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Post Pandemic Facilitation of Air Transport

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Preface

I started writing this book on 21 September 2021—the day the United Nations General Assembly annual session commenced in New York. Many countries were physically represented by their leaders and delegates while others had their delegations attending virtually by Zoom, which in itself reflected what some call "the new normal". International air transport was just picking up but with immigration measures, quarantine measures, and vaccination requirements of tourists at variance with each other. There seemed to be no international consensus nor a global standard in the carriage of passengers from country to country even at this micro level of facilitation, in a world divided on a macro level. The words from the opening speech of the UN Secretary General at the General Assembly resonate this wide divide: "I fear our world is creeping towards two different sets of economic, trade, financial, and technology rules, two divergent approaches in the development of artificial intelligence, —and ultimately, two different military and geopolitical strategies".

Apart from traditional considerations of economic and legal nuances that air transport has presented us, the rise of autocracy and populism and the decline of democracy in many parts of the world, which has been aggravated by lockdowns imposed by governments at various stages of the spread of the COVID-19 virus has brought to bear a groundswell of political upheaval that has made a scapegoat of air transport as a political tool which this book will examine, particularly against the backdrop of two major controversial issues that sprang up in Belarus in 2021. As well, this book discusses the flight ban dispute which arose between Qatar and other Middle East States where the jurisdiction of the ICAO Council—which adopts Annexes to the Chicago Convention—is discussed, as well as a high-level Ministerial conference held by ICAO on COVID-19 in October 2021 which reflects positions of States as well as of ICAO on a suitable approach to adapt air transport and its facilitation and security aspects to a post pandemic future as well as current exigencies.

Against these specific case studies, as well as general legal, economic, and other relevant issues impacting air transport, the issue at hand is, how does current facilitation of air transport in its legal, political, and economic setting stand?

The fundamental postulate of international civil aviation is subsumed in the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (hereafter, the Chicago Convention), the Preamble of which says *inter alia* that contracting States must strive for the development of air transport in a safe and orderly manner, soundly and economically, with equality of opportunity. Annex 9 to the Chicago Convention—which addresses facilitation of air transport and forms the analysis of this book—provides in Article 22 of the Convention, that each contracting State is obligated "to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers, and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance". Article 23 of the Convention follows through this obligation by stating that each Contracting State must undertake "so far as it may find practicable, to establish customs and immigration procedures affecting international air navigation in accordance with the practices which may be established or recommended from time to time, pursuant to this Convention". The words "pursuant to this convention" denotes a global harmonization of customs and immigration procedures, thus effectively precluding arbitrary and capricious fetishes from creeping into State regulations in the areas of admittance of persons into countries.

In the third quarter of 2021, although international air transport was opening up albeit slowly, the trend of facilitation was the antithesis of Articles 22 and 23 of the Chicago Convention. Given below are just a few examples: for Mainland China, foreign nationals with visas issued before 28 March 2020 were not permitted to enter the Chinese Mainland and foreign nationals with residence permits or APEC Business Travel Cards were not permitted to enter the Chinese Mainland. Although there were certain exempted categories such as diplomats and those with valid employment, all passengers were subject to a medical screening and a 14-day quarantine. All passengers entering Beijing were subject to an additional 7-day quarantine and 7-day health surveillance, following their 14-day mandatory quarantine at the government designated facilitates. All passengers (including those travelling on a diplomatic basis) departing from/transiting through nominated countries were required to take a nucleic acid COVID-19 test and IgM anti-body tests within 48 hours of the scheduled time of departure of the flight to the Chinese Mainland. In the United States, there was an entry ban to non-US citizens and residents who had visited/transited through one or more of the following countries/regions in the 14 days prior to travel: Chinese Mainland; India; Iran; Brazil; Austria; South Africa; and in Europe, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom. Again, as in China, there were exempted categories that were eligible for entry, but all passengers were subject to a quarantine assessment on arrival, with the exception of arrivals in Los Angeles.

Canada, on the other hand, had put out an inclusive list of persons that could be admitted to the country among whom were: a person whose presence in Canada, in

the opinion of the Minister of Foreign Affairs, the Minister of Citizenship and Immigration, or the Minister of Public Safety and Emergency Preparedness, is in the national interest; foreign nationals with a valid Canadian work permit; foreign nationals with a valid Canadian study permit, foreign nationals holding an approval letter to obtain a work permit in Canada; foreign nationals that have a valid study permit or a letter of introduction that shows they were approved for a study permit, and have a valid letter of acceptance from a designated learning institution (DLI) with a COVID-19 readiness plan; a person who takes up a post as a diplomat, consular officer, representative or official of a country other than Canada, of the United Nations or any of its agencies or of any intergovernmental organization of which Canada is a member, and the immediate family members of that person, are allowed to enter Canada. However, all passengers entering Canada are subject to quarantine for a total of 14 days.

There were similar restrictions and quarantine requirements in Australasia, the Middle East, Africa, Asia, and Europe as well as in South American countries and the list is too exhaustive to be mentioned here. All this brings one to a curious requirement in the Chicago Convention in Article 13 which states: "The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State". What is curious is that the person or persons responsible for ensuring compliance with entry/departure and quarantine requirements are not identified, leaving the question open. Many have posited that this responsibility devolves upon the airline carrying the passenger as it is obligated to carry back an inadmissible passenger.[1]

The Economist of 14 August 2021 put it best: "Governments have succeeded in taking the joy out of travel. . .Britain has introduced rules of tooth grinding complexity. In theory its traffic lights system rates countries by Covid-19 risk and sets travel rules accordingly. In practice it is arbitrary, unpredictable and constantly changing. . .policies in America are equally baffling. . .All around the world a jumble of rules causes confusion, chokes tourism and leaves businesses struggling to work out who can do what and can go where. . .The confusion is made worse by governments taking very different approaches to travel. East Asia and Australasia are largely locked down. The poorest regions such as sub-Saharan Africa and Europe are somewhere in between".[2]

In late November 2021, a new variant of COVID 19 erupted called "Omicron" which is a dangerously infectious variant of COVID-19 discovered in South Africa and was later discovered in travellers in other parts of the world. CNN reported: "As fears mount over the newly identified coronavirus variant Omicron, governments

[1] For a detailed discussion of Article 13, see Ruwantissa Abeyratne *Convention on International Civil Aviation—A Commentary*, Springer: Heidelberg (2014) at pp. 186–214.

[2] Getting off the ground, *The Economist*, August 14, 2021, at 46.

around the world are scrambling to protect their citizens from a potential outbreak. The new mutation, which is potentially more transmissible, was first discovered in South Africa and has since been detected in Australia, United Kingdom, Germany, Israel, Italy, the Czech Republic and Hong Kong". This resulted in the United States and States in the European Union banning flights into and out of some African States—South Africa, Botswana, Zimbabwe, Namibia, Lesotho, Eswatini, Mozambique, and Malawi. The ban came into effect on Monday 29 November 2021.

