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Summary
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Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement

(Bahrain, Egypt and United Arab Emirates v. *Qatar)*

Summary of the Judgment of 14 July 2020

The Court begins by recalling that, by a joint Application filed in the Registry of the Court on 4 July 2018, Bahrain, Egypt and the United Arab Emirates instituted an appeal against a Decision rendered by the Council of the International Civil Aviation Organization (ICAO) on 29 June 2018 in proceedings brought by Qatar against these States on 30 October 2017, pursuant to Article II, Section 2, of the International Air Services Transit Agreement, adopted at Chicago on 7 December 1944 (the "IASTA"). In this Decision, the ICAO Council rejected the preliminary objections raised by the applicant States that it lacked jurisdiction "to resolve the claims raised" by Qatar in its application and that these claims were inadmissible.

In their Application, the applicant States seek to found the jurisdiction of the Court on Article II, Section 2, of the IASTA, and by reference on Article 84 of the Chicago Convention, in conjunction with Articles 36, paragraph 1, and 37 of the Statute of the Court.

For the purposes of this Judgment, the applicant States are collectively referred to as the "Appellants". In describing proceedings before the ICAO Council, these States are referred to as respondents before the ICAO Council.

I. INTRODUCTION (PARAS. 21-36)

A. Factual background (paras. 21-26)

The Court explains that, on 5 June 2017, the Governments of Bahrain, Egypt and the United Arab Emirates, as well as Saudi Arabia, severed diplomatic relations with Qatar and adopted a series of restrictive measures relating to terrestrial, maritime and aerial lines of communication with Qatar, which included certain aviation restrictions. Pursuant to these restrictions, all Qatar-registered aircraft were barred by the Appellants from landing at or departing from their airports and were denied the right to overfly their respective territories, including the territorial seas within the relevant flight information regions. Certain restrictions also applied to non-Qatar-registered aircraft flying to and from Qatar, which were required to obtain prior approval from the civil aviation authorities of the Appellants. According to the latter, these restrictive measures were taken in response to the alleged breach by Qatar of its obligations under certain

international agreements to which the Appellants and Qatar are parties, namely the Riyadh 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, and of other obligations under international law.

On 30 October 2017, pursuant to Article II, Section 2, of the IASTA, Qatar filed an application and memorial with the ICAO Council, in which it claimed that the aviation restrictions adopted by Bahrain, Egypt and the United Arab Emirates violated their obligations under the IASTA. On 19 March 2018, Bahrain, Egypt and the United Arab Emirates, as respondents before the ICAO Council, raised two preliminary objections. In the first, they argued that the ICAO Council lacked jurisdiction under the IASTA since the real issue in dispute between the Parties involved matters extending beyond the scope of that instrument, including whether the aviation restrictions could be characterized as lawful countermeasures under international law. In the second, they argued that Qatar had failed to meet the precondition of negotiation set forth in Article II, Section 2, of the IASTA, also reflected in Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences, and consequently that the Council lacked jurisdiction to resolve the claims raised by Qatar, or alternatively that the application was inadmissible. By a decision dated 29 June 2018, the ICAO Council rejected, by 18 votes to 2, with 5 abstentions, the preliminary objections, treating them as a single objection.

On 4 July 2018, the Appellants submitted a joint Application to the Court instituting an appeal against the Decision of the Council dated 29 June 2018.

B. The Court's appellate function and the scope of the right of appeal to the Court (paras. 27-36)

The Court observes that Article II, Section 2, of the IASTA provides for the jurisdiction of the ICAO Council to decide "any disagreement between two or more contracting States relating to the interpretation or application of this Agreement" if it "cannot be settled by negotiation". Under the Chicago Convention, to which the IASTA refers, a decision of the Council may be appealed either to an *ad hoc* arbitral tribunal agreed upon between the parties to a dispute or to "the Permanent Court of International Justice". Under Article 37 of the Statute of the International Court of Justice, "[w]henever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice". Accordingly, under Article II, Section 2, of the IASTA and Article 84 of the Chicago Convention, the Court is competent to hear an appeal against a decision of the ICAO Council.

The Court notes that Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA) appears under the title "Settlement of disputes", whereas the text of the Article opens with the expression "any disagreement". In this context, it recalls that its predecessor, the Permanent Court of International Justice, defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". The Court notes that the Appellants are appealing against a decision of the ICAO Council on the preliminary objections which they raised in the proceedings before it. The text of Article 84 does not specify whether only final decisions of the ICAO Council on the merits of disputes before it are subject to appeal. The Court nonetheless settled this issue in 1972, in the first appeal submitted to it against a decision of the ICAO Council, finding that "an appeal against a decision of the Council as to its own jurisdiction must therefore be receivable since, from the standpoint of the supervision by the Court of the validity of the Council's acts, there is no ground for distinguishing between supervision as to jurisdiction, and supervision as to merits" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 26). The Court is thus satisfied that it has jurisdiction to entertain the present appeal.

With regard to the scope of the right of appeal, the Court recalls that its role in supervising the Council in the exercise of the latter's dispute settlement functions under Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA) is to determine whether the impugned decision is correct. In the present case, its task is to decide whether the Council has erred in rejecting the preliminary objections of the Appellants to the jurisdiction of the ICAO Council and the admissibility of Qatar's application.

