Corrigé
Corrected

CR 2019/13

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Monday 2 December 2019, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

in the cases concerning the
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)
and the
Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates *v.* Qatar)

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le lundi 2 décembre 2019, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

dans les affaires relatives à
***l'*Appel concernant la compétence du Conseil de l'OACI en vertu de l'article 84 de la convention relative à l'aviation civile internationale (Arabie saoudite, Bahreïn, Egypte et Emirats arabes unis c. Qatar)**
et à
***l'*Appel concernant la compétence du Conseil de l'OACI en vertu de l'article II, section 2, de l'accord de 1944 relatif au transit des services aériens internationaux (Bahreïn, Egypte et Emirats arabes unis c. Qatar)**

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Judges *ad hoc*	Berman
		Daudet
	Registrar	Gautier

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges
MM. Berman
Daudet, juges *ad hoc*

M. Gautier, greffier

The Government of the Kingdom of Bahrain is represented by:

H.E. Sheikh Fawaz bin Mohammed Al Khalifa, Ambassador of the Kingdom of Bahrain to the United Kingdom, accredited to the Kingdom of the Netherlands,

as Agent;

Mr. Georgios Petrochilos, *avocat au barreau de Paris* and Advocate at the Greek Supreme Court, Three Crowns LLP,

Ms Alexandra van der Meulen, *avocate au barreau de Paris* and member of the Bar of the State of New York, Three Crowns LLP,

as Advocates;

Ms Amelia Keene, Barrister and Solicitor of the High Court of New Zealand, Three Crowns LLP,

Mr. Motohiro Maeda, Solicitor admitted in England and Wales, Three Crowns LLP,

Mr. Ryan Manton, Barrister and Solicitor of the High Court of New Zealand, Three Crowns LLP,

Ms Julia Sherman, member of the Bar of the State of New York, ***Three Crowns LLP,***

as Counsel;

Mr. Mohamed Abdulrahman Al Haidan, Director of Legal Affairs, Ministry of Foreign Affairs of the Kingdom of Bahrain,

Mr. Hamad Waheed Sayyar, Counsellor, Embassy of the Kingdom of Bahrain in the United Kingdom,

Mr. Devashish Krishan, Legal Adviser, Court of H.R.H. the Crown Prince of the Kingdom of Bahrain,

Mr. Mohamed Hafedh Ali Seif, Third Secretary, Legal Affairs Directorate, Ministry of Foreign Affairs of the Kingdom of Bahrain,

as Advisers;

Ms Eleonore Gleitz, Three Crowns LLP,

as Assistant.

The Government of the Arab Republic of Egypt is represented by:

H.E. Mr. Amgad Abdel Ghaffar, Ambassador of the Arab Republic of Egypt to the Kingdom of the Netherlands,

as Agent;

Mr. Payam Akhavan, LLM SJD (Harvard), Professor of International Law, McGill University, member of the Bar of the State of New York and of The Law Society of Ontario, member of the Permanent Court of Arbitration,

Ms Naomi Hart, Essex Court Chambers, member of the Bar of England and Wales,

Le Gouvernement du Royaume de Bahreïn est représenté par :

S. Exc. le cheikh Fawaz bin Mohammed Al Khalifa, ambassadeur du Royaume de Bahreïn au Royaume-Uni, accrédité auprès du Royaume des Pays-Bas,

comme agent ;

M. Georgios Petrochilos, avocat au barreau de Paris et à la Cour suprême grecque, Three Crowns LLP,

Mme Alexandra van der Meulen, avocate au barreau de Paris et membre du barreau de l'Etat de New York, Three Crowns LLP,

comme avocats ;

Mme Amelia Keene, *barrister* et *solicitor* près la *High Court* de Nouvelle-Zélande, Three Crowns LLP,

M. Motohiro Maeda, *solicitor* (Angleterre et pays de Galles), Three Crowns LLP,

M. Ryan Manton, *barrister* et *solicitor* près la *High Court* de Nouvelle-Zélande, Three Crowns LLP,

Mme Julia Sherman, membre du barreau de l'Etat de New York, ***Three Crowns LLP,***

comme conseils ;

M. Mohamed Abdulrahman Al Haidan, directeur des affaires juridiques au ministère des affaires étrangères du Royaume de Bahreïn,

M. Hamad Waheed Sayyar, conseiller à l'ambassade du Royaume de Bahreïn au Royaume-Uni,

M. Devashish Krishan, conseiller juridique à la Cour de S. A. R. le prince héritier du Royaume de Bahreïn,

M. Mohamed Hafedh Ali Seif, troisième secrétaire à la direction des affaires juridiques du ministère des affaires étrangères du Royaume de Bahreïn,

comme conseillers ;

Mme Eleonore Gleitz, Three Crowns LLP,

comme assistante.

Le Gouvernement de la République arabe d'Egypte est représenté par :

S. Exc. M. Amgad Abdel Ghaffar, ambassadeur de la République arabe d'Egypte auprès du Royaume des Pays-Bas,

comme agent ;

M. Payam Akhavan, LLM SJD (Harvard), professeur de droit international à l'Université McGill, membre de la Cour permanente d'arbitrage, membre du barreau de l'Etat de New York et du barreau de l'Ontario,

Mme Naomi Hart, Essex Court Chambers, membre du barreau d'Angleterre et du pays de Galles,

as Counsel and Advocates;

H.E. Ms Howaida Essam Abdel Rahman, Assistant Minister for Foreign Affairs for International Legal Affairs and Treaties of the Arab Republic of Egypt,

Ms Angi Mostafa, Permanent Representative of the Arab Republic of Egypt to the International Civil Aviation Organization,

~~***Mr. Sameh Ahmed Zaky Elhefny, President, Egyptian Civil Aviation Authority,***~~

H.E. Mr. Khaled Mahmoud Elkhamry, Ambassador, Ministry of Foreign Affairs,

Mr. Ihab Soliman, Counsellor, Deputy Chief of Mission, Embassy of the Arab Republic of Egypt in the Kingdom of the Netherlands,

Mr. Hazem Fawzy, Counsellor, Embassy of the Arab Republic of Egypt in the Kingdom of the Netherlands,

Ms Hadeer Samy Ibrahim Elsayed Saoudy, Third Secretary, Ministry of Foreign Affairs,

Mr. Mostafa Diaa Eldin Mohamed, Third Secretary, Embassy of the Arab Republic of Egypt in the Kingdom of the Netherlands,

as Advisers.

The Government of the Kingdom of Saudi Arabia is represented by:

H.E. Mr. Abdulaziz bin Abdullah bin Abdulaziz Abohaimed, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands,

as Agent;

~~***H.E. Mr. Abdulkhalig Rashed bin Rafaa, Minister plenipotentiary, Royal Embassy of Saudi Arabia in the Kingdom of the Netherlands,***~~

Mr. Nasser Awad Alghanoom, Counsellor, Royal Embassy of Saudi Arabia in the Kingdom of the Netherlands,

~~***Mr. Shafi Bajad Alotaibi, Counsellor, Ministry of Foreign Affairs,***~~

~~***Mr. Mohammed Hassan Monis, Counsellor, Ministry of Foreign Affairs,***~~

~~***Mr. Mohammed Ali Almalki, Second Secretary, Ministry of Foreign Affairs,***~~

Mr. Mohammed Saud Alnasser, General Authority of Civil Aviation,

as Advisers;

Mr. Gavan Griffith, QC, Barrister, Lincoln's Inn, member of the Bars of England and Wales and of Australia,

~~***Mr. Chester Brown, Professor of International Law and International Arbitration, University of Sydney, member of the Australian Bar,***~~

as Counsel.

comme conseils et avocats ;

S. Exc. Mme Howaida Essam Abdel Rahman, vice-ministre aux affaires étrangères de la République arabe d'Egypte, chargée des affaires juridiques internationales et des traités internationaux,

Mme Angi Mostafa, représentante permanente de la République arabe d'Egypte auprès de l'Organisation de l'aviation civile internationale,

~~***M. Sameh Ahmed Zaky Elhefny, président de l'autorité égyptienne de l'aviation civile,***~~

S. Exc. M. Khaled Mahmoud Elkhamry, ambassadeur, ministère des affaires étrangères,

M. Ihab Soliman, conseiller, chef de mission adjoint de l'ambassade de la République arabe d'Egypte au Royaume des Pays-Bas,

M. Hazem Fawzy, conseiller à l'ambassade de la République arabe d'Egypte au Royaume des Pays-Bas,

Mme Hadeer Samy Ibrahim Elsayed Saoudy, troisième secrétaire, ministère des affaires étrangères,

M. Mostafa Diaa Eldin Mohamed, troisième secrétaire, ambassade de la République arabe d'Egypte au Royaume des Pays-Bas,

comme conseillers.

Le Gouvernement du Royaume d'Arabie saoudite est représenté par :

S. Exc. M. Abdulaziz bin Abdullah bin Abdulaziz Abohaimed, ambassadeur du Royaume d'Arabie saoudite auprès du Royaume des Pays-Bas,

comme agent ;

~~***S. Exc. M. Abdulkhalig Rashed bin Rafaa, ministre plénipotentiaire, ambassade du Royaume d'Arabie saoudite au Royaume des Pays-Bas,***~~

M. Nasser Awad Alghanoom, conseiller, ambassade du Royaume d'Arabie saoudite au Royaume des Pays-Bas,

~~***M. Shafi Bajad Alotaibi, conseiller, ministère des affaires étrangères,***~~

~~***M. Mohammed Hassan Monis, conseiller, ministère des affaires étrangères,***~~

~~***M. Mohammed Ali Almalki, deuxième secrétaire, ministère des affaires étrangères,***~~

M. Mohammed Saud Alnasser, autorité générale de l'aviation civile,

comme conseillers ;

M. Gavan Griffith, QC, *barrister*, Lincoln's Inn, membre du barreau d'Angleterre et du pays de Galles et du barreau d'Australie,

~~***M. Chester Brown, professeur de droit international et d'arbitrage international, Université de Sydney, membre du barreau d'Australie,***~~

comme conseils.

The Government of the United Arab Emirates is represented by:

H.E Ms Hissa Abdullah Ahmed Al-Otaiba, Ambassador of the United Arab Emirates to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Abdalla Hamdan Alnaqbi, Director of International Law Department, Ministry of Foreign Affairs and International Cooperation,

Mr. Abdulla Al Jasmi, Head of the Multilateral Treaties and Agreements Section, Ministry of Foreign Affairs and International Cooperation,

Ms Majd Abdalla, Senior Legal Researcher, Multilateral Treaties and Agreements Section, Ministry of Foreign Affairs and International Cooperation,

Mr. Mohamed Salim Ali Alowais, Embassy of the United Arab Emirates in the Kingdom of the Netherlands,

Ms Fatima Alkhateeb, Ministry of Foreign Affairs and International Cooperation,

as Special Advisors;

Mr. Malcolm Shaw, QC, Emeritus Sir Robert Jennings Professor of International Law at the University of Leicester, Senior Fellow, Lauterpacht Centre for International Law, University of Cambridge, associate member of the Institut de droit international, Barrister, Essex Court Chambers, London,

Mr. Simon Olleson, Three Stone Chambers, Lincoln's Inn, London, member of the English Bar,

as Counsel and Advocates;

Mr. Scott Sheeran, Senior Legal Adviser to the Minister of State for Foreign Affairs, Ministry of Foreign Affairs and International Cooperation, Barrister and Solicitor of the High Court of New Zealand,

Mr. Paolo Busco, Legal Adviser to the Minister of State for Foreign Affairs, Ministry of Foreign Affairs and International Cooperation, member of the Italian Bar, registered European lawyer with the Bar of England and Wales,

Mr. Mark Somos, Senior Research Affiliate, Max Planck Institute for Comparative Public Law and International Law,

Mr. Charles L. O. Buderi, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP, London, member of the District of Columbia Bar and California State Bar,

Ms Luciana ***T.*** Ricart, ***LLM, New York University School of Law, Counsel***, Curtis, Mallet-Prevost, Colt & Mosle LLP, London, ***member of the Buenos Aires Bar Association,***

Ms Lillie Ashworth, LLM, Cambridge University, Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP, London, Solicitor admitted in England and Wales,

as Counsel.

Le Gouvernement des Emirats arabes unis est représenté par :

S. Exc. Mme Hissa Abdullah Ahmed Al-Otaiba, ambassadeur des Emirats arabes unis auprès du Royaume des Pays-Bas,

comme agent ;

S. Exc. M. Abdalla Hamdan Alnaqbi, directeur du département du droit international, ministère des affaires étrangères et de la coopération internationale,

M. Abdulla Al Jasmi, chef du service des traités et accords multilatéraux, ministère des affaires étrangères et de la coopération internationale,

Mme Majd Abdalla, chargée de recherche principale, service des traités et accords multilatéraux, ministère des affaires étrangères et de la coopération internationale,

M. Mohammed Salim Ali Alowais, ambassade des Emirats arabes unis au Royaume des Pays-Bas,

Mme Fatima Alkhateeb, ministère des affaires étrangères et de la coopération internationale,

comme conseillers spéciaux ;

M. Malcom Shaw, QC, professeur émérite de droit international à l'Université de Leicester, titulaire de la chaire sir Robert Jennings, *senior fellow* au Lauterpacht Centre for International Law de l'Université de Cambridge, membre associé de l'Institut de droit international, *barrister*, Essex Court Chambers, Londres,

M. Simon Olleson, Three Stone, Lincoln's Inn, Londres, membre du barreau d'Angleterre,

comme conseils ou avocats ;

M. Scott Sheeran, conseiller juridique principal du ministre des affaires étrangères, ministère des affaires étrangères et de la coopération internationale, *barrister* et *solicitor* près la *High Court* de Nouvelle-Zélande,

M. Paolo Busco, conseiller juridique du ministre des affaires étrangères, ministère des affaires étrangères et de la coopération internationale, membre du barreau d'Italie, statut de *registered European Lawyer* inscrit au barreau d'Angleterre et du pays de Galles,

M. Mark Somos, chercheur principal adjoint, Institut Max Planck de droit public comparé et de droit international,

M. Charles L. O. Buderi, associé, Curtis, Mallet-Prevost, Colt & Mosle LLP, Londres, membre de l'association du barreau du district de Columbia et du barreau de l'Etat de Californie,

Mme Luciana T. Ricart, ***LLM, faculté de droit de l'Université de New York, avocate,*** Curtis, Mallet-Prevost, Colt & Mosle LLP, Londres, ***membre du barreau de Buenos Aires,***

Mme Lillie Ashworth, LLM, Université de Cambridge, collaboratrice, Curtis, Mallet-Prevost, Colt & Mosle LLP, Londres, **solicitor** ***(Angleterre et pays de Galles),***

comme conseils.

The Government of the State of Qatar is represented by:

Mr. Mohammed Abdulaziz Al-Khulaifi, Legal Adviser to H.E. the Deputy Prime Minister and Minister for Foreign Affairs of the State of Qatar, Dean of the College of Law, Qatar University,

as Agent;

Mr. Vaughan Lowe, QC, Emeritus Professor of International Law, University of Oxford , member of the Institut de droit international, Essex Court Chambers, member of the English Bar,

Mr. Pierre Klein, Professor of International Law, Université libre de Bruxelles,

Ms Loretta Malintoppi, 39 Essex Chambers Singapore, member of the Bar of Rome,

Mr. Lawrence H. Martin, Foley Hoag LLP, member of the Bars of the District of Columbia and Massachusetts,

Mr. Constantinos Salonidis, Foley Hoag LLP, member of the Bars of New York and Greece,

Mr. Pierre d'Argent, Professor of International Law, Université catholique de Louvain, ~~***associate***~~ member of the Institut de droit international, Foley Hoag LLP, member of the Bar of Brussels,

as Counsel and Advocates;

H.E. Mr. Abdullah bin Hussein Al-Jaber, Ambassador of the State of Qatar to the Kingdom of the Netherlands,

H.E. Mr. Abdulla bin Nasser Turki Al-Subaey, President of the Civil Aviation Authority of the State of Qatar,

Mr. Ahmad Al-Mana, Ministry of Foreign Affairs of the State of Qatar,

Mr. Jassim Al-Kuwari, Ministry of Foreign Affairs of the State of Qatar,

Mr. Nasser Al-Hamad, Ministry of Foreign Affairs of the State of Qatar,

Ms Hissa Al-Dosari, Ministry of Foreign Affairs of the State of Qatar,

Mr. Ali Al-Hababi, Embassy of the State of Qatar in the Kingdom of the Netherlands,

Mr. Essa Al-Malki, Permanent Representative, Permanent Mission of the State of Qatar to the International Civil Aviation Organisation,

Mr. John Augustin, Adviser, Permanent Mission of the State of Qatar to the International Civil Aviation Organisation,

Mr. Salah Al-Shibani, Director of Legal Affairs Department, Civil Aviation Authority of the State of Qatar,

Mr. Nasser Al-Suwaidi, Director of International Cooperation Department, Civil Aviation Authority of the State of Qatar,

Le Gouvernement de l'Etat du Qatar est représenté par :

M. Mohammed Abdulaziz Al-Khulaifi, conseiller juridique auprès de S. Exc. le vice-premier ministre et ministre des affaires étrangères de l'Etat du Qatar, doyen de la faculté de droit de l'Université du Qatar,

comme agent ;

M. Vaughan Lowe, QC, professeur émérite de droit international à l'Université d'Oxford, membre de l'Institut de droit international, Essex Court Chambers, membre du barreau d'Angleterre,

M. Pierre Klein, professeur de droit international à l'Université libre de Bruxelles,

Mme Loretta Malintoppi, 39 Essex Chambers Singapore, membre du barreau de Rome,

M. Lawrence H. Martin, cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et du Massachusetts,

M. Constantinos Salonidis, cabinet Foley Hoag LLP, membre des barreaux de New York et de Grèce,

M. Pierre d'Argent, professeur de droit international à l'Université catholique de Louvain, membre ***~~associé~~*** de l'Institut de droit international, cabinet Foley Hoag LLP, membre du barreau de Bruxelles,

comme conseils et avocats ;

