substantive limb of Article 2.[24] Two statements provided by Azerbaijan were held to be insufficient to rebut the overwhelming body of evidence of a causal link between the Armenian ethnicity of R.S's victims and the virtual impunity and glorification granted to him by Azerbaijani authorities. Genuinely rare as it is for international human rights bodies to establish discriminatory animus, the Court had no difficulty doing so here.

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International Civil Aviation Organization—jurisdiction and admissibility—precondition of negotiation—due process—ICJ's appellate function—annulment

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). Judgment. At https://www.icj-cij.org/public/files/case-related/173/173-20200714-JUD-01-00-EN.pdf.

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). Judgment. At https://www.icj-cij.org/public/files/case-related/174/174-20200714-JUD-01-00-EN.pdf.

International Court of Justice, July 14, 2020.

In two nearly identical judgments dated July 14, 2020, the International Court of Justice (ICJ or Court) reviewed a decision taken by the Council of the International Civil Aviation Organization (ICAO) in a dispute about aviation restrictions imposed on Qatar by Bahrain, Egypt, Saudi Arabia, and the United Arab Emirates (UAE).[1] These cases represent the second time that the Court has heard an appeal concerning a decision of the ICAO Council, a treaty body which has executive, administrative, and dispute settlement functions. As in 1972, when the Court heard an appeal brought by India against Pakistan, the Court's 2020 judgments concern a Council decision on preliminary objections to jurisdiction and admissibility.[2] These judgments not only reinforce the ICJ's findings in its 1972 judgment, which raised similar procedural issues, but they also highlight the scope and the limits of the Court's rare appellate function.

[24] Racial animus was ultimately not proven in *Nachova and Others v. Bulgaria* [GC], App. Nos. 43577/98, 43579/98 (2005). This was largely because the Chamber in the case wanted to reverse the burden of proof, whereas the Grand Chamber did not. See *id.*, paras. 156–57.

[1] The two judgments do not contain identical paragraph numbers. Paragraph references in this case note are to *Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation*.

[2] Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), Judgment, 1972 ICJ Rep. 46 (Aug. 18).

The underlying dispute arose on June 5, 2017, when the Appellants imposed a series of aviation restrictions on Qatar, in addition to severing diplomatic relations with and imposing other restrictive measures on Qatar. The Appellants adopted the blockade in response to Qatar's alleged noncompliance with its counter-terrorism and nonintervention obligations under the Riyadh Agreements, which were concluded in 2013 and 2014 between Qatar and other members of the Gulf Cooperation Council. The aviation restrictions barred Qatar-registered aircraft from landing at or departing from the airports of the Appellants and denied them the right to overfly their territories. The restrictions also applied to non-Qatar registered aircraft flying in and out of Qatar without prior approval from the Appellants' civil aviation authorities.

On October 30, 2017, Qatar initiated proceedings before the ICAO Council against the Appellants. Qatar claimed that the aviation restrictions adopted by Bahrain, Egypt, Saudi Arabia, and the UAE violated their obligations under the Convention on International Civil Aviation (Chicago Convention) and the International Air Services Transit Agreement (IASTA). Qatar invoked both treaties because Saudi Arabia is a party only to the IASTA. Qatar referred the dispute under the Chicago Convention to the Council on the basis of Article 84, a compromissory clause which provides that:

> 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. . . . 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. . . .

Qatar referred the dispute under the IASTA to the Council on the basis of Article II, Section 2, of that treaty, which provides that disagreements relating to its interpretation or application are subject to the dispute settlement provisions of the Chicago Convention.[3]

The respondents raised two preliminary objections before the Council. First, they argued that it lacked jurisdiction under the Chicago Convention and the IASTA because the "real issue" in dispute lay beyond the scope of these treaties. They characterized the real issue as Qatar's noncompliance with the Riyadh Agreements, and further claimed that their aviation restrictions represented lawful countermeasures, taken in response to Qatar's noncompliance. Second, they argued that the Council lacked jurisdiction (or in the alternative, that Qatar's claim was inadmissible) because Qatar had not fulfilled the precondition of negotiation, as set out in Article 84 of the Chicago Convention; Article II, Section 2 of the IASTA; and Article 2(g) of the ICAO Rules for the Settlement of Differences. On June 29, 2018 the Council adopted a decision rejecting these objections, stating that "the preliminary objection of the Respondents is not accepted" without providing any explanation (para. 25).