II. GROUNDS OF APPEAL (PARAS. 37-126)

The Court observes that it is not bound to follow the order in which the Appellants invoke their three grounds of appeal. The Court first examines the grounds based on the alleged errors of the ICAO Council in rejecting the Appellants' objections (second and third grounds of appeal). Thereafter, the Court considers the ground based on the alleged manifest lack of due process in the procedure before the Council (first ground of appeal).

A. The second ground of appeal: rejection by the ICAO Council of the first preliminary objection (paras. 41-63)

The Court notes that, in their second ground of appeal, the Appellants assert that the ICAO Council "erred in fact and in law in rejecting the first preliminary objection . . . in respect of the competence of the ICAO Council". According to the Appellants, 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, including "certain airspace restrictions", adopted by the Appellants. In the alternative, and for the same reasons, they argue that the claims of Qatar are inadmissible.

1. Whether the dispute between the Parties relates to the interpretation or application of the IASTA (paras. 41-50)

The Court has first to determine whether the dispute brought by Qatar before the ICAO Council is a disagreement between the Appellants and Qatar relating to the interpretation or application of the IASTA. The Council's jurisdiction *ratione materiae* is circumscribed by the terms of Article II, Section 2, of the IASTA to this type of disagreement.

The Court observes that, in its application and memorial submitted to the ICAO Council on 30 October 2017, Qatar requested the Council to "determine that the Respondents violated by their actions against the State of Qatar their obligations under the International Air Services Transit Agreement and other rules of international law". It further requested the Council to "deplore the violations by the Respondents of the fundamental principles of the International Air Services Transit Agreement". Consequently, Qatar asked the Council to urge the respondents "to withdraw, without delay, all restrictions imposed on the Qatar-registered aircraft and to comply with their obligations under the IASTA" and "to negotiate in good faith the future harmonious cooperation in the region to safeguard the safety, security[,] regularity and economy of international civil aviation". In its memorial, Qatar stated that parties to the IASTA "grant each other in scheduled international air services [t]he privilege to fly across its territory without landing, and [t]he privilege to land for non-traffic purposes". It further stated that "[b]y their actions starting on 5 June 2017 and lasting to the present time the Respondents violated the letter and spirit of the [IASTA]" and that "[t]hey are in blatant default of their obligations under the IASTA".

The Court considers that the disagreement between the Parties brought before the ICAO Council does concern the interpretation and application of the IASTA and therefore falls within the scope of Article II, Section 2, of the IASTA. The mere fact that this disagreement has

arisen in a broader context does not deprive the ICAO Council of its jurisdiction under Article II, Section 2, of the IASTA.

The Court also cannot accept the argument that, because the Appellants characterize their aviation restrictions imposed on Qatar-registered aircraft as lawful countermeasures, the Council has no jurisdiction to hear the claims of Qatar. Countermeasures are among the circumstances capable of precluding the wrongfulness of an otherwise unlawful act in international law and are sometimes invoked as defences. The prospect that a respondent would raise a defence based on countermeasures in a proceeding on the merits before the ICAO Council does not, in and of itself, have any effect on the Council's jurisdiction within the limits laid down in Article II, Section 2, of the IASTA.

The Court therefore concludes that the Council did not err when it rejected the first preliminary objection by the Appellants relating to its jurisdiction.

2. Whether Qatar's claims are inadmissible on grounds of "judicial propriety" (paras. 51-62)

The question for the Court is, in its view, whether the decision of the ICAO Council rejecting the first preliminary objection as it relates to the admissibility of Qatar's claims was a correct one. In other words, the Court has to ascertain whether the claims brought before the Council are admissible.

The Court observes that it is difficult to apply the concept of "judicial propriety" to the ICAO Council. 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. The Court considers that, in any event, the integrity of the ICAO Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction under Article II, Section 2, of the IASTA. Therefore, a possible need for the ICAO Council to consider issues falling outside the scope of the IASTA solely in order to settle a disagreement relating to the interpretation or application of the IASTA would not render the application submitting that disagreement to it inadmissible.

The Court therefore concludes 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.

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In view of the above, the Court is of the opinion that the second ground of appeal cannot be upheld.

B. The third ground of appeal: rejection by the ICAO Council of the second preliminary objection (paras. 64-108)

The Court notes that, as their third ground of appeal, the Appellants assert that the ICAO Council erred when it rejected the second preliminary objection which they raised as respondents before the Council, whereby they claimed that the ICAO Council lacked jurisdiction because Qatar had failed to meet the negotiation precondition found in Article II, Section 2, of the IASTA and that Qatar's application to the ICAO Council was inadmissible because it did not comply with Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences.