S. Exc. M. Abdullah bin Hussein Al-Jaber, ambassadeur de l'Etat du Qatar auprès des Pays-Bas,

S. Exc. M. Abdulla bin Nasser Turki Al-Subaey, président de l'autorité de l'aviation civile de l'Etat du Qatar,

M. Ahmad Al-Mana, ministère des affaires étrangères de l'Etat du Qatar,

M. Jassim Al-Kuwari, ministère des affaires étrangères de l'Etat du Qatar,

M. Nasser Al-Hamad, ministère des affaires étrangères de l'Etat du Qatar,

Mme Hissa Al-Dosari, ministère des affaires étrangères de l'Etat du Qatar,

M. Ali Al-Hababi, ambassade de l'Etat du Qatar aux Pays-Bas,

M. Essa Al-Malki, représentant permanent de l'Etat du Qatar auprès de l'Organisation de l'aviation civile internationale (OACI),

M. John Augustin, conseiller à la mission permanente de l'Etat du Qatar auprès de l'Organisation de l'aviation civile internationale (OACI),

M. Salah Al-Shibani, directeur du département des affaires juridiques de l'autorité de l'aviation civile de l'Etat du Qatar,

M. Nasser Al-Suwaidi, directeur du département de la coopération internationale de l'autorité de l'aviation civile de l'Etat du Qatar,

Mr. Talal Abdulla Al-Malki, Director of Public Relations and Communication Department, Civil Aviation Authority of the State of Qatar,

Mr. Rashed Al-Naemi, Embassy of the State of Qatar in the Kingdom of the Netherlands,

Mr. Abdulla Nasser Al-Asiri, Ministry of Foreign Affairs of the State of Qatar,

Ms Noora Ahmad Al-Saai, Ministry of Foreign Affairs of the State of Qatar,

Ms Dana Ahmad Ahan, Ministry of Foreign Affairs of the State of Qatar,

as Advisers;

Mr. Pemmaraju Sreenivasa Rao, Special Adviser in the Office of the Attorney General, State of Qatar, former member of the International Law Commission, member of the Institut de droit international,

Mr. Surya Subedi QC (Hon.), Professor of International Law, University of Leeds, member of the Institut de droit international, Three Stone Chambers, member of the English Bar,

Ms Catherine Amirfar, Debevoise & Plimpton LLP, member of the Bar of New York,

Mr. Arsalan Suleman, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

Mr. Joseph Klingler, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

Mr. Ioannis Konstantinidis, Assistant Professor of International Law, College of Law, Qatar University,

Mr. Ofilio Mayorga, Foley Hoag LLP, member of the Bar***s*** of New York ***and Nicaragua***,

Mr. Peter Tzeng, Foley Hoag LLP, member of the Bar of New York,

Ms Floriane Lavaud, Debevoise & Plimpton LLP, member of the Bars of New York and Paris, Solicitor in England and Wales,

Mr. Ali Abusedra, Legal Counsel, Ministry of Foreign Affairs of the State of Qatar,

Ms Yasmin Al-Ameen, Foley Hoag LLP,

as Counsel;

Ms Flannery Sockwell,

Ms Nancy Lopez,

Ms Deborah Langley,

as Assistants.

M. Talal Abdulla Al-Malki, directeur du département des relations publiques et de la communication de l'autorité de l'aviation civile de l'Etat du Qatar,

M. Rashed Al-Naemi, ambassade de l'Etat du Qatar aux Pays-Bas,

M. Abdulla Nasser Al-Asiri, ministère des affaires étrangères de l'Etat du Qatar,

Mme Noora Ahmad Al-Saai, ministère des affaires étrangères de l'Etat du Qatar,

Mme Dana Ahmad Ahan, ministère des affaires étrangères de l'Etat du Qatar,

comme conseillers ;

M. Pemmaraju Sreenivasa Rao, conseiller spécial auprès du bureau de l'*Attorney General* de l'Etat du Qatar, ancien membre de la Commission du droit international, membre de l'Institut de droit international,

M. Surya Subedi QC (Hon), professeur de droit international à l'Université de Leeds, membre de l'Institut de droit international, cabinet Three Stone, membre du barreau d'Angleterre,

Mme Catherine Amirfar, cabinet Debevoise & Plimpton LLP, membre du barreau de New York,

M. Arsalan Suleman, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

M. Joseph Klingler, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

M. Ioannis Konstantinidis, professeur adjoint de droit international à la faculté de droit de l'Université du Qatar,

M. Ofilio Mayorga, cabinet Foley Hoag LLP, membre ***des*** barreau***x*** de New York ***et du Nicaragua***,

M. Peter Tzeng, cabinet Foley Hoag LLP, membre du barreau de New York,

Mme Floriane Lavaud, cabinet Debevoise & Plimpton LLP, membre des barreaux de New York et de Paris, *solicitor* (Angleterre et pays de Galles),

M. Ali Abusedra, conseiller juridique auprès du ministère des affaires étrangères de l'Etat du Qatar,

Mme Yasmin Al-Ameen, cabinet Foley Hoag LLP,

comme conseils;

Mme Flannery Sockwell,

Mme Nancy Lopez,

Mme Deborah Langley,

comme assistantes.

The PRESIDENT: Please be seated. The sitting is open.

For reasons duly made known to me, Judge Bennouna is unable to sit with us during this week.

The Court meets today and will meet over the course of this week to hear the oral arguments of the Parties on the merits in the cases concerning the *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)* and the *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates* v. *Qatar)*. In light of the similarity of the arguments contained in the Applications and the written pleadings in the two cases, the Court has decided, after consultations with the Parties, to hold combined hearings. For the sake of convenience, the States that have filed the two Applications shall be referred to collectively as the "Applicants" — even though their composition is not identical in each case; and the State of Qatar shall be referred to as "Qatar" or the "Respondent". Today, the Court will hear the Applicants' first round of oral argument.

It is now necessary to complete the composition of the Court for the purposes of these cases.

Since the Court included upon the Bench no judge of the nationality of the Parties, the Applicants and the Respondent proceeded to exercise the right conferred upon them by Article 31 of the Statute to choose a judge *ad hoc* to sit in each case. The Applicants first chose Mr. Nabil Elaraby, who resigned on 10 September 2019. As a result, they chose Sir Franklin Berman. The Respondent chose Mr. Yves Daudet.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Notwithstanding that both Sir Franklin Berman and Mr. Daudet have been judges *ad hoc* and have made a solemn declaration in previous cases, Article 8, paragraph 3, of the Rules of Court requires that they make a further solemn declaration for the purposes of the two present cases.

Before inviting Sir Franklin and Mr. Daudet to make their solemn declaration, I shall first, in accordance with custom, say a few words about their career and qualifications.

Sir Franklin Berman, of British nationality, is a barrister with a long career both in international law and in diplomacy. He served as the Legal Adviser to the Foreign & Commonwealth Office and has represented his country in cases before this Court as well as in a multitude of international negotiations. He is a member of various international committees concerned with the administration of justice, and has undertaken advisory work in a wide range of areas of public international law and international dispute settlement. Having been appointed by his Government to the list of arbitrators under the ICSID Convention, he has also vast experience in international investment arbitration. Sir Franklin has served as Judge *ad hoc* at the International Court of Justice in the case concerning *Certain Property (Liechtenstein* v. *Germany)*. He is also a visiting professor of international law at Oxford University and at the University of Cape Town. Since 2010 he has been a member of the Permanent Court of Arbitration. He has published widely on many aspects of international law, from the law of treaties to legal theories on international dispute prevention.

M. Daudet, de nationalité française, est docteur en droit et agrégé de droit public et de science politique. Il est actuellement le président du Curatorium de l'Académie de droit international de La Haye et professeur émérite de l'Université de Paris I (Panthéon-Sorbonne), dont il a été premier vice-président. Il a occupé divers postes d'enseignement et de recherche en France, à l'île Maurice, au Maroc et en Côte d'Ivoire. Il a été désigné plusieurs fois comme juge *ad hoc*. M. Daudet exerce aujourd'hui ces fonctions en l'affaire relative à des *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)*, en l'affaire relative au *Différend concernant le statut et l'utilisation des eaux du Silala (Chili c. Bolivie)*, en l'affaire relative à l'*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis)* et en l'affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*. Il est par ailleurs membre du comité de rédaction de l'*Annuaire français de droit international*, et membre de la société française pour le droit international et de l'Association de droit international. Il a publié de nombreux ouvrages et articles dans différents domaines du droit international.

I shall now invite Sir Franklin Berman to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Sir Franklin, you have the floor.

Sir FRANKLIN:

"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: I thank you. J'invite maintenant M. Daudet à faire la déclaration solennelle prescrite par le Statut. Monsieur Daudet.

M. DAUDET :

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

Le PRESIDENT : Je vous remercie. Veuillez vous asseoir.

I take note of the solemn declaration made by Judges Berman and Daudet and declare them duly installed as judges *ad hoc* in the case concerning the *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)* and in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates* v. *Qatar)*.

*

Before recalling the principal steps of the procedure, I shall briefly retrace the events leading to the Court being seised of these two cases. On 30 October 2017, two sets of proceedings relating to certain airspace restrictions were initiated by Qatar through two applications filed with the Council of the International Civil Aviation Organization which I shall refer to as the "ICAO Council". In the first application, initiated against four respondents, namely Bahrain, Egypt,

Saudi Arabia and the United Arab Emirates, Qatar claimed that the airspace restrictions imposed on it by these States violated the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (hereinafter the "Chicago Convention"). In the second application, initiated against three respondents, namely Bahrain, Egypt and the United Arab Emirates, Qatar claimed that those same airspace restrictions violated the International Air Services Transit Agreement, signed at Chicago on 7 December 1944 (hereinafter the "IASTA" Convention).

On 19 March 2018, the respondents before the ICAO Council raised preliminary objections to the jurisdiction of the Council in each set of proceedings. By two similar decisions dated 29 June 2018, the ICAO Council rejected these preliminary objections.

I now turn to the principal steps of the procedure in the two cases before the Court.

On 4 July 2018, two separate joint Applications were filed in the Registry of the Court. By the first joint Application, Bahrain, Egypt, Saudi Arabia and the United Arab Emirates instituted an appeal from the decision rendered by the ICAO Council in proceedings commenced by Qatar against these States, on the basis of the Chicago Convention. In their Application, the Applicants seek to found the jurisdiction of the Court on Article 84 of the Chicago Convention, in conjunction with Articles 36, paragraph 1, and 37 of the Statute of the Court.

By the second Application, Bahrain, Egypt and the United Arab Emirates instituted an appeal from the decision rendered by the ICAO Council in proceedings commenced by Qatar against these States, on the basis of the IASTA. In their Application, the Applicants seek to found the jurisdiction of the Court on Article II, Section 2 of the IASTA, in conjunction with Article 36, paragraph 1, and Article 37 of the Statute of the Court.

By Orders dated 25 July 2018 in both cases, the President of the Court fixed 27 December 2018 and 27 May 2019 as the respective time-limits for the filing of a Memorial by the Applicants, and a Counter-Memorial by the Respondent. In each case, the Memorial and the Counter-Memorial were filed on 27 December 2018 and 25 February 2019, respectively.

By Orders dated 27 March 2019 in both cases, the Court directed the submission of a Reply by the Applicants and a Rejoinder by the Respondent, and fixed 27 May 2019 and 29 July 2019 as

the respective time-limits for the filing of those pleadings. In each case, the Reply and Rejoinder were filed within the time-limits thus prescribed.

*

After ascertaining the views of the Parties, the Court decided today, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings and documents annexed will be put on the Court's website from today.

*

I note the presence at the hearing of the Agents, counsel and advocates of the Applicants and the Respondent. In accordance with the arrangements for the organization of the proceedings which have been decided by the Court, the combined hearings will comprise a first and a second round of oral argument. The first round of oral argument will begin today, with the statement of the Applicants, and will close tomorrow afternoon, on Tuesday 3 December 2019, following the Respondent's first round of oral pleading. The Court has decided to allow the Applicants an additional hour of speaking time for their first round and that hour will be this afternoon — exactly 60 minutes in the afternoon — and an additional half hour for their second round. The Applicants have thus been allocated a total period of four hours for the first round — three hours this morning, between 10 a.m. and 1 p.m., and one hour this afternoon, between 3 p.m. and 4 p.m. For its part, for the first round, the Respondent has been allocated a total period of three hours, tomorrow between 3 p.m. and 6 p.m. The second round of oral argument will begin on the morning of Thursday 5 December 2019 and come to a close on the afternoon of Friday 6 December 2019. The Applicants will have a maximum of two hours to present their second round and the Respondent a maximum of one and a half hours.

In this first sitting, the Applicants may, if required, avail themselves of a short extension beyond 1 p.m. — I hope it will not go beyond 1.15 p.m., that is the maximum — in view of the time taken up by the opening part of these oral proceedings.

I now give the floor to the Agent of the Kingdom of Bahrain, H.E. Sheikh Fawaz bin Mohammed Al Khalifa. You have the floor, Sir.

SHEIKH AL KHALIFA:

OPENING STATEMENT OF THE AGENT OF THE KINGDOM OF BAHRAIN

1. Bismillah al-Rahman al-Rahim. Mr. President, Members of the Court, it is an honour to address you as the Agent of the Kingdom of Bahrain and to express the Kingdom of Bahrain's respect for the International Court of Justice. This is the second time that Bahrain has appeared before the Court. Regrettably, the State of Qatar is again the opposing Party.

2. The Kingdom of Bahrain wishes to express its long-standing commitment to international law, multilateral co-operation, and the peaceful resolution of international disputes. These are commitments Bahrain considers to be essential to its existence and well-being. We have a strong respect for this Court. Bahrain has placed its confidence in the Court ***before in a*** matter of capital significance to it. We have no hesitation in doing so today.

3. The real dispute before the Court is not about civil aviation. Instead, it arises directly from the sustained regional efforts to restrain Qatar's support for terrorism and other forms of extremism, particularly through the Riyadh Agreements. I will focus on those unsuccessful efforts. I will explain how Qatar's repeated non-compliance with the Riyadh Agreements and other international obligations compelled Bahrain to take its measures**,** adopted in June 2017.

4. The distinguished Agents ***of*** Egypt, the United Arab Emirates and Saudi Arabia will each elaborate on Qatar's non-compliance with its international obligations. They will each describe how Qatar's non-compliance compelled their States to adopt the measures that they did, in parallel with Bahrain, on 5 June 2017.

5. It is one of the foundational objectives of the Gulf Cooperation Council — the GCC — "to effect cooperation, integration and inter-connection between Member States . . . in order to

achieve unity between them."[1] In addition, co-operating to protect the region's security and stability has always been a priority for the GCC and the Arab League. That priority took on even greater importance as the threats presented by terrorism and other forms of extremism became increasingly severe in 2013. This concern was the catalyst for Qatar, Kuwait and Saudi Arabia to conclude the First Riyadh Agreement on 23 November 2013, which UAE, Bahrain and Oman joined one day later[2]. The signing of the first Riyadh Agreement was the culmination of more than 20 years in which the States had repeatedly raised their concerns with Qatar, to no avail.

6. The obligations set down in this agreement bound all six signatories, including Qatar. They include obligations to ensure "[n]o interference in the internal affairs of the [GCC] States". The parties undertook not to harbour hostile individuals, or extremist or terrorist groups, and not to permit media outlets being used for hate speech or as a platform for these entities[3].

7. The parties also agreed to provide "[n]o support to the Muslim Brotherhood or any. . . organizations, groups or individuals that threaten the security and stability of the [GCC] states"[4].

8. In March 2014, Bahrain, Saudi Arabia, UAE announced their "efforts have not resulted, with great regret, in the consent of the State of Qatar to adhere to the[] procedures [under the Riyadh Agreement]"[5]. Together with Egypt, all of the States withdrew their ambassadors from Qatar.

9. Qatar promised that it would return to the fold of legality. On 17 April 2014, the GCC States thus concluded the ***M***echanism ***I***mplementing the Riyadh Agreement in an attempt to strengthen the obligations in the First Riyadh Agreement[6].

10. Yet this new ***M***echanism failed to restrain Qatar's support for terrorism and extremism. On 16 November 2014, all of the GCC Member States, except Oman, concluded the Supplementary Riyadh Agreement. It was intended to reinforce the obligations in the earlier

---

[1] Memorial of the Applicants (MA) — ICAOA, Vol. II, Ann. 8, Art. 4.

[2] Memorials of the Applicants — ICAOA and ICAOB (MA), Vol. II, Ann. 19.

[3] MA — ICAOA and ICAOB, Vol. II, Ann. 19, Art. 1.

[4] MA — ICAOA and ICAOB, Vol. II, Ann. 19, Art. 2.

[5] MA — ICAOA and ICAOB, Vol. V, Ann. 62, p. 1.

[6] MA — ICAOA and ICAOB, Vol. II, Ann. 20.

Agreements[7]. On the faith of Qatar's commitments, Bahrain, Saudi Arabia and UAE returned their ambassadors to Qatar on 17 November 2014[8].

11. The sustained efforts reflected in the Riyadh Agreements brought no change to Qatar's behaviour. In February 2017, Qatar effectively announced its intention to repudiate the Riyadh Agreements. In April 2017, Qatar paid a sum of hundreds of millions of US dollars to terrorist groups, on the pretext that it was a ransom. Qatar's non-compliance with its international obligations, particularly under the Riyadh Agreements, compelled Bahrain to join Egypt, Saudi Arabia and the United Arab Emirates in taking the measures they did on 5 June 2017. These include breaking off diplomatic relations with Qatar, and imposing the airspace restrictions, with the hope that Qatar then would bring its conduct into compliance with its obligations.

12. Mr. President, Members of the Court, it was with dismay that we imposed the measures that we did on 5 June 2017. But these measures reflected our vital concerns about the safety and security of the Kingdom of Bahrain, and other States in the region such as Egypt, if Qatar continued undermining regional stability through its support of terrorist groups.

13. Bahrain announced these measures as an official statement on 5 June 2017, explaining that they had been taken because Qatar continued to "destabilize the security and stability of the Kingdom of Bahrain" and was interfering in its affairs. Qatar was in "flagrant violation of all agreements and principles of international law without regard to [its] commitment to the constants of Gulf ***~~[States]~~ relations***". This is a clear reference to the Riyadh Agreements. Bahrain explained that the decision to break off diplomatic relations with the State of Qatar and to close its airspace 24 hours later were necessary "to preserve its national security." Finally, Bahrain indicated that "these dangerous Qatari practices . . . embody a very dangerous pattern that cannot be met with silence or accepted, but which must be vigorously and resolutely addressed"[9].

