding:

> That in anticipation of the possible need for action under Article XI of the Interim Agreement, the Council finds it necessary to interpret this Article

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[1]International Civil Aviation Conference, Chicago, Ill., November 1 to December 7, 1944. *Interim Agreement.* . . . Article III. (In its *Final Act and Related Documents.* Washington, U. S. Govt. Print. Off., 1945. (U. S. Department of State. Publication no. 2282.))

[2]———. *Convention* . . . Article 69 (In its *Final Act and Related Documents.* Washington, U. S. Govt. Print. Off., 1945. (U. S. Department of State, Publication no. 2282.))

with respect to the extent of the authority that it confers;
That the Council concludes and declares that the clear implication of the language of Chapter XV of the Convention on International Civil Aviation, which is given immediate effect by Article XI of the Interim Agreement, is that the authorization conveyed by that Chapter should cover such action as may be needed to overcome any lack of air navigation facilities reasonably adequate for safe, regular, efficient and economical air services on the high seas or in areas of undetermined sovereignty; and
That the Council accordingly directs that further action under Article XI by the Provisional International Civil Aviation Organization shall contemplate that such action will be extended to the high seas or to areas of undetermined sovereignty as may be required to attain an adequate provision of air navigation facilities.[3]

The Council's interpretation has received the approval of the Assembly.

There is little limitation on what can be done where agreement exists. The nations can agree through PICAO to cooperate in keeping ships at sea to observe the weather. They can agree to allow the Interim Council to decide their controversies; and they can agree on whether the judgment rendered in such a case is to be advisory or binding. Agreement upon the particular action to be taken, in any matter of major importance, is the condition precedent to action. The road to international government is a long one; and PICAO, like other international organizations, represents only a very short step along the road.

The assignment of governmental powers to international organizations is the subject of one of the great debates of the day. The pooling of some of the prerogatives of national sovereignty into larger units finds increasing support. The active advocates of such a pooling in matters directly affecting security, the use of military force, or major economic policy are still in a minority; the concept of mutual exclusivity of national interest dies hard; but even the most anxious defenders of national sovereignty against any possible suggestion of check or burden recognize the need of the specialized international organizations for power to reach decisions binding upon their whole membership in certain matters, in order that they may work at all.

The range between the minimum power that an international organization must have if it is to escape complete paralysis and the largest power that might conceivably be granted in the present state of governmental opinion is substantial. It is a nice problem in balance to give a

[3]At its meeting 30 November 1945.

budding organization enough power to enable it to do useful work and build a solid reputation, without giving it so much as to arouse the suspicion and alienate the support of major national governments or to cause the organization to bog down under the suddenly-assumed load of large administrative responsibilities for which its officials have had no opportunity of proper preparation. It is of particular aeronautical interest, but it is of interest also in the broad study of the progress of international organization, to see just where the powers assigned to PICAO and to its permanent successor fit into the scale of possibilities —to see what powers PICAO has, how it might have had less, and where it might have more.

II

The powers of the organization must of course be distinguished from the undertakings specifically offered by the member States under the specific terms of the Interim Agreement or the Convention. The assurance of freedom of international passage for private aircraft and those rendering charter service that is given by Article 5 of the Convention, for example, is a direct exchange of privileges among States, through the medium of a convention which all may accept with full knowledge of its provisions. States that dislike the consequences of such an exchange have the option of refusing to accept the Convention. The exchange of rights of passage confers no power on the Council or the Assembly, and in fact it requires no organization of any kind to make it effective. Where powers of the organization are mentioned in this text, the reference will always be to cases in which some one of the organization's constituent bodies is authorized to take decisions by which the membership as a whole is bound.

PICAO lacks those powers which offhand consideration might suppose it most likely to possess. It has no direct legislative power, or power of regulation. It adopts recommendations on technical matters. There is every reason to expect that the recommendations will be generally accepted and put into effect; and in fact the member states undertake to apply them "as rapidly as possible"; but they are still recommendations. When the Chicago Convention has entered into effect and the provisional organization has given way to the permanent one, the present series of "recommendations" will be replaced by "international standards." The international standards for air navigation services, for the rules of the air, and for certifying the competence of airmen and the

fitness of their equipment will be adopted through a procedure insuring at least three months' interval between the vote to adopt and the effective date.[4] It will still lie open to the member States, at least in theory, to hold to their own ideas where those differ from the standards internationally adopted. Their only obligation will be to file a report with the international organization in any instance in which they fail to bring their own practices into accord with those internationally agreed upon.[5] Each State is to be a free agent. Its neighbors' protection will be that any notice of failure to comply would be broadcast to the world, and pilots entering the territory of the non-complying State would be put on notice that a special hazard existed there—whether the hazard of sub-standard meteorological service, of non-standard radio aids to navigation, or of eccentricities in the rules of the air. Travellers by air would weigh such hazards precisely as they weigh the natural hazards of abnormally difficult terrain, passage over wide bodies of water, or exceptional liability to dangerous weather, in deciding whether a flight is justified and what route it should take.