1. The alleged failure to meet a negotiation precondition prior to the filing of Qatar's application with the ICAO Council (paras. 65-99)

The Court observes that Article II, Section 2, of the IASTA refers to Chapter XVIII of the Chicago Convention, entitled "Disputes and Default". This chapter provides a dispute settlement procedure that is available in the event of disagreements concerning the interpretation or application of the Convention and its Annexes. It follows that disagreements relating to the interpretation or application of the IASTA are to be resolved through the procedure provided in Chapter XVIII of the Chicago Convention. Article II, Section 2, of the IASTA further specifies that the disagreements that are to be settled through this procedure, which involves resort to the ICAO Council, are only those that "cannot be settled by negotiation". The Court also notes that Article 14 of the ICAO Rules for the Settlement of Differences contemplates that the Council may invite the parties to a dispute to engage in direct negotiations. It further notes that the reference, in Article II, Section 2, of the IASTA, to a disagreement that "cannot be settled by negotiation" is similar to the wording of the compromissory clauses of a number of other treaties. The Court has in the past found several such compromissory clauses to contain negotiation preconditions that must be satisfied in order to establish the Court's jurisdiction. It considers that this jurisprudence is also relevant to the interpretation of Article II, Section 2, of the IASTA and to its application in determining the jurisdiction of the ICAO Council. Thus, prior to filing an application under Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA), a contracting State must make a genuine attempt to negotiate with the other concerned State or States. If the negotiations or attempted negotiations reach a point of futility or deadlock, the disagreement "cannot be settled by negotiation" and the precondition to the jurisdiction of the ICAO Council is satisfied. In the view of the Court, a genuine attempt to negotiate can be made outside of bilateral diplomacy. Exchanges that take place in an international organization are also recognized as "established modes of international negotiation".

The Court notes that, in responding to the preliminary objection presented to the ICAO Council, Qatar cited a series of communications in June and July 2017 in which it urged the Council to take action with respect to the aviation restrictions. These communications referred both to the aviation restrictions and to provisions of the IASTA that, according to Qatar, are implicated by those restrictions. The Court further notes that many of the interactions relevant to the question whether the negotiation precondition has been met with regard to Article II, Section 2, of the IASTA took place in the context of Qatar's request pursuant to Article 54 *(n)* of the Chicago Convention. Moreover, some of these interactions involved Saudi Arabia, which is not a party to the present case. The Court recalls, however, that Article II, Section 2, of the IASTA provides that Chapter XVIII of the Chicago Convention shall be applicable to settlement of disagreements under the IASTA in the same manner as it applies to settlement of disagreements under the Chicago Convention. In considering whether the precondition of negotiation was fulfilled in this case, the Court finds it appropriate to take into account interactions that took place as a consequence of Qatar's invocation of Article 54 *(n)* of the Chicago Convention. Those interactions relate to aviation restrictions which were jointly adopted by four States, including the three Appellants, and which, according to Qatar, are inconsistent with the Appellants' obligations under

the IASTA. The Court further observes that the competence of ICAO unquestionably extends to questions of overflight of the territory of contracting States, a matter that is addressed in both the Chicago Convention and the IASTA. The overtures that Qatar made within the framework of ICAO related directly to the subject-matter of the disagreement that later was the subject of its application to the ICAO Council under Article II, Section 2, of the IASTA. The Court concludes that Qatar made a genuine attempt within ICAO to settle by negotiation its disagreement with the Appellants regarding the interpretation and application of the IASTA.

As to the question whether negotiations within ICAO had reached the point of futility or deadlock before Qatar filed its application to the ICAO Council, the Court has previously stated that a requirement that a dispute cannot be settled through negotiations "could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that . . . 'no reasonable probability exists that further negotiations would lead to a settlement'." In past cases, the Court has found that a negotiation precondition was satisfied when the parties' "basic positions have not subsequently evolved" after several exchanges of diplomatic correspondence and/or meetings. In the view of the Court, its inquiry into the sufficiency of negotiations is a question of fact.

The Court observes that, in advance of the ICAO Council's Extraordinary Session of 31 July 2017, which was to be held in response to Qatar's request, the Appellants submitted a working paper that urged the Council to limit any discussion under Article 54 *(n)* of the Chicago Convention to issues related to the safety of international aviation. During the Extraordinary Session, the Council focused on matters other than the aviation restrictions that later formed the subject-matter of Qatar's application to the ICAO Council, with particular attention to contingency arrangements to facilitate air traffic over the high seas. The Court considers that, as of the close of the Extraordinary Session, settlement of the disagreement by negotiation within ICAO was not a realistic possibility. The Court also takes into account developments outside of ICAO. Diplomatic relations between Qatar and the Appellants had been severed on 5 June 2017, concurrently with the imposition of the aviation restrictions. Under these circumstances, the Court considers that, as of the filing of Qatar's application before the ICAO Council, there was no reasonable probability of a negotiated settlement of the disagreement between the Parties regarding the interpretation and application of the IASTA, whether before the ICAO Council or in another setting. The Court also recalls that Qatar maintains that it faced a situation in which the futility of negotiation was so clear that the negotiation precondition of Article II, Section 2, of the IASTA could be met without requiring Qatar to make a genuine attempt at negotiations. Because the Court has found that Qatar did make a genuine attempt to negotiate, which failed to settle the dispute, it has no need to examine this argument.

