good reason."[15] Prior to this judgment, the Court would always find a party responsible for human rights violations if these violations happened within the Convention's territorial space. Yet, here, the ECtHR failed to establish jurisdiction in relation to people living on a territory who would otherwise be protected by the Convention. The Court's solution to the problem of jurisdiction in this case does not sit well with either its previous case law or practice. It may well be subject to major corrections in the future.

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European Convention on Human Rights—right to life—extraterritorial assassinations—prohibition of discrimination—hate crimes—pardons and impunity—attribution of conduct not committed in official capacity—attribution of conduct on the basis of state acknowledgment and adoption

MAKUCHYAN AND MINASYAN V. AZERBAIJAN AND HUNGARY. App. No. 17247/13. *At* https://hudoc.echr.coe.int.
European Court of Human Rights, May 26, 2020.

The judgment of the European Court of Human Rights (ECtHR or Court) in *Makuchyan and Minasyan v. Azerbaijan and Hungary* is remarkable both on account of its facts and the peculiar legal issues it raised. In 2004, an ax-wielding Azerbaijani army officer (R.S.) beheaded one Armenian officer, and attempted to kill another, while attending a NATO-organized English language course in Budapest, Hungary. R.S. was prosecuted in Hungary and given a life sentence. Eight years later, R.S. was transferred to Azerbaijan to serve the remainder of his sentence. However, upon his arrival, R.S. received a hero's welcome. He was released, pardoned, promoted, and awarded salary arrears for the period spent in prison, as well as the use of a state apartment in the capital. Many high-ranking Azerbaijani officials expressed their approval of R.S.'s conduct and pardon. (The long-standing Nagorno-Karabakh conflict between Armenia and Azerbaijan of course looms in the background of this story.)[1]

The applicants before the European Court were the surviving Armenian soldier and a relative of the slain soldier. They complained that Azerbaijan violated Article 2 (right to life) of the European Convention on Human Rights (Convention),[2] in both its substantive and procedural aspects: the former because the killer was a soldier in the Azerbaijani military and thus a state agent; the latter because the state released him from prison. The applicants additionally claimed a violation of Article 14 (prohibition of discrimination), read together with the right to life, alleging that R.S.'s attack and his release were both motivated by anti-Armenian animus. Finally, the applicants complained that Hungary also violated the procedural limb of

[15] KANSTANTSIN DZEHTSIAROU, CAN THE EUROPEAN COURT OF HUMAN RIGHTS SHAPE EUROPEAN PUBLIC ORDER (forthcoming 2021).

[1] The European Court has dealt with aspects of that conflict in *Chiragov and Others v. Armenia* [GC], App. No. 13216/05 (2015) and *Sargsyan v. Azerbaijan* [GC], App. No. 40167/06 (2015), and is considering several interstate cases regarding the outbreak of the conflict in 2020.

[2] European Convention on Human Rights, Nov. 4, 1950, ETS No. 5, 213 UNTS 222 [hereinafter ECHR].

Article 2 by transferring R.S. to Azerbaijan without obtaining adequate assurances that he would complete his prison sentence there.

A Chamber of the European Court unanimously decided that Azerbaijan violated Article 2 by releasing R.S., and, by six votes to one, that this also violated Article 14. On the other hand, by six votes to one, the Chamber found that Azerbaijan bore no responsibility for the killing itself, and that Hungary bore no responsibility for transferring R.S. to Azerbaijan.

Apart from the various state obligations under the right to life, the case raised numerous other questions: the Convention's extraterritorial application; attribution of conduct under Article 11 of the International Law Commission's Articles on State Responsibility (ILC Articles);[3] and the burden of proving discriminatory intent.