14. This was Bahrain's official position at the time. It remains so today. Bahrain rejects Qatar's allegation that we invented this position just for this case. As we said at the time, Bahrain adopted the measures it did on 5 June 2017 because of Qatar's long-standing non-compliance with

---

[7] MA — ICAOA and ICAOB, Vol. II, Ann. 21.

[8] MA — ICAOA, para. 2.32; MA — ICAOB, para. 2.31.

[9] MA, — ICAOA and ICAOB, Vol. III, Ann. 24, Exhibit 7, para. 55; MA — ICAOA and ICAOB, Vol. V, Ann. 73.

its commitments. This dispute long pre-dates the present proceedings. Qatar's response has been to bring legal cases — before the ICAO Council and other specialized agencies — in an attempt to distract from its own misconduct. But Qatar invoked the ICAO Council's jurisdiction without first making any genuine attempt to negotiate the specific disagreements it alleges concerning the Chicago Convention or the Air Transit Agreement.

15. Mr. President, Members of the Court, this concludes the statement of Bahrain. I invite you to call to the podium the distinguished Agent on behalf of Egypt. Thank you for your kind attention.

The PRESIDENT: I thank the Agent of Bahrain and I now give the floor to the Agent of the Arab Republic of Egypt, H.E. Amgad Abdel Ghaffar. You have the floor, Sir.

Mr. GHAFFAR:

OPENING STATEMENT OF THE AGENT OF THE ARAB REPUBLIC OF EGYPT

1. Bismillah al-Rahman al-Rahim. Mr. President, Members of the Court, it is an honour to address you as the Agent of the Arab Republic of Egypt. Egypt has a long-standing commitment to international law, multilateralism and the peaceful resolution of disputes, in which the Court plays a central role as the principal judicial organ of the United Nations.

2. It is in this connection that Egypt regrets that it is before the Court today. As much as Egypt desires a policy of friendly relations, especially among fellow Arab League members, Qatar's conduct has left Egypt with no choice but to impose the airspace restrictions in 2017 about which Qatar now complains. That decision was a long time in the making. It was the direct result of Qatar's persistent pattern of intervention in the internal affairs of Egypt — its support for terrorist groups with a view to destabilizing Egypt and killing its citizens. Qatar's conduct is the real dispute between Egypt and Qatar, not the airspace restrictions. Were Qatar to change its conduct, those measures would not have been taken.

3. Mr. President, Members of the Court, the real nature of the case before you, is about the interpretation and application of two international rules embedded in the purposes and principles of

the United Nations: the maintenance of international peace and security, and the promotion of good neighbourliness and friendly relations and co-operation among States.

4. Mr. President, the distinguished Agent for Bahrain has described the sustained regional efforts to restrain Qatar's conduct. Aside from the Riyadh Agreements, Qatar was and remains bound by fundamental rules of international law on suppression of terrorism and non-intervention in other States' affairs. No State in our region has been spared the consequences of Qatar's conduct. But it has presented an especially grave threat to Egypt.

5. In 2013, millions of Egyptians revolted against the Muslim Brotherhood government. During this volatile period, the Mubashir Masr channel of Qatar's *Al Jazeera* became the mouthpiece of extremists and an instrument for incitement to hatred and violence.

6. While Egypt is not a signatory to the Riyadh Agreements, it is a beneficiary of the express treaty obligations which Qatar assumed to end support for the Muslim Brotherhood, and end inflammatory *Al Jazeera* broadcasts against Egypt. This was in addition to its wider obligations under international law to suppress terrorism and respect the sovereignty of Egypt.

7. In 2017, Egypt's Court of Cassation found that, during the same period, Qatari intelligence agents had paid political leaders in the Muslim Brotherhood government to disclose military and other secret information vital to Egypt's national security. This included sensitive details of counter-terrorism operations against the local terrorists in North Sinai.

8. The hateful ideologies promoted on *Al Jazeera* and other media platforms affiliated with or financed by Qatar, and their campaign of interference and espionage, are consistent with Qatar's notorious support for terrorist organizations across the region. Many extremist leaders and terrorist financiers operate freely in Qatar, and move among its political elite. This policy has had terrible consequences for Egypt.

9. Unfortunately, Qatar's behaviour has not changed since 2013. It has continued to support extremists who endorsed suicide bombings on *Al Jazeera* and other media platforms affiliated with or financed by Qatar. It has continued to support the Muslim Brotherhood against Egypt. It has provided haven to terrorist leaders who have incited acts of terrorism and violence against the State and the Egyptian people. It has repeatedly failed to extradite or prosecute United Nations-designated terrorist financiers. Instead of extending its influence through

co-operation, this small country has used its tremendous wealth to spread chaos and violence among its neighbours and across the world.

10. Egypt issued diplomatic Notes and public statements warning Qatar that there would be consequences for its conduct; on 3 February 2014, it even recalled its ambassador from Doha. All these protests were in vain. Qatar refused to change course.

11. Finally, on 5 June 2017, Egypt was left with no choice, along with the other Appellants, to cut diplomatic ties with Qatar and to adopt a series of measures, including the airspace restrictions.

12. Those measures were intended to induce Qatar to cease its unlawful conduct. Egypt's official statement, issued on 5 June 2017, makes that perfectly clear. It stated that Egypt's decision to terminate diplomatic relations "came due to the insistence of the Qatari regime on adopting a hostile approach to Egypt" and its continued "support to the terrorist organizations, topped by the terrorist group of the Muslim Brotherhood". Egypt objected to the fact that Qatar "sheltered" Muslim Brotherhood leaders whom Egyptian courts have found to have "targeted the safety and security of Egypt, in addition to promoting the doctrine of Al-Qaeda and ISIL, as well as supporting the terrorist operations in Sinai". Egypt drew attention also to Qatar's "insist[ence] on interfering in the internal affairs of Egypt and the countries of the region, in a way that threatens the Arab national security"[10].

13. Mr. President, Qatar has openly admitted that the airspace restrictions are incidental to a long-standing dispute that is wholly unrelated to civil aviation. Accordingly, Egypt cannot accept Qatar's attempt to use litigation — before the ICAO Council and other specialized agencies — to deflect attention from the real dispute between the Parties. Egypt's consent to the jurisdiction of the Council does not include matters relating to intervention and terrorism, and the Council's serious violations of due process underscore its inability to adjudicate these highly complex and sensitive issues.

14. Mr. President, Members of the Court, this concludes the statement of Egypt. I invite you to call to the podium the distinguished Agent on behalf of Saudi Arabia.

---

[10] MA — ICAOA and ICAOB, Vol. III, Ann. 24, Exhibit 6.

The PRESIDENT: I thank the Agent of the Arab Republic of Egypt. I thought that the next speaker would be the Agent of the United Arab Emirates, unless you have changed the order?

Mr. GHAFFAR: I beg your pardon, Mr. President, you are right. It is on behalf of the United Arab Emirates.

The PRESIDENT: Thank you. I now invite the Agent of the United Arab Emirates, Her Excellency Hissa Abdullah Al-Otaiba. You have the floor, Madam.

Ms AL-OTAIBA: Bismillah al-Rahman al-Rahim.

OPENING STATEMENT OF THE AGENT OF THE UNITED ARAB EMIRATES

1. Mr. President, Members of the Court, it is an honour and privilege to appear before you as the Agent for the Government of the United Arab Emirates. My name is Hissa Al-Otaiba and I serve as the Ambassador of the UAE to the Netherlands. The UAE delegation wishes to convey our Government's deepest respect for this Court as the principal judicial organ of the United Nations, and its strong confidence in the system of international dispute settlement.

2. I will begin by underlining that this case engages issues of fundamental importance for us. It concerns the national security of the United Arab Emirates and the protection of our sovereignty. This is because, at the heart of this dispute, is Qatar's support for various groups devoted to extremism and terrorism.

3. Since 2010, the scourge of terrorism has claimed countless victims in our region. It has turned countries upside down at great cost to their people. In this regard, Qatar's support for terrorist groups is well known and widely reported. The UAE and others have unsuccessfully sought for years through dialogue, negotiations, and written agreements to persuade Qatar to change course and not to support terrorism. Resolving the dispute with Qatar was the single purpose of the three Riyadh Agreements. It is difficult to overstate the painstaking dialogue, consultation and negotiation that took place, and the encouragement provided to Qatar to implement these agreements.

4. Qatar signed the Riyadh Agreements, freely entered into them, but in truth never complied with them.

5. Let me take one example. The number of designated terrorists living in, operating from or transiting through Qatar is large by any measure, and especially considering the size of Qatar's population. Abd Al-Malik Muhammad and Abd Al-Rahman Al-Nu'aymi, for example, are high-profile terrorists designated by the United Nations, but operate freely in Qatar in defiance of the sanctions restrictions. The Agreements provided that Qatar would not give "refuge, employ, or support, whether directly or indirectly, whether domestically or abroad, to any person . . . that harbors inclinations harmful to any Gulf Cooperation Council state"[11]. Harbouring terrorists is therefore certainly a breach of the Riyadh Agreements.

6. Then, on 19 February 2017, Qatar's already clear disregard for the principles and the obligations of the Riyadh Agreements was formalized. In a letter to the Secretary General of the GCC, Qatar's Minister for Foreign Affairs signalled that Qatar intended to walk away from the Riyadh Agreements[12]. Qatar knew full well that the Appellants considered Qatar to be already in breach of the Agreements. It knew that the Appellants would understand that Qatar was formally repudiating the very principles, as well as the specific rights and obligations, contained in the Riyadh Agreements.

7. Furthermore, in April 2017 Qatar attempted to pay hundreds of millions of dollars to terrorist groups, including groups affiliated with Al-Qaida, as a ransom. Qatar used a Qatar Airways airliner to fly the cash into Iraq. Qatari officials were on board. The Iraqi Government, which was not aware of the plan, still less had authorized it, managed to seize the money. Yet, Qatar was successful in otherwise delivering funds to the intended recipients. This serious episode occurred just a little more than a month before the Appellants' announcement of the termination of relations in June 2017. It demonstrates all too well the security and stability concerns raised by Qatar's actions, including by the unlawful use of the airspace of other countries in the region.

8. Finally, the UAE became convinced that, absent more robust action, Qatar would not change. That conclusion came after more than four years of efforts and three binding agreements. It came after Qatar had repeatedly committed to ceasing its threatening conduct, but it did not. I assure you that the UAE does not terminate relations with another nation lightly. And so, on 5 June

---

[11] MA — ICAOA and ICAOB, Vol. II, Ann. 21, p. 538, Art. 3 *(c)*.

[12] Counter-Memorials of Qatar — ICAOA and ICAOB (CMQ), Vol. III, Ann. 40.

2017, the UAE terminated relations with Qatar because it firmly believed that this was necessary to protect its security and stability. It did so due to the continuing breaches of the Riyadh Agreements, and pursuant to those Agreements.

9. The UAE terminated its relations with Qatar through a series of measures that aimed to end direct, bilateral engagement between the two Governments. The aim was to encourage Qatar to finally live up to its security-related promises in the Riyadh Agreements. The measures, as formally announced on 5 June 2017, included closing UAE ports, airports, and territory to Qatari aircraft and vessels; and blocking Qatari State propaganda websites and broadcast channels.

10. Despite the claims that Qatar makes, I can assure you that the UAE has acted in the utmost good faith in this dispute. Qatar says that the Appellants' invocation of the measures adopted pursuant to the Riyadh Agreements and general international law is an *ex post facto* legal tactic to escape dispute settlement. This is not true. Qatar has been on notice for years that the Appellants would take action if Qatar did not change course. From the very beginning, the UAE publicly characterized the flight restrictions as measures adopted pursuant to the Riyadh Agreements. It did so when the measures were adopted, well before Qatar turned to the ICAO Council. Contrary to Qatar's allegations of bad faith, the UAE has limited the measures to what was necessary to achieve the aim of inducing Qatar's compliance with the Riyadh Agreements. For instance, alternative and contingency routes for Qatari flights were worked out.

11. Further, I wish to note that the UAE is a strong supporter of multilateral organizations and treaties, including the Chicago Convention and IASTA. As an open, trading country, these régimes are essential to it. However, when the UAE became party to these treaties, it simply could not have conceived that a dispute like this would be resolved through their mechanisms for dispute resolution. That was the purpose of the Riyadh Agreements. It is no surprise, therefore, that the specific relief that Qatar asked for goes beyond the mandate of the ICAO Council.

12. Qatar is in essence asking this Court to expand the jurisdiction of a highly specialized organization into issues wholly unrelated to civil aviation. It wants the ICAO Council, a technical organ of member States, to sit in judgment on a dispute that can only be addressed through the Riyadh Agreements. Qatar effectively wants the ICAO Council to determine the legal question of whether a breach of the Riyadh Agreements has occurred and whether the Appellants' right to take

appropriate measures under the Agreements has therefore been lawfully exercised. This is the real systemic threat to the international system, to international treaties, and to binding dispute settlement.

13. In summary, the Appellants have withdrawn from Qatar the privileges of international friendship. This was done for good reasons. The resolution of the dispute between Qatar and its neighbours can only be addressed through the means agreed in the Riyadh Agreements, which Qatar tries to avoid. Resolution will take time, patient dialogue, and genuine engagement. The UAE stands fully ready to engage in that process.

14. Mr. President, Members of the Court, that concludes my speech. I would like to thank you for your attention and ask that the honourable Agent of Saudi Arabia be called to deliver his speech.

The PRESIDENT: I thank the Agent of the United Arab Emirates and I now give the floor to the Agent of the Kingdom of Saudi Arabia, H.E. Mr. Abdulaziz bin Abdullah bin Abdulaziz Abohaimed. You have the floor, Sir.

Mr. ABOHAIMED: Bismillah al-Rahman al-Rahim.

OPENING STATEMENT OF THE AGENT OF THE KINGDOM OF SAUDI ARABIA

1. Mr. President, Members of the Court, it is an honour to appear before the Court as the Agent of the Kingdom of Saudi Arabia in respect of the appeal under Article 84 of the Chicago Convention only.

2. The Kingdom of Saudi Arabia has the greatest respect for the International Court of Justice and for international law, and it is committed to regional co-operation aimed at promoting stability and security by taking actions against the scourges of terrorism and other forms of extremism.

3. The Agent for Bahrain has described the sustained regional efforts that were aimed at restraining Qatar's support for terrorism and extremism. The Agents for Egypt and the United Arab Emirates have already described some specific examples of this support. We are here today because Qatar has not complied with the commitments made to Saudi Arabia and to the other

Appellants in the Riyadh Agreements. For more than 20 years, Qatar has supported terrorism and extremism by permitting their financing to take place from within its borders. This is despite Qatar undertaking in the Riyadh Agreements not to support the Muslim Brotherhood or other extremist groups, nor to shelter or provide support to individuals and groups engaged in terrorist activities or conducting subversive activities against other States. Those obligations are in addition to other international obligations that prohibit Qatar from permitting such conduct to take place within Qatar.

4. The Riyadh Agreements did not burst suddenly on to the scene in the last few months. They were concluded in 2013 and 2014 following years of diplomatic engagement by Saudi Arabia, Qatar and other members of the Gulf Cooperation Council. In 2013 the first Riyadh Agreement was concluded in which each of Saudi Arabia, Qatar and the other parties committed to cease supporting, financing or harbouring persons presenting a danger to each other's national security.

5. Two supplements were agreed in 2014. One in the spring — we call it the ***I***mplementing ***M***echanism, and one in November, often referred to as the supplemental Riyadh Agreement. They were registered with the United Nations. They first appeared publicly during the ICAO proceedings and are filed before the Court.

6. In accordance with the Riyadh Agreements, from 2014 onwards, there were many meetings and repeated calls made on Qatar to comply. We simply asked Qatar to do what it promised us it would do: in simple terms, to cease actions designed to undermine our Governments and our countries. Unfortunately, these calls went unheeded.

7. Finally, on 5 June 2017, Saudi Arabia and the other Appellants decided to take various actions, not to punish Qatar, but to try to encourage it to comply with the commitments it made in the Riyadh Agreements. One of these measures is the flight restrictions Qatar complains of at ICAO. We also broke off diplomatic relations with Qatar. We took these various actions reluctantly, and only following a lengthy deliberative process within the framework of the Riyadh Agreements, during which time it became clear that Qatar had no intention to engage seriously and to end its wrongful conduct.

8. The official Saudi statement issued on 5 June 2017 declares that these actions are "due to the grave violations practiced by the authorities of Doha, in public and in secret, for the last year". The statement recalls that Qatar "funds, fosters and shelters . . . terrorists who aim at destabilizing and disuniting the country" including by sponsoring the "Muslim Brotherhood, ISIL and Al-Qaeda groups".

9. Mr. President, Members of the Court, there are two points confirmed by this statement.

10. First, that Saudi Arabia's complaint is against "the authorities of Doha", not the people of Qatar. We are one people.

11. Second, this dispute with "the authorities of Doha" is not some abstract foreign policy or legal difference: the terrorists that "the authorities of Doha" support aim at "destabilizing and disuniting" Saudi Arabia. The purpose of the Riyadh Agreements was to stop any party, including Qatar, engaging in any action to undermine any of the Governments and national security of neighbouring countries. However, Qatar has not ceased such activities: its consistent and continuing provocative actions on numerous fronts amount to a fundamental national security threat both to the Kingdom and to its neighbours joined in these proceedings.

12. No neighbouring country will stand for such behaviour. In such circumstances each is compelled to take steps to protect its national security and stability. Indeed, the Riyadh Agreements spell out these consequences, wherein each party, including Qatar, acknowledges the right of each other party (including the Kingdom) to take appropriate action to protect its security and stability. The term of the implementing agreement is clear and unambiguous: "If any country of the GCC Countries failed to comply with this mechanism, the other GCC countries shall have the right to take any appropriate action to protect their security and stability."

13. As a party to the Riyadh Agreements, Qatar agreed with its neighbouring States that if it did not comply with its obligations, Saudi Arabia and others could "take any appropriate action to protect their security and stability".

14. What appropriate action did the Parties before the Court take? We did not take military action. Nor did we support terrorist groups that seek to replace the authorities in Doha. What we did instead was co-operatively to adopt a series of peaceful measures directed to induce Qatar's Government to comply with its commitments under the Riyadh Agreements.