For the reasons set forth above, the Court considers that the ICAO Council did not err in rejecting the contention advanced by the respondents before the Council that Qatar had failed to fulfil the negotiation precondition of Article II, Section 2, of the IASTA prior to filing its application before the ICAO Council.

2. Whether the ICAO Council erred by not declaring Qatar's application inadmissible on the basis of Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences (paras. 100-106)

The Court notes that Article 2 of the ICAO Rules for the Settlement of Differences sets out the basic information that is to be contained in a memorial attached to an application filed pursuant to Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA), in order to facilitate the ICAO Council's consideration of such applications. By requiring a statement regarding negotiations, subparagraph *(g)* of Article 2 takes cognizance of the negotiation precondition contained in Article II, Section 2, of the IASTA.

Qatar's application and memorial before the ICAO Council contain a section entitled "A statement of attempted negotiations", in which Qatar states that the respondents before the ICAO Council "did not permit any opportunity to negotiate" regarding the aviation restrictions. The Secretary General confirmed that she had verified that Qatar's application "compl[ied] in form with the requirements of Article 2 of the . . . Rules [for the Settlement of Differences]" when forwarding the document to the respondents before the ICAO Council. The question of substance, i.e. whether Qatar had met the negotiation precondition, was addressed by the Council in the proceedings on preliminary objections, pursuant to Article 5 of the ICAO Rules for the Settlement of Differences.

The Court sees no reason to conclude that the ICAO Council erred by not declaring Qatar's application before the ICAO Council to be inadmissible by reason of a failure to comply with Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences.

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For the reasons set forth above, the Court cannot uphold the third ground of appeal.

C. The first ground of appeal: alleged manifest lack of due process in the procedure before the ICAO Council (paras. 109-125)

The Court recalls that, in their first ground of appeal, the Appellants submit that the Decision of the Council "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".

The Court observes that, in its Judgment in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, it concluded that, in the proceedings at issue, the ICAO Council had reached the correct decision as to its jurisdiction, which is an objective question of law. The Court also observed that the procedural irregularities alleged by the Appellant did not prejudice in any fundamental way the requirements of a just procedure. The Court had no need to examine whether a decision of the ICAO Council that was legally correct should nonetheless be annulled because of procedural irregularities.

In the present case, the Court has rejected the Appellants' second and third grounds of appeal against the Decision of the ICAO Council. The Court considers that the issues posed by the preliminary objections that were presented to the Council in this case are objective questions of law. It also considers that the procedures followed by the Council did not prejudice in any fundamental way the requirements of a just procedure.

For the reasons set forth above, the first ground of appeal cannot be upheld.

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Recalling the Court's previous observation, in its Judgment in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, that the Chicago Convention and the IASTA give the Court "a certain measure of supervision" over decisions of the ICAO Council, the Court emphasizes that it will be best positioned to act on any future appeal if the decision of the ICAO Council contains the reasons of law and fact that led to the ICAO Council's conclusions.

III. OPERATIVE CLAUSE (PARA. 127)

For these reasons,

THE COURT,

(1) Unanimously,

Rejects the appeal brought by the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates on 4 July 2018 from the Decision of the Council of the International Civil Aviation Organization, dated 29 June 2018;

(2) By fifteen votes to one,

Holds that the Council of the International Civil Aviation Organization 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.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Judge* ad hoc Berman.

Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge *ad hoc* BERMAN appends a separate opinion to the Judgment of the Court.

Separate opinion of Judge Cançado Trindade

1. In the case of *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 IASTA* (ICAOB), Judge Cançado Trindade presents his separate opinion, composed of nine parts, wherein he begins by pointing out that, although he arrives at the conclusions of the *dispositif* of ICJ's Judgment (*ICAOB*, para. 127), he does so on the basis of a distinct reasoning, in particular in his own rejection of so-called "countermeasures" (para. 2). He selects this point, raised by the appellant States, so as to examine in his separate opinion their lack of legal grounds and their negative effects on the law of nations and on State responsibility, and to leave on the records the foundations of his own personal position thereon.

2. Judge Cançado Trindade begins by addressing "countermeasures" — unduly invoked by the appellant States — in breach of the foundations of the law of nations, and of State responsibility. In recalling that "the international legal order is based upon justice rather than force" (para. 10), he warns that

> "[c]ountermeasures are reminiscent of the old practice of retaliation, and, — whether one wishes to admit it or not, — they rely upon force rather than conscience. Recourse to them discloses the insufficient degree of development of the treatment of State responsibility" (para. 9).

3. Judge Cançado Trindade further warns that attention is to focus not on "coercive means", but rather "on conscience and the prevalence of *opinio juris communis*", keeping in mind "the very foundations of the international responsibility of States"; attention is thus "correctly focused on Law rather than force, on conscience rather than 'will', to the greater effectiveness of public international law itself" (para. 12). He much regrets that "countermeasures" have been raised by the appellant States in the present case of *ICAOB*, paying a disservice to international law (para. 13).