Israel banned all foreigners from entering the country in response to Omicron fears. The ban, pending government approval, was expected to last two weeks. Israelis returning from a country on the red list, which includes countries in southern Africa, were required to isolate for seven days in a designated hotel.

The problem with pandemic panic is that countries have their own knee-jerk reactions to the threat of a new variant. When the Delta variant broke out, there was a chaotic cocktail of reactions analogous to what Wordsworth called in poetic terms "a spontaneous outflow of powerful feeling"—only, he was referring to the creative mind and not to the terrified trepidation that confronts us when a panoply of virus variants hits us without warning.

So, what are we to do? Most scientists were apprehensive that Omicron will spread like wildfire, whatever the measures are that are imposed. A knee-jerk reaction in banning flights from or into a State which records a new variant has as much a precipitous outcome on the freedom of the individual to travel as it would on liberalized travel that would be calculated to proliferate the variant with inordinate speed leading to catastrophic results. Legal and regulatory issues must go hand in hand with science in order that a balance be maintained between retaining reasonable connectivity in the world and maintaining a reasonable level of control on the spread of the virus. It is submitted that scientific opinion must take precedence and legal and regulatory issues must be applied according to the recommendations of the scientists. For example, the starting point should be WHO which said the new Omicron COVID-19 variant is a "variant of concern", stating it is potentially more contagious than other variants, though it is not yet known if it causes more or less severe COVID-19. The follow-up statement of WHO—made in late November 2021—is that it will take weeks to understand how the variant may affect diagnostics, therapeutics, and vaccines.

CNBC reported that "The organization (WHO) only labels Covid strains as variants of concern when they're more transmissible, more virulent or more adept at eluding public health measures, including vaccines and therapeutics".

It should also be noted that Moderna—the vaccine manufacturer—said a new vaccine to provide immunity against the variant could be ready by early 2022 if it is needed.

The above information should be sufficient for States, within the parameters and prerogatives of their sovereignty, to take the necessary decisions. That the Omicron variant is a matter of concern—as identified by science—is incontrovertible, calling for timely action by States. The question would be whether States should ban flights to and from affected areas or keep air transport going while introducing strict quarantine measures. The ultimate issue that this discussion would lead to would

be State responsibility that would permeate the exercise of sovereignty. The bottom line would be the need for a new look at State sovereignty and sovereign responsibility. The sovereignty that is relevant in addressing this global issue responsibly against the proliferation of communicable viruses should be based on, what Richard Haas, Chief of the Foreign Relations Council called "Sovereign Obligation", which means that sovereignty should not stop at borders but extend to helping countries and their people who might suffer as a result of arbitrary and capricious decisions of leaders taken under the shroud of national sovereignty.

The COVID-19 era and post COVID air transport present ambiguity at best, as the above discussion reflects. This book examines, from a legal perspective the Standards[3] of Annex 9 to the Chicago Convention in its original setting, based on its Fourteenth Edition which became effective on 25 October 2015 and was applicable from 25 February 2016.

Against the backdrop of the devastation caused by the COVID-19 pandemic, the Twelfth Meeting of the Facilitation Panel (FALP/12) was held virtually (due to COVID-19 restrictions), from 13 to 22 July 2021. The Panel had for consideration input from FAL area meetings, facilitation contacts, and the Secretariat to formulate recommendations for new and amended Standards and Recommended Practices (SARPs) or guidance material, taking into account recent developments in applicable technology, contemporary challenges, and future needs for improvement of the efficiency and effectiveness of border inspection and other control processes in airports. The Panel was also required to contribute information that could be used by the Secretariat in developing management tools (*e.g.* a manual) and other guidance material to assist States with the implementation of Annex 9. Finally, the Panel was required to develop proposals for consideration at FAL Division sessions; and perform other tasks as assigned by the Air Transport Committee (ATC).

This book carries an analysis of Annex 9 in its legal background, providing an insight into how the Standards of the Annex could be perceived in their application in these critical and contentious times.

Montreal, Canada
26 January 2022

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[3]The Standards and Recommended Practices on Facilitation are the outcome of Article 37 of the Convention, which provides, *inter alia*, that the "International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with . . . customs and immigration procedures . . . and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate".

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Chapter 1
Legal Basis of Annex 9

1.1 Treaty Pespectives

Annex 9 is derived from the Chicago Convention[1] and applies to all categories of aircraft operation, except where a particular provision refers specifically to only one type of operation. In terms of general principles, the Facilitation Manual which accompanies the Annex contains guidance with a view to assisting States in adhering to the provisions of the Annex. Contracting States to the Chicago Convention are required by the Annex—particularly regarding the Standards which this book addresses—to abide by the Standards and Recommended Practices (SARPs)[2] in Annex 9 which apply and to take necessary measures to ensure that: the time required for the accomplishment of border control procedures in respect of persons and aircraft and for the release/clearance of goods is kept to the minimum; minimum inconvenience is caused by the application of administrative and control requirements; the exchange of relevant information between Contracting States, operators and airports is fostered and promoted to the greatest extent possible; and optimal levels of security and compliance with the law are attained.[3]

In adhering to the Standards in the Annex States must use risk management in the application of border control procedures for the release/clearance of goods. This provision applies exclusively to the procedures of Chap. 4—a discussion of which follows. States must also develop effective information technology to increase the

[1] Convention on International Civil Aviation, signed at Chicago on 7 December 1944. ICAO Doc 7300/9, 9th Edition: 2006.

[2] SARPs have been developed and agreed to by consensus among ICAO Contracting States. Over the years, this material has been periodically updated during meetings of the Facilitation Division, a worldwide conference to which all Contracting States are invited. Since 1997, a Facilitation Panel has carried out this work between Division sessions. The recommendations of the Division and the Panel for amendments to Annex 9 are reviewed by Contracting States and eventually, upon the recommendation of the Air Transport Committee, submitted to the Council of ICAO for adoption.

[3] The Facilitation Manual, *ICAO Doc 9957*, First Edition: 2011, at 1.1.1. and 1.1.2.

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efficiency and effectiveness of their procedures at airports; develop procedures for the pre-arrival lodgment of data so as to enable expeditious release/clearance.[4]

The provisions of Annex 9 do not preclude States from applying their national legislation with regard to aviation security measures or other necessary controls. Paragraph 1.4.5 of the Manual clarifies this further by acknowledging that States must contend with the external challenges of unlawful interference, such as illegal migration, illicit narcotics trafficking, travel document fraud, contagious diseases, all of which can negate initiatives to facilitate inspection if they are not kept under control. These problems have become global threats and are everyday realities. They cannot be considered as exceptional circumstances, which sometimes require facilitative measures to be set aside. Instead, these problems must be considered so that the FAL Programme can provide the necessary control, while meeting ICAO's facilitation objectives. The containment of security problems, such as trafficking in narcotics or other contraband, illegal migration and travel document fraud, are priority elements of the FAL Programme. The existence of these problems at unacceptable levels is often frequently cited as a reason not to adopt measures that would improve efficiency in border controls. Cooperation between industry and government, as well as cooperative arrangements among States, have been and will continue to be promoted by ICAO through Annex 9 provisions covering the repatriation of inadmissible persons, fraudulent documentation, security procedures, and supply chain security.[5] A strategy common to facilitation and aviation security is "targeting", which is the use of "behavioral pattern" techniques and intelligence databases to select people or cargo shipments for intensive examination, instead of attempting to examine everyone and everything. In both cargo and passenger processes, this enables the authorities to apply their resources more judiciously and efficiently to inspection operations. The result is that low-risk traffic is expedited and authorities are more successful in detecting security violations.