15. Unfortunately, Qatar's response has had nothing to do with its commitments under the Riyadh Agreements. Instead, Qatar has challenged those measures wherever it can find a forum to do so, somehow turning the consequences of its non-observance of the Riyadh Agreements into international ***law*** claims against the Appellants.

16. It is as if Qatar takes this as some sort of a game. Saudi Arabia does not regard its issues with Qatar as a game. If "the authorities of Doha" support persons and groups that seek to destabilize and disunite Saudi Arabia, the Government of Saudi Arabia owes a duty to its people to do all that is necessary to protect the security and stability of the Kingdom, and of its neighbours.

17. As is required under the Chicago Convention, Qatar made no attempt to negotiate its alleged complaints with the Kingdom.

18. Mr. President, Members of the Court, we have said before and we will say again: the flight restrictions will be removed when the Riyadh Agreements are complied with.

19. Mr. President, I turn to introduce counsel who will address the Court on behalf of the Applicants:

— Professor Payam Akhavan will provide an introductory speech;

— Ms Alexandra van der Meulen will speak to the first ground of appeal, the due process concerns that render the decisions a nullity;

— Professor Malcolm Shaw will deliver submissions on the second ground of appeal, focusing on the jurisdictional implications of the fact that the real issue in dispute in this case concerns the dispute between the Parties about whether Qatar has complied with the Riyadh Agreements and other obligations, which is not a matter for the ICAO Council;

— Mr. Georgios Petrochilos will address the second ground of appeal, explaining why it would be improper for the Council to exercise jurisdiction;

— Lastly, Mr. Simon Olleson will present the third ground of appeal that Qatar has failed to meet the precondition of negotiations.

20. I thank the President and the Members of the Court for your attention and ask for Professor Akhavan to be called. Thank you.

The PRESIDENT. I thank the Agent of the Kingdom of Saudi Arabia and I now give the floor to Mr. Payam Akhavan. You have the floor.

Mr. AKHAVAN:

INTRODUCTION TO THE APPELLANTS' CASE

1. Introduction

1. Mr. President, distinguished Members of the Court. I serve as counsel to the Arab Republic of Egypt, and I am honoured to appear today on behalf of the Appellants. The two Appeals before you relate respectively to the jurisdiction of the ICAO Council, under Article 84 of the Chicago Convention on International Civil Aviation (Chicago Convention), and under Article II, Section 2, of the 1944 International Air Services Transit Agreement (IASTA). It is my task to introduce the case and to summarize the circumstances giving rise to the dispute before the Court.

2. This case is about the proper exercise of judicial functions by a United Nations specialized agency: the ICAO Council. As with any specialized régime, it must respect the limits of its competence *ratione materiae*. Consistent with the principle of speciality[13], it may not act *ultra vires*, beyond its specifically designated area of technical expertise. Furthermore, in the exercise of its judicial functions, it must respect both fundamental due process as well as preconditions to the exercise of jurisdiction. The Court's judgment in this case will provide important guidance to the ICAO Council and other specialized agencies regarding the exercise of their judicial functions.

3. My speech has three parts. *First*, I will provide an overview of the three grounds of appeal advanced by the Appellants. *Second*, I will address the scope of the Court's appellate jurisdiction in respect of the Council's ***D***ecisions. And *third*, I will explain the factual background to these proceedings, which arises out of a dispute wholly unrelated to civil aviation and, thus, beyond the competence of the Council.

---

[13] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 78–80, paras. 25–26.

2. Overview of the grounds of appeal

4. As the Court is aware, there are two distinct appeals, corresponding to Qatar's Applications A and B, submitted to the ICAO Council on 30 October 2017. Although Saudi Arabia is not a party to the IASTA case under Application B, the issues on appeal are common to both cases. We will therefore address both appeals in our pleadings.

5. The appeals concern the ICAO Council ***D***ecisions of 29 June 2018, rejecting the Appellants' preliminary objections to jurisdiction and admissibility. Each of the appeals is based on three common grounds.

6. *First*, the Appellants submit that because of fundamental violations of due process, the decisions are null and void, and should be set aside. In particular, despite the judicial function conferred upon it by Article 84 of the Chicago Convention and Article II, Section 2, of IASTA, and contrary to its own Rules, the Council did not engage in any deliberations or offer any reasoned opinion whatsoever in support of its ***D***ecisions. Furthermore, it arrived at those decisions in what — by Qatar's own admission — was a procedure characterized by secret and political voting whereby Council Members acted "in a *representative* capacity on behalf of ICAO Member States, [and] not in their *personal* capacity"[14]. The ***D***ecisions are thus manifestly arbitrary; they set an unfortunate precedent for specialized régimes that must exercise their judicial functions properly, independent of political considerations. For that reason alone, in the exercise of its supervisory authority, the Court should declare the ***D***ecisions null and void *ab initio*.

7. *Second*, the Appellants submit that the Council erred in fact and in law in rejecting their ***F***irst ***P***reliminary ***O***bjection that determination of the real issue in dispute between the Parties is beyond the Council's competence. The Appellants adopted the airspace restrictions against Qatar pursuant to the express rights granted by the Riyadh Agreements, parallel to and separate to the additional right to take countermeasures under customary international law. The sole purpose of the restrictions was to induce Qatar to comply with legal obligations unrelated to civil aviation. The three Riyadh Agreements — concluded between November 2013 and November 2014 — contained express undertakings not to support terrorist groups, not to use *Al Jazeera* to incite hatred and violence, and not to interfere in the internal affairs of other States. All questions of Qatar's

[14] Rejoinders of Qatar — ICAOA and ICAOB (RQ), para. 5.11; emphasis in original.

compliance with these obligations are manifestly beyond the Council's specialized competence. Yet, they are at the core of the dispute between the Parties, and indeed underlie the very measures of which Qatar complains.

8. Plainly, the lawfulness of the airspace restrictions, and the international responsibility of the Appellants for those restrictions, cannot be decided without first deciding whether they qualify as lawful measures, whether under the Riyadh Agreements or as lawful countermeasures under customary international law. This, in turn, depends upon the lawfulness of Qatar's conduct in respect of international obligations which are wholly unrelated to civil aviation. In other words, the Council cannot reach a final decision upon Qatar's claims without acting *ultra vires*. Article 84 of the Chicago Convention and Article II, Section 2, of IASTA confer jurisdiction solely for the "interpretation and application" of the Chicago Convention and IASTA respectively; they do not confer jurisdiction in respect of rights and obligations such as those under the Riyadh Agreements.

9. In respect of the second ground of appeal, Appellants submit additionally that even if, facially, a different characterization of the dispute were possible, the case would still be inadmissible as a matter of judicial propriety. Qatar suggests that the Council could still exercise jurisdiction by simply taking judicial notice of the Appellants' invocation of countermeasures; that is to say, without deciding whether the airspace restrictions are in fact lawful countermeasures[15], or "addressing the substantive premise" thereof[16].

10. Such partial or inchoate exercise of jurisdiction, however, would necessarily result in a partial or inchoate decision. The Council would determine whether the Appellants' conduct has breached their civil aviation obligations but without considering whether there was a circumstance precluding the wrongfulness of that same conduct. In other words, Qatar's proposed solution would mean that the Council could not make a decision on the question of State responsibility. This, the Appellants submit, would be inconsistent with the proper administration of justice.

11. *Third*, and finally, the Appellants submit that the ICAO Council erred in fact and in law in rejecting the second preliminary objection, namely that Qatar had failed to satisfy the precondition of negotiations under Article 84 of the Chicago Convention and Article II, Section 2,

---

[15] CMQ — ICAOA, para. 3.68; CMQ — ICAOB, para. 3.67.

[16] CMQ — ICAOA, para. 3.69; CMQ — ICAOB, para. 3.68; see also RQ — ICAOA and ICAOB, para. 3.46.

of IASTA, and Article 2 *(g)* of the ICAO Rules for the Settlement of Differences. Qatar made no genuine attempt to settle the civil aviation dispute prior to seising the Council. Qatar's Rejoinder has no response to this basic fact. Instead, it now maintains that it was not *required* to negotiate at all[17], or, alternatively, that its purported readiness to discuss a different, much wider range of issues sufficed[18]. In fact, Qatar's primary evidence is a telephone call to the Head of State of just one of the Appellants, Saudi Arabia[19], which is not even a Party to the proceedings in respect of IASTA. In any event, Qatar does not suggest that the call proposed negotiations in respect of civil aviation. The negotiation precondition is clearly not satisfied. The Council, therefore, should have held on this additional basis, that it did not have jurisdiction.

12. The relationship between the three grounds of appeal requires a brief observation. If the Appellants succeed on the first ground regarding due process, then the decisions are null and void *ab initio*. Thus, it would not be necessary to consider the second and third grounds. Even if the case is disposed of on another ground, however, it is incumbent on the Court to provide the Council with guidance on fundamental due process to ensure the proper exercise of judicial functions. Furthermore, if the Court accepts the appeal on either the second or third ground, it would not be necessary to consider the other grounds. Either would be sufficient to conclude that the Council does not have jurisdiction.

3. The scope of the Court's appellate function

13. The Appellants note that the second and third grounds of appeal require a *de novo* consideration by the Court[20]. Qatar has not disputed this. This is necessary, first because of the Court's supervisory authority in the form of appellate review, and second because of the complete absence of any reasoned opinion in support of the ***D***ecisions.

14. The Appellants note further that the appeal is limited to the jurisdictional objections set out before the Council; it is not a hearing on the merits. In the 1972 *Appeal Relating to the*

---

[17] RQ — ICAOA and ICAOB, paras. 4.4–4.19, 4.55.

[18] RQ — ICAOA and ICAOB, para. 4.24.

[19] RQ — ICAOA and ICAOB, para. 4.32.

[20] MA — ICAOA, paras. 1.19–1.20, 5.71; MA — ICAOB; Replies of the Applicants (RA), para. 1.3; Replies of the Applicants — ICAOA and ICAOB (RA), para. 1.3.

Jurisdiction of the ICAO Council (India v. *Pakistan)*, the Court emphasized the "essential point of legal principle" that "a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established"[21]. Accordingly, the Court found that it "must avoid not only any expression of opinion on . . . matters of substance, but any pronouncements which might prejudge, or appear to prejudge, the eventual decision . . . on the ultimate merits of the case"[22].

15. The Appellants raise this obvious point because, although Qatar acknowledges this fundamental principle[23], it has chosen to enter into matters relating to the merits. In particular, as I shall discuss, it has attempted to bypass the Appellants' jurisdictional objection by addressing the lawfulness of the Appellants' countermeasures. That question, however, is not before the Court. The proper question is whether the real issue in dispute falls within the Council's competence.

16. In this respect, the second ground of appeal, namely, the scope of the Council's jurisdiction *ratione materiae*, raises an important issue of first impression for the Court; it concerns the juxtaposition of the strictly limited jurisdiction of a United Nations specialized agency under compromissory clauses in two treaties, with the adoption of countermeasures in response to breaches of obligations that are manifestly outside the scope of those same treaties[24].

17. The Court has not previously considered the competence of a specialized régime in respect of non-reciprocal countermeasures. On this point, Qatar's Rejoinder continues to rest almost entirely on the Court's 1972 Judgment in *India* v. *Pakistan*; but the present case is readily distinguishable. India's contention in that case related *inter alia* to whether the Chicago Convention and IASTA were terminated or suspended in respect of Pakistan[25]. It was essentially a question of *compétence-compétence*. The case before the Court is quite different. The central issue here is whether the Council has competence to determine issues that are wholly unrelated to those treaties.

---

[21] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 56, para. 18 *(b)*.

[22] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, pp. 51–52, para. 11.

[23] RQ — ICAOA and ICAOB, para. 2.5.

[24] MA — ICAOA, paras. 1.31–1.39; MA — ICAOB, paras. 1.32-1.40.

[25] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 51, para. 10.

18. The Riyadh Agreements specifically contemplated the adoption of measures in response to a State's failure to comply with its obligations. The ***I***mplementing ***M***echanism provided that:

> "The leaders shall take the appropriate action towards what the Ministers of Foreign Affairs raise to them regarding any country that has not complied with the signed agreement by the Gulf Cooperation Council Countries.
>
> . . . . . .
>
> If any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take an[y] appropriate action to protect their security and stability."[26]

19. These terms clearly allow States adopting the measures to judge what is "appropriate" in the circumstances[27].

20. This treaty-based régime is separate and additional to the principle of customary international law that countermeasures are a circumstance precluding wrongfulness. Countermeasures may also be non-reciprocal; the obligations breached, and the obligations suspended in response, may relate to different subject-matters. Thus, suspension of obligations in respect of civil aviation may in principle be justified by violations of obligations in respect of non-intervention and counter-terrorism.

21. While its position has not been consistent, Qatar now claims that it has "*always* accepted that there is a dispute between the Parties concerning Qatar's compliance with its counter-terrorism and non-interference obligations under international law". It adds further that: "The existence of that dispute is notorious and indisputable."[28] Thus, Qatar agrees that there is a dispute in respect of obligations unrelated to civil aviation. The Court may simply take notice of this fact and decide the issue of the Council's competence.

22. Qatar suggests elsewhere, however, that the Appellants' "real issue" argument is "an artifice for escaping scrutiny of their aviation prohibitions" or that it is "transparently pretextual" and based on "false accusations"[29]. Qatar thus seeks to bypass the jurisdictional objection by having the Court believe that the Appellants have invented the "real issue" argument to

---

[26] MA — ICAOA and ICAOB, Vol. II, Ann. 20.

[27] RA — ICAOA and ICAOB, para. 2.7.

[28] RQ — ICAOA and ICAOB, para. 3.6; emphasis in original.

[29] CMQ — ICAOA and ICAOB, Chap. 2; RQ — ICAOA and ICAOB, Chap. 2, Sect. II and para. 2.18.

retroactively justify their position in these proceedings. The Appellants wish to briefly address this accusation to assist the Court in its determination of the "real issue" objection.

4. The factual background to the "real issue" in dispute between the Parties

23. The Riyadh Agreements were concluded between 2013 and 2014, three to four years prior to the adoption of the airspace restrictions in 2017. This is the fact which most obviously refutes Qatar's contention that the Appellants' reliance on countermeasures is a manufactured, retrospective argument, put forward in bad faith. Qatar, Bahrain, Saudi Arabia and the United Arab Emirates were all parties to these agreements. It is also clear from their express provisions that Egypt was a third State beneficiary within the meaning of Article 36 of the Vienna Convention on the Law of Treaties. Qatar does not deny that it negotiated and adopted those agreements; and it agrees that they have legally binding force[30]. Qatar cannot plausibly characterize the parties' real dispute as an "artifice" when the Riyadh Agreements were concluded to resolve precisely that same dispute.

24. Qatar still has no answer to the many instances of its support for Al-Qaida and ISIL, among others[31]. Take by way of example Khalifa Muhammad Turki Al-Subaiy. The United Nations Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee describes him as "a Qatar-based terrorist financier and facilitator who has provided financial support to, and acted on behalf of, the senior leadership of Al-Qaida"[32]. It is not a coincidence that he and other designated terrorists have found a safe haven in Qatar.

25. The Agent for the United Arab Emirates has referred to the fact that Qatar attempted to make ransom payments in the hundreds of millions of dollars to terrorist groups, including affiliates of Al-Qaida. This occurred in April 2017, just weeks before the Appellants announced the airspace restrictions[33]. Qatar claims in its Counter-Memorial that it "intended the funds for the Government of Iraq and that Iraq had possession of them"[34]; but this has been strenuously denied

---

[30] CMQ — ICAOA, fn. 144; CMQ — ICAOB, fn. 145; RQ — ICAOA and ICAOB, para. 2.19.

[31] MA — ICAOA, paras. 2.11–2.15; MA — ICAOB, paras. 2.10–2.14; RA — ICAOA and ICAOB, paras. 2.16–2.19.

[32] MA — ICAOA and ICAOB, Vol. III, Ann. 24, Exhibit 15.

[33] MA — ICAOA and ICAOB, para. 2.17.

[34] CMQ — ICAOA, para. 2.40; CMQ — ICAOB, para. 2.41.

by the Prime Minister of Iraq. He explained that the money was "brought in without the approval of the Iraqi government", was intended for "armed groups", and was "seized" by Iraqi authorities[35]. Qatar is tellingly silent on this question in its Rejoinder. Such payments to terrorist groups are contrary to binding United Nations Security Council resolutions, including resolution 2133 of 27 January 2014[36]. They were also inconsistent with Qatar's undertakings in the Riyadh Agreements not to support extremist groups[37], and not to provide support to individuals and groups engaged in terrorist or subversive activities against other States[38].

26. Qatar also flouted its obligations regarding incitement on *Al Jazeera*. Qatar portrays itself as a champion of free speech in the Middle East. It would have the Court believe that the Appellants' concerns about *Al Jazeera* are "false accusations" that have nothing to do with the airspace restrictions[39]. Yet, in the supplementary Riyadh Agreement of 16 November 2014, Qatar specifically committed to "ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all offenses broadcasted on Al Jazeera, Al Jazeera Mubashir Masr, and to work to stop all offenses in Egyptian media"[40]. Clearly, if *Al Jazeera* was not a matter of serious concern, the Parties would not have adopted a specific provision that singled out its inflammatory broadcasts.

27. Similarly, for all its defence of the Muslim Brotherhood[41], Qatar expressly undertook in the First Riyadh Agreement that it would provide "[n]o support to the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the Council states through direct security work or through political influence"[42].

---

[35] MA — ICAOA and ICAOB, Vol. II, Ann. 35.

[36] MA — ICAOA and ICAOB, Vol. VI, Ann. 92, para. 3.

[37] MA — ICAOA and ICAOB, Vol. II, Ann. 19, Art. 2.

[38] MA — ICAOA and ICAOB, Vol. II, Ann. 19, Art. 2; Vol. II, Ann. 20, Arts. 1 *(b)* and 1 *(d)*; Vol. II, Ann. 21, Art. 3.

[39] CMQ — ICAOA and ICAOB, para. 2.1; RQ — ICAOA and ICAOB, para. 2.18.

[40] MA — ICAOA and ICAOB, Vol. II, Ann. 21, Article 3 *(d)*.

[41] See e.g. CMQ — ICAOA, para. 2.55; CMQ — ICAOB, para. 2.56.