4. In sequence, Judge Cançado Trindade examines in detail the lengthy and strong criticisms of "countermeasures" presented in the corresponding debates of both the UN International Law Commission, as well as of the Sixth Committee of the UN General Assembly (parts III and IV, respectively), in the process of preparation (1992-2001) of the International Law Commission's Articles on State Responsibility (2001). He demonstrates how in those prolonged debates strong criticisms were made to the inclusion of "countermeasures" in that document, from jurists from distinct continents.

5. Yet, despite those heavy criticisms throughout the whole preparatory work of the corresponding provisions of that document, — he adds, — it is "surprising and regrettable" that there were supporters for the inclusion therein of "countermeasures", "without any juridical grounds"; furthermore, Judge Cançado Trindade adds,

> "it is likewise surprising and regrettable that the ICJ itself referred to 'countermeasures' in its Judgment of 25.09.1997 in the case of *Gabčíkovo-Nagymaros Project* (Hungary *versus* Slovakia, paras. 82-85), and again referred to it in the present Judgments of the ICJ of today in the two cases of *ICAOB* and *ICAOA* (para. 49 of both Judgments)" (para. 38).

6. Following that, he focuses on the prevalence of the imperative of judicial settlement over the State's "will", turning to further criticisms to the initiative of consideration of so-called "countermeasures" (paras. 40-41), and recalling the earlier lessons of true jurists, in previous decades, on the importance of the realization of justice (paras. 42-44). Judge Cançado Trindade then adds that, regrettably, "[o]nce again, in the present case, the ICJ reiterates its view that jurisdiction is based on State consent, which I have always opposed within the Court: in my perception, human conscience stands above *voluntas*" (para. 39).

7. He further recalls that this is the position he has been sustaining within the ICJ, as illustrated, e.g. by his long reasoning in his dissenting opinion in the case of *Application of the CERD Convention* (Georgia *versus* Russian Federation, Judgment of 01.04.2011) (paras. 45-52). In his understanding, there is need to secure "the reconstruction and evolution of the *jus gentium* in our times, in conformity with the *recta ratio*, as a new and truly *universal law of humankind*. It is thus more sensitive to the identification and realization of superior common values and goals, concerning humankind as a whole" (para. 52).

8. Judge Cançado Trindade then moves to another part (VI) of his separate opinion, wherein he presents his own reflections on international legal thinking and the prevalence of human conscience (*recta ratio*) over the "will". He begins with the identification and flourishment of *recta ratio* in the historical humanization of the law of nations as from the writings of its "founding fathers" at the XVIth and XVIIth centuries (paras. 54-63), focusing the emerging new *jus gentium* in the realm of natural law, developing until our times. The conception of *recta ratio* and justice, conceiving human beings as endowed with intrinsic dignity, came to be seen as "indispensable to the prevalence of the law of nations itself" (para. 54).

9. In sequence, he strongly criticizes the personification of the powerful State with its unfortunate a most regrettable influence upon international law by the end of the XIXth century and in the first decades of the XXth century; "voluntarist positivism", grounded on the consent or "will" of States, became the predominant criterion, denying *jus standi* to human beings, and envisaging "a strictly inter-State law, no longer *above* but *between* sovereign States", leading to "the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it against human beings", with "disastrous consequences of such distortion" (para. 64-65). Yet, — Judge Cançado Trindade adds, — the confidence in the *droit des gens* has fortunately survived, as

> "from the 'founding fathers' of the law of nations grounded on the *recta ratio* until our times, the jusnaturalist thinking in international law has never faded away; it overcame all crises, in its perennial reaction of human conscience against successive atrocities committed against human beings, which regrettably counted on the subservience and cowardice of legal positivism" (para. 66).

10. He adds that the "continuing revival" of natural law strengthens the safeguard of the universality of the rights inherent to all human beings, — overcoming self-contained positive norms, deprived of universality for varying from one social *milieu* to another, — and acknowledges the importance of fundamental principles of international law (para. 68). To sustain nowadays this legacy of the evolving *jus gentium*, — he proceeds, — amounts to keep on "safeguarding the universalist conception of international law", giving "expression to universal values, and advancing a wide conception of international legal personality (including human beings, and humankind as a whole); this can render viable to address more adequately the problems facing the *jus gentium* of our times, the international law for humankind" (cf. A. A. Cançado Trindade, *International Law for*

Humankind — Towards a New Jus Gentium, 3rd. rev. ed., The Hague, Nijhoff/The Hague Academy of International Law, 2020, pp. 1-655) (para. 69).

11. Judge Cançado Trindade further recalls that contemporary international law counts on "the mechanisms of protection of human beings in situations of adversity (International Law of Human Rights, International Humanitarian Law, International Law of Refugees) as well as the operation of the Law of International Organizations" (para. 70). Awareness of, and respect for, "the fundamental principles of international law are essential for the prevalence of rights" (para. 71). In his perception, the basic mistake of legal positivists has been "their minimization of the *principles*, which lie on the foundations of any legal system (national and international), and which inform and conform the new legal order in the search for the realization of justice" (para. 73).