This may seem a very weak position, and in fact the failure to give the international standards greater legal force, with the member states definitely obligating themselves to keep their own regulations and their own practices identical with those set forth in the standards, brought deep regret to some of the participants in the work at Chicago.

It would have been more generally acceptable that the standards adopted by PICAO should be binding upon the members if they were to relate only to such matters as the standardization of rules of the air; but there is another type, that requires substantial outlays of national funds. PICAO is shortly to convene a technical committee charged to recommend standard systems of radio navigation and instrument landing. Their recommendations may cost the largest states many millions of dollars to carry out, and the small states sums that will impose proportionately-heavy burdens on their more slender resources. It is to be hoped that the recommendations, as approved by the Council, will in fact be universally complied with and the appropriate installations made; but it is understandable that states would hesitate to pledge themselves in advance to comply with the Council's decisions in such a matter, as they would have been called on to do if Article 38 of the

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[4] . . *Convention*. . . *Op. cit.* Article 90.

[5] *Ibid.* Article 38.

Convention had been cast in the generally obligatory form that had some advocates.

The Convention does hold an indirect compulsion to comply with the international standards for the licensing of airmen and aircraft; for the freedom of international air navigation that the member states undertake to grant to one another's aircraft (except as to scheduled air transport, which requires a separate arrangement) is guaranteed only to aircraft that have been found to comply with the international standard of airworthiness, operated by pilots who have met the international standard of competence. If aircraft and pilots not meeting those standards are allowed to enter any other territory than that of their own state, it will be an act of grace on the part of the admitting state. If a state wishes to license its own nationals by standards lower than have been found internationally acceptable, nothing prevents it from doing so, subject only to the obligation to report its intentions to PICAO for publication; but its neighbors need not admit to their airspace the personnel that bear the sub-standard licenses.

I have heard no objection to those provisions, so far as they affect personnel. I believe it is generally agreed that states should have the right to protect their own pilots and passengers within their own territory by excluding foreigners who do not meet the internationally-established qualifications. There is no such unanimity on the wisdom of authorizing the exclusion of aircraft that deviate from the international standard of airworthiness; and PICAO's Airworthiness Division has favored the application of the present provisions of the Convention to aircraft used in regular transport service, but to no others. For the moment, at least, the question does not arise, for the Airworthiness Division's whole attention has been concentrated on developing a suitable standard for a transport category. They have deferred the consideration of airworthiness standards for non-transport types until their next meeting; and as long as no standard exists for non-transport aircraft, each state will grant airworthiness certificates in accordance with its own regulations, independently developed, and the certificates so granted will be internationally recognized for the want of any standard against which to check them.

III

The opposition to empowering the international organization to make universally-binding regulations assumed that such regulations

would be adopted after controversy, and imposed by a majority on a reluctant minority. On the first eight months' experience, together with that of ICAN and other international bodies of technical character, the assumption was ill-founded. There is the greatest reluctance to proceed with any action that fails to gain unanimous support, and leading members of some of the technical groups have celebrated with special gratification the fact that they had never found it necessary to take a vote. Obviously if the representatives of every state are to have an effective veto on group action, assured by the custom of waiting for unanimity, no state need fear that it will be constrained to comply with regulations adopted against its will. On the other hand, it would be of little advantage, under those circumstances, to establish an obligation to comply with the international decisions; for states which have freely joined in the unanimous adoption of an international standard may be expected to introduce it into their national practices without need for the pressure of a previously-accepted obligation to do so.

Most of PICAO's technical groups have been willing to take a vote where it seemed necessary; but the reluctance to reach the conclusion that a vote is necessary reflects the common view that in international affairs no nation can be expected to accept a decision in which it did not concur. The result may be that a dissenting state not only avoids the taking of a decision which it would not wish to apply in its own operations, but that it prevents its fellow-members from adopting as among themselves a course which they are agreed in wishing to follow.

The urge towards unanimity, and the willingness to search at length for a solution that will be acceptable to all in preference to making a simple choice by vote among the alternative positions originally presented, have good origins. Other things being approximately equal, unanimity is a desirable goal; but the goal may be pursued to the point where it becomes harmful. To make unanimity a fetish is to run the risk of attaining it by colorless compromise, by ambiguity that will leave each party satisfied that the result can be read in its way, or by failure to reach any real decision at all. There are cases in which any decision, however arrived at, will in the long run be better than no decision.