[42] MA — ICAOA and ICAOB, Vol. II, Ann. 19, Art. 2.

28. Qatar continues to insist that the notorious Muslim Brotherhood leader, Yusuf Al-Qaradawi, is merely a "Sunni theologian"[43]. It has nothing to say about his outrageous statements on *Al Jazeera* that Hitler was divine punishment for the Jews, expressing the hope that the next Holocaust will be at the hands of the "believers"[44]. Similarly, Qatar does not address his hateful conspiracy theories against Copt Christians, and his endorsement of suicide bombings as a religious duty, all broadcast on *Al Jazeera* for millions of viewers[45]. The consequences of such incitement have been catastrophic. It is not surprising, for example, that the suicide bomber responsible for the December 2016 massacre of worshippers at the Church of Saints Paul and Peter in Egypt was radicalized by Muslim Brotherhood leaders in Qatar[46].

29. Qatar's only response is that it "had no role in the selection of these speakers or their content"[47]. Yet the supplementary Riyadh Agreement specifically recognized that the broadcasts were within Qatar's control. *Al Jazeera* is wholly-owned by Qatar; its chairman is a member of the royal family[48]. It cannot plausibly be considered independent of Qatar. The former *Al Jazeera* journalist Mohammad Fahmy described it as a "pernicious . . . tool of [Qatar's] foreign policy" and "a mouthpiece for extremism"[49]. Qatar attempts to discredit Mr. Fahmy, but ignores the fact that 22 other *Al Jazeera* journalists in Egypt resigned in protest making the very same allegations[50].

30. Qatar also seeks to downplay the evidence submitted in *Morsi and others* v. *Public Prosecution*. Egypt's Court of Cassation concluded that Qatari intelligence operatives and *Al Jazeera* agents bribed senior Muslim Brotherhood officials to obtain documents containing military secrets relating to Egypt's counter-terrorism operations in the Sinai Peninsula[51]. It is difficult to imagine a more egregious form of intervention in Egypt's internal affairs.

---

[43] CMQ — ICAOA, para. 2.46; CMQ — ICAOB, para. 2.47; RQ — ICAOA and ICAOB, para. 2.21.

[44] MA — ICAOA, para. 2.19; MA — ICAOB, para. 2.18; RA — ICAOA and ICAOB, paras. 2.28–2.29.

[45] MA — ICAOA, para. 2.19; MA — ICAOB, para. 2.18; RA — ICAOA and ICAOB, paras. 2.28–2.29.

[46] RA — ICAOA, para. 2.30; RA — ICAOB, para. 2.29.

[47] RQ — ICAOA, para. 2.23, fn. 53; RQ — ICAOB, para. 2.23, fn. 54.

[48] RA — ICAOA and ICAOB, para. 2.31.

[49] RA — ICAOA and ICAOB, para. 2.33.

[50] RA — ICAOA and ICAOB, para. 2.32.

[51] MA — ICAOA, para. 2.45; MA — ICAOB, para. 2.44; RA — ICAOA and ICAOB, para. 2.23.

31. The documentary record establishes that Qatar was repeatedly put on notice of the Appellant's concerns as to its compliance with its obligations, and that there were specific discussions between them in this regard. There can also be no doubt that each of the Appellants made clear to Qatar that there would be consequences if it did not cease its conduct.

32. During a July 2014 meeting of the Implementation Committee set up under the Riyadh Agreements' implementing mechanism, Bahrain expressly raised concerns about Qatar's support for Al-Qaida[52]. In a subsequent meeting among Ministers for Foreign Affairs in August 2014, the Foreign Minister of Saudi Arabia recorded the discussions that he and the King of Saudi Arabia had with Qatar's Emir on "all the points of conflict, such as the support for Islamists, Muslim Brotherhood, political policy, ***[and]*** Libya"; he recorded further how they "informed [the Emir of Qatar] that we would like him to stand by Egypt and not with the Muslim Brotherhood or encourage extremists"[53]. Similarly, in January 2014, Egypt had condemned Qatar's "gross interference" in its "domestic affairs" and warned that Qatar would bear "full responsibility for any ramifications from such interference"[54].

33. These exchanges took place three years prior to the measures adopted in June 2017. Clearly, the real issue in dispute was not invented after the fact as Qatar now suggests.

34. It is abundantly clear that the airspace restrictions were adopted in response to Qatar's conduct. The contemporaneous statements of the Appellants on 5 June 2017, which have been recited in the Agents' speeches, leave no doubt about this[55].

35. Mr. President, the Court is not called upon to make a ruling on these allegations; they are evidently part of the merits. It is sufficient for it to merely conclude that there is a genuine dispute between the Parties in regard to obligations unrelated to civil aviation, absent which the airspace restrictions would not have been adopted. On that basis alone, the real issue in dispute is clearly beyond the competence of the ICAO Council.

---

[52] MA — ICAOA and ICAOB, Vol. V, Ann. 64.

[53] MA — ICAOA, para. 2.20; MA — ICAOB, para. 2.19; MA — ICAOA and ICAOB, Vol. V, Ann. 59.

[54] MA — ICAOA, para. 2.20; MA — ICAOB, para. 2.19; MA — ICAOA and ICAOB, Vol. V, Ann. 59.

[55] MA — ICAOA and ICAOB, paras. 2.4–2.7.

36. Article 84 of the Chicago Convention and Article II, Section 2, of IASTA do not confer any competence on the Council to make judicial findings on the highly complex and sensitive questions of fact and law arising from obligations of counter-terrorism and non-intervention, whether under the Riyadh Agreements or general international law. If the Council were to enter into these highly controversial issues, wholly unrelated to civil aviation, it would risk politicization and dysfunction in a United Nations specialized agency that has functioned effectively exactly because it has remained within the narrow confines of its expertise and mandate. The ICAO Council, like all international organizations, must respect the limited scope of its activities. The jurisprudence of this Court is clear: specialized agencies are governed by the "principle of speciality"; they cannot address matters beyond their competence[56].

37. Mr. President, distinguished Members of the Court, that concludes the introduction to the Appellants' case. I would now ask that you give the podium to Ms Alexandra van der Meulen, unless you wish now to take the break.

The PRESIDENT: I thank Mr. Akhavan. Before giving the floor to the next speaker, the Court will observe a coffee break of 10 minutes. The sitting is adjourned.

The Court is adjourned from 11.35 to 11.45 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and I will now give the floor to Ms van der Meulen. You have the floor.

Mme van der MEULEN : Merci beaucoup, Monsieur le président.

PREMIER MOYEN : VIOLATION DES GARANTIES FONDAMENTALES D'UNE BONNE JUSTICE

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un grand privilège de paraître devant vous aujourd'hui et de le faire pour le Royaume de Bahreïn.

2. Il m'appartient de vous exposer, au nom de l'ensemble des appelants, le premier moyen relatif à la violation des garanties fondamentales d'une bonne justice, à laquelle s'est livré le

[56] MA, paras. 5.16–5.17; RA, para. 4.23; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, pp. 75, 77–78, 80, paras. 19, 22, 25–26.

Conseil de l'OACI au cours de la procédure sur les exceptions préliminaires soulevées par les appelants.

3. Le Qatar reconnaît que le Conseil exerçait dans notre affaire une fonction judiciaire[57] et que les «exigences d'une bonne procédure» devaient donc s'appliquer[58]. Il reconnaît également que le Conseil a adopté sa décision sans délibération, ni motivation. Il reconnaît enfin — il *revendique* même — que les membres du Conseil ont agi sur instruction des Etats qui les ont désignés[59].

4. Le différend entre les Parties porte donc sur la conformité de cette procédure avec les garanties fondamentales d'une bonne justice, et sur les conséquences juridiques des violations procédurales.

5. J'aborderai trois points dans ma plaidoirie.

a) Premier point, tout organe qui exerce une fonction judiciaire doit respecter les garanties procédurales, à défaut de quoi sa décision est nulle et de nul effet **(I)**.

b) Deuxième point, et par voie de conséquence, la Cour est compétente pour connaître de plaintes d'ordre procédural dans le cadre d'un appel porté devant elle **(II)**.

c) Troisième point, les irrégularités qui ont affecté la procédure dans la présente affaire doivent amener la Cour à conclure à la nullité de la décision du Conseil **(III)**.

I. L'absence de procédure régulière entache la décision de nullité

6. En ce qui concerne mon premier point, le Qatar prétend que la Cour n'a pas à statuer sur les vices procéduraux, qui sont, pour lui, «dénués de toute pertinence»[60] et sans lien avec la question de savoir si le Conseil a correctement conclu à sa compétence[61].

7. Au soutien de cette position, le Qatar invoque l'affaire *Inde c. Pakistan*, dans laquelle l'Inde avait interjeté appel d'une décision rendue par le Conseil, et dans laquelle la Cour n'a pas jugé nécessaire de se prononcer sur les vices de procédure.

---

[57] Contre-mémoires du Qatar — ICAOA et ICAOB (CMQ), par. 5.56.

[58] CMQ — ICAOA et ICAOB, par. 5.65.

[59] Dupliques du Qatar — ICAOA et ICAOB (DQ), par. 5.11.

[60] CMQ — ICAOA et ICAOB, par. 5.2. et par. 1.7 ; DQ — ICAOA et ICAOB, par. 5.5.

[61] CMQ — ICAOA et ICAOB, par. 5.2, 5.6–5.9.

8. La position du Qatar revient à dire que la seule question qui importe est celle de savoir si le dispositif de la décision du Conseil est correct ; peu importe la procédure par laquelle la décision est atteinte, même si cette procédure est arbitraire et même si elle est en tout point contraire aux principes d'une bonne justice. Tant pis, nous dit le Qatar, si une décision du Conseil n'est pas une décision *judiciaire*.

9. Mais le respect des garanties procédurales constitue le socle commun à toute procédure judiciaire digne de ce nom[62].

10. Une procédure qui ne respecte pas les principes procéduraux les plus élémentaires est une procédure viciée. Dépourvue des qualités qui en font l'essence, elle n'est pas à proprement parler une procédure judiciaire ; et une décision qui en émane ne peut être maintenue. L'idée que l'on peut parvenir à la décision qui convient d'une manière qui contrevient aux garanties fondamentales d'une bonne justice comme le prétend le Qatar[63] est contraire à la notion même de justice.

II. La Cour, en tant que juridiction d'appel, est compétente pour connaître de la procédure suivie par le Conseil

11. Dès lors qu'une procédure régulière devait être suivie, la Cour a nécessairement compétence pour connaître de la procédure suivie par le Conseil ; c'est mon deuxième point.

12. L'article 84 de la convention de Chicago — auquel renvoie aussi l'article II, section 2, de l'accord relatif au transit — prévoit un droit d'appel dans ces termes : «Tout État contractant peut, sous réserve de l'article 85, faire appel de la décision du Conseil.»

13. Il n'y a *aucune* limite quant aux moyens pouvant être invoqués.

14. Malgré ces termes généraux et non qualifiés, le Qatar lit des limites là où il n'y en a pas, et prétend que la Cour ne peut pas revoir la procédure suivant laquelle une décision du Conseil a été rendue[64].

---

[62] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), p. 389–390.

[63] DQ — ICAOA et ICAOB, par. 5.9 citant tous deux *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 69, par. 44.

[64] CMQ — ICAOA et ICAOB, par. 5.11–5.12.

15. Monsieur le président, cet argument revient à dire que les Etats ne disposent *pas* de garanties procédurales devant le Conseil ; puisque si les violations procédurales ne peuvent pas faire l'objet d'un appel, il n'y a aucun moyen de sanctionner ces violations.

16. La position du Qatar revient aussi à dire que la procédure devant le Conseil n'a pas la moindre importance. Pour lui, seul compte l'appel. Si la Cour *confirme* en appel une décision du premier degré, dit-il, inutile de s'attarder sur la manière dont le Conseil a rendu sa décision. Si en revanche la Cour *infirme* la décision du Conseil, la procédure suivie par le Conseil n'a plus la moindre importance puisque l'arrêt de la Cour remplace la décision du premier degré.

17. Donc le premier degré n'existe même pas. Il s'agit d'une simple formalité. Seul compte l'appel devant la Cour qui rend une nouvelle décision et efface des violations procédurales commises par le Conseil.

18. Mais l'intention des rédacteurs des instruments de Chicago ne pouvait pas être de donner carte blanche au Conseil en matière procédurale. Elle n'était pas non plus de faire assumer par la Cour les fonctions qui appartiennent à la juridiction de premier degré. Leur intention était au contraire de faire du Conseil un organe judiciaire du premier degré digne de ce nom, ce qui implique de respecter les garanties procédurales propres à une procédure judiciaire, et de permettre à la Cour, par le biais d'un appel, de veiller au respect de ces garanties.

19. Dans l'arrêt *Inde c. Pakistan*, la Cour a considéré qu'

> «[e]n prévoyant ainsi un recours juridictionnel d'appel devant la Cour contre les décisions du Conseil en matière d'interprétation et d'application … *les Traités donnaient aux Etats membres et par leur entremise au Conseil la possibilité de faire assurer un certain contrôle de ces décisions par la Cour. Dans cette mesure les Traités font contribuer la Cour au bon fonctionnement de l'Organisation*…»[65]

20. ***«un certain contrôle».*** Les termes employés par la Cour ont leur importance et ils ont un sens. La Cour ne dit pas simplement qu'elle s'assurera que le dispositif d'une décision du Conseil est correct. La Cour dit qu'elle doit assurer un certain contrôle des décisions du Conseil. La notion de contrôle implique que la Cour est en mesure d'examiner la manière par laquelle le Conseil arrive à une décision. Et statuer sur les vices de procédure est une façon — une façon essentielle — pour la Cour de contribuer au bon fonctionnement de l'OACI.

---

[65] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 60, par. 26 (les italiques sont de nous).

21. Comme le soutenait le président Jiménez de Aréchaga dans son opinion individuelle dans l'affaire *Inde c. Pakistan*, le droit d'appel consacré par l'article 84

> «comporte le droit d'obtenir non seulement que la Cour se prononce sur le point de savoir si la décision rendue en première instance était fondée quant au droit de fond applicable, mais aussi qu'elle dise si la décision a été valablement adoptée, conformément aux principes essentiels de procédure devant régir les fonctions quasi judiciaires de l'organe du premier degré»[66].

22. Cette opinion individuelle est conforme à l'intention des Etats parties aux instruments de Chicago qui ont spécifiquement confié à la Cour cette fonction de contrôle.

23. Cette fonction est d'autant plus importante que le Conseil de l'OACI est un organe qui, en pratique, a besoin d'orientation pour remplir sa fonction judiciaire. Plusieurs conseillers juridiques de l'OACI — dont l'actuel — ont ainsi exprimé des réserves s'agissant de l'aptitude du Conseil à remplir sa fonction judiciaire[67]. M. Fitzgerald, conseiller juridique au moment de l'affaire *Inde c. Pakistan*, parlait, par exemple, de la «relatively primitive decision-making procedure followed by the ICAO Council when acting as a judicial body»[68].

24. Le Qatar lui-même reconnaît que les membres du Conseil agissent sur instruction de leurs gouvernements lorsqu'ils exercent leurs fonctions judiciaires[69]. Il va même jusqu'à dire que procéder à un vote *sans* avoir au préalable obtenu de telles instructions serait contraire aux principes d'un procès équitable[70].

25. Au soutien de cet argument pour le moins surprenant, le Qatar invoque l'article 50 de la convention de Chicago, qui prévoit que le Conseil est composé de «trente-six *Etats* contractants»[71]. Pour lui, les membres du Conseil doivent donc à tout moment agir comme des représentants de ces Etats.

---

[66] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, opinion individuelle de M. le juge Jiménez de Aréchaga, p. 153, par. 37.

[67] M. Milde, *International Air Law and ICAO*, 3e éd. (2016), mémoires des demandeurs — ICAOA et ICAOB (MD), annexe 127, p. 203–204 ; J. Huang, *Aviation Safety and ICAO*, 2009, p. 231–238. Voir aussi E. Warner, «Notes from PICAO Experience», (1946) 1 *Air Affairs* 30; MD — ICAOA et ICAOB, annexe 128, p. 37 ; T. Buergenthal, *Law-Making in the International Civil Aviation Organization* (1969), MD — ICAOA et ICAOB, annexe 125, p. 195-197.

[68] MD — ICAOA et ICAOB, annexe 126, p. 170.

[69] DQ — ICAOA et ICAOB, par. 5.11.

[70] CMQ — ICAOA et ICAOB, par. 5.41.

[71] DQ — ICAOA et ICAOB, par. 5.11.

26. Monsieur le président, le Conseil a deux fonctions : la première, et c'est sa fonction principale, est d'adopter des normes internationales en matière d'aviation civile — et dans ce cadre il ne fait pas de doute que les membres suivent des instructions, comme c'est le cas dans d'autres assemblées délibératives d'organisations internationales. Mais la seconde fonction du Conseil est de trancher judiciairement les différends entre Etats membres. L'examen de l'article 84, qui attribue au Conseil ses fonctions judiciaires, et les dispositions du Règlement pour la solution des différends, montre que lorsqu'il tranche un différend, le Conseil doit siéger comme un corps véritablement judiciaire.

27. Si les membres du Conseil tranchent un différend sur le fondement d'instructions, ils ne remplissent pas leur fonction judiciaire qui est de rendre une décision exclusivement au regard des éléments du dossier, des arguments soulevés par les parties et de la délibération.

28. Un moyen de corriger ce manque d'indépendance serait de permettre aux Etats de s'assurer qu'une décision du Conseil repose bien sur le droit et sur les faits invoqués par les parties, et seulement cela ; mais c'est impossible lorsque des décisions du Conseil ne sont pas motivées — je reviendrai sur ce point tout à l'heure.

29. Le Conseil a donc besoin d'orientation en matière judiciaire. Et la Cour, en tant qu'organe d'appel chargé d'exercer un «contrôle de ses décisions», est le seul organe autorisé à la lui donner.

III. En l'espèce, les vices de procédure constituent une atteinte fondamentale aux exigences d'une bonne procédure

30. J'en arrive à mon troisième point : la Cour doit conclure que le Conseil n'a pas en l'espèce respecté les exigences d'une bonne procédure.