On July 4, 2018, the Respondents appealed the Council's decision by submitting a joint application to the ICJ, pursuant to Article 84 of the Chicago Convention. In addition, Bahrain, Egypt, and the UAE submitted a joint application to the ICJ pursuant to Article II, Section 2, of the IASTA. The Court declined Qatar's request to join the proceedings, and instead organized "combined hearings" in the two cases (para. 16).

[3] Chicago Convention on International Civil Aviation, ch. XVIII, Dec. 7, 15 UNTS 295.

At the outset, the Court recalled that its supervisory role in relation to the ICAO Council involves determining "whether the impugned decision is correct" (para. 36). The Court determined that in this case it had to decide whether the Council erred in rejecting the Appellants' preliminary objections concerning jurisdiction and admissibility. By defining its supervisory role in this manner, the Court implicitly rejected the Appellants' argument that an appeal under Article 84 of the Chicago Convention may encompass procedural complaints about denial of due process, as well as questions of law.

The remainder of the judgments concerns the Appellants' three grounds of appeal against the Council's June 2018 decision. The Appellants submitted that: (1) the Council's decision should be set aside because it was "manifestly flawed and in violation of fundamental principles of due process and the right to be heard" (para. 37); (2) the Council lacked jurisdiction (or in the alternative Qatar's claims were inadmissible) because a decision on the merits of the dispute would require the Council to rule on questions that fall outside of its jurisdiction; and (3) Qatar had failed to satisfy the precondition of negotiation, as set out in the Chicago Convention and the IASTA.

The Court decided initially to examine the second and third grounds of appeal. The Appellants' second ground of appeal was that the ICAO Council could not resolve Qatar's claims regarding the lawfulness of the civil aviation restrictions without dealing with the "wider dispute" between the parties, over which the Council lacks competence (para. 42). The wider dispute, according to the Appellants, involved Qatar's alleged violations of the Riyadh Agreements.

The Court considered that the Council's jurisdiction was unaffected by the fact that the dispute related to a broader political context. The Court rejected the Appellants' argument that the Council's jurisdiction was precluded by the countermeasures, a circumstance precluding wrongfulness under the law on state responsibility. The Court recalled its 1972 judgment in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, in which it noted that it would be impermissible to allow respondents to control the competence of the tribunal or organ concerned by casting a defense on the merits in a particular form.[4] In other words, the competence of the Council, as well as the Court, does not depend on the defenses raised with respect to the merits. The Court accordingly upheld the Council's rejection of the Appellants' first preliminary objection concerning jurisdiction.

The ICJ also rejected the Appellants' alternative argument that Qatar's claims were inadmissible on grounds of "judicial impropriety" because they did not relate exclusively to matters of civil aviation. The Court noted the difficulty involved in applying the concept of judicial propriety to the Council, which has executive and administrative functions, in addition to its role in the settlement of disagreements between contracting states (para. 60). The Court concluded 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 exclusive purpose of deciding a dispute which falls within its jurisdiction" (para. 61).

The Appellants' third ground of appeal concerned Qatar's alleged failure to negotiate prior to filing its application with the Council. The Court considered that Article 84 of the Chicago Convention imposes a "precondition of negotiation" which must be fulfilled in order to establish the Council's jurisdiction (para. 89). According to the Court, this precondition requires a

[4] Appeal Relating to the Jurisdiction of the ICAO Council, *supra* note 2, para. 27.

contracting state to make a "genuine attempt" to negotiate with other concerned state(s), whether through bilateral diplomacy or in the context of an international organization (paras. 89–90). If the attempted negotiations become futile or deadlocked, then the precondition has been satisfied.

The Court concluded that Qatar made a genuine attempt, within the context of ICAO, to settle its disagreement with the Appellants. The Court took into consideration Qatar's communications with the ICAO Council in June and July 2017, in which Qatar urged the Council to take action with respect to the Appellants' aviation restrictions. These communications specifically referenced violations of provisions of the Chicago Convention and the IASTA. The Court further concluded that at the time Qatar filed its application before the Council, there was "no reasonable probability of a negotiated settlement" of its disagreement with the Appellants (para. 96). The Court noted that the Appellants were unwilling to seek a resolution of the disagreement over the aviation restrictions within the context of the ICAO Council. Furthermore, beyond ICAO, the Appellants had severed diplomatic relations with Qatar on June 5, 2017 and senior officials of the Appellants had indicated that they would not negotiate with Qatar unless Qatar complied with a series of demands. The ICJ accordingly rejected the Appellants' contention that Qatar had not fulfilled the negotiation precondition.