In summary, PICAO lacks the power of regulation, and it is evident that national representatives would exercise the greatest restraint in using that power if they had it. The organization's judicial powers are somewhat greater—or will be, after the provisional organization has

given way to the permanent one—but they are likely to have infrequent use.

IV

The most far-reaching of the judicial powers relates to the interpretation of the Convention. It provides that:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.[6]

Subject to some provisions regarding the right of appeal of the Council's decision to the Permanent Court of International Justice or to a special tribunal, the Convention provides that when the decision has become final:

> Each contracting State undertakes not to allow the operation of an airline of a contracting State through the air-space above its territory if the Council has decided that the airline concerned is not conforming [to the decision rendered as previously described].[7]

It is further provided (Article 88) that any contracting State that failed to conform to such a decision should have its voting power suspended by the Assembly. These are very drastic sanctions; but it is hard to conceive of conditions under which their application would become necessary.

The Council has somewhat similar powers under the Transit and Transport Agreements. The sequence of their use would begin with a complaint by one of the parties to one of those agreements that it was suffering injustice or hardship through the action of another of the parties; and it might continue through a finding by the Council that the complaint was justified and that remedial action should be taken, through a failure of the offending state to take the action called, and ultimately to its suspension from the organization by the Assembly. The possibilities are formidable; but as yet no such complaint has ever been filed. They are likely to be rare, and cases in which complaints fail to reach an early settlement through discussion will be even more so.

Additional powers may derive from special agreements by member

[6] *Ibid.* Article 84.

[7] *Ibid.* Article 87.

states that in the event of any disputes arising between them during the life of the agreement they will refer the controversy to the Council under the provisions that permit that body to arbitrate or adjudicate issues between members on special request. The provisions were written in anticipation that particular controversies might be referred to the Council, by agreement of the parties, after they had developed; but they have been given a much broader application by such agreements as that entered into at Bermuda by the United States and the United Kingdom, providing that *all* differences between those states on certain subjects, not yielding to direct discussion, will go automatically to the Council for its recommendations.

Other powers of judicial character are limited to the presentation of recommendations, which would have moral force but which the members would have taken no legal obligation to accept. The principal case of that sort relates to the charges made for the use of airports. Article VIII of the Interim Agreement and Article 15 of the Convention direct that upon complaint by a member state

> the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned.

There has, of course, been a substantial body of opinion in favor of giving an international tribunal much larger powers of an essentially judicial character, applied to issues which (unlike those covered by the powers now granted) would demand their frequent use. Both the British and Canadian Governments have pressed for international adjudication of commercial operating rights and continuous interpretation of any set of principles that might be agreed upon to govern the exercise of those rights—especially in connection with 5th-freedom operations.

If the power of economic regulation were in fact to be given to an international body, a new tribunal might be created. With all the demonstrated merits of PICAO's Council, it was not shaped for a primarily judicial function. It is large; its membership is subject to change at any time at the discretion of the states which the members represent; and, above all, it is a group of national representatives, whereas true international economic regulation could be better operated by a tribunal of individuals whose sole and direct responsibility would be to the international organization and to the common interest of the international community. The Council itself

has considered that its difficulties in sitting as a whole in a judicial capacity, even in a limited number of specially-presented cases, would make it desirable to work with a more compact group. In the rules that it has recently adopted for the conduct of arbitration, it has provided that the typical procedure will be for the President of the Council to appoint a committee of five members, who shall thereafter conduct the proceedings and present a report to the Council in the form of a proposed decision. The draft of a multilateral convention on commercial rights in air transport as presented by the Council to the recent Assembly also provided for the creation of a board of five or seven members, chosen as individuals and for their individual qualities, who would have exercised (subject to appeal to the Council) such economic regulatory powers as the draft convention assigned to international authority.