31. Dans l'affaire *Inde c. Pakistan*, la Cour n'avait pas jugé nécessaire d'examiner les vices procéduraux dont se plaignait l'Inde au motif que «les irrégularités alléguées ne constituent pas une atteinte fondamentale aux exigences d'une bonne procédure»[72].

[72] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 69, par. 45.

32. Monsieur le président, les irrégularités dans la présente affaire sont différentes de celles invoquées par l'Inde et constituent sans aucun doute une atteinte fondamentale aux exigences d'une bonne procédure.

33. Les appelants se sont vu attribuer un temps de parole largement insuffisant au vu de la complexité de leurs objections et, qui plus est, déséquilibré par rapport au Qatar qui agissait seul. Le Conseil n'a pas voté sur les deux objections soulevées à l'encontre de la requête du Qatar. Il a voté sur une seule objection qui ne faisait aucune distinction entre les moyens bien distincts invoqués par les appelants. Le Conseil n'a pas pris le temps de délibérer et n'a fourni aucun motif au soutien de sa décision.

34. Les appelants ont, dans leurs écritures, détaillé ces violations multiples[73] ; je me contenterai aujourd'hui d'en aborder deux.

A. L'absence de délibérations par les membres du Conseil

35. D'abord, l'absence de délibérations.

36. Lorsque des Etats soumettent leur différend à un organe judiciaire collégial, ce qui est attendu c'est la décision de cet organe, pas l'addition pure et simple de votes pris individuellement par chacun de ses membres. Ce qui est attendu c'est une réflexion, suivie d'un dialogue collégial au cours duquel s'affrontent les justifications, explications et solutions à donner aux prétentions de chacune des parties[74].

37. C'est ce qu'attendaient les appelants de la part du Conseil de l'OACI, et le directeur des affaires juridiques de l'OACI avait du reste indiqué aux membres du Conseil quelques jours avant l'audience qu'une délibération était attendue[75].

38. Au lieu de cela, le Conseil a entendu les brefs exposés des parties, et immédiatement procédé à un vote. Il ne s'est pas retiré pour procéder à une délibération ; il n'a même pas pris le temps de la réflexion.

39. L'impasse faite sur les délibérations est d'autant plus surprenante que la question soumise au vote était ambiguë. La question était la suivante : «Acceptez-vous l'exception

[73] MD — ICAOA et ICAOB, par. 3.34–3.65 ; répliques des demandeurs — ICAOA et ICAOB (RD).

[74] J. C. Wittenberg, *L'organisation judiciaire – La procédure et la sentence internationale* (1937), p. 269–270.

[75] MD — ICAOA et ICAOB, annexe 51, p. 6.

préliminaire ?»[76] J'insiste — «l'exception préliminaire» au singulier, alors qu'il y avait *deux* objections distinctes. Cette formulation manquait à n'en point douter puisque accepter l'une *ou* l'autre de ces objections suffisait à faire échec à la compétence du Conseil. Certains membres du Conseil ont d'ailleurs été contraints de demander des précisions sur la signification d'un vote «oui» ou d'un vote «non» dans ces circonstances[77]. Les appelants avaient au cours de l'audience suggéré de clarifier et reformuler la question[78], mais cette suggestion n'a pas été suivie d'effets.

40. Dans ces circonstances, une délibération était indispensable pour permettre au Conseil de débattre de chacune des objections soulevées, l'une indépendamment de l'autre.

41. Le Qatar admet qu'aucune délibération n'a eu lieu[79]. Il ne s'en inquiète pas davantage et justifie cette absence par le fait que le Conseil avait décidé de procéder à un vote secret[80]. Impossible dans ces conditions, dit le Qatar, de tenir une délibération.

42. Mais la délibération n'est en rien incompatible avec la tenue d'un vote secret. La délibération, c'est-à-dire la discussion entre membres d'une formation collégiale sur le bien-fondé des demandes et arguments des parties est une chose. Le vote en est une autre, et la délibération n'engage en aucun cas les membres à voter d'une certaine manière. Chaque membre d'une formation collégiale vote de manière libre et indépendante, et ce, que le vote soit pris] à [la] main levée, par appel nominal ou au scrutin secret.

43. Pour le Qatar, l'absence totale de délibération est assumée. Elle n'était pas nécessaire, dit-il, parce que le Conseil avait déjà été consulté avant l'audience[81].

44. Cette position est très claire : il n'y a pas eu de délibération parce que chacun des membres avait déjà, avant même d'entendre les parties, pris une décision, ou reçu des instructions de vote.

---

[76] MD — ICAOA et ICAOB, annexe 53, par. 124.

[77] MD — ICAOA et ICAOB, annexe 53, par. 120.

[78] MD — ICAOA et ICAOB, annexe 53, par. 121.

[79] CMQ — ICAOA, note 504 ; ICAOB, note 511.

[80] CMQ — ICAOA et ICAOB, par. 5.29 et 5.33 ; DQ — ICAOA, par. 5.19 et note 328 ; ICAOB, par. 5.19 et note 332.

[81] CMQ — ICAOA et ICAOB, par. 5.39.

45. Le Qatar prétend enfin que les appelants ne peuvent pas se plaindre : s'ils tenaient vraiment à ce qu'il y ait une délibération, ils auraient dû en faire la demande[82].

46. Là encore, la position du Qatar étonne. Lorsque des Etats soumettent un différend à un organe judiciaire, ce qu'ils demandent ce n'est pas simplement un «oui» ou un «non», sans réflexion, ni discussion collégiale. Ce qu'ils demandent, c'est une décision qui est le résultat d'un processus de décision rigoureux. Ils demandent et attendent une procédure en bonne et due forme. Or, à en croire le Qatar, il faudrait pour obtenir le respect des garanties les plus élémentaires, faire une demande expresse et supplémentaire à cet effet. Cette position frappe par son mépris des principes essentiels de procédure : toute procédure judiciaire doit respecter les garanties fondamentales. Pas seulement parfois, ni à la demande des parties, mais toujours.

B. La décision du Conseil est dépourvue de motifs

47. Deuxième vice procédural devant le Conseil : la décision est dépourvue de motifs. Elle consiste en un dispositif qui tient en une seule ligne : le Conseil «DÉCIDE que l'exception préliminaire des défendeurs n'est pas acceptée»[83].

48. Aucune motivation n'est fournie au soutien de cette décision.

49. L'absence de motivation confirme qu'aucune raison n'a fait l'objet de délibérations et, de ce fait, qu'aucune raison ne pouvait être retranscrite au soutien de la décision. Elle confirme surtout qu'il n'y a en réalité aucune raison judiciaire sous-jacente à la décision. Ceci n'a rien d'étonnant puisque, comme le revendique le Qatar, la décision du Conseil est le fruit d'instructions politiques[84].

50. Ce défaut de motivation n'en est pas moins une violation flagrante de l'une des garanties fondamentales d'une procédure régulière.

51. Il n'y a pas de décision judiciaire internationale valide sans motivation. Cette obligation existe dans un souci de transparence et de bonne administration de la justice. La motivation permet aux juges d'arriver à une décision raisonnée en ce qu'elle aura été réfléchie et débattue, par

---

[82] CMQ — ICAOA et ICAOB, par. 5.34.

[83] MD — ICAOA et ICAOB, annexe 52, p. 2.

[84] DQ — ICAOA et ICAOB, par. 5.11.

opposition à une décision arbitraire, ou qui est le résultat d'instructions. La motivation est donc perçue comme une garantie fondamentale contre l'arbitraire du juge ou sa partialité.

52. Le juge Hersch Lauterpacht relève en ce sens :

> «Absence of reasons — or of adequate reasons — unavoidably creates the impression of arbitrariness . . . When a tribunal, by failing to base a decision on articulate grounds, makes it difficult to scrutinize the law underlying the decision, it leaves the door wide open for imputing motives extraneous to the proper exercise of the judicial function.»[85]

53. Dans son arrêt consultatif de 1973 sur le *jugement du Tribunal administratif des Nations Unies*, la Cour a considéré qu'il «est de l'essence des décisions judiciaires d'être motivées» et «qu'un exposé des motifs est indispensable pour qu'un jugement du Tribunal soit valable»[86]. Dans l'affaire de la *sentence arbitrale (Guinée-Bissau c. Sénégal)*, la Cour a précisé qu'un raisonnement était suffisant, même s'il était succinct, dès lors qu'il permettait d'«éclairer les Parties et la Cour sur les raisons qui ont guidé le Tribunal»[87].

54. Ce devoir élémentaire de motivation se retrouve bien sûr dans le Règlement de l'OACI pour la solution des différends, dont l'article 15, que vous voyez maintenant sur vos écrans, prévoit que les décisions du Conseil sont formulées par écrit et contiennent «les conclusions motivées du Conseil»[88]. En anglais, «the conclusions . . . together with its reasons for reaching them».

55. Le Qatar reconnaît l'existence de ce texte mais prétend que l'absence de raisonnement était parfaitement en ligne avec le Règlement[89]. La rédaction de l'article 15 ne fait pourtant aucun doute : «la décision … *contient* les conclusions motivées du Conseil». Dans sa version anglaise, l'emploi du mot «shall» est tout aussi clair.

56. Les appelants ne savent pas — et la Cour ne sait pas non plus — si c'est l'une — ou les deux objections — qui n'a pas su convaincre le Conseil, ni pour quelles raisons il a rejeté l'une

---

[85] H. Lauterpacht, *The Development of International Law by the International Court* (réimpression, 1982), p. 39-40. Voir aussi J. C. Wittenberg, *L'organisation judiciaire – La procédure et la sentence internationale* (1937), p. 292.

[86] *Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies, avis consultatif, C.I.J. Recueil 1973*, p. 210, par. 94–95.

[87] *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), arrêt, C.I.J. Recueil 1991*, p. 74, par. 63.

[88] MD — ICAOA et ICAOB, annexe 6.

[89] CMQ — ICAOA, note 516 ; ICAOB, note 523. Voir aussi DQ — ICAOA et ICAOB, par. 5.27.

ou/et l'autre objection. Ils n'ont même pas la certitude que le Conseil a bien pris l'une ou l'autre de ces objections en compte avant de conclure à sa compétence.

57. Il ne s'agit pas ici de savoir si la motivation est suffisante, arbitraire ou même contradictoire. Il n'y a pas de motivation. Il n'y a même pas une motivation «ramassée», comme c'était le cas dans l'affaire de la *Sentence arbitrale* entre la Guinée-Bissau et le Sénégal[90]. La motivation étant un élément indispensable de la décision au sens de la convention de Chicago, il n'y a pas de décision.

58. Permettez-moi, pour finir sur les violations procédurales, de répondre à un dernier argument soulevé par nos contradicteurs. Le Qatar prétend que les deux objections n'avaient de toute façon aucune chance d'aboutir, de sorte que suivre une procédure régulière n'aurait pas conduit à un résultat différent[91]. Inutile donc pour le Qatar de se préoccuper d'éventuelles violations procédurales.

59. La Cour n'aura aucun mal à rejeter un tel argument. D'abord, et c'est fondamental, parce qu'un vice procédural ne se mesure pas au résultat, mais à la procédure. Ensuite, et en tout état de cause, c'est précisément en raison de l'absence de délibération et de motivation qu'il est impossible d'affirmer que le Conseil aurait de toute façon rejeté les objections préliminaires. On ne sait pas ce qui a poussé le Conseil à rejeter les objections des appelants ; on ne peut donc pas dire que la décision aurait été la même dans d'autres circonstances.

C. Aucune renonciation de la part des appelants

60. J'en viens, Monsieur le président, à l'argument selon lequel les appelants auraient renoncé au droit de soulever les irrégularités procédurales devant la Cour[92]. Je me contenterai ici de soulever deux points.

61. D'abord, et comme l'a énoncé la Cour dans l'affaire *Pedra Branca*, la renonciation à un droit doit «se manifester clairement et de manière dépourvue d'ambiguïté»[93]. Le Qatar ne prouve pas une telle renonciation.

---

[90] *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), arrêt, C.I.J. Recueil 1991*, p. 68, par. 43.

[91] DQ — ICAOA et ICAOB, par. 5.9.

[92] CMQ — ICAOA et ICAOB, par. 5.38.

62. Les faits démontrent au contraire que les appelants ont émis une objection à chaque fois qu'ils en ont eu l'opportunité, et à chaque fois que cela était justifié.

63. Ils l'ont fait *avant même le début de l'audience*, lorsqu'ils ont appris qu'ils ne disposeraient que de 20 minutes pour leur plaidoirie sur chacune des requêtes du Qatar[94].

64. Ils l'ont fait *tout au long de l'audience*. L'agent de l'Arabie saoudite a notamment observé que les «défendeurs n'ont pas bénéficié d'un temps égal ou suffisant pour exposer convenablement leur argumentation, ce qui a compromis leur droit d'être entendus»[95].

65. Enfin, ils l'ont fait *après l'audience*, en consignant par écrit leurs objections dans leurs commentaires sur le projet de procès-verbal — commentaires que vous trouverez sous l'onglet n° 24 du dossier des juges.

66. En tout état de cause, et c'est mon deuxième point, le droit international n'exige pas que soit émise une objection à chaque étape. Ce qui est exigé, c'est une réaction quand les circonstances le requièrent, et ce, conformément à votre jurisprudence, «dans un délai raisonnable»[96]. C'est précisément ce qu'ont fait les appelants en émettant des objections et en formant appel de la décision du Conseil, y compris sur le fondement des irrégularités procédurales devant le Conseil.

IV. Conclusion

67. En conclusion, Mesdames et Messieurs de la Cour, il ressort de l'ensemble des éléments qui précèdent qu'il n'y a pas eu de procédure judiciaire devant le Conseil.

68. Les appelants prient donc respectueusement la Cour de reconnaître la nullité de la décision, son inexistence juridique. Ils prient également la Cour d'exercer son rôle de contrôle en fournissant au Conseil l'orientation nécessaire pour lui permettre et lui imposer de respecter les conditions de forme et de procédure qui s'imposent à lui.

---

[93] *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 51, par. 122.

[94] MD — ICAOA et ICAOB, par. 3.27.

[95] MD — ICAOA et ICAOB, vol. V, annexe 53, par. 9.

[96] *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 23.

69. Monsieur le président, Mesdames et Messieurs de la Cour, ceci conclut mes observations sur le premier moyen des appelants. Je vous remercie pour votre attention et vous demanderais, Monsieur le président, de bien vouloir appeler le professeur Shaw à la barre.

The PRESIDENT: I thank Madam van der Meulen and I invite Mr. Malcolm Shaw to take the floor. You have the floor, Sir.

Mr. SHAW:

SECOND GROUND OF APPEAL:
JURISDICTION — THE REAL ISSUE IN DISPUTE

1. Mr. President, Members of the Court, it is indeed an honour to appear before you again and to appear on behalf of the Government of the United Arab Emirates, and to present on behalf of the Applicants.

2. My charge is to examine our second ground of appeal, concerning the scope of jurisdiction of the ICAO Council under Article 84 of the Chicago Convention and Article II, Section 2, of IASTA. The particular task before the Court is to determine the scope of compromissory jurisdiction of a specialized agency of the United Nations in respect of claims implicating violations of a State's international obligations leading to the imposition of non-reciprocal countermeasures pursuant to the Riyadh Agreements and customary international law[97]. And this in the situation where the jurisdiction of the relevant body, the ICAO Council, is carefully circumscribed and does not cover the subject-matter of the violations which are well outside the competence of ICAO, nor the consequential resort to applicable measures, their validity or operation.

1. The dispute

3. Let us start from the beginning. Is there a dispute between the Parties? Yes, this is accepted by both Parties[98]. It is also accepted that the dispute is essentially concerned with the question of Qatar's non-compliance with obligations undertaken under the Riyadh Agreements and

[97] MA — ICAOA, paras. 1.31, 5.1–5.2, 5.15.

[98] See e.g. CMQ — ICAOA and ICAOB, Chap. 2, particularly para. 3.37; RQ — ICAOA and ICAOB, para. 3.6; see also MA — ICAOA and ICAOB, Chap. II; RA — ICAOA and ICAOB, para. 2.4.

under international law concerning counter-terrorism and non-interference obligations[99]. Qatar readily acknowledges this[100] and goes so far as to say that this dispute is "notorious and indisputable"[101]. Indeed. The difference between the sides is that while Qatar asserts that the aviation measures adopted in this case can be simply severed from the core dispute regarding the Riyadh Agreements and other international obligations, the Applicants deny this and maintain that any such severance would artificially escalate the jurisdiction of the ICAO Council. A ruling on Qatar's claim regarding the aviation measures would necessarily involve a determination of the broader dispute and the justification of the taking of those measures pursuant to the Riyadh Agreements and customary international law.

4. There are thus two critical issues here. First, can the core elements of a dispute be conveniently sliced up so as to render one party subject to binding dispute resolution, whether it has consented or not? Secondly, is the jurisdiction of the ICAO Council sufficiently expansive to encompass that real issue?

2. The real issue

5. The Applicants have examined in some detail the violations of the Riyadh Agreements and other international law obligations concerning counter-terrorism and non-interference that have been committed by Qatar. It is not necessary to repeat this. The written pleadings have articulated the facts clearly and concisely[102]. And as the Court has noted, at the jurisdictional stage, it determines the issues on the basis of the material before it as pleaded by the parties[103].

6. The Parties also agree — and this is crucial — that *this* dispute was in existence at the time that Qatar lodged a complaint before the ICAO Council. Qatar's complaint alleges that the Applicants "gave an ultimatum to the State of Qatar on matters *unrelated* to air navigation and air transport"[104]. It is *not* the case here that the legal landscape was altered or that the Riyadh

---

[99] See CMQ — ICAOA and ICAOB, Chap. 2, particularly para. 3.37; and RQ — ICAOA and ICAOB, para. 3.6.

[100] CMQ — ICAOA and ICAOB, para. 3.37.

[101] RQ — ICAOA and ICAOB, para. 3.6.

[102] See e.g. MA — ICAOA and ICAOB, Chap. II; RA, Chap. II.

[103] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, I.C.J. Reports 1996 (II)*, pp. 809–810, para. 16 and pp. 819–820, paras. 50–52.

[104] MA — ICAOA and ICAOB, Vol. III, Ann. 23, Sect. *(g)*.