Finally, the Court dispensed with the Appellants' first ground of appeal—the alleged manifest lack of due process in the procedure before the ICAO Council. The Appellants called upon the Court to hold that the decision of the Council was "null and void *ab initio*" for a host of procedural reasons, namely: the Council gave no reasons for its decision; there were no deliberations prior to the decision; the Council voted by secret ballot; the Appellants were together given the same pleading time as Qatar; the Council incorrectly required nineteen rather than seventeen out of thirty-six members to uphold the preliminary objections; and the decision refers to just a single "preliminary objection" (paras. 108–15). The Council's failure to state its reasons in the decision was notably not in keeping with the Council's Rules for the Settlement of Differences.[5] The ICJ decided, without elaboration, that the Council's procedures in this case "did not prejudice in any fundamental way the requirements of a just procedure" (para. 123). After rejecting the first ground of appeal, the Court emphasized, in the last substantive paragraph of the judgments, 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" (para. 125).

The ICJ thus unanimously rejected the appeal brought by the Appellants from the decision of the Council. It held, by fifteen votes to one, that the Council had jurisdiction to entertain the application submitted to it by Qatar and that the application is admissible.

* * * *

These judgments disposed of one aspect of a multifaceted conflict between Bahrain, Egypt, Saudi Arabia, and the UAE (often referred to as "the Quartet") and other states that are members of the Gulf Cooperation Council. The term "conflict" may be better suited than the term "dispute" for the purposes of describing the "general state of hostilities" between the Quartet and Qatar over not only aviation restrictions, but more significantly, counter-terrorism and

[5] ICAO Rules for the Settlement of Differences, Art. 15(2)(v).

nonintervention obligations.[6] At its core, this conflict relates to Qatar's alleged noncompliance with the Riyadh Agreements, which were first made publicly available during the ICJ proceedings.[7] The First Riyadh Agreement of 2013 requires the parties (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE) to refrain from interfering in each other's internal affairs, including through support for "antagonistic media," meaning in particular Al-Jazeera, which is based in Qatar. In addition, the First Riyadh Agreement provides that the parties shall not "support the Muslim Brotherhood" or other groups or individuals who threaten their security and stability. The Second Riyadh Agreement of 2014 sets out an implementing mechanism and the Third Riyadh Agreement of 2014 includes, inter alia, an obligation to "cease all media activity directed against the Arab Republic of Egypt in all media platforms" including Al-Jazeera and Al-Jazeera Mubashir Masr, which operated in Cairo, Egypt from 2011–2014. While Egypt is not a party to the Riyadh Agreements, it is an intended beneficiary of them.[8]

The judgments make only brief reference to the Riyadh Agreements, which is understandable given that the dispute concerned the Council's jurisdiction over the Chicago Convention and the IASTA. The Court's discussion of the Riyadh Agreements was unnecessary to resolve these appeals concerning jurisdiction and admissibility. But the origins of this procedural dispute can only be fully understood against this background conflict, which the Appellants characterized as "the real dispute." The Parties' agents also dwelled on this background conflict at the beginning of the oral proceedings. The agents for the Appellants alleged that Qatar has harbored extremist and terrorist groups that destabilize other countries in the region (particularly Egypt), permitted the dissemination of hate speech by Al-Jazeera, and even paid a ransom of hundreds of millions of U.S. dollars to terrorist groups.[9] For its part, Qatar's agent argued that what the Appellants "call terrorism and intervention in internal affairs by Al Jazeera is actually free expression." The agent further defended Al-Jazeera as an independent media outlet, and a "public utility private corporation," which is funded by the government of Qatar just like the BBC or Radio France.[10]

[6] John Collier & Vaughan Lowe, The Settlement of Disputes in International Law: Institutions and Procedures 1 (2000).

[7] Riyadh Agreement, Nov. 23, 2013, UN Doc. I-55378 (First Riyadh Agreement); Mechanism Implementing the Riyadh Agreement, Apr. 17, 2014, UN Doc. A-55378 (Second Riyadh Agreement); Supplementary Riyadh Agreement, Nov. 16, 2014, UN Doc. A-55378 (Third Riyadh Agreement) (see Annexes 2–4 of the Appellants' Joint Application Instituting Proceedings, July 4, 2018) (collectively, Riyadh Agreements); Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (Bahr., Egypt, Saudi Arabia and U.A.E. v. Qatar); Appeal Relating to the Jurisdiction of the ICAO Council Under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahr., Egypt and U.A.E. v. Qatar), Verbatim Record, CR 2019/14, para. 5 (Int'l Ct. Just. Dec. 2, 2019).