12. This leads Judge Cançado Trindade to his next line of reflections, on the universal juridical conscience in the rejection of voluntarism and "countermeasures". He ponders that, for those who dedicate themselves to the law of nations, it has become evident that one can only properly approach its foundations and validity as from *universal juridical conscience*, in conformity with the *recta ratio*, which prevails over the "will". By contrast, legal positivism statically focuses rather on the "will" of States. In rejecting this view, he criticizes that

> "[h]umankind as subject of international law cannot at all be restrictively visualized from the optics of States only; definitively, what imposes itself is to recognize the limits of States as from the optics of humankind, this latter likewise being a subject of contemporary international law.
>
> It is clear that human conscience stands well above the 'will'. The emergence, formation, development and expansion of the law of nations (*droit des gens*) are grounded on *recta ratio*, and are guided by general principles of law and human values. Law and justice are interrelated, they evolve together. It is regrettable that the great majority of practitioners in international law overvalue the 'will' of the contending parties, without realizing the importance of fundamental principles and superior human values.
>
> Voluntarism and positivism have by themselves rendered a disservice to international law. So-called 'countermeasures' are an example of deconstruction ensuing therefrom, which should not appeal in legal practice" (paras. 75-78).

13. In sequence, attention is thus focused by Judge Cançado Trindade on law and justice interrelated, with general principles of law in the foundations of the new *jus gentium*. He identifies, as the remaining points to be here at last examined, the following ones: first, basic considerations of humanity in the *corpus juris gentium* (paras. 79-81); secondly, human suffering and the need of protection to victims; and thirdly, the interrelationship between law and justice orienting jurisprudential construction. As to the first point, he observes that nowadays the evolving universalization and humanization of the law of nations, is "faithful to the thinking of the 'founding fathers' of the discipline", and attentive to "the needs and aspirations of the international community, and of humankind as a whole" (para. 82).

14. As to the second point, he stresses the need to devote attention to the consequences of human cruelty, and the need to extend protection to those victimized by injustice and human suffering (paras. 83-85). He recalls that, in the historical year of 1948, the law of nations itself expressed concern for humankind, as exemplified by the successive adoptions, in that same year, e.g. of the OAS American Declaration of the Rights and Duties of Man (adopted on 02.05.1948), of

the UN Convention against Genocide (adopted on 09.12.1948), and of the UN Universal Declaration of Human Rights (adopted on 10.12.1948); the "International Law of Human Rights was at last seeing the light of the day, enhancing the position of human beings and their inherent rights in the *corpus juris gentium* from that historical moments onwards" (para. 86).

15. And as to the third point, Judge Cançado Trindade points out that acknowledgment of the interrelationship between law and justice has come to orient jurisprudential construction, so as "to avoid the undue and regrettable divorce between *law* and *justice*, which legal positivists had incurred into" (para. 87). It is clear that

> "*law and justice* are not at all put apart, they are interrelated and advance together. After all, it is in jusnaturalist thinking that the notion of *justice* has always occupied a central position, orienting *law* as a whole. In my own perception and conception, *justice* is found, in sum, at the beginning of all *law*, being, moreover, its ultimate end (A. A. Cançado Trindade, "Reflexiones sobre la Presencia de la Persona Humana en el Contencioso Interestatal ante la Corte Internacional de Justicia: Desarrollos Recientes", *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* — Universidad del País Vasco (2017), Vol. 17, pp. 223-271)" (para. 89).

16. Furthermore, he stresses that the law of nations "can only be properly considered together with its foundations, and its basic principles which permeate its whole *corpus juris*, in the line of natural law thinking" (para. 90). Judge Cançado Trindade then recalls (paras. 91-92 and 94) that he has been making this point along the years in the case-law of the ICJ, e.g.: his separate opinion in the ICJ's Advisory Opinion (of 22.07.2010) on the *Declaration of Independence of Kosovo*; his separate opinion in the ICJ's Advisory Opinion (of 25.02.2019) on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*; his dissenting opinion in the ICJ's Judgment (of 01.04.2011) in the case concerning the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation).

17. Moreover, in his separate opinion in the case of *Application of the Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination* (preliminary objections, Judgment of 08.11.2019, Ukraine *versus* Russian Federation), he draws attention to the relevance of the right of redress (para. 95). And, in the lecture he delivered at the Hague Academy of International Law in 2017, Judge Cançado Trindade warns that "la position fondamentale d'un tribunal international ne peut être que principiste, sans faire de concessions injustifiées au volontarisme des États"; in the "*jus gentium* en évolution, les considérations fondamentales de l'humanité jouent un rôle de la plus haute importance (A. A. Cançado Trindade, "Les tribunaux internationaux et leur mission commune de réalisation de la justice: développements, état actuel et perspectives", *Recueil des Cours de l'Académie de Droit International de La Haye* (2017), Vol. 391, pp. 59 and 61-62)" (para. 93).

18. An international tribunal, besides settling disputes, — he continues, — is entitled to state what the law is (*juris dictio*), keeping in mind that contemporary *droit des gens* applies directly to States, international organizations, peoples and individuals, as well as humankind. Advances achieved so far are due to the awareness that human conscience stands above the "will"; after all, the foundations of international law emanate clearly from human conscience, the universal juridical conscience, and not from the so-called "will" of individual States (paras. 96-99).