The first issue concerns the scope of the state's "jurisdiction" beyond its territory within the meaning of Article 1.[4] All violations alleged in *Makuchyan* were extraterritorial in nature. Neither applicant had ever set foot on Azerbaijani territory. They claimed that Azerbaijan was responsible for R.S.'s crimes in Hungary, and for its authorities' procedural violation of the right to life by releasing R.S. Nor were the victims located in Hungary when its officials transferred R.S. in alleged violation of the Convention.

Neither of the parties raised the extraterritoriality issue in their pleadings. The Court did so *proprio motu* in relation only to Azerbaijan (paras. 47–52). Following its approach in *Güzelyurtlu and Others v. Cyprus and Turkey*,[5] the Court concluded that there were "special features" that triggered the extraterritorial applicability of the Convention with regard to the procedural limb of Article 2: specifically R.S.'s presence in Azerbaijan, because Azerbaijan had sought his transfer, and assumed the obligation to continue enforcing his sentence (paras. 50–51). The Court avoided addressing the extraterritorial application of Article 2's substantive limb, finding Azerbaijan not responsible for R.S.'s actions on other grounds (para. 52).

The second set of issues in *Makuchyan* concerned the attribution of R.S.'s conduct. The Court concluded that the murder and attempted murder could not be attributed to Azerbaijan under either a theory of state action or of subsequent adoption. First, the Court held that although as a soldier R.S. was a state organ, he was not acting in his official capacity when he committed the offenses (para. 111). Second, the Court held that the conduct of R.S. could not be attributed to Azerbaijan on the basis of the rule codified in Article 11 of the ILC Articles, which provides that a purely private act of an individual is to be attributed to a state when it subsequently acknowledges and adopts such conduct as its own.[6] The Court stressed that the requirements of "acknowledgement" and "adoption" must be cumulatively met. Thus, despite holding that the release, pardon, promotion, and other benefits afforded to R.S. amounted to the subsequent "approval" and "endorsement" of his acts (paras. 114–17), these did not amount to the adoption of the relevant conduct as Azerbaijan's own:

[3] Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, Supp. 10 (2001).

[4] ECHR, *supra* note 2, Art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.").

[5] Güzelyurtlu and Others v. Cyprus and Turkey [GC], App. No. 36925/07, paras. 178–90 (2019).

[6] *See, e.g.*, United States Diplomatic and Consular Staff in Tehran (Iran v. U.S.), 1980 ICJ Rep. 3, 33–35, paras. 71–74 (May 24).

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> [It] has not been convincingly demonstrated that the State of Azerbaijan "clearly and unequivocally" "acknowledged" and "adopted" "as its own" R.S.'s deplorable acts, thus assuming, as such, responsibility for his actual killing of G.M. and the preparations for the murder of the first applicant. . . . This assessment is undertaken on the basis of the very stringent standards set out by the existing rules of international law, as they stood at the material time and stand today, from which the Court sees no reason or possibility to depart in the present case. . . . The present case cannot be considered fully comparable to the [International Court of Justice's (ICJ)] *United States Diplomatic and Consular Staff in Tehran* case. (Para. 118).

Because the relevant conduct was not attributable to it, Azerbaijan could not be responsible for a violation of the substantive aspect of the right to life under Article 2 of the Convention. Judge Pinto de Albuquerque dissented on this issue, considering that Article 11 was satisfied on the facts (diss. op., Pinto de Albuquerque, J., paras. 4–10).

The ECtHR still had to decide on Azerbaijan's responsibility for releasing R.S. and Hungary's responsibility for transferring him without obtaining proper assurances that he would continue serving his prison sentence in Azerbaijan. Both entailed potential violations of Article 2 procedural obligations, which require an effective investigation into a loss of life, followed, where appropriate, by criminal proceedings.

Regarding Azerbaijan, the issue was whether the state shirked its duty to punish a violation of the right to life through enforcing a prison sentence imposed in another country. The Court held that Azerbaijan assumed responsibility for the enforcement of R.S.'s sentence at the moment of R.S.'s transfer—"to provide an adequate response to a very serious ethnically-biased crime for which one of its citizens had been convicted in another country" (para. 163). Any decision to release R.S. thus had to be justified.

