SEPARATE OPINION OF JUDGE *AD HOC* BERMAN

Appeal must be rejected but Court has missed the opportunity to offer much-needed clarification of Article 84 of the Chicago Convention — Separate finding that ICAO Council has "jurisdiction" not required by Party submissions and likely to lead to future misunderstanding or confusion unless qualified or explained — Many difficulties in understanding and interpreting Article 84 in itself and in light of powers already conferred on Council by Chicago Convention — Failure of the Court and of the Parties to try to unpick why Article 84 focuses primarily on "disagreements" not disputes — While dispute presupposes disagreement, not every disagreement constitutes a dispute — Multiple reasons, deriving from ICAO Council's nature, composition, mode of operation, and its own Rules, why Council is not a judicial organ and its dispute settlement functions are not judicial ones justifying the term "jurisdiction" — Council's functions rather to give authoritative rulings based on its specialist expertise, whether or not part of specific inter-State disputes — Such a reading would respect terms of the Convention, make greater practical sense, and open way to clearer and more manageable role for Court itself in its appellate function — These issues regrettably not argued out by Parties, however, so must await some future occasion to be decided — If Applicants' choice of non-Chicago Convention defence cannot deny ICAO Council its competence, then it cannot extend Council's competences under Article 84 either, and Court should have been prepared to say so — Court should have subjected to more nuanced attention the cavalier treatment of due process considerations in 1972 Judgment — No room for any impression that serious procedural irregularity is of no concern to Court, or that such irregularity may (should it occur) render a Council decision a nullity or of no legal effect — Right that Court should remind the Council that Article 84 imposes substantive legal requirements of its own on the Council in order to make Court's appellate functions effective, notably requirement to give reasons for Council's decisions

1. I have no great difficulty in associating myself with the Court's dismissal of this appeal. The applicant States have failed to make out any of their three grounds of appeal against the Decision of the ICAO Council (which I will for convenience refer to simply as "the Council"), and the inevitable consequence is that the appeal as such must be rejected. Nevertheless, the Court has thought it useful to add, in the second part of the *dispositif* of its Judgment, a formal finding that the Council "has jurisdiction to entertain" the application submitted to it by Qatar. These are sweeping terms which have little relationship to the submissions actually put to the Court by the Parties on either side. They are terms which, if left unqualified or unexplained, are all too likely to lead to misunderstanding or confusion in the future, in the application of Article 84 of the Chicago Convention. And, as the Court has missed the opportunity to perform, in its Judgment, the necessary task of explanation or even qualification, I have found myself constrained to vote against subparagraph (2) of paragraph 126, and should explain the reasons why. I do so in the hope that this may be of real assistance to the Council in the future in carrying out the awkward and not altogether clear-cut task that has been laid upon it by Article 84. What I say may well turn out to be of greater practical importance for the case of a final decision by the Council on the merits of a question of interpretation or application of the Chicago Convention, but that does not make it out of place in appeal proceedings on what the Judgment refers to as a question of "jurisdiction" as the precursor of an eventual decision on the merits.

2. Article 84 is a difficult and troubling provision, raising numerous problems over its interpretation, as well as uncertainties over what the intention was that lay behind it. It is hardly surprising to find in the historical record that it has regularly raised perplexity and anxiety within the Council itself over what it can and should do to realize the mandate Article 84 casts upon it, and how

that should be done. Much of that can be seen reflected in the controversy and uncertainty that dogged the processes followed within ICAO in the handling of Qatar's initial complaint, and which re-emerged in the present proceedings before the Court.

3. If the appellate jurisdiction conferred on this Court by Article 84 is reasonably clear — or at least clear enough (though see paragraphs 12 and 18 below), it is far from clear, on the terms of the Article, exactly what authority it seeks to confer on the ICAO Council over and above that which arises from the other provisions of the Chicago Convention taken as a whole. The Council already has, for example, the "[m]andatory"[1] function under Article 54 to "[c]onsider any matter relating to the Convention which any contracting State refers to it", as well as to "[r]eport to contracting States any infraction of this Convention". What Article 84 adds to that must therefore be something to do with the nature or legal status of the decision which the Council reaches 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.