19. Such advances should, however, have been more sufficiently examined, as, in his perception, the ICJ, instead of concentrating on general principles of law, "has unduly given much importance to State 'consent'", an attitude that he has constantly criticized. In Judge Cançado Trindade's understanding, general principles of law are in the foundations themselves of international law, being essential for the realization of justice, and they are to be kept in mind within the larger framework comprising the expansion of international jurisdiction, and the concomitant expansion of the international legal personality and capacity, as well the international responsibility, — and the corresponding mechanisms of implementation (para. 99).

20. Such expansion (of international jurisdiction, legal personality and capacity, and responsibility), characteristic of our times, — he adds, — comes on its part "to foster the encouraging historical process in course of the *humanization* of international law". There have been cases with true advances with the necessary overcoming of persisting difficulties[1], discarding the dogmas of the past; the rights of the human person, — he stresses, — have been "effectively marking presence" also in the framework of the ICJ's traditional inter-State *contentieux* (para. 100).

21. At last, in an epilogue, Judge Cançado Trindade proceeds to the presentation of his final considerations on the points dealt with in his separate opinion. He emphasizes that the present cases (*ICAOB* and *ICAOA*) before the ICJ once again show that "international adjudication can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook" (para. 105). To him,

> "*[r]ecta ratio* and the jusnaturalist thinking in international law have never faded away until our times, as a perennial reaction of human conscience against the subservience and cowardice of legal positivism and the breaches of the rights of human beings. (…) The foundations and validity of the law of nations can only be properly approached as from the *universal juridical conscience*, in conformity with the *recta ratio*" (para. 106).

22. The traditional inter-State outlook of international law "has surely been overcome", with the expansion of international legal personality encompassing nowadays, besides States, international organizations, individuals and peoples, as well as humankind (para. 112). It is clearly sustained, along the present separate opinion, that the foundations of the law of nations emanate clearly from human conscience, — the universal juridical conscience, — and not from the so-called "will" of individual States (para. 111).

23. Judge Cançado Trindade sustains that "general principles of law are a manifestation of the universal juridical conscience", recalling permanent attention for the preservation of the ineluctable interrelationship between law and justice; the international community cannot prescind from "universal principles and values of the law of nations", which are essential for the realization of justice. The present case of *ICAOB* leaves it clear that so-called "countermeasures" are groundless, providing no legal ground whatsoever for any legal action (paras. 109-110); furthermore, it reveals "the importance of the awareness of the historical formation of the law of nations, as well as of the needed faithfulness of the ICJ to the realization of justice, which clearly prevails over the 'will' of States" (para. 114).

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[1] In some decisions along the last decade, the ICJ has known to go beyond the inter-State dimension, in rendering justice, for example: case of *A. S. Diallo* (Guinea *versus* D. R. Congo, Judgments on merits, of 30.11.2010; and on reparations, of 19.06.2012; both with his corresponding separate opinions); and case of *Frontier Dispute* (Burkina Faso *versus* Niger, Judgment on the merits, of 16.04.2013; also with his corresponding separate opinion); among others.

Declaration of Judge Gevorgian

In his declaration, Judge Gevorgian explains his disagreement with certain aspects of the Court's reasoning regarding the Applicants' second ground of appeal, particularly as contained within paragraphs 48 and 61 of the Judgment.

In his view, the Court is not justified in relying upon jurisprudence relating to its own competence — specifically its Judgment in *United States Diplomatic and Consular Staff in Tehran* — when assessing the competence of the ICAO Council. Significant differences between the two bodies — including the facts that the Council is composed not of independent judges but of Members representing contracting States, that those Members act on the instructions of their Governments, and that the Council primarily exercises functions of a technical and administrative nature — are reasons to consider that jurisdictional principles which apply to the Court do not apply equally to the ICAO Council.

Moreover, the Court goes too far in making the broad statement that the integrity of the ICAO Council's dispute settlement function "would not be affected" if the Council examined matters outside of civil aviation for the purpose of resolving a dispute over which it has jurisdiction. The basic principle remains that States are only subject to the jurisdiction of the Council to the extent they have consented to it, and States have not consented to the Council's adjudication of disputes unrelated to civil aviation. The need to adhere to the principle of consent is all the more important in the context of the ICAO Council, which has a narrow dispute settlement mandate.

Separate opinion of Judge *ad hoc* Berman

1. In his separate opinion, Judge *ad hoc* Berman agrees that the applicant States have failed to make out any of their three grounds of appeal and that therefore the appeal must be rejected. However the Court's further finding that the Council "has jurisdiction to entertain" the application submitted to it by Qatar has little relationship to the submissions actually put to the Court by the Parties on either side and, if left unqualified or unexplained, is all too likely to lead to misunderstanding or confusion in the future, in the application of Article 84 of the Chicago Convention. Judge *ad hoc* Berman therefore voted against subparagraph (2) of paragraph 127 of the Judgment and explains the reasons why, in the hope that this may be of real assistance to the ICAO Council in the future.

