DECLARATION OF JUDGE GEVORGIAN

Disagreement with certain aspects of the Court's reasoning as regards the second ground of appeal — Paragraph 48 of the Judgment — The Court's reliance on jurisprudence regarding its own competence when addressing the competence of the ICAO Council is unjustified — Certain key differences exist between the Council and the Court — Paragraph 61 of the Judgment — The Court goes too far in endorsing a broad conception of the ICAO Council's competence to examine matters outside of civil aviation — The Council's dispute settlement mandate is limited to the ICAO treaties — In principle States have not consented to the Council adjudicating matters unrelated to civil aviation.

1. I have voted in favour of the Court's findings in the *dispositif*, as I believe each of the Applicants' three grounds of appeal ought to have been rejected. However, I disagree with the Court's expansive view of the ICAO Council's competence to address matters unrelated to civil aviation, particularly as expressed in paragraphs 48 and 61 of the Judgment. In this declaration, I shall set out the reasons for this disagreement.

2. In my view, the Applicants' arguments concerning jurisdiction *ratione materiae* can be rejected by adhering to the Court's 1972 decision in *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*. In that case, the Court clearly rejected the notion that the characterization of a defence on the merits as falling outside the scope of the Chicago Convention and IASTA can deprive the ICAO Council of jurisdiction[1]. The same reasoning applies in the present case, as the Applicants' contention that their aviation restrictions constitute lawful countermeasures is, in essence, a defence on the merits[2].

3. However, the propriety of the ICAO Council addressing matters unrelated to civil aviation as part of its dispute settlement function is not

[1] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27. The Court wrote that

> "[t]he fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned, —otherwise parties would be in a position themselves to control that competence, which would be inadmissible. As has already been seen in the case of the competence of the Court, so with that of the Council, its competence must depend on the character of the dispute submitted to it and on the issues thus raised — not on those defences on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled."

[2] See paragraph 49 of the present Judgment.

nearly as unequivocal as the present Judgment suggests. Given the importance of the principles at stake — most notably the principle of consent in inter-State dispute settlement — the Council's competence should be clearly defined and limited to those matters with which the States parties have affirmatively entrusted it. The Court in the present Judgment goes too far in appearing to endorse an expanded definition of the Council's competence, according to which the Council may (and perhaps must) consider issues unrelated to civil aviation in resolving disputes under Article 84 of the Chicago Convention and Article II, Section 2, of IASTA.

4. In paragraph 48 of the Judgment, the Court relies upon a pronouncement from *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* for the proposition that the existence of a broader context behind the Parties' dispute "does not deprive the ICAO Council of its jurisdiction under Article 84 of the Chicago Convention"[3]. According to the Court's Judgment in that case, the fact that a legal dispute may form part of a wider political dispute between the States involved does not deprive the Court of jurisdiction over that legal dispute[4]. To hold otherwise would be to "impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes"[5].

5. While this principle has been upheld numerous times in the context of proceedings before the Court[6], it does not, in my view, apply to other international institutions that were not created exclusively for the purpose of the peaceful settlement of disputes. In particular, the political contexts referred to in *United States Diplomatic and Consular Staff in Tehran* may have a greater impact on proceedings before a body composed of representatives of States than on proceedings before the Court. In other words, it is one thing to say that the existence a broader political dispute should not affect the competence of a body that is composed of "independent judges"[7], and quite another to apply the same principle to a body made up of States parties to the treaty in

[3] See paragraph 48 of the present Judgment.

[4] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37.

[5] *Ibid.*

[6] See e.g. *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, I.C.J. Reports 2019 (II)*, p. 576, para. 28; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 23, para. 36; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 604, para. 32.

[7] See Article 2 of the Statute of the International Court of Justice.

question[8], each of which is likely to have its own political agenda and the potential to be influenced by non-legal considerations.

6. The Court does not provide an explanation for why it considers its reasoning from *United States Diplomatic and Consular Staff in Tehran* to apply to the Council. This omission is notable given that, elsewhere in the present Judgment, the Court highlights significant differences between itself and the ICAO Council[9], particularly that the Council is composed not of independent judges, but of "contracting States elected by the Assembly"[10].