Agreements were succeeded, let alone superseded, by other legal texts. The present case therefore stands in contrast to the *Lockerbie* cases. There, the United Kingdom and the United States had contested jurisdiction on the basis that Libya's pleaded legal case had been entirely superseded by various Security Council resolutions. The Court dismissed that objection on grounds that these resolutions, which were issued after Libya's Application was lodged, could not retroactively affect jurisdiction[105]. Here, by contrast, Qatar's ICAO complaint simply ignores, or side-steps, the ***P***arties' real issue in dispute, although its parameters had already been cast.

7. It remains to re-examine the law. However, in doing so, it is important to appreciate precisely the scope of the Applicants' preliminary objection. The Applicants' argument is not that there exists a general principle that where a particular legal dispute brought to an international tribunal under a compromissory clause is linked to or is part of a wider political dispute, jurisdiction cannot as such lie. The Applicants do not take issue with the Court's case law which differentiates on this basis[106], but that is not what the Applicants are here objecting to. In this case, Qatar's breaches of its international obligations form an integral part of the dispute, so that the ICAO Council, of necessity, could not decide the dispute without also deciding questions of the interpretation and the application of treaties and questions of compliance with rules of customary law falling outside the scope of the Chicago Convention and IASTA from which the jurisdiction of the ICAO Council derives, and by which it is limited.

8. So, how does one identify the "real issue" as a matter of law?

9. The Court's case law suggests the following approach. First, it is for the Court itself to make the appropriate determination. It is not bound by the approach or the claims of the parties[107].

---

[105] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp*. 23–24, paras. 37–38; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 128–129, paras. 36-37.

[106] See e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37, *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 91–92, para. 54; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America) Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 23, para. 36.

[107] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment of 8 November 2019*, para. 24. See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 308, para. 48.

Secondly, the Court will act in an objective manner[108]. Thirdly, the process by which the Court will approach the question is, as the Court declared very recently in *Ukraine* v. *Russia* "to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim . . . The matter is one of substance, not of form."[109]

10. Fourthly, the Court will approach this task of deciding what the real issue is by taking into account a range of relevant information. In the *Nuclear Tests* case, the Court referred specifically to "the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court's attention, and public statements made on behalf of the applicant Government"[110]. In *Nuclear Tests*, of course, France did not appear or file pleadings. The Court further clarified this aspect in the *Fisheries Jurisdiction* cases, noting that it was for it, "while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties" taking into account the oral and written pleadings of both parties "and other pertinent evidence"[111].

11. Fifthly, it is for the Court to interpret the submissions of the parties and that is part of its judicial function[112]. In other words, what matters is not what the applicant says or what it asserts its claim is, but, taking that into account, of course, what the Court decides objectively is the real issue in the case, in ***the*** light of relevant materials.

12. The real issue is, to put it colloquially, what the matter is actually about. In this case, Qatar's claims before the ICAO Council are with regard to asserted breaches of the ICAO Treaties, as well as other international treaties such as the United Nations Charter, UNCLOS and obligations

---

[108] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 308, para. 48.

[109] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment of 8 November 2019*, para. 24, citing *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 308, para. 48.

[110] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 263, para. 30; see also *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 467, para. 31.

[111] See in particular, *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp.* 448–50, paras. 30, 31 and 33. See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 308, para. 48; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objections, Judgment, I.C.J. Reports 2015*, pp. 602–603, para. 26; RA, para. 4.11 and footnotes therein.

[112] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 263, para. 30; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 467, para. 31.

under customary international law[113]. As far as Qatar is concerned, that is it[114]. However, the claimed breach of the Chicago Convention and IASTA, the measures taken to restrict aviation, were and are vindicated on the basis that they constitute valid actions, in turn justified by the prior breaches by Qatar of its international legal obligations. Thus, a ruling on Qatar's claim regarding the aviation restrictions inevitably and necessarily requires a determination of the broader dispute and the justification of the taking of those measures under the Riyadh Agreements and customary international law of non-reciprocal countermeasures.

13. The "*fons et origo*" of this whole legal situation are Qatar's prior wrongful acts, particularly those in violation of the Riyadh Agreements[115]. Without these prior breaches, there would have been no measures adopted by the Applicants. For the Council to determine the legal issues solely on the basis of compliance of the aviation restrictions with the Chicago Convention and IASTA would be to tell only a part of the story, ignoring the beginning and ignoring the end. Little Red Riding Hood without the wolf.

14. Qatar's principal requests for relief were that the Council should "determine that the Respondents violated by their actions against the State of Qatar their obligations under" the Chicago Convention and IASTA and to "deplore the violations by the Respondents of the fundamental principles" of those treaties[116]. Any such definitive determination of violation for the purposes of State responsibility, however, would necessarily require the Council to determine the wrongfulness of the relevant measures, which in turn inexorably raises the question of whether there is present any circumstance precluding wrongfulness.

15. Similarly, Qatar requests the Council to declare that the Applicants were required "to withdraw, without delay, all restrictions imposed on the Qatar-registered aircraft and to comply with their obligations"[117]. That is self-evidently a request for cessation of the allegedly internationally wrongful acts. But the obligation of cessation is a secondary obligation, which

---

[113] MA — ICAOA and ICAOB, Vol. III, Ann. 23, Sect. *(e)*.

[114] RQ — ICAOA and ICAOB, para. 3.3.

[115] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 263, para. 30; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 467, para. 31.

[116] MA — ICAOA and ICAOB, Ann. 23, Sect. *(f)*.

[117] MA — ICAOA and ICAOB, Ann. 23, Sect. *(f)*.

arises upon a finding of State responsibility. Such relief could not legitimately be granted without having determined State responsibility, and disregarding the question of the existence of any circumstance precluding wrongfulness.

16. In their argument, the Applicants referred to the *Aegean Sea Continental Shelf* case and the *Chagos Islands* arbitration[118]. Qatar seeks to use *Aegean Sea* to support its case, by noting that the Court rejected jurisdiction over Greece's claim, because its object, as stated in Greece's first submission, necessarily required the adjudication of a matter that was outside of the parties' consent. This was as a result of Greece's reservation to the applicable title of jurisdiction, invoked on a reciprocal basis[119].

17. But this is precisely the point. In that case, there was an express limitation upon the scope of the Court's jurisdiction by virtue of Greece's reservation. The Court reached the conclusion that, on the basis of the claims and contentions made by the parties, the "very essence" of the dispute concerned and implicated the territorial status of Greece, a matter which fell squarely within the excluded realm[120]. The Court did not automatically accept the applicant's characterization, but reformulated it so as to determine the real issue between the parties and it decided that it fell outside its jurisdiction[121].

18. To turn to the *Chagos Islands* arbitration. In many, but not all ways, this case is analogous to the instant matter in that a determination was made that the issue before the Tribunal was one incidental aspect of a broader dispute which fell outside jurisdiction. As the Tribunal there emphasized, it "must evaluate where the relative weight of the dispute lies"[122]. The conclusion was that the differing views of the parties on the meaning of the "coastal State" for the purposes of ~~*United Nations Convention on the Law of the Sea (*~~UNCLOS~~*)*~~ was "simply one aspect of this larger dispute" in fact concerning the question of disputed territorial sovereignty over the Chagos

---

[118] MA — ICAOA and ICAOB, paras. 5.53, 5.60–5.61; RA, para. 4.16.

[119] RQ — ICAOA and ICAOB, para. 3.20.

[120] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, pp. 35–37, paras. 83, 87 and 88.

[121] *Ibid*., p. 34, para. 81.

[122] *In the Matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius* v. *United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, Award, 18 March 2015, para. 211.

Archipelago[123]. Qatar's way out of this is to say that the Tribunal reached its conclusion "because Mauritius was actually looking for a judicial pronouncement that would 'state that Mauritius is the "coastal State" in relation to the Chagos Archipelago'"[124]. The object of the claim, it is stated, was to obtain a judicial declaration that the United Kingdom did not have sovereignty over the Chagos Archipelago[125]. That is as may be on the political level. But that would require the Court to draw this out by a process of inference. In a similar manner, in order to grant the relief requested by Qatar, the ICAO Council would of necessity have to determine the legality of the measures adopted by the Applicants under the Riyadh Agreements and customary international law.

19. Qatar refers to the recent *Certain Iranian Assets* case, and earlier cases, such as ~~***the***~~ *Tehran Hostages*, as showing that parts of a broader dispute may be severed so as to enable jurisdiction under a particular compromissory clause[126]. In *Certain Iranian Assets*, the United States took the position that Iran was not seeking the settlement of a legal dispute concerning the provisions of the relevant Treaty of Amity, but was attempting to embroil the Court in a "broader strategic dispute" and referred to Iran's long-standing violations of international law with regard to the United States and its nationals[127]. But it did not rely upon them as a basis for a countermeasures defence; they were contextual in a background or perhaps a tangential sense.

20. This is different in the current case. The ICAO Council cannot find a violation without first determining Qatar's prior breach of its international obligations under the Riyadh Agreements and under customary international law, since the Applicants' measures were taken precisely and solely because of th***o***se breaches and pursuant to the Riyadh Agreements and international law. Those measures in turn provoked Qatar's complaint to the ICAO Council. What is at issue here is

---

[123] *In the Matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, Award, 18 March 2015, paras. 211–212.

[124] RQ — ICAOA and ICAOB, para. 3.21.

[125] RQ — ICAOA and ICAOB, para. 3.21.

[126] RQ — ICAOA and ICAOB, paras. 3.8–3.14.

[127] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 22, para. 34.

not a broader political or "strategic dispute" nor a "context", but rather indivisible links in the chain. To use a phrase from the *Lockerbie* cases, they are "inextricably interwoven"[128].

3. The jurisdiction of the ICAO Council

21. Two things are clear. First, that the ICAO Council has jurisdiction with regard to the interpretation and application of the Chicago Convention and IASTA (and it is common ground that these issues are the same under both instruments)[129] and, second, that this jurisdiction is limited, and does not extend beyond these conventions[130]. It does not extend to the alleged breaches of the United Nations Charter, UNCLOS and obligations of customary international law that Qatar has alleged in its applications and memorials before the Council[131].

22. However, Qatar claims that: "[t]he Council's jurisdiction under Article 84 [and Article II, Section 2] plainly includes the jurisdiction to decide Joint Appellants' countermeasures defence on the merits"[132].

23. Article 84 of the Chicago Convention provides that where any disagreement between two or more of the Contracting States "relating to the interpretation or application" of the Convention cannot be settled by negotiation, it shall be decided by the Council. Article II, Section 2 is in similar terms, and renders the Article 84 procedure applicable to such disagreement. The question is: how broadly can this provision be interpreted? Qatar takes a very wide view indeed. The Council's dispute settlement powers under this provision should be understood so as to be exercised "to their full extent"[133].

---

[128] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* pp. 28–29, para. 50; *Ibid.*, pp. 133–134, para. 49, citing *Barcelona Traction, Light and Power Company, Limited (New Application: 1962), (Belgium* v. *Spain) Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 46.

[129] MA — ICAOB, paras. 1.15, 5.13; CMQ — ICAOA, paras. 3.6, fn. 168, 4.5, fn. 302; CMQ — ICAOB, paras. 3.6, fn. 169, 4.5, fn. 306.

[130] MA — ICAOA and ICAOB, paras. 5.13–5.14.

[131] MA — ICAOA and ICAOB, Vol. III, Ann. 23, Sect. *(e)*.

[132] RQ — ICAOA and ICAOB, para. 3.2.

[133] CMQ — ICAOA and ICAOB, paras. 3.8, 3.14–3.15.

24. Interestingly, that phrase is taken from the Court's Advisory Opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[134], which in turn quotes from the Permanent Court's *Jurisdiction of the European Commission of the Danube* advisory opinion[135]. In the relevant passage the Permanent Court makes two particular points. First, that an international institution with a specific purpose "only has the functions bestowed upon it" by its statute and, secondly, the "power to exercise these functions to their full extent" applies only "in so far as the Statute does not impose restrictions upon it"[136]. Accordingly, the authority of the Council to determine a question relating to the interpretation or application of the Convention is bounded by, not only, the words actually used, but by the fact that that jurisdiction is conferred in the context of a specialized agency forming part of the wider United Nations system, with precisely determined powers. This is the principle of speciality, to which I will refer ~~***further***~~ shortly.

25. Qatar seeks to justify its expansive approach to Article 84 and Article II, Section 2, by referring to Article 31 (3) *(c)* of the Vienna Convention on the Law of Treaties, arguing that consideration of obligations outside of the Chicago Convention by the Council — such as countermeasures — cannot amount to an improper expansion of its jurisdiction[137]. However, this provision relates solely to the extent to which other rules of international law may be taken into account in deciding questions relating to the interpretation of a treaty as such. It does not, and cannot, mean that the jurisdiction of the Council with regard to a dispute concerning the interpretation or application of the Convention may be expanded so as to burst the bounds of Article 84. As the International Tribunal on the Law of the Sea (ITLOS) recently stated: "a distinction must be made between the question of its jurisdiction, on the one hand, and the applicable law, on the other . . . article 293 of the Convention [on the Law of the Sea] on applicable law may not be used to extend the jurisdiction of the Tribunal"[138]. *A fortiori*, Mr. President, where rules of substantive law are concerned.

---

[134] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 78–79, para. 25 (quoting from *Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14*, p. 64).

[135] *Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14*, p. 64.

[136] *Ibid.*

[137] RQ — ICAOA and ICAOB, para. 3.31.

[138] *The M/V "Norstar" Case (Panama* v. *Italy), Judgment, ITLOS Case No. 25, 10 April 2019*, p. 37, para. 136.

26. Qatar also prays in aid the customary rules of State responsibility, asserting that in principle the ICAO Council has jurisdiction to apply them[139]. But to what end? The rules of State responsibility constitute secondary rules and, to put it simply, Qatar cannot resort to secondary rules of international law in order to expand the jurisdiction of an international organization with a carefully circumscribed competence, merely on the basis that the Council has jurisdiction over the relevant primary norms.

27. The expansion of compromissory clauses is not to be contemplated in the absence of very clear consensual evidence. Thus, for example, in the *Pulp Mills* case, the Court declined to extend its jurisdiction beyond the scope of the relevant 1975 Treaty so as to incorporate a whole series of treaties on environmental protection. This was so even where there was a claim that there existed an express referral clause in the relevant treaty[140]. ***And i***n the *Arctic Sunrise* case, the Tribunal held that its jurisdiction pursuant to UNCLOS did not give it jurisdiction to apply directly provisions of the International Covenant on Civil and Political Rights or to determine breaches of those provisions[141].

28. That brings me to the second point.

29. ICAO is a specialized agency established with a defined competence with defined powers[142], and jurisdiction contingent upon the scope of that constitutional document. This is the principle of speciality.

30. The Court took pains — in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* Advisory Opinion — to reaffirm the essential nature of such organizations. It noted in particular that

> "international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[143]

---

[139] RQ — ICAOA and ICAOB, para. 3.32.

[140] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 ~~(I)~~*, p. 46, para. 63.

[141] *The Arctic Sunrise Arbitration (Kingdom of The Netherlands* v. *Russian Federation)*, PCA Case No. 2014–02, Award on the Merits, 14 August 2015, paras. 197–198.

[142] See MA — ICAOA and ICAOB, paras. 5.15–5.26.

[143] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 ~~(I)~~*, pp. 78–79, para. 25.

31. While it is true that an organization may possess and exercise implied powers in addition to those expressly given, such powers are "subsidiary powers", flowing from the necessities of international life in order to achieve the objectives of the organization in question[144]. As the Court put it in relation to the United Nations, such implied powers "are conferred upon it by *necessary* implication as being *essential* to the performance of its duties"[145]. Quite apart from the principle of speciality, it is necessary to have regard to the status of ICAO as a specialized agency of the United Nations. This was underlined by the Court in its Advisory Opinion, where it was careful to note that

> "the WHO Constitution can only be interpreted, as far as the powers conferred upon that Organization are concerned, by taking due account not only of the general principle of speciality, but also of the logic of the overall system contemplated by the Charter. If, according to the rules on which that system is based, the WHO has, by virtue of Article 57 of the Charter, 'wide international responsibilities', those responsibilities are necessarily restricted to the sphere of public 'health' and cannot encroach on the responsibilities of other parts of the United Nations system."[146]

32. Similarly, the ICAO Council's jurisdiction to resolve disputes is expressly limited to the interpretation or application of the Convention. ICAO's objectives as laid down in Article 44 of its constitutional document, the Chicago Convention, focus upon air navigation and the safety of civil aviation. In terms, it is provided that "[t]he aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport"[147].

33. Accordingly, given that the general competence of ICAO is so limited, the specific jurisdiction of the ICAO Council when exercising judicial functions under Article 84 of the Chicago Convention must likewise be regarded as limited to those matters falling within its area of specialization.

34. Mr. President, Members of the Court, there has to be some limit to jurisdictional creep.

---

[144] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 78–79, para. 25.

[145] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 182 (emphasis added).

[146] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 79–80, para. 26.

[147] MA — ICAOA and ICAOB, Vol. II, Ann. 1, Art. 44.

4. Prior breaches and measures in response

35. Our case here essentially starts with and centres upon the Riyadh Agreements. The First Riyadh Agreement (November 2013) prohibited interference in the internal affairs of the States of the Gulf Council, whether directly or indirectly, and support to the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the Council States through direct security work or through political influence[148]. On 17 April 2014, a mechanism implementing the Riyadh Agreement was adopted and Article 3 of this instrument expressly provides the following:

> "If any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take an[y] appropriate action to protect their security and stability."[149]

In other words, the parties to this ***I***mplementing ***A***greement clearly and unequivocally agreed that if any one of the GCC countries did not comply with their obligations, the others would be legally competent, indeed expressly authorized, to adopt appropriate actions, ~~***i.e.***~~ to turn to measures in response.

36. A ***S***upplementary ***A***greement was signed on 16 November 2014[150]. This agreement stressed that failure to commit to any of the articles of the First Riyadh Agreement and its ***I***mplementing ***M***echanism would amount to a violation of the entirety of them and underlined that every State was committed "to taking all the regulatory, legal and judicial measures" against anyone committing any encroachment against GCC States. It stressed that all countries were committed to supporting Egypt and to contributing to its security and stability[151].

37. However, in addition to the solid ground for the resort to measures under the Riyadh Agreements, countermeasures also exist in the realm of customary international law[152].