4. Article 84 is drafted to deal with "disagreements" between contracting States, disagreements "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 by agreement between them, may then be referred to the Council by any State "concerned in" the disagreement. The Court's failure to enter into any consideration of the use of these two different terms in Article 84 is disappointing. The Court is of course right to point out (in paragraph 29), by reference to the Judgment in *Mavrommatis Palestine Concessions*, that for there to be a "dispute" presupposes a "disagreement", but this by no means entails that every disagreement constitutes a dispute. 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.

5. 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 with its references to negotiation, enquiry, mediation, conciliation, etc. — the language used is 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.

6. The Court has, again rightly, made it plain that the Council should not be regarded as a judicial organ in any ordinary sense. The Judgment lays out, in paragraph 60, some compelling reasons why that is so, and others could readily be added, including the factor which figured largely in the arguments of the Parties, namely that the Members of the Council are accepted as acting on instructions from their Governments, even in the exercise of their functions under Article 84. To which I would myself add a further factor, and one that seems to me of possibly even greater significance. This is that, in framing its own Rules for the implementation of Article 84[2], the Council builds expressly on the notions of "disagreement" and "not settled by negotiation" which are found

[1] The term is drawn from the heading to Article 54.

[2] Entitled, incidentally, Rules for the Settlement of *Differences* (emphasis added).

in the Article. It does this by laying a mandatory requirement on itself to consider at an early stage (Article 6 of the Rules) whether to invite the States concerned to enter into direct negotiations, and even allows it expressly to suspend its own proceedings for that purpose, to offer its own assistance in negotiations, to appoint conciliators, have enquiries carried out, procure expert opinions, etc. (Articles 8 and 14 of the Rules). These are actions 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 touches on this, in paragraph 87, but does so far too lightly, indeed almost casually, and thus fails to extract from it the conclusions that should have been drawn.

7. All of the above is so far removed from the fundamental concepts underlying judicial or legal settlement of disputes, anchored as they are in the objective, independent, and detached assessment of arguments of fact and law, that it must give one pause. Pause, in other words, to consider 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. It can be remarked in this connection that, whereas the Chicago Convention goes out of its way, in Article 86, to confer "final and binding" status on appellate decisions of this Court (or an arbitral tribunal), it says nothing at all a few lines earlier about the status in law of a decision arrived at by the Council on a "disagreement between two or more contracting States relating to the interpretation or application of the Convention".

8. Moreover, I detect another significant clue within the text of Article 84 itself. The Article opens the right to appeal against a Council decision of the kind just mentioned, not to any State "party" to a "dispute", nor even to any State "concerned in a disagreement", but in fact to *any contracting State* to the Convention without further qualification. If that means what it says, it takes one a long way away from any normal dispute settlement process, and most certainly one involving elements lying outside the régime of the Chicago Convention. True it is that no textual questions of this kind found much place in the arguments of the Parties on either side, and that the Court may therefore have some justification for not entering into them itself in any detail. But it seems to me elementary that any judgment of the Court that bases itself on a concept of "jurisdiction" is duty bound to give some prior reasoned consideration to the actual nature and quality of the powers or competences that had been conferred on the body thought to possess such "jurisdiction". And that, in turn, can only be done by close analysis of Article 84 and associated articles according to the hallowed formula of the Vienna Convention on the Law of Treaties, i.e. to discern the meaning to be given to their terms in their context and in the light of the object and purpose of the treaty as a whole.

9. The Court has always given close and minute attention of this kind to jurisdictional clauses[3]. The more "jurisdictional" the Court was inclined to find Article 84 to be, the more the Court was under a duty to give that kind of detailed attention to the Article's interpretation. A true "jurisdictional" clause — perhaps more so than any other, inasmuch as it embodies, along with general consent to be bound by the treaty as a whole, specific consent by each contracting State to the exercise of that jurisdiction and the consequences of its exercise — has to be interpreted as it is, with all its difficulties and ambiguities, not according to how later interpreters might themselves have written the clause if tasked with doing so.

[3] See, most recently, *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)*, para. 57.