7. Several other considerations bear mentioning. For instance, Members of the Council act on instructions from their Governments when voting in proceedings under Article 84[11] — a fact which clearly illustrates the Council's non-judicial nature. Moreover, while the Court's principal function relates to the peaceful settlement of legal disputes, Article 54 of the Chicago Convention assigns to the ICAO Council a wide array of responsibilities, most of which are of a technical or administrative nature (for instance, it must "[a]dminister the finances of the Organization", and "[a]dopt . . . international standards and recommended practices" relating to civil aviation). Finally, while the Court's Statute empowers it to consider "any question of international law", the ICAO Council has a far narrower dispute settlement mandate relating solely to the interpretation and application of the ICAO treaties.

8. These are all reasons to consider that jurisdictional principles which apply to the Court do not apply equally to the ICAO Council. I therefore disagree with the Court's reliance on the pronouncement from *United States Diplomatic and Consular Staff in Tehran* in its approach to the Applicants' second ground of appeal.

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[8] See Article 50 *(a)* of the Chicago Convention.

[9] See paragraph 60 of the present Judgment.

[10] *Ibid.*

[11] See G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal relating to the Jurisdiction of the ICAO Council", *Canadian Yearbook of International Law*, Vol. 12 (1974), pp. 168-169 (observing that

> "[i]n the case of the ICAO Council, the persons sitting on the bench are demonstrably the national representatives of the respective member States . . . Indeed, a perusal of the minutes of the Council meetings of July 28-29, 1971 [in the *India* v. *Pakistan* case], shows that some of the members wanted to defer decisions because they wished to await instructions from their governments. Other representatives had apparently received their instructions . . . The best that can be said is that, in the case of the settlement of disputes in ICAO, the States as such act as judges and their representatives speak on behalf of the States, and not as individuals.")

9. For similar reasons, I am also in disagreement with the Court's reasoning in paragraph 61 of the Judgment. Given the aforementioned differences between itself and the ICAO Council, the Court declines to apply the concept of "judicial propriety" per se to the Council[12]. However, the Court then proceeds to hold that the "integrity of the Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation" for the sole purpose of deciding a dispute over which it has jurisdiction[13].

10. In my view, this categorical statement is too broad. Nothing like a doctrine of "judicial propriety" can properly be applied to the ICAO Council, as the Council is a body of a primarily technical and administrative nature, whose Members act as representatives of their Governments and need not be well-versed in international law, and whose dispute settlement mandate is narrowly limited to the interpretation and application of the ICAO treaties. These factors weigh against a general pronouncement that it is appropriate for the Council to consider matters unrelated to civil aviation, so long as it does so for the purpose of resolving a dispute over which it otherwise has jurisdiction.

11. The basic principle remains that States should be subjected to the jurisdiction of the Council only to the extent they have consented to it. As the Court has observed with respect to its own competence, "the Court has jurisdiction in respect of States only to the extent that they have consented thereto"[14], and when consent is expressed in a compromissory clause in an international agreement, the terms of the clause "must be regarded as constituting the limits" on that consent[15].

12. These considerations apply with even greater force to an institution like the ICAO Council, given its narrow mandate. As Article 84 of the Chicago Convention and Article II, Section 2, of IASTA only provide the Council with jurisdiction to adjudicate disputes relating to those instruments, States have not, in principle, consented to having matters unrelated to civil aviation adjudicated by the Council. In establishing that the integrity of the Council's dispute settlement function "would not be affected" by the Council considering matters unrelated to civil aviation in exercising its jurisdiction, the Court endorses a broad vision of the Council's competence that in the future may do harm to the fundamental principle of consent in the peaceful settlement of disputes.

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[12] See paragraphs 60-61 of the present Judgment.

[13] See paragraph 61 of the present Judgment.

[14] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 65.

[15] *Ibid.*, p. 39, para. 88.

13. In summary, I am of the view that the Court goes in a wrong direction in attempting to define the ICAO Council's ability to address arguments unrelated to civil aviation. The Court could have relied on its 1972 Judgment in the *India* v. *Pakistan* case to reject the Applicants' second ground of appeal. That decision made clear that the Council is not deprived of jurisdiction *ratione materiae* simply because the respondent characterizes a defence on the merits as falling outside the Council's competence. Instead, whether willingly or unwillingly, the Court appears to widen the competence of the ICAO Council — a body whose role is to settle discrete aviation disputes. In so doing, the Judgment, without substantial legal basis, risks in the future unduly subjecting States to the Council's dispute settlement procedures without their consent. For the reasons described above, I consider this neither necessary nor appropriate.

(Signed) Kirill GEVORGIAN.