38. The validity of countermeasures in response to a prior international unlawful act was reaffirmed by the Court in the *Gabčíkovo-Nagymaros Project* case, which noted that in order for it

---

[148] MA — ICAOA and ICAOB, Vol. II, Ann. 19. See also MA — ICAOA and ICAOB, paras. 2.10 *et seq.*.

[149] MA — ICAOA and ICAOB, Vol. II, Ann. 20, p. 528, Art. 3; emphasis in the original.

[150] MA — ICAOA and ICAOB, Vol. II, Ann. 21. See also MA — ICAOA, para. 2.66; MA — ICAOB, para. 2.65.

[151] MA — ICAOA and ICAOB, Vol. II, Ann. 21, p. 538.

[152] *Case Concerning Air Service Agreement of 27 March 1946 between the United States of America and France*, Decision, 9 December 1978, *RIAA*, Vol. XVIII, p. 443, para. 81.

to be justifiable a countermeasure had, in the first place, to be taken in response to a prior international wrongful act of another State and be directed against that State[153].

39. What can be said at this stage is the following. For the ICAO Council to exercise jurisdiction here, it would need to consider, first, whether Qatar had breached its international legal obligations as detailed by the Applicants and derived from the Riyadh Agreements and customary international law; second, whether the measures that were adopted (which included many other aspects not brought before the Council) were imposed in order to induce Qatar's compliance with these obligations; and, thirdly, whether the other conditions for valid countermeasures, such as proportionality, were met. All of these matters are patently outside the scope of its jurisdiction under the relevant constitutional provisions.

40. Finally, I turn to address the *India* v. *Pakistan* ICAO case.

5. The *India* v. *Pakistan* ICAO case

41. Qatar puts much reliance on this case, arguing that the first and second grounds of appeal here can be dismissed for the same reasons that the Court rejected India's identical arguments in the *India* v. *Pakistan* case of 1972[154]. Superficially, the cases seem similar. In Qatar's view the fact that the appeal in *India* v. *Pakistan* was dismissed substantively, notwithstanding that India's defence appeared to raise issues outside of the ambit of the Chicago Convention, should mean that the Applicants' case here should be similarly failed. But the similarity is no more than skin deep and for the following reason.

42. The 1972 case concerned whether or not the Chicago Convention and IASTA applied as between the parties in the circumstances. India argued that it did not, in that these ICAO Treaties had either been terminated or suspended upon an outbreak of hostilities and replaced by a special régime, or that India had the right to terminate or suspend following a later hijacking incident that it considered put Pakistan in material breach of its obligations. Pakistan argued that these instruments still applied and that India had breached them[155].

---

[153] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, Judgment*, pp. 55–56, paras. 82–83. See also MA, Vol. II, Ann 13, Art. 22.

[154] See RQ — ICAOA and ICAOB, paras. 1.2–1.9, 3.24–3.26.

[155] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, pp. 61–62, paras. 28–29.

43. In other words, India's defence focused upon whether or not the Chicago Convention and IASTA had been validly terminated or suspended or whether they continued in force as between India and Pakistan. There was no argument as to obligations or legal principles wholly extraneous to the provisions of these Treaties. The dispute took place in legal terms within the bounds of the instruments in question and thus the Court found that "India's defences equally involve questions of their interpretation or application"[156].

44. The Court emphasized that both Pakistan and India contended that there had been material breaches of the Chicago Convention and declared:

> "Thus the case is one of mutual charges and counter-charges of breach of treaty which cannot, by reason of the very fact that they are what they are, fail to involve questions of the interpretation and application of the treaty instruments in respect of which the breaches are alleged."[157]

45. The Court also declared that India's arguments necessarily involved consideration of provisions of the Convention concerning war and emergency conditions (Article 89) and denunciation (Article 95), which in turn meant that there was clearly a dispute about the interpretation or application of the Convention[158].

46. But, if we turn to the case now before us, we see that it is eminently obvious that the dispute relates to Qatar's prior violations of international obligations in the Riyadh Agreements and other international rules concerning anti-terrorism and non-interference and the consequential defence of countermeasures as justifying the asserted breach of the Chicago Convention and IASTA. These prior breaches, it must be underlined, having no connection with the Treaties and thus clearly falling outside the scope of the compromissory clause.

47. Thus, whatever this case is, it is certainly *not India* v. *Pakistan*.

48. Mr. President, Members of the Court, allow me to conclude with the following observations:

(i) First, jurisdiction is a critical issue in this case and jurisdiction is founded upon and bound by consensual agreement between the parties.

---

[156] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972,* p. 66, para. 35.

[157] *Ibid*., pp. 66–67, para. 37.

[158] *Ibid*., pp. 68–69, paras. 40–43.

(ii) Secondly, this case concerns the jurisdiction of a specialized agency, whose competence is necessarily constrained by its declared purposes, that is, by the principle of speciality and by its status as a specialized agency. The purposes of ICAO are closely focused upon aviation and do not and cannot stray from that, and nor can the jurisdiction of the Council when acting as a dispute settlement body.

(iii) Thirdly, the Court's case law demonstrates that in order to determine jurisdictional competence in such circumstances, regard must be had to the "real issue", which constitutes a methodology to demonstrate jurisdictional competence. In so doing, the Court extracts and identifies the real issue objectively in the light of the ICAO Applications, the arguments of the parties before the ICAO Council, oral and written, and all other relevant material.

(iv) Fourthly, such jurisdiction cannot be artificially extended by recourse to ancillary principles such as specific rules of interpretation and the secondary rules of State responsibility.

(v) Fifthly, the core of this case, the "real issue", concerns Qatar's breaches of the Riyadh Agreements and other international obligations in the fields of anti-terrorism and non-interference and the consequential measures adopted by the Applicants.

(vi) Finally, and more specifically, the task before this Court, it is suggested, is to determine the scope of compromissory jurisdiction with regard to the measures taken on the basis of the Riyadh Agreements and as non-reciprocal countermeasures under customary international law. This is unlike any other case that has come before the Court. The adoption of the measures by the Applicants on 5 June 2017 was in response to the repeated violations of these Riyadh Agreements and other obligations under international law by Qatar and the action taken by the Applicants was contemplated by the Riyadh Agreements themselves.

49. Mr. President, Members of the Court. I thank you for your kind attention and would ask you to invite Mr. Georgios Petrochilos to address you next.

The PRESIDENT: I thank Mr. Shaw and I now invite Mr. Petrochilos to the lectern. You have the floor.

Mr. PETROCHILOS:

SECOND GROUND OF APPEAL: THE JUDICIAL PROPRIETY ASPECTS

1. Introduction

1. Mr. President, Members of the Court, it is a privilege to appear before you, and I am honoured on this occasion to do so for the Kingdom of Bahrain, addressing you on behalf of all the Appellants.

2. My task is to develop an aspect of the second ground of appeal, which goes to judicial propriety. Professor Shaw has already described why the real issue in dispute between the Parties is not one about the interpretation and application of the Chicago Convention or IASTA (which we collectively call the "ICAO Treaties"). Rather, it involves different legal rights and obligations, including — most importantly — the Riyadh Agreements. In Qatar's own words, from the Counter-Memorial — and they bear repetition, because you have heard them already this morning — the dispute concerns "Qatar's compliance with its counterterrorism and non-interference obligations, including under the Riyadh Agreements"[159].

3. The Riyadh Agreements *do* provide for a method to resolve disputes. But Qatar has preferred to bring a selective, fragmented version of the Parties' dispute before ICAO. This is a tactic to eviscerate the dispute — namely Qatar's multiple violations of key legal obligations *outside* the ICAO Treaties. This kind of evisceration is, we respectfully submit, improper; and Qatar's claim is, as a result, inadmissible.

4. My observations this morning will be in three parts.

(i) first, I will describe the issue;

(ii) secondly, I will describe why this is an issue of judicial propriety;

(iii) and finally, Mr. President, perhaps after the lunch break, I will address Qatar's various ideas on how this issue might be avoided. That these ideas on how this issue might be

[159] CMQ — ICAOA and ICAOB, para. 3.37.

avoided are being mooted at all proves that there is a serious difficulty with Qatar's claim. And as we will see, Qatar's ideas would aggravate the difficulty; they are not a solution.

2. The issue before the Court

5. Mr. President, it is common ground between the Parties that a dispute exists as to whether Qatar has complied with its obligations under the Riyadh Agreements and other instruments of international law; and as to whether the appellant States were entitled — again under the Riyadh Agreements but also under general international law — to take measures in respect of Qatar[160]. These measures, as the Court knows, extend to spheres well beyond civil aviation.

6. The Parties diverge on a narrow but crucial point:

— Qatar submits that it can carve out of the Parties' dispute a stand-alone disagreement about the ICAO Treaties. In simple terms, Qatar submits that if it can formulate a claim under the ICAO Treaties, and that claim is opposed, on whatever ground, there is *ipso facto* a dispute relating to the interpretation or application of these treaties.

— The Appellants disagree that the dispute can fairly or properly be split into as many hermetically sealed boxes as Qatar can purport to fashion claims. Why do the Appellants say that? Members of the Court, the Appellants' entitlement to take the measures that they took in 2017 is to be found in the Riyadh Agreements and the customary law of countermeasures[161]. Either one of these justifications is capable of fully disposing of Qatar's complaint[162]. As a result, any finding regarding the breach (or not) of the ICAO Treaties is contingent upon — and therefore it is inseparable from — the Appellants' entitlements under the Riyadh Agreements and customary law[163]. And the Appellants have not agreed that such matters, involving as they do vital rights and duties in international law, should be determined by a technical organization of narrow competence such as ICAO[164].

---

[160] CMQ — ICAOA and ICAOB, para. 3.37.

[161] MA — ICAOA, para. 2.53; MA — ICAOB, para. 2.52.

[162] RA — ICAOA and ICAOB, para. 3.20 *(c)*.

[163] MA — ICAOA and ICAOB, para. 5.2 *(b)*.

[164] MA — ICAOA and ICAOB, para. 5.2 *(b)*.

7. Now, both sides recognize that this contested issue is not straightforward. And I expect our friends across the aisle will acknowledge that the issue is unlikely to arise in other circumstances; as a result of two factors. On the one hand, the ICAO Treaties have a narrow, technical subject-matter, dealing only with civil aviation. On the other hand, the Riyadh Agreements expressly set forth a broad entitlement for the contracting States to take "any appropriate action" in case of a breach by another contracting State[165].

3. The role of judicial propriety

8. Mr. President, that brings me to my second point, which is that considerations of judicial propriety should bear on the question whether the ICAO Council should accept, or exercise, jurisdiction based on the fragmented conception of the Parties' dispute that Qatar has presented.

9. There is no disagreement, and rightly so, that preliminary objections may extend beyond the categories of jurisdiction and admissibility. As the Court observed in the *Lockerbie* case***s***, such objections are "not limited solely to objections regarding jurisdiction or admissibility"[166].

10. Nor is there any disagreement between the Parties that considerations of judicial propriety must, one way or another, inform the Court's jurisdictional analysis. Qatar does not contest that it is for the Court to safeguard the "judicial propriety" of the ICAO Council[167].

11. The Appellants respectfully submit that, in this case, considerations of judicial propriety ought to be regarded as going to admissibility[168]. But this characterization is not critical. The Court's jurisprudence indicates that judicial propriety may be relevant to jurisdiction, admissibility, or matters anterior to either jurisdiction or admissibility[169].

---

[165] MA — ICAOA and ICAOB, Ann. 20, Art. 3.

[166] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 47; *Ibid.*, p. 131, para. 46; emphasis added.

[167] MA — ICAOA and ICAOB, paras. 4.27–4.28, 5.97–5.98 (both Memorials citing *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29).

[168] MA — ICAOA and ICAOB, para. 4.28.

[169] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 24–25, paras. 32–33; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 157–158, para. 47; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine* v. *Russian Federation*), *Judgment of 8 November 2019;* dissenting opinion of Vice-President Xue, para. 10.

12. In the *Northern Cameroons* case, the Court recognized the "varying connotations" that may be ascribed to the term "admissibility"[170]. Ultimately, the Court did not find it "necessary to consider all the objections [pending before it], nor to determine whether all of them are objections to jurisdiction or to admissibility or based on other grounds"[171]. The essential point was this:

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of the applicant, or indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."[172]

And the Court went on to dismiss Cameroon's application. As Judge Fitzmaurice observed, in concurrence, the Court declined "even to consider whether it has any jurisdiction"[173].

13. By contrast, in another case, the case of *Monetary Gold* — excerpts of which you will find under tab 37 in your folders — the Court assessed its jurisdictional mandate under the prism of judicial propriety[174]. The matrix of the case is important to bear in mind. The dispute presented to the Court had been formulated in a special agreement. There was no doubt as to the Court's jurisdiction to adjudicate the dispute that was set out in that agreement. But that was not the end of the matter. The Court said that it was required to "examine whether [its] *jurisdiction* [was] co-extensive with the *task* entrusted to it"[175]. And so the Court examined the reality of the situation. The gold in question belonged originally to Albania's national bank, and there were two separate claims in respect of it. One claim was by Italy against Albania and that claim was not before the Court. There was a completely different, separate claim by the United Kingdom against Italy, and that claim was before the Court. The United Kingdom's position was that the latter claim — which was a contest as to priority between creditors — could perfectly well be determined on its own; and that nothing that the Court could decide as between the United Kingdom and Italy would be binding on Albania or affect Albania's interests.

---

[170] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963,* p. 28.

[171] *Ibid.*, p. 27.

[172] *Ibid.*, p. 29.

[173] *Ibid.*, p. 101; separate opinion of Judge Sir Gerald Fitzmaurice.

[174] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954,* p. 31.

[175] *Ibid.*, p. 31.

14. The Court disagreed. It focused on the reality of the situation**,** rather than ***on*** the technical confines of its jurisdiction and the careful formulation of the United Kingdom's claim. The Court held that deciding the dispute between the United Kingdom and Italy would practically lead the Court also to "decide a dispute between Italy and Albania" — without Albania's consent[176]. That Albania would not be bound by any determination as between the United Kingdom and Italy was nothing to the point, the Court held[177].

15. And so *Monetary Gold* stands for three propositions that are engaged in the present case.

(i) The first is that no rule compels a court to uphold or to exercise jurisdiction whenever it can find jurisdiction. This applies even in circumstances where — and obviously that is not the case here — jurisdiction is readily established.

(ii) The second proposition is that, beyond black-letter jurisdiction, it is necessary to consider, in real-world terms, the "task" — as the Court put it — that a judicial body is being asked to perform. Even where a claimant seeks to frame its claim narrowly, to come within the four corners of a jurisdictional instrument, or clause, the actual adjudication may well have implications outside that instrument.

(iii) The third proposition engaged is that one of the functions of judicial propriety is to safeguard the cardinal principle of consent to jurisdiction. In *Monetary Gold*, there was no consent by Albania, whose interests were necessarily implicated in the disposition of a dispute between two other States. In our case, there is no consent by the Appellants for ICAO to adjudicate legal entitlements outside the ICAO Treaties which are necessarily implicated in assessing the lawfulness of the Appellants' measures.

16. Now, lest our friends try to caricature the Appellants' position, let this be clear. We accept of course that a dispute may have different facets or engage a variety of legal norms. We also accept that in a number of circumstances it will be proper for one aspect of a dispute to be treated as separate from other aspects; and so to be adjudicated on its own, leaving other aspects untouched.

---

[176] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954,* p. 32.

[177] *Ibid*., pp. 32–34.

17. In the *Pedra Branca* case between Malaysia and Singapore, the Court held that "sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located"[178]. Since the special agreement in that case did not ask the Court to delimit the territorial waters of Malaysia and Singapore, the Court considered that its jurisdiction permitted it to determine territorial sovereignty in so far as it could do so, without creating prejudice for either party. And that is what the Court did: it did not say in which State's territorial waters South Ledge was located, or indeed how these waters should be delimited.

18. Similarly, in the *Maritime Delimitation case (Peru* v. *Chile*), the Court dealt with a maritime boundary but it declined to reopen the landward terminus of that boundary, since land-boundary questions were subject to the jurisdiction of an arbitral tribunal[179].

19. In those two cases, matters outside the Court's jurisdiction could be dealt with as being peripheral, and being peripheral, they were severable from the Court's main task.

20. But this, in our respectful submission, cannot be done here — not without prejudicing the rights of the Appellants.

21. If the ICAO Council were to proceed to the merits, the Appellants would be compelled to plead how Qatar has supported terrorism and extremism, and a host of other matters of which the Agents and Professor Akhavan gave you a small sample. They would be compelled to plead how Qatar's misconduct violated the Riyadh Agreements and a number of other international-law obligations. They would be compelled to plead how Qatar's violations entitled the Appellants to take appropriately broad-ranging measures, exercising their rights under the Riyadh Agreements and under the customary law of non-reciprocal countermeasures. These matters are not peripheral, nor are they severable from the airspace restrictions. They are the heart of the dispute — whether Qatar likes it or not — and they are necessarily implicated in assessing the airspace restrictions.

22. The Appellants would have to plead these forensically and legally complex issues that are involved in the dispute before a body comprising technical specialists and diplomats[180], who, as

---

[178] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 101, para. 299.

[179] *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 62, para. 163.

[180] The ICAO Council is "composed of experts in other fields than law", *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 75; declaration by Judge Lachs.

you heard earlier, take instructions from capitals and whose principal task is to adopt civil-aviation technical standards[181]. This is a body, Members of the Court, which is yet to deliver a single judicial decision on the merits since its inception in 1945. Yet that body would be called upon to issue a decision which either side might claim — in any and all fora — is final and binding in respect of matters concerning terrorism and interference in the affairs of other States.

23. Members of the Court, it is difficult, we submit, not to acknowledge that this prospect offends against judicial propriety.

Mr. President, if that is a convenient time for the Court, it is a convenient time for me. Thank you.

The PRESIDENT: I thank Mr. Petrochilos. Your statement brings to an end this morning's sitting. Oral argument in the case will resume this afternoon at 3 p.m., for the conclusion of the Applicants' first round. The sitting is adjourned.

The Court rose at 1.15 p.m.

_____

[181] MA-ICAOA, Vol. II, Ann. 1, Arts. 44, 54; MA-ICAOB, Vol. II, Ann. 2, Art. II, Sect. 2; see also MA, paras. 3.10, 5.20–5.23.