2. In Judge *ad hoc* Berman's view, it is far from clear, on the terms of Article 84, exactly what authority it sought to confer on the ICAO Council over and above that which arises from the other provisions of the Chicago Convention taken as a whole, notably the "mandatory" functions of the Council laid down in Article 54; what Article 84 adds to that must therefore be something to do with the nature or legal status of the Council's decision on an application made to it under Article 84, not about its competence to entertain the application in the first place. By using in the *dispositif* the term "jurisdiction" for the Council's functions under Article 84, with all of the connotations that term usually carries of judicial power and process, the Court has, regrettably, contributed to prolonging this confusion rather than setting out to dispel it.

3. Judge *ad hoc* Berman draws attention to the wording of Article 84, which is drafted to deal with "disagreements" between contracting States "relating to" the interpretation or application of the Convention. Although the heading uses the term "disputes" and there are two references to "dispute" in the body text, it remains the fact that what the Article opens the path for, and what the Council must then "decide", are "disagreement[s] between two or more contracting States" which, if not settled between them, may then be referred to the Council by any State "concerned in" the

disagreement. The Court's consistent practice, in regard to "jurisdictional" clauses, had been to give their text close and minute attention, following Vienna Convention principles of treaty interpretation. The Court's failure to enter into any consideration of the use of these different terms in Article 84 is therefore disappointing, as it is not at all difficult to give each of the two different terms, as used here, a full meaning of its own, and one which would thus illuminate the role and function cast on the Council by Article 84.

4. While therefore Article 84, taken as a whole, can certainly find a place of some kind within the framework of "dispute settlement" — in the broad ecumenical sense of Article 33 of the United Nations Charter — the language used, in Judge *ad hoc* Berman's view, is clearly not that of judicial settlement. And it is judicial settlement that carries with it the notion of "jurisdiction" *(jus dicere)* and therefore of the legally binding outcome that results from its exercise.

5. To the reasons given by the Court in paragraph 60 of the Judgment why the Council should not be regarded as a judicial organ in any ordinary sense, Judge *ad hoc* Berman adds the fact that the Members of the Council are accepted as acting on instructions from their governments, including in the exercise of their functions under Article 84. He further finds it perhaps even more significant that, in framing its own rules for the implementation of Article 84, the Council has itself provided for various actions — such as encouraging negotiation between the parties with its own assistance and appointing conciliators — that are naturally and typically associated with the highest executive organ of a significant technical agency, or with an *amiable compositeur*, but not with any kind of tribunal. The Judgment fails to extract from this the conclusions that should have been drawn.

6. Judge *ad hoc* Berman therefore questions whether the contracting States to the Chicago Convention, or in its turn the Council itself in seeking to give effect to their wishes, can have been thinking of Article 84 as endowing the Council with any kind of judicial power to decide, with binding legal effect, upon disputes between member State A and member State B. Taking into account the suggestive further fact that Article 84, on its literal terms, opens the right of appeal to *any contracting State*, whether or not party to a dispute or disagreement, he finds persuasive another reading of Article 84 that would see the Council as carrying, not "jurisdiction", but rather the high administrative function, drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings of general application as to what the Convention means and requires, whether or not part of specific disputes between member States over their mutual rights and duties. Under such a reading of Article 84, the Council's decisions would constitute authoritative determinations of general application having equal force for all the contracting States to the Chicago Convention, to the enormous benefit of the vital régime of international civil aviation. That would at the same time demarcate a clearer and more manageable role for the Court itself in its appellate function, without drawing it into questions of aviation policy. As, however, none of these issues were, disappointingly, gone into by the Parties in their argument, the question remains open, to be decided by the Court at some later stage when the opportunity and the need arise.

7. Judge *ad hoc* Berman adds two points of a more specific character, directed at particular aspects of the Judgment.

8. The first relates to paragraph 49 of the Judgment, where the Court inexplicably fails to draw the corollary from its central finding that the ICAO Council cannot be disseised of its competences under Article 84 by the fact that one side in a disagreement has defended its actions on a basis lying outside the Chicago Convention; it must necessarily follow, by the same token, that

the invocation of a wider legal defence cannot have the effect of extending or expanding the Council's competence under Article 84 either. This is implicit in what it has said, but the Court missed a valuable opportunity to clarify it expressly.

9. The second relates to the questions of due process disposed of by the Court somewhat brusquely in paragraphs 123-124 of the Judgment, which fail to subject to more nuanced attention, as contemporary conditions require, the cavalier approach to this question adopted in the only precedent case from 1972. Circumstances could readily be imagined, even if unlikely to occur, in which serious procedural irregularity might render a Council decision a nullity, or not legally correct. There should be no room for any impression, through overbroad language, that procedural irregularity was a matter of indifference to the Court. It was therefore welcome that the Court had at least reminded the ICAO Council, in paragraph 126 of the Judgment, that the very structure of Article 84 imposes certain obligatory requirements on the Council itself in order to make an effective reality out of the right of appeal laid down in that Article, notably the requirement to give reasons. It was disappointing that the Council adopted the decisions presently under appeal without so much as a hint at its reasoning, contrary to its own directly applicable rules; and it would have been better had the Court been prepared to say that doing so was not legally acceptable, for the Council's future guidance.

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