10. For all of the above reasons and more, it seems to me that there is another reading of Article 84, in its context within the Chicago Convention as a whole, including specifically the other powers and functions to be carried out by the Council. Rather than conceiving of the Council as endowed with "jurisdiction" of any kind to settle disputes between particular member States, this reading of the Convention would see the Council as carrying the high administrative function, drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings as to what the Convention means and requires, *whether or not* such issues form part of specific disputes between member States over their particular rights and duties towards one another. Once the matter is viewed from that angle, the great majority of the questions contested between the Parties in these proceedings take on a quite different aspect and become tractable. As indeed do many of the textual questions of interpretation raised above.

11. Such a reading of Article 84 would moreover have one inestimable advantage, in fact two.

12. On the one hand, far from subjecting the decisions of the Council, as a dispute settlement role would do, to the common rule embodied in Article 59 of the Court's own Statute, i.e. that they had binding force only between the States involved and in respect of that particular situation, it would turn the Council's decisions into 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 on which so much of the modern world depends. And on the other hand, it would demarcate a clearer and more manageable role for the Court itself in its appellate function, confining it to the correct interpretation of the provisions of the Convention and their proper application, but without drawing the Court into decisions of aviation policy in which it might find itself as much adrift as the Council might find itself over questions of international law.

13. There is, in other words, much to be said for such a reading, which respects the actual terms of Article 84 and its associated provisions, and also makes good practical sense. But I must exercise caution in expressing myself on the subject, as the underlying issues, rather to my disappointment, have not been argued out by the Parties before the Court. The question therefore remains open, to be decided by the Court at some later stage when the opportunity and the need arise.

14. Having reached this point, I should like to add two points of a more specific character, directed at particular aspects of the Judgment.

15. The first relates to paragraph 49 of the Judgment.

16. I particularly regret the Court's inexplicable refusal to draw the corollary from its main finding in this paragraph, which is central to the whole disposition of the case. The Court says (in my view rightly) 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. But 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 the Court has said. But by failing to say so expressly, the Court has missed a valuable opportunity to clarify what the Council may properly do within the parameters of Article 84, which would certainly have been of value to the Council in future.

17. The second relates to the questions of due process raised under the first ground of appeal, and disposed of by the Court somewhat brusquely in paragraphs 122-123 of the Judgment. In these two brief paragraphs, the Court does little more than recapitulate in summary form, without further discussion, the approach taken by the Court in the only precedent case some forty years ago.

18. The cavalier approach to this question adopted by the Court in 1972, and (regrettably) not subjected today to the more nuanced attention called for in contemporary conditions, ignores the possibility that a given decision of the Council might for some particular reason, or for a combination of reasons, be tainted to such an extent by fundamental procedural irregularity that the Court would find itself obliged to treat that purported decision as a nullity or, in the French terminology, *une décision nulle et non avenue*. Or indeed that, in certain perfectly conceivable circumstances, serious procedural irregularity may simply prevent a resulting answer to a question of law being considered as legally "correct" at all. Were that to happen, the Court would be confronted with the question: What should be understood as implicit in the notion of "appeal", in the way the concept is employed in Article 84, as to the functions of the Court as an appellate instance and as to the range of the remedies available to it flowing from that? One naturally hopes that a situation of that kind will never arise, in a highly responsible specialized agency like ICAO, but unlikelihood is not impossibility, and it would be unfortunate if overbroad language left behind it any impression that procedural irregularity was a matter of indifference to the Court. It is therefore welcome that the Court has at least reminded the ICAO Council, in paragraph 125 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; in some future instance, for example, especially if a substantive decision on the merits by the Council was under challenge, it is very hard to imagine how this Court might properly exercise its functions as an instance of appeal against the decision without the Council having duly set out why it had adopted its decision and what the reasoning behind it was. It is therefore a source of disappointment that the Council, in the face of the provisions of its own directly applicable Rules, adopted the decisions presently under appeal without so much as a hint at its reasoning, and would appear in doing so to have hidden behind the possibility (under a separate set of procedural rules) of adopting the decision by secret ballot. The effect was to elevate a procedural device above the status not only of the applicable substantive rules but also above the international Convention itself from which those rules derived. That is not legally acceptable. Moreover, it can in itself be regarded as a question of the "interpretation or application of the Chicago Convention", and it would have been better had the Court been prepared to say so, for the Council's future guidance.

(Signed) Sir Franklin BERMAN.