V

Outside the fields of legislation and adjudication, PICAO now has power (through the Assembly) to fix its own budget and to determine how much each of the members will contribute to the total, and (through the Council) to call on the members for statistical and other data on air transport, which they have obligated themselves to supply. The budgetary determinations are backed by the power of the Assembly to suspend the voting privileges of states that do not pay; but no sanctions attach to failure to meet the members' obligations to supply data on their operations, and if too much should be asked for, either in money or in statistical reports, it might come in very slowly or not at all. PICAO already has experienced difficulty, which many international organizations have shared, in getting the material required for the studies that its staff are directed to undertake. To the man at the end of the line, the man who is called upon actually to dig out an airline's figures in accordance with a new set of forms, the superposition of international requests on the demands for regular and special reports that are already being made by national governments may appear as the last back-breaking straw. The temptation to ignore such requests or to delay in meeting them must be strong; yet the international movement of traffic will never be fully understood, and it will never be possible to discuss its political and economic consequences to full advantage, until all international operations are reported in identical form, and at intervals brief enough to keep the record up to date and to

show its trends. The supply of the material for the U. S. Civil Aeronautics Board traffic surveys of 1940 and 1941 was a great burden, and the compilation and publication of the results was a vast undertaking; yet they were agreed by all parties to give such a picture of the American air transport system and the use made of it as had never existed before, and could not have been secured in any other way. In the international movement of air traffic, exactly the same sort of picture is needed; and it exacts the same price, of willingness to take a deal of trouble in preparing the statistical raw material.

That in turn leads into a new question—the question of the sort of studies that an international organization, and particularly PICAO and its successor, ought to conduct. Up to the present time there has been little opportunity for research in PICAO. The staff has been fully engaged in planning for and attending meetings and in assisting the Council and its committees in preliminary work on such matters as arbitral procedure, the development of a multilateral agreement on commercial rights in transport, and the preparation of statistical reporting forms. In coming months there will be more opportunity for general studies, and more material accumulated with which to make them. How diversified ought those studies to be? Ought they to cover the whole territory of the economics of air transport, as some other international organizations have engaged in economic and social research over equally broad fields, or should a line be drawn between the type of work for which PICAO has special qualifications and the type that should be done by private students of air transportation, on university faculties or elsewhere, or by such semi-private bodies as the *Institut Français de Transport Aérien* or the Brookings Institution?

The language of the Interim Agreement and the Convention scarcely suggest a limitation. The instruction is to

> continuously report upon the facts concerning the origin and volume of international air traffic and the relation of such traffic, or the demand therefor, to the facilities actually provided;

to

> collect, analyze and report on information with respect to subsidies, tariffs, and costs of operation;

and still more broadly, to

> study any matters affecting the organization and operation of international air services.[8]

[8]. . . Interim Agreement. . . *Op. cit.* Article III.

In addition to repeating some of the foregoing authorization the Convention authorizes the Council to

> conduct research into all aspects of air transport and air navigation which are of international importance.[9]

I believe that any project that is undertaken ought to qualify by one or another of three tests. It ought either:

(1) to be based on information that PICAO is in a particularly favorable position to secure;

(2) to be designed to provide information that the Council, or some other PICAO organ, needs to assist in its work; or

(3) to produce comparative analyses of national policies, regulations, or economic factors.

The most important of all PICAO's research responsibilities is a special case under the first of those categories—the analysis, interpretation, and publication of the data received in response to the requests addressed by members or to the Interim Agreement's obligation to file with PICAO all air transport contracts and agreements entered into by member states or their airlines. It would be a sad failure on the organization's part, which its Council and staff have no intention of allowing, if the data painstakingly prepared by the members were to lie buried in files, or if the conclusions that could be drawn from the reports were not to be made generally available through the PICAO Journal and other publications. The only exception to the rule of publication applies to the contracts filed, since the Agreement makes those available only to member states and not to the general public. Member states secure copies of any of the filed contracts that interest them. The provisions of the Convention on that point differ from those of the Interim Agreement, and although the language may still leave room for some difference of opinion on interpretation the Convention appears to contemplate open publication of all contracts after the permanent organization is operative.

The preceding remarks on research have applied especially to economic studies, conducted in PICAO's Air Transport Bureau. The position in the Air Navigation Bureau is somewhat different, since research on navigational methods and services requires laboratory equipment and staff that PICAO is unlikely to acquire. The organization's opportunities in that case are in the coordination of national programs; and PICAO's Air Navigation committee and its specialized technical

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9. . . . *Convention* . . . *Op. cit.* Article 55.

divisions may be the medium through which national researches on communications, air traffic control, and airport and search and rescue equipment will be so adjusted that they may complement one another without undue duplication. We have no such coordination to our credit as yet, but clearly we must keep it among our goals.

VI

I must not leave PICAO's functions without some mention of what is potentially the greatest of them all—the provision of air navigation services where national action alone cannot or will not provide them. Wherever facilities and auxiliary services are inadequate for the full requirement of international operations, PICAO is under direction to step in. Taking account of the need for weather ships on fixed patrol on the high seas, for island airports maintained only for refuelling purposes, where no commercial need exists, and for arctic and desert stations within the territory of states that lack the direct interest that would lead them to bear the cost unaided, the need for international financing might well run to $50,000,000 a year. On the North Atlantic alone, as seen from the recent PICAO discussions at Dublin, it may be from $10,000,000 to $15,000,000.