The provisions of the Annex provide a frame of reference for planners and managers of international airport operations, including government inspection agencies, airport authorities and airline operators. It describes the responsibilities of both industry and government agencies and the specifications for information requirements. In addition, Annex 9 specifies procedures for carrying out clearance operations, with the twin objectives of effective compliance with national laws and the productivity of operators, airport staff and government inspection agencies involved.

The genesis of Annex 9, as well as the other 18 Annexes to the Chicago Convention, lies in the Convention itself. Article 54 which lays down the mandatory functions of the Council of ICAO requires the Council in 54l) to "adopt, in accordance with the provisions of Chapter VI of this Convention, international

[4] *Id*. 1.1.3. to 1.1.6.

[5] ICAO recommends that there be close coordination between national programmes for facilitation and aviation security. Facilitation control procedures actually enhance security, in that a controlled environment allows for a discriminating approach to law enforcement, and for low-risk traffic to be expedited. FAL Manual *supra* note 3 at 1.6.1.

Standards and Recommended Practices; *for convenience* (my emphasis) designate them as Annexes to this Convention; and notify all contracting States of the action taken". The reference to Chapter VI was to link the Annexes to two provisions of the Convention: Article 37 which lays out the subjects to be addressed by the various Annexes with the preceding words: "*Adoption of international standards and procedures:* "Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary international standards and recommended practices and procedures… and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate".

Article 38 adds a condition that incontrovertibly ascribes discretion to States in adhering to the Annexes: "*Departures from international standards and procedures*: "Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State".[6]

If SARPs are to be amended, the amendment process usually begins in FAL Divisional meetings, and more recently, in FAL Panel meetings. These bodies propose changes to the Annex, which could be the addition of new SARPs or amendments to existing SARPs. Once the Council of ICAO has either adopted a new Standard or amended one ICAO disseminates a State letter (under the hand of the Secretary General) to Contracting States, inviting them to take action on the adopted Amendment. A State letter regarding the adoption of amendments generally consists of four parts: the letter itself, which informs States of the Amendment, briefly describes the salient points of the Amendment, and provides deadlines for responses by States; Attachment A, which contains a note on the Notification of

[6]The only Annex to which the Article 38 discretion does not apply is Annex 2 (Rules of the Air) which makes it mandatory for purposes of standardization (or compliance) and harmonization (global consistency) that the Standards of Annex 2 are followed without exception for obvious reasons.

Differences; Attachment B, which States are to use if they wish to notify ICAO of any disapprovals. States usually have 90 days (3 months) from the date of adoption of the Amendment to notify disapproval of the Amendment (or any part thereof); Attachment C, which States are to use if they wish to notify ICAO of their compliance with, or differences from, Annex 9 (up to and including the latest Amendment). States usually have about 180 days (6 months) from the date of adoption of the Amendment to notify ICAO of compliance or differences.

States have the right to vote against an Amendment (or any part thereof) that they do not agree with, by registering their disapproval. If a majority of States disapproves the adopted Amendment (or part thereof), ICAO is obliged to "withdraw" the provision. If a State does not reply to the State letter indicating disapproval, ICAO assumes that State does not disapprove of the Amendment. At the end of the prescribed period, the Amendment becomes "effective", unless it (or any part thereof) has been withdrawn. For all practical purposes, "effective" is understood to mean that the Amendment is officially "enacted". It can no longer be withdrawn or modified by ICAO without recourse to the amendment process.[7] Approximately four months after the Amendment has become effective, it becomes "applicable". This is understood to mean that it comes into force. Ideally, by the time the Amendment becomes applicable, States would have made the appropriate changes to their national regulations to bring them in line with the Amendment. However, this rarely occurs within the timeframe. Even though such an amendment or addition to the Annex comes into force, States are not under an obligation to implement SARPs as soon as they become applicable. They can do this at any time. States may also depart from SARPs at any time. However, they are obliged to inform ICAO of subsequent compliance and/or differences, to enable ICAO to disseminate this information to all Contracting States.

Paragraph 1.5.22 of the FAL Manual contains an important statement: "It is important for ICAO to know not only what differences exist on a fixed date, but also what action a State intends to take in the future. This procedure is intended to help ICAO plan ahead. To give one example: a large proportion of States may indicate their intention not to comply with a particular SARP. ICAO would therefore revisit the SARP at a future date, examine why States oppose it, and perhaps amend or delete it, as appropriate. This procedure allows ICAO to remove obsolete/infeasible provisions, and also to maintain uniformity in international regulations".

Notwithstanding this elaborate and structured process, the above discussion points to two weaknesses in the Annexes to the Chicago Convention, the first being that the Annexes are called such *for convenience*, implying that they may

[7] With regard to registration of disapprovals: statements of disapproval registered after the Amendment becomes effective do not affect the status of the Amendment; and a registration of disapproval does not constitute a notification of differences. A separate statement is necessary if any differences do exist. This means that, if a State registers a disapproval, it should not assume that ICAO would automatically regard this as a difference. The State has to expressly notify ICAO that a difference exists. One reason for this is that disapprovals and differences are governed by different provisions of the Chicago Convention. FAL Manual supra note 3 at 1.5. 12.

not necessarily have the legal legitimacy of an Annex to a treaty. The second is that the Standards in Annex 9 do not carry the same compelling force of the Chicago convention since Article 38 waters down the strength of a Standard with attendant discretion.[8] A leading authority on treaty law says: "When a treaty has an annex it is normal to provide, though not necessarily in a separate article, that the annex is an integral part of the treaty. Since there are often other documents produced at the rime the treaty is adopted, such as agreed minutes, declarations, and interpretative exchanges of notes, it is important to know whether they are an integral part of the treaty or merely associated with it".[9] Although one can argue that what is meant here is an annex that is drawn simultaneously with the treaty and accompanies the treaty (whereas the Annexes to the Chicago Convention were adopted by the Council of ICAO after the Chicago Convention had been in existence for several years), this should not have deterred the forefathers of the Convention from including a qualification that Annexes to follow would be part and parcel of the Chicago Convention, having the same legal force of *pacta sunt servanda.*

ICAO's Booklet on Annexes identifies Annex 9 as *inter alia* the Annex providing a frame of reference for planners and managers of international airport operations, describing maximum limits on obligations of industry and minimum facilities to be provided by governments. In addition, Annex 9 specifies methods and procedures for carrying out clearance operations in such a manner as to meet the twin objectives of effective compliance with the laws of States and productivity for the operators, airports and government inspection agencies involved. The words "methods and procedures" take away any hint of a legislative nature. Another point for argumentation would be that if the Annexes to the Chicago Convention were meant to have the same peremptory thrust and force of a treaty, the founding fathers would not have included the discretion of States whether or not to follow standards in Article 38.