[8] Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation, *supra* note 7; Appeal Relating to the Jurisdiction of the ICAO Council Under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahr., Egypt and U.A.E. v. Qatar), Verbatim Record, CR 2019/13, para. 6 (Int'l Ct. Just. Dec. 2, 2019).

[9] *Id.*, paras. 2, 8–9 (Ghaffar); para. 7 (Al-Otaiba).

[10] Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation, *supra* note 7; Appeal Relating to the Jurisdiction of the ICAO Council Under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahr., Egypt and U.A.E. v. Qatar), Verbatim Record, CR 2019/15, paras. 21–22 (Al-Khulaifi) (Int'l Ct. Just. Dec. 3, 2019).

In this context, international litigation is perhaps best seen as a way of managing, rather than resolving, the wider conflict between Qatar and its Persian Gulf neighbors and Egypt. This conflict has given rise to a series of specific disputes, which Qatar, in particular, has framed as legal disputes and pursued before a range of international fora, including not just the ICAO Council, but also the ICJ,[11] the World Trade Organization (WTO) Dispute Settlement Body,[12] and the Committee for the Convention on the Elimination of All Forms of Racial Discrimination.[13] For Qatar, a small state at odds with its Persian Gulf neighbors, including the regional power Saudi Arabia, international law and international litigation represent tools of conflict management. The ICJ's judgments should be seen against this backdrop.

From a procedural perspective, these judgments also shed light on the ICJ's unique and rarely invoked appellate function. Appellate proceedings in international dispute settlement are very much the exception rather than the rule. Beyond the Grand Chamber of the European Court of Human Rights and the WTO Appellate Body, which is not in operation at the time of writing, international courts and tribunals largely lack mechanisms to appeal decisions. International adjudication is typically nonhierarchical, and the judgments and awards are final and binding.[14] The Chicago Convention's provision for appeals from ICAO Council decisions to the ICJ constitutes a rare exception (Art. 84). While the Chicago Convention explicitly provides for appeals to the ICJ or an arbitration tribunal, the ICJ Statute does not itself contemplate the possibility of the Court receiving an appeal.[15] The Rules of Court, however, address "special reference to the Court," and provide that the rules governing contentious cases shall also apply to matters which have been "the subject of proceedings before some other international body."[16] The Statute and the Rules of Court do not, however, use the word "appeal" or define the scope of the Court's appellate function.

Yet, the scope of the ICJ's appellate function merits attention, as the Appellants' first ground of appeal tested the boundaries of the Court's role as an appellate body. By asking the Court to review not just the correctness of the Council's Decision in law, but to declare it "null and void *ab initio*" on account of serious due process violations, the Appellants conflated the distinction between appeal and annulment. Both appeal and annulment fall under the umbrella of post-adjudicatory proceedings, but they are fundamentally distinct from one another.[17] Post-adjudicatory proceedings, which allow parties to challenge decisions, include not only appeal and annulment, but also interpretation and revision, the latter being more

[11] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.).

[12] United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights (DS526); Bahrain – Measures Relating to Goods and Services, and Trade-Related Aspects of Intellectual Property Rights (DS527); Saudi Arabia – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights (DS528); Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (DS567).

[13] Qatar v. Kingdom of Saudi Arabia, CERD/C/99/5 (Aug. 30, 2019); Qatar v. United Arab Emirates, CERD/C/99/3 (Aug. 30, 2019).

[14] *See, e.g.*, ICJ Statute, Arts. 59–60.

[15] Karin Oellers-Frahm, *International Courts and Tribunals, Appeals*, *in Max Planck Encyclopedia of Public International Law*, para. 23 (last updated Jan. 2019).

[16] ICJ Statue, *supra* note 14, Art. 87(1).