The ECtHR did not examine Azerbaijan's decision to pardon R.S. in isolation.[7] Rather, it conducted a rigorous review of the context of his release, taking into account all of Azerbaijan's affirmative acts conveying benefits to R.S. (the salary arrears, the state apartment, and the public military promotion). The Court was unpersuaded by Azerbaijan's justifications for releasing R.S. ("humanitarian concerns for the history, plight and mental condition of R.S." and objection to the fairness of the criminal proceedings conducted against him in Hungary) (paras. 165–68). In the Court's view, the acts of the Azerbaijani government indicated that "R.S. was treated as an innocent or wrongfully convicted person and bestowed with benefits that appear not to have had any legal basis under domestic law" (para. 170). Azerbaijan "in effect granted R.S. impunity for the crimes committed against his Armenian victims" (para. 172), which is incompatible with its obligation under Article 2 to effectively deter crimes involving the loss of life (*id.*).

The Court did not, however, find Hungary in violation of Article 2. It emphasized that Hungary had followed the procedure set out in the Council of Europe Transfer Convention.[8] It also noted that Hungary had requested from Azerbaijan to specify the procedure it would follow upon R.S.'s transfer (para. 196). While it concluded that Azerbaijan's

[7] It stated that "pardons and amnesties are primarily matters of member States' domestic law and are in principle not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights" (para. 160).

[8] Council of Europe Transfer Convention, Mar. 21, 1983, ETS 112.

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reply was incomplete and general, which "could have aroused suspicion," the Court found no tangible evidence showing that "Hungarian authorities unequivocally were or should have been aware that R.S. would be released upon his return to Azerbaijan" (*id.*). The Court thus concluded that Hungary could only have been expected to "respect the procedure and the spirit of the Transfer Convention and proceed on the assumption that another Council of Europe member State would act in good faith" (*id.*).

In his dissent, Judge Pinto de Albuquerque argued that Hungary was aware of the likelihood that R.S. would be granted a pardon, due to "widely known and publicly available facts" (diss. op., Pinto de Albuquerque, J., para. 20). This primarily referred to a statement of the Hungarian prime minister that was not in the record, which indicated that Hungary had understood the possibility of R.S.'s release. Judge Pinto de Albuquerque criticized the majority for ignoring the context, pointing out that the Court had used such extrinsic evidence before to obtain "a realistic view of the facts beyond the case file" (diss. op., Pinto de Albuquerque, J., *id.*).

Finally, the Court also found a violation of Article 14 of the Convention (read in conjunction with Article 2), holding that the decision of the Azerbaijani authorities to release R.S. was motivated by a discriminatory animus against ethnic Armenians. Relying on all of the approbatory conduct of the Azerbaijani government and official statements glorifying R.S.'s crimes on a dedicated webpage, the Court was

> satisfied that the applicants have put forward sufficiently strong, clear and concordant inferences as to make a convincing prima facie case that the measures taken by the Azerbaijani authorities in respect of R.S. were racially motivated. The Court is mindful of the difficulty faced by the applicants in proving such bias beyond a reasonable doubt, given that the facts in issue lie wholly, or in large part, within the exclusive knowledge of the Azerbaijani authorities. The Court considers that, given the particular circumstances of the present case, it was therefore incumbent on the respondent Government to disprove the arguable discrimination allegation made by the applicants. (Para. 218).

Thus, the applicants had established a "convincing prima facie case" of discriminatory intent sufficient to shift the burden of proof to the respondent (*id.*). This burden Azerbaijan failed to carry. It could not refute the overwhelming evidence linking its approving treatment of R.S. to the Armenian ethnicity of his victims (paras. 219–20).

* * * *

In *Makuchyan* the Court engaged with five sets of issues: extraterritoriality, attribution, the compatibility of R.S.'s release with the procedural limb of the right to life, the standard of care required of states when transferring prisoners to other states, and proof of discriminatory animus. We address each in turn.