Although this argument has its foundation both in logic and legal theory, aviation lawyers have tended to pivot to practicality by saying that in the absence of the Annexes there would be no implementing arms of the provisions of the Chicago Convention. For example, *Milde* is of the view that the manner in which ICAO has exercised its regulatory functions in matters relating to the safety of international air navigation and the facilitation of international air transport provides a fascinating example of international law making. He further observes that the Organization has consequently not had to contend with any of the post war ideological differences that have impeded international law making on politically sensitive issues.[10]

The earlier mentioned Articles 22 and 23 of the Chicago Convention seemingly support this theory. For instance, Article 22 requires that States must adopt *all practicable measures, through the issuance of special regulations or otherwise* (my emphasis), to facilitate and expedite navigation by aircraft between the

[8] See Abeyratne (2014), pp. 421–424 for a discussion on the nature of an Annex to the Chicago Convention.

[9] Aust (2000), p. 348.

[10] Milde (1989), p. 203.

territories of contracting States, and *to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance* (again, my emphasis), thus ascribing some legitimacy and strength to the Standards of Annex 9. Article 23 offers further support by saying that State must undertake "so far as it may find *practicable,* to establish customs and immigration procedures affecting international air navigation in accordance with the *practices which may be established or recommended from time to time, pursuant to this Convention*" (my emphasis) where the words "pursuant to this Convention" leaves no room for doubt that Annex 9 is the logical heir to this requirement.

There are other provisions of the Chicago Convention which embody principles that require optimum facilitation. For example, Article 10 provides that, except in a case where, under the terms of the Convention or a special authorization, aircraft are permitted to cross the territory of a contracting State without landing, every aircraft which enters the territory of a contracting State must, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination. On departure from the territory of a contracting State, such aircraft is required to depart from a similarly designated customs airport. Particulars of all designated customs airports must be published by the State and transmitted to ICAO. for communication to all other contracting States. This provision leads to Standards in Annex 9 that require air carriers to follow ways and means of how to conduct themselves in order to facilitate processes. A good example is the diversion of Ryanair Flight 4978 on 23 August to an airport in Belarus while over the airspace of that country. The SARPs of Annex 9 pertain specifically to facilitation of landside formalities for clearance of aircraft and commercial traffic through the requirements of customs, immigration, public health, and agriculture authorities. The Annex is a wide-ranging document which reflects the flexibility of ICAO in keeping pace with international civil aviation. ICAO is recognized as being the first international body to make a real start on facilitation by developing Standards which bind its Contracting States.

Similarly, Article 11 of the Convention has provision which *inter alia* requires an aircraft to follow the laws of a Contracting State when it enters and departs the territory of that State. One can tie this provision to ICAO's contemporary focus in facilitation: "ICAO's contemporary FAL strategy. is to advocate and support action by Contracting States in three principal areas: the standardization of travel documents, the rationalization of border clearance systems and procedures, and international cooperation to tackle security problems related to passengers and cargo. While the primary motivation of Annex 9 will continue to carry out the mandate in Article 22 of the Chicago Convention, "...to prevent unnecessary delays to aircraft, passengers and cargo....", numerous provisions, developed with the intent to increase

efficiency in control processes, support also the objective to raise the level of general security"[11]

As such, a Standard in Annex 9 (which is the focus of this book) needs definition. There have been numerous Assembly Resolutions governing the development of Standards and Recommended Practices (SARPs) in the Annexes. ICAO Assembly Resolution A21-21 (Consolidated Statement of Continuing Policies and Associated Practices Related Specifically to Air Navigation), which has already been discussed, in Appendix A (Formulation of Standards and Recommended Practices and Procedures for Air Navigation Services) Resolves that a Standard is "any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention".[12] It is therefore arguable that all Standards contained in the ICAO Annexes are formally binding on Contracting States, except when a State opts out of under the procedure set forth in the Convention in Article 38. ICAO's international Standards are identified by the words "Contracting States shall" and have a mandatory flavour (infused by the word "shall") while Recommended Practices identified by the words "Contracting States may" have only an advisory and recommendatory connotation (infused by the word "may"). It is interesting that at least one ICAO document9 requires States under Article 38 of the Convention, to notify ICAO of all significant differences from both Standards and Recommended Practices, thus making all SARPS regulatory in nature.

It is also worthy of note that the non-compliance with a Standard in Annex 9 (and any other Annex except Annex 2) hinges on the word "practicable" where States can justify non compliance only if there is a cogent practical difficulty in following a particular Standard. In this sense, Article 38 of the Chicago Convention is not strictly discretionary, and States would ultimately be answerable to ICAO (and the ICAO Council) when the audits are carried out against individual States to show cause as to why a particular Standard is impracticable.

This brings one to the inexorable argument—which is yet to be judicially examined in specificity—in which the powers of the ICAO Council in the event of a breach of a Standard, the legal legitimacy of which can be ascribed to a provision of the Chicago Convention itself, can be extended in the context of dispute resolution. A comparatively recent issue, where the International Court of Justice gave an opinion in 2020 on the Qatar issue is analogically relevant to the discussion.

[11] The Convention on International Civil Aviation Annexes 1 to 18 at https://www.icao.int/Documents/annexes_booklet.pdf.

[12] A Recommended Practice was described in the same Resolution as "any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention".

1.2 Accessibility of Airports to Aircraft and Passengers

Article 15 of the Chicago Convention admits of non-discriminatory admissibility of aircraft to airports. For this to happen an aircraft has to traverse the airspace of a State in which the airport is situated. Annex 9 specifies Standards in the context of admissibility of aircraft and is therefore implicitly linked to Article 15 of the Chicago Convention, which in turn brings to bear the authority of the Council in the hearing of a dispute in this connection. Analogically therefore the pronouncement of the International Court of Justice in the Qatar case becomes worthy of discussion.

1.2.1 The Qatar Case Study

The Qatar saga started in June 2017 when Qatari aircraft were banned from the skies of Saudi Arabia and the United Arab Emirates (UAE) where the two States alleged that Qatar posed a security threat in its alleged support of Islamic militants linked to Iran.[13] This ban also applied to land, maritime and aerial lines of communication with Qatar, this measure, seemingly adopted without prior consultation with Qatar, caused much inconvenience to Qatar Airways which had to reroute its flights, causing inflated costs to the airline and political contention in the region.[14] This meant that all aircraft registered in Qatar were effectively precluded by the two countries, which were later joined by some other States in the region[15] who were allies of Saudi Arabia and UAE, from not only overflying their territories but also from landing at or departing from their airports. Qatari ships were barred from the territorial waters of these States as well. Additionally, there were certain aircraft which did not bear Qatari nationality that were subject to the requirement of obtaining prior permission if they were to fly in and out of these States.