[17] Christoph Schreuer, *From ICSID Annulment to Appeal: HalfWay Down the Slippery Slope*, 10 L. & PRACTICE INT'L CTS. & TRIBUNALS 211, 212 (2011).

common at the ICJ.[18] While appeal proceedings allow parties to seek a review of substantive decisions made at first instance, annulment proceedings allow parties to seek a review of grave procedural errors, such as excess of power or improper constitution of the tribunal.[19] Appellate and annulment proceedings also yield distinct outcomes. Appellate proceedings allow for mistakes to be corrected by the appellate body, which has the power to replace the lower court's decision, whereas annulment proceedings allow for the original decision to be invalidated by the annulment body on procedural grounds. Depending on the basis for its jurisdiction, the ICJ has the capacity to act as both an appellate body, and as an annulment body, and at various points in the past it has functioned in both capacities.[20] An appellate mechanism for investment disputes, which is currently under discussion within the framework of the United Nations Commission on International Trade Law, could potentially possess both appellate and annulment functions.[21]

In the judgments, the Court did not remark upon the Appellants' conflation of appeal and annulment proceedings. But the judgments do suggest a reluctance or unwillingness to take up an annulment-like ground of appeal. The Court departed from the order in which the Appellants presented their arguments (thereby falling back on one of its standard avoidance techniques), and considered the Appellants' first ground last, and very briefly (paras. 122–25). The Court limited itself to noting that the preliminary objections heard by the Council present "objective questions of law," and that "the procedures followed by the Council did not prejudice in any fundamental way the requirements of a just procedure" (para. 123). The judgments do not, however, include any analysis of the Appellants' numerous and specific arguments about procedural irregularities. The Court thereby avoided embracing an annulment function, for which the Chicago Convention does not provide.

In the penultimate paragraph of the judgments, however, the Court notes the Council's failure to include any reasons in its 2018 decision, as is required by the Council's Rules for the Settlement of Differences (para. 125).[22] 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" (*id.*). This paragraph notably stands alone, with two asterisks above it (separating it from the Court's consideration of the Appellants' first ground of appeal), and three asterisks below it (separating it from the *dispositif*).[23]

[18] Chester Brown, A Common Law of International Adjudication 156–58 (2007). While the judgments at issue admittedly concern interlocutory, rather than post-adjudicatory appeals, it is nevertheless useful to understand appeal and annulment as two separate types of proceedings that both fall within the post-adjudicatory umbrella.

[19] Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 Recueil de Cours (1996); Oellers-Frahm, *supra* note 15, para. 6. For a provision governing annulment, see Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 52, Mar. 18, 1965, 575 UNTS 159.

[20] Cases in which the ICJ considered itself competent to function in an annulment capacity include *Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, Judgment, 1960 ICJ Rep. 192 (Nov. 18), and *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, Judgment, 1991 ICJ Rep. 53 (Nov. 12).

[21] UNCITRAL, Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate Mechanism and Enforcement Issues, UN Doc. A/CN.9/WG.III/WP.202 (Nov. 12, 2020).

[22] ICAO Rules for the Settlement of Differences, *supra* note 5, Art. 15(2)(v).

[23] *See also* 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 (Ukr. v. Russ.), Order on Preliminary Objections, para. 104 (Int'l Ct. Just. Apr. 19, 2017).

In remarking on the Council's procedural shortcoming, the Court is thereby careful not to include this paragraph in its consideration of the Appellants' arguments about grounds for annulment. Instead, the Court couches this warning as part of its supervisory function in relation to the ICAO Council. Moreover, the positioning of this paragraph, by itself and at the end of the judgments, allows the Court to emphasize the extent to which this practice by the Council is unsatisfactory and should change (sep. op., Berman, J. *Ad Hoc*, para. 18).

Unfortunately, the limited practice of the Council under Article 84 of the Chicago Convention suggests that change may not be on the horizon.[24] The Council only rarely deals with interstate disputes, and it has a history of not including reasons in its decisions.[25] The Council, after all, is a political body with mainly nonlawyer members who represent their states and may not be well-positioned to adjudicate interstate disputes under public international law. Nevertheless, for the sake of the good administration of justice, its judicial supervisor's advice may be well worth heeding.

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[24] Jon Bae, *Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication*, 4 J. INT'L DISPUTE SETTLEMENT 65 (2013).

[25] *See, e.g.*, Decision of the Council on the Preliminary Objections in the Matter "United States and 15 European States" (ICAO Council Nov. 16, 2000) (Appellants' Memorial, Annex 28); Decision of the Council on the Preliminary Objections of the United States in the Matter "Brazil v. United States" (ICAO Council June 23, 2017 (Appellants' Memorial, Annex 32).