No such sums can be provided out of a general fund, unless and until the world is much more integrated than now and until ICAO (the permanent organization that will follow PICAO) has commanded a degree of trust from its member governments that has hardly yet been vouchsafed to any international body. To use the general-fund method would require that the member states put a fund of many millions of dollars annually at the disposal of ICAO, to be allocated among the needs of the world's airways as the Council or Assembly might determine.

For the near future, at least, it will be far easier for governments to provide such large sums if it is known in advance where they are to be spent, and if the contributions are sought only from the states that have a substantial interest in the routes that would benefit by the expenditure. That suggests a special agreement to cover the financing of each important group of facilities; and it is upon that basis that the Council is approaching the problem of the North Atlantic, the first major case to arise.

To determine how the money shall be spent may be as vexing as to determine how it shall be raised. Are the funds simply to be turned

over to a national government? Or shall PICAO let contracts for required construction, by competition without regard to nationality, and operate facilities with its own personnel? There has been general agreement—in which I share—that PICAO ought not to operate directly if it can be avoided. I believe, however, that the organization will owe it to those who provide the funds to satisfy the Council, through PICAO's own technically-qualified personnel, that the money is being spent with proper economy and that the work is being satisfactorily done. In some cases the assurance of economy may be secured through simple comparison of costs. For the maintenance of facilities on the high seas, for example, national governments might be invited to state the annual figure for which they would be willing to assure the provision of a specified service, and the operation assigned to the government offering the most satisfactory terms.

VII

PICAO has been trying out the organization and working schedule that were adopted in August of 1945, when the Council first met. Facing the unknown, but certain that many problems would arise without notice and demand prompt treatment, the Council decided to remain in virtually continuous session. Actually its practice since then has been to sit for from six weeks to two months at a time, meeting about twice a week on the average, and to allow intervals of a month to six weeks between sessions to let the members go home for consultation. The schedule followed has been generally satisfactory to the present members of the Council; but there are occasional suggestions that it would be preferable to substitute the practice of shorter and more intensive sessions at intervals of two or three months, and to expect that the Council member states would then send regular officials of their departments of civil aviation to attend the occasional meetings in lieu of their present practice of assigning to the Council an official who has no other duties, and who remains permanently resident at PICAO's headquarters to work with his colleagues.

The continuous-session and permanent-membership policies are unusual among international organizations; but in PICAO's experience there have been many occasions when the necessity of waiting for a month or two for the next Council session before a needed action could be taken would have been a real handicap, and there has been some talk of the adoption of a similar course by other specialized organiza-

tions. One of its effects, of course, has been that Council members are closer to the day-to-day conduct of the organization's affairs, and take a larger share in governing them, than would be practicable if their presence in Montreal were only intermittent.

The decisions of August 1945 will necessarily be reviewed when the permanent organization is established. Some of the present practices will be changed, for the character of the organization is to change. At present the members of the Council give much of their time to the work of the Air Navigation and Air Transport Committees. Every member of the Council represents his state upon at least one of those main committees, and a number of the members sit on both of them. Under the permanent organization, both of the main committees in their present form disappear. The Air Navigation Committee, upon which every member state is now allowed to have a representative, will be superseded by an Air Navigation Commission of twelve personally-elected members, none of whom are likely to be members of the Council as well. The Air Transport Committee of the future will still be composed of Council members, but only of a part of their number (the exact number of committee members not being specified in the Convention, but left to future determination). It will result that a part, at least, of the Council members will have no personal share in the technical committee work that is now among their principal occupations. Reconsideration of the desirability of continuous Council session under the new conditions will have to be accompanied by consideration of the working schedule of the newly-created Air Navigation Commission and a decision of whether it, too, should sit continuously. From my own view of past experience and projection of the probabilities of the next two or three years, I believe that although something less than continuous sittings might suffice to get the Council's work done, there will be need to sit during so large a part of each year, in the aggregate, that the members would find it difficult to combine Council work with the holding of any regular position at home.

Entirely aside from the possible advantage of having the Council always ready to act upon questions as they arise, or within a few weeks' time at most, its efficiency undoubtedly gains from the constant association of the members. Of the twenty Council member states (the number has now been increased to twenty-one), fifteen have been represented by members who have devoted their entire time to Coun-

cil work, and ten of that number have been active in PICAO affairs ever since the Council first met; and the organization, and the world, have been fortunate in the close and harmonious personal relations that have uniformly prevailed.