Qatar petitioned the Secretary General of the International Civil Aviation Organization (ICAO) On 15 June 2017, to place before the Council of ICAO the fact that it was applying to initiate proceedings before the Council, citing as respondents Bahrain, Egypt, Saudi Arabia and the United Arab Emirates, as well as submitting a

[13] The States which imposed the restrictions (see *infra* n.4) alleged that the restrictions were imposed as a response to Qatar's alleged breach of its obligations under certain international agreements to which the said States and Qatar are parties, namely the Riyadh Agreement (with Endorsement Agreement) of 23 and 24 November 2013, the Mechanism Implementing the Riyadh Agreement of 17 April 2014 and the Supplementary Riyadh Agreement of 16 November 2014 (the "Riyadh Agreements"), and other obligations under international law. The restrictions on Qatar were extended beyond air transport.

[14] For a discussion of this issue see generally, Abeyratne (2018), pp. 179–192.

[15] On 5 June 2017, Bahrain, Egypt, Saudi Arabia and the United Arab Emirates severed diplomatic relations with Qatar and adopted a series of restrictive measures relating to which included certain aviation restrictions. Pursuant to these restrictions, airlines of Qatar were prohibited from flying over the airspace of these countries.

memorial. The memorial was later corrected by Qatar at the request of the Secretary General and on 30 October 2017, Qatar filed a new application and memorial with the ICAO Council, in which it claimed that the aviation restrictions adopted by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates violated their obligations under the Chicago Convention. Qatar requested that its application be heard by the ICAO Council under Article 84[16] of the Chicago Convention.[17]

In response to Qatar's application Bahrain, Egypt, Saudi Arabia and the United Arab Emirates, in their capacity as respondents, raised on 19 March 2018, two preliminary objections. The first was the averment by the Respondents that the ICAO Council was bereft of jurisdiction to hear the dispute, citing that Article 84 did not confer upon the Council such jurisdiction since the real issue in dispute between the Parties involved matters extending beyond the scope of the Chicago Convention, including the question as to whether the aviation restrictions could be characterized as lawful countermeasures under international law. The second objection was that Qatar had failed to negotiate with the Respondents—a precondition contained in Article 84. of the Chicago Convention. The Respondents further averred that the need for an applicant to have negotiated prior to application was also stipulated in Article 2, subparagraph (g), of the *ICAO Rules for the Settlement of Differences* (Doc 7782), and on both counts the Council lacked jurisdiction to hear the dispute in question, and alternatively claimed that the application was inadmissible. It must be noted that Article 2 (g) of Doc 7782 stipulates that the Council may invite the parties to a dispute to engage in direct negotiations.

The ICAO Council delivered its decision to the Respondents on 29 June 2018, rejecting, by 23 votes to 4, with 6 abstentions, the preliminary objections, which the Council treated as a single objection. After careful consideration of the claim that the Council lacked jurisdiction to resolve the claims raised by the Applicant or in the alternative, and that the Applicant's claims are inadmissible; and, the second objection as to whether to accept the preliminary objection of the Respondents; and according to Article 52 of the Chicago Convention which provides that decisions by the Council require approval by a majority of its Members and the consistent practice of the Council in applying this provision in previous cases; The gravamen of the Council's decision was that, the Council rejected the preliminary objections of the Respondents.

[16] Article 84 states as follows: "*Settlement of Disputes*

If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

[17] Convention on International Civil Aviation signed at Chicago on 7 December 1944. *Supra,* note 1.

The respondent States submitted on 4 July 2018 a joint Application to the International Court of Justice (ICJ) appealing from the Decision of the Council dated 29 June 2018.

1.2.2 Grounds of Appeal Before the ICJ

The ICJ noted that the former Respondents to the ICAO Council's hearings—now Appellants before the Court—raised three grounds of appeal against the Decision of the ICAO Council dated 29 June 2018. Firstly, their contention was that the Council's decision "should be set aside on the grounds that the procedure adopted by the ICAO Council was manifestly flawed and in violation of fundamental principles of due process and the right to be heard".[18] In support of their second ground of appeal the Applicants averred that the ICAO Council "erred in fact and in law in rejecting the first preliminary objection made [by them] in respect of the competence of the ICAO Council", arguing that the claims of Qatar were inadmissible. The Appellants stated: "to pronounce on the dispute would require the Council to rule on questions that fall outside its jurisdiction, specifically on the lawfulness of the countermeasures".

The Appellants' third ground of appeal was that the ICAO Council erred when it rejected their second preliminary objection. That objection had been "based on the assertion that Qatar had failed to satisfy the precondition of negotiation contained in Article 84 of the Chicago Convention, and thus that the ICAO Council lacked jurisdiction" arguing further that "the claims of Qatar were inadmissible because Qatar had not complied with the procedural requirement in Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences".[19]

The ICJ rejected all three points of appeal. The subject of this article concerns only on whether the ICAO Council, as claimed by the Appellants, failed to " act judicially" as in their own words: "the Decision of the ICAO Council dated 29 June 2018 reflects a manifest failure to act judicially on the part of the ICAO Council, and a manifest lack of due process in the procedure adopted by the ICAO Council;"[20] The ICJ found it difficult to apply the concept of "judicial propriety" to the ICAO Council as the Court was of the view that the Council, being a permanent organ responsible to the ICAO Assembly, and composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body could not be considered a court or tribunal having judicial functions. Furthermore the ICJ

[18] 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), 14 JULY 2020, JUDGMENT, at 17.

[19] *Ibid.*

[20] Supra, note 18 at 11.

was of the view that, in addition to its executive and administrative functions specified in the Chicago Convention, the Council was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, did not make the ICAO Council a judicial institution in the proper sense of that term.

It is interesting to note that, in its decision the ICJ observed the claim of the Appellants that, on the merits of the case the ICAO Council would have two options. First, it might "adjudicate" (my emphasis) the issues relating to whether the aviation restrictions constitute lawful countermeasures, including, in particular, whether Qatar has breached its international obligations in matters outside civil aviation. Here, the word "adjudicate" is an intriguing misnomer as the Appellants knew, or ought to have known that the ICAO Council was not a tribunal to "adjudicate" on the issue at hand. This makes the use of the term "acting judicially" inconsistent with the nature, meaning and purpose of the Council which is required by Article 84 of the Chicago Convention to merely settle disputes by hearing disagreements between parties. The Court observed in this context that this would, have meant that the Appellants would be required to plead their defence on the basis of countermeasures in a forum that they consider not to be properly equipped to determine such matters. This *ex facie* calls into question the very nature of the hearing before the ICAO Council which was working under a restricted parameter of having to settle the dispute between the parties rather than adopt an adversarial approach to the hearing. Secondly, the ICJ opined that the ICAO Council might decline to hear the "defence" (my emphasis) on the basis of countermeasures, but this would mean that it could not decide all the matters before it. It would be wrong, in the Court's view, for the Council to adjudicate the dispute in part only, ignoring that part which contains "a vital defence" of the Appellants.

The Court noted that the Appellants claimed that Qatar's application to the ICAO Council is inadmissible in so far as any resolution of Qatar's claims would necessarily require the Council to adjudicate upon matters over which it does not possess jurisdiction. The Court held that "any such exercise of jurisdiction by the Council would be incompatible with the consensual basis for jurisdiction and thus incompatible with "judicial propriety" and the ICAO Council's alleged "judicial" function under Article 84 of the Chicago Convention." It is not clear what the Court meant by the word "judicial" as ascribed to the ICAO Council. Even more strange is the statement: "Qatar notes that the Appellants assert that if the Council were to pass judgment upon their defence on the basis of countermeasures it would "adjudicate" outside the scope of Article 84 of the Chicago Convention without their consent. It contends that none of the "exceptional circumstances" which gave rise to the doctrine of "judicial propriety" in the Court's jurisprudence are present in the case pending before the Council. Qatar argues that "judicial propriety" would be offended

if the Appellants' submissions were to be accepted because the Council then would not exercise its powers "to their full extent".[21]

It is here that the conundrum raises its head. The use of the words "judicial propriety" and "adjudicate" when taken together are way beyond the remit of the Council as prescribed by the Chicago Convention. Although the word "adjudicate" generally could mean the act or process of adjudicating a dispute, when it is used with the word "judicial" it connotes a judicial decision or sentence. The Council decides on a dispute or disagreement by either adopting a Resolution, which is nothing but the result of a political compromise or taking a non-binding decision which does not involve a sanction prescribing judicial sentence.[22] *Milde* noted in 1979:

> The Council of ICAO cannot be considered a suitable body for adjudication in the proper sense of the word—i.e. settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of States (not independent individuals) and its decisions would always be based on policy and equity considerations rather than on pure legal grounds. . .truly legal disputes. . .can be settled only by a true judicial body which can bring into the procedure full judicial detachment, independence and expertise. The under-employed ICJ is the most suitable body for such types of disputes.[23]

It must be noted that the Court also held that Article 84 of the Convention did not prevent the Council from examining issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction under Article 84 of the Chicago Convention. Therefore, a possible need for the ICAO Council to consider issues falling outside the scope of the Chicago Convention solely in order to settle a disagreement relating to the interpretation or application of the Chicago Convention would not render the application submitting that disagreement to it inadmissible. The Court concluded that the Council did not err when it rejected the first preliminary objection in so far as the respondents asserted that Qatar's application to the Council did not comply with Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences.

1.2.3 Can the Council Act Judicially?

The Appellants (Saudi Arabia and other States associated with the appeal before the ICJ) maintained that the ICAO Council carries out a "judicial function" when it is deciding a disagreement pursuant to Article 84 of the Chicago Convention. This in itself is a contradiction in terms when taken with the term "act judicially" which appears elsewhere in their appeal. In the least, the Appellants' arguments are a

[21] ICJ Appeal, *supra* note 18 at 21.

[22] https://www.merriam-webster.com/dictionary/adjudication Accessed on 7 August 2020.

[23] Michael Milde, Dispute settlement in the framework of the international civil aviation organization (ICAO). *Settlement Space Law Disputes* cited in Abeyratne (2014), p. 666.

convoluted and ambivalent mishmash of the two concepts when they claimed that the ICAO Council was iniquitous in indulging in "[a] fundamental requirement of due process . . . that judicial bodies give the necessary reasons in support of their decisions", here referring to the Council as a tribunal or court. Added to this confusing message is the statement which followed that there were no adequate deliberations prior to the Council decision which was "essential for judicial bodies to function in a collegial manner". Then the Appellants argued that the ICAO Council violated the principle of equality of the parties and the right to be heard because, as respondents before the ICAO Council, they were awarded "[p]atently insufficient time . . . to present their case" and were collectively given the same length of time to do so as was given to Qatar individually.

It is incorrect to refer to the ICAO Council as being a "judicial body" as claimed by the Appellants. Article 84 of the Chicago Convention states *inter alia*, " . . . Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Court". If the ICAO Council were to be considered a "judicial body" the fact of referral from its findings to an "arbitral tribunal" (with judicial characteristics) would indeed be nonsensical. There are other clear indications that The Council is not a judicial body: " Council members were placed in a somewhat unusual position in that they were on occasion asked to act in a judicial manner, even though they were appointed to the Council as representatives of their nations and were expected to act in their nations interests".[24] Bin Cheng has stated: "ICAO Council members are aviation specialists or civil servants. – not lawyers or judges – and they might not be best suited for serving on a judicial tribunal".[25] The result of clarification by the Council of its status in settling disputes was the adoption by the Council in 1957 of its *Rules of Procedure for the Settlement of Disputes* already alluded to in this article, which again, by the use of the words "rules of procedure" leaves no room for doubt that the Council has effectively precluded any interpretation or misconception that it is a judicial body.

One of the most respected international aviation legal specialist has endorsed the aforementioned views—that the Council is not a judicial body—when he states: " the Council is not a court of law. . .it sees its task as to assist in settling rather than in adjudicating disputes. . .up to the moment of final decision he Council in fact acts more as a mediator than a court".[26] Seemingly, therefore, the Council of ICAO would only be performing an administrative function under Article 84 of the Chicago Convention.

The words of the ICJ are consistent with the above view: "The Court observes that it is difficult to apply the concept of "judicial propriety" to the ICAO Council.

[24] Mackenzie (2010), p. 196.

[25] Cheng (1960), p. 104.

[26] Buergenthal (1969), pp. 162–164.

The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, the Council was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term".[27]

At common law, the claim of the Appellants could only be sustained under the *Audi Alteram Partem* principle which calls for both sides to be heard. The question at issue is whether the ICAO Council is "a body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially"[28] which are ascribed to any body of persons in an administrative capacity as well. Here, the words "act judicially" has a different connotation than "act as a judicial body or court" Although the Council can determine questions affecting the rights of parties applying for a hearing before it and the respondents it remains to be seen as to what extent the *Audi Alteram Partem* rule applies to the ICAO Council.

At most, the Council may be considered an administrative body which has a duty to act fairly. In *Minister of Manpower and Immigration* v. *Hardayal*[29] Justice Spence, speaking on behalf of the full Court said: "It is true that in exercising what, in my view, is an administrative power, the Minister is required to act fairly and for a proper motive and his failure to do so might well give rise to a right of the person affected to take proceedings. . .".[30]

In the celebrated case of *Ridge* v. *Baldwin*,[31] the Brighton Police Authority dismissed its Chief Constable without offering him an opportunity to defend his actions. The Chief Constable appealed, arguing that the Brighton Watch Committee had acted unlawfully (ultra vires) in terminating his appointment in 1958 following criminal proceedings against him. Lord Reid, referring to the earlier case of *Nakkuda Ali* v. *Jayaratne,*[32] said: "[C]an one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the controller might in any ordinary sense of the word have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take

[27] ICJ Decision, *supra*, note 4 at 23.

[28] The quote is taken from Arkin L.J's dictum in *Rex* v. *Electricity Commissioners* [1924] 1 K.B. 171.

[29] [1978] 1 S.C.R. 470.

[30] *Id*. 476.

[31] [1963] 2 All ER 66.

[32] 1951 AC 66.

action unless he has reasonable grounds for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process".[33]

In the *Nakkuda Ali case*[34] the Privy Council held that the duty to act judicially is a super-added condition. This notion was soundly rejected by Lord Reid in the *Ridge* case when his Lordship said that the notion of a "super-added duty to act judicially", as a separate and independent pre-condition to the availability of natural justice, and inferentially a separate element is unacceptable. His Lordship concluded: "If . . .it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of natural justice, then that appears to me impossible to reconcile with the earlier authorities".[35]

A clear perception of the origin of the principles of natural justice can be attenuated from the dictum of Lord Morris of Borth-y-Gest in *Furnell* v. *Whangarei High Schools Board*:[36] "[N]atural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions."[37] The Supreme Court of the United States in *Wolff* v. *McDonnell*[38] observed: "The fact that a decision-maker does not have a duty to act judicially, with observance of formal procedure which that characterization entails, does not mean that there may not be a duty to act fairly which involves importing something less than the full panoply of conventional natural justice rules. In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework.[39]

In the 1967 case of *In re HK*[40] the facts of the case were that, in the case of an immigrant who settled in the UK was allowed to bring any children aged below 16 into the country to live with him, he arrived at the airport with his son, who was presented to the immigration authorities as being 15 years of age. However, the chief immigration officer considered the child to be over 16 years of age and denied the son entry. The immigrant instituted action against what e claimed to be an arbitrary decision by the authorities. This claim of the immigrant was questioned by the immigration authorities on the ground that, although the immigration officer was obligated to comply with natural justice, the father and son both knew of the rule regarding age and had ample opportunity to try and convince the immigration officers of the son's age. Lord Parker CJ delivering judgment stated: "even if the

[33] Id. at 78.
[34] *Supra*, note 32.
[35] Supra, note 32 at 81.
[36] [1973] A.C. 660 (P.C.).
[37] *Id.* 679.
[38] 418 U.S. 539 (1974).
[39] *Id.* 554.
[40] [1967] 2 QB 617.

officers weren't acting in a judicial/quasi judicial capacity, they still had a duty to act fairly and hearing the immigrant out. This duty is not simply being impartial: it is to act fairly. Insofar as the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply".[41]

Another decision which supports the link between the principles of natural justice and the duty to act fairly is the 1978 case of *McInnes* v. *Onslow-Fane*[42] where Megarry V.C. stated that natural justice must be addressed flexibly which imposed subjectively different requirements based on a case by case basis. Viscount Megarry held that when a function moved from a judicial to a quazi judicial function, it was appropriate to lean towards the requirement to act fairly.

1.2.4 The Way Forward Procedure

The ICJ found that the disagreement between the Parties before the ICAO Council concerned the interpretation and application of the Chicago Convention and its Annexes and therefore fell within the scope of Article 84 of the Chicago Convention. The Council was not precluded from hearing the Qatar application even though the disagreement had arisen in a broader context and does not deprive the ICAO Council of its jurisdiction. As the Court has observed, "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned".[43] The Court therefore concluded that the Council did not err when it rejected the first preliminary objection in so far as the respondents asserted that Qatar's claims were inadmissible. On this basis the ICJ held, by fifteen votes to one, that the Council of ICAO has jurisdiction to entertain the application submitted to it by the Government of the State of Qatar on 30 October 2017 and that the said application is admissible. This leaves open the Qatar application to be heard *in substance* -by the Council.

The starting point would be a re-look at the dispute settlement principles of the Chicago Convention. Article 84 implies that either a disagreement should *prima facie* be settled by negotiation or if that is not possible, the provision explicitly states *inter alia* that the matter will be decided by the Council. Any State dissatisfied with the position taken by the Council could appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice as the ICJ then was). This is what the Appellants did by appealing to the ICJ. Now that the ICJ has handed down its decision—that the ICAO Council can hear the application of Qatar—Article 86 of

[41] *Id.* 632.

[42] [1978] 1 W.L.R. 1520.

[43] ICJ Decision, *supra*, note 18 at 19.

the Chicago Convention is conclusive, that the decisions of the ICJ are final and binding.

The Appellants (Saudi Arabia and its allies in the action) are legally bound to accept the jurisdiction of the ICAO Council to hear the Qatari application. For its part, the Council has to accept the fact that it has jurisdiction to hear the application. The Council has a mandatory function under Article 54 n) of the Convention to consider any matter referred to it by an ICAO member State. The Council would have to conclusively determine whether, as required by Article 84 of the Chicago Convention, the parties to the dispute made a genuine and purposeful attempt at negotiation prior to the application of Qatar to the Council. It is incumbent on the parties to the dispute to attempt a negotiation. Article 6 of Doc 7782 which sets out procedures for ICAO to settle disputes provides that the Council is required to have the parties enter into direct negotiations and, if it is decided not to have direct negotiations the Council must decide which procedure under Doc 7782 is applicable. Unless the Council decides to undertake the preliminary examination of the matter itself, it is required to appoint a Committee of five individuals who must all be Representatives on the Council of Member States not concerned in the disagreement, and must designate one of them as Chairman. Article 8 of Doc 7782 provides that the Council may at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion. In such cases the Council must define the subject of enquiry or expert opinion and prescribe the procedure to be followed.

The ICAO Council has the discretion, under Article 14 of Doc 7782 at any time during the proceedings and prior to the meeting at which the Council decision is rendered to invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiations have not been exhausted. If the parties accept the invitation to negotiate, the Council may set a time-limit for the completion of such negotiations, during which other proceedings on the merits, must be suspended. Subject to the consent of the parties concerned, the Council may render any assistance likely to further the negotiations, including the designation of an individual or a group of individuals to act as conciliator during the negotiations.

Article 15 rounds up well the procedural aspect of the hearing, providing that after hearing arguments, or after consideration of the report of the Committee, as the case may be, the Council must render its decision. The decision of the Council must be in writing and contain certain details such as: the date on which it is delivered; a list of the Members of the Council participating; the names of the parties and of their agents; a summary of the proceedings; the conclusions of the Council together with its reasons for reaching them ;its decision, if any, in regard to costs; a statement of the voting in Council showing whether the conclusions were unanimous or by a majority vote, and if by a majority, giving the number of Members of the Council who voted in favour of the conclusions and the number of those who voted against or abstained.

1.2.5 Considerations for the Council

As for the substance of the dispute, it would be exclusively within the purview of the Council of ICAO to determine and deliberate upon in accordance with the procedure discussed above. However, it would not be inappropriate for the Council to review the meaning and purpose of the Chicago Convention from an originalist's point of view. For this, one has to go back 76 years to the International Civil Aviation Conference in Chicago in 1944 which gave birth to the Chicago Convention. At that conference, the Delegate of China, Dr. Chang said: "As the Chairman, Mr. Berle has just said, the air has been used as a medium of aggression, and it is our purpose hereafter to make it a highway serving all peoples of the world. Fortunately, aviation is still a young art and therefore more subject to the influence of forethought in shaping the course of its development and its role in human affairs".[44] Adolf A. Berle, Chairman of the Conference and representative of The United States said, adding a nuance to the statement of China: "The use of the air has this in common with the use of the sea: it is a highway given by nature to all men. It differs in this from the sea: that it is subject to the sovereignty of the nations over which it moves. Nations ought therefore to arrange among themselves for its use in that manner which will be of the greatest benefit to all humanity wherever situated".[45] Here, the Council will be presented with a dichotomy of on the one hand balancing freedom of the skies as espoused by China and the restraint that sovereignty of the airspace over the territory of a State brings, as claimed by The United States.

Canada's intervention at the Chicago Conference bears direct relevance to the difficulties that were faced by Qatar in 2017 with the lockdown of the airspace over Saudi Arabia and its allied States: " Nations can exercise, in an anti-social way, their present right to refuse foreign airlines air transit over their territories. Nations can likewise exercise, in an anti-social way, their present right to prevent foreign airlines from landing on their territories to pick up and discharge traffic. The obstructionist use of the one right can be an outrageous exploit of geography for purely negative and destructive purposes by nations which are situated athwart the great airways of the world. The obstructionist use of the other right can be an equally outrageous exploitation of economic power for purely negative and destructive purposes".[46]

As a final consideration, the Council will have to abide by the fundamental principle in the Chicago Convention which carries the distilled essence of the different views discussed above, which are now embodied in the Preamble to the Convention which states that the Convention's principles embody a fundamental truth—that the principles and arrangements advocated in the Convention are to ensure that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis

[44] *Proceedings of the International Civil Aviation Conference*, Chicago: Illinois, November 1–December 7 1944 Vol. 1, The Department of State, at 45.
[45] *Id*. 55.
[46] *Id*, 73.

of equality of opportunity and operated soundly and economically. In this context the operative considerations would be that each contracting State to the Convention has to ensure that their actions and measures they take would not derogate and adversely affect airlines of other States in that there should be safe and orderly operation of air services to be operated soundly and economically with equality of opportunity for all carriers.

These fundamental drivers of air transport form the gravamen of accusations levelled by Qatar at the States which closed their airspace to Qatari aircraft, which was claimed by the former to be arbitrary and without basis, which prevented the airlines of Qatar from having equality of opportunity to compete with other carriers.

Arguably, the most complex issue for determination by the ICAO Council would be the claim by Saudi Arabia and its allies that airspace over their territories were closed to the airlines of Qatar for security reasons, to protect against alleged links between Qatar and subversive activities in Iran**.** Although Saudi Arabia can claim that it has not ratified the International Air Services Transit Agreement which grants fly over rights to airlines of States over the territories of other signatory States (UAE and Bahrain have ratified the Agreement) it cannot find solace in the basic principle of equal treatment enshrined in Article 9 of the Chicago Convention which provides that each contracting State may, for reasons of military necessity y or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. However, the overriding consideration of security and safety, as claimed by Saudi Arabia and its allies will be beyond the purview of the ICAO Council and it is interesting to observe the manner in which the Council will approach the application of Qatar.

One way to go would be for the President of the Council to mediate purely on the basis of the principles contained and embodied in the Preamble to the Convention as already discussed. One of the functions of the President of the Council as per Article 51 c) of the Chicago Convention is to carry out on behalf of the Council the functions which the Council assigns to him.[47]

It is envisioned that, whichever way the ICAO Council decides to go in terms of the procedure and process to be followed, action by the Council will be taken at a time when the effects of the Covid-19 pandemic would still be affecting air transport in an unprecedented way. This brings to bear the compelling need to view the concept of "equality of opportunity' in a different light from just the "free for all" type of competition that States and their carriers were used to. The closure of airspace over Saudi Arabia, Bahrain and the UAE caused inconvenience to

[47] Noteworthy is the President's function, which is not one explicitly mentioned in Article 51, of mediation. A glaring example of the intervention of the President in bringing about a compromise between two polarized groups was his successful mediation in the aircraft noise issue that sprang up in the 28th Session of the ICAO Assembly.

passengers who had connected conveniently on an intra region basis. It is possible that any action taken by the ICAO Council on this dispute would be taken at a time where airlines would still be in the doldrums and passengers are profoundly confused. Concurrently, therefore, and on a separate platform, bearing in mind the economic and social effects such lockdowns on airspace might be enforced, it might be opportune for ICAO and the International Air Transport Association (IATA)—the trade association of airlines—to get together and come up with a revised interpretation of liberalized routes and air services in the best interests of the travelling public, and one that would effectively preclude economic exploitation by powerful forces for their own benefit. In the parlous state all airlines are in, there would be no better a time than to muster States and airlines to carve out a win-win situation where both the passenger and traveller wins. Airports Council International (ACI)—the association of airports—could form the threesome where it could discuss revisions of charges imposed.

The equitable sharing of the skies is not a new phenomenon. As already discussed, 76 years ago, at the Chicago Conference, when the future of commercial air transport was discussed in a post World War setting, this was a serious topic of discussion but polarization among the two great powers at the time—The United States and Britain—stymied it. This resulted in ICAO having no say in air transport economics and being relegated to a limited function to guide the progress of air transport by fostering the planning and development of air transport.

If one were to claim that lop sided principles of sovereignty which in many instances are applied in an arbitrary and capricious manner resulting in lop sided competition in air transport to the detriment of the passenger has so far resulted in something distinctly immoral about exploiting society at its most vulnerable moment, one would not be incorrect.

1.2.6 The Final Discussions in the International Court of Justice

There are several perceived misconceptions with regard to the International Civil Aviation Organization (ICAO).[48] One is that ICAO has a mandate to prescribe regulations that States are bound to follow. Another is that ICAO is a purely technical Organization which cannot address issues of air transport that have

[48]The International Civil Aviation Organization is the United Nations specialized agency dealing with international civil aviation. ICAO was established by the Convention on International Civil Aviation (Chicago Convention), signed at Chicago on 7 December 1944. Fifty-two States signed the Chicago Convention on 7 December 1944. The Convention came into force on 4 April 1947, on the thirtieth day after deposit with the Government of the United States. Article 43 of the Convention states that an Organization to be named the International Civil Aviation Organization is formed by the Convention. ICAO is made up of an Assembly, a Council and such other bodies as are deemed necessary. See ICAO Doc 7300, 9th Edition 2006.