First, the Court's analysis of the extraterritorial application of Article 2's procedural obligation is not compelling. As in *Güzelyurtlu*, the reasoning behind the "special features" approach makes little sense if the jurisdictional inquiry is concerned, as traditionally understood, with the relationship between the state and the victim. It rather seems that the Court (rightly) feels it would be arbitrary for the Convention not to apply, and adopts an entirely discretionary approach to determining extraterritorial applicability on the basis of nebulous "special features." It is difficult to articulate—let alone predict—which features matter. For

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example, it is unclear whether the outcome here would have been the same if Azerbaijan had not sought R.S.'s transfer, or if R.S. was a fugitive on the run in Azerbaijani territory.

The Court's analysis of the extraterritorial applicability of the substantive obligation under Article 2 of the Convention is interesting both for what the Court did and did not say. At issue was whether the Convention applies to assassinations by state agents abroad. The Court framed its analysis through the personal conception or model of state jurisdiction, focused on a state agent's exercise of authority or control over the victim. Whether the Convention applies to kinetic uses of force abroad has been the most controversial and complex issue in the Court's extraterritoriality jurisprudence. For example, in *Banković*, the Court ruled that dropping a bomb on an individual from the air did not suffice to create a jurisdictional link;[9] while in *Al-Skeini* the Court accepted that killing an individual could be an exercise of power or control over them.[10]

Makuchyan is the first case in which the Court had to consider whether the Convention applies to the assassination of a single individual by a stage agent, outside of an armed conflict. One of us has long argued that the answer to this question must be yes, and that negative obligations of restraint under human rights treaties should apply without territorial restriction.[11] The personal conception of jurisdiction must include any state conduct that kills a victim; it cannot be limited nonarbitrarily.[12] Consider, as recent examples, the assassination of Alexander Litvinenko by Russian agents in London using a polonium-laced teapot; the murder of Kim Jong-nam, the unfortunate half-brother of the North Korean dictator, by VX nerve agent smeared on his skin at the Kuala Lumpur airport; the Salisbury Novichok attack; the murder of Jamal Khashoggi; or indeed cyberattacks against hospitals during the pandemic. In all of these instances, the state obligation to refrain from using lethal force simply must apply.

Nevertheless, the ECtHR has been cautious about asserting a role as final arbiter of any lethal use of force by a European state acting overseas (e.g., in Afghanistan). However, *Makuchyan* left the door open to realigning its jurisprudence with those of other human rights bodies.[13] The Court did *not* say that the Convention would not apply, per *Banković*, to the killing of a single individual by a state agent; rather, it chose not to dismiss the case in an Article 1 jurisdictional analysis. The Court thus assumed that the Convention could have applied extraterritorially, but did not here for want of attribution, without which there could be no exercise of power over the victim by a state agent (para. 120).

[9] Banković and Others v. Belgium and Others [GC] (dec.), App. No. 52207/99 (2001).

[10] Al-Skeini and Others v. United Kingdom [GC], App. No. 55721/07 (2011). *See further* Marko Milanović, Al-Skeini *and* Al-Jedda *in Strasbourg*, 23 EUR. J. INT'L L. 121 (2012).

[11] *See* MARKO MILANOVIĆ, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011).

[12] *Cf.* Al-Saadoon & Ors v. Secretary of State for Defence [2015] EWHC 715 (UK) (Justice Leggatt holding that any extraterritorial killing must be captured by the personal conception of jurisdiction); Al-Saadoon & Ors v. Secretary of State for Defence [2016] EWCA Civ. 811 (UK) (Court of Appeal endorsing Justice Leggatt's reasoning in principle, but holding that pushing the boundaries of Article 1 jurisdiction would require a decision from the European Court).

[13] *See* General Comment No. 36, UN Doc. CCPR/C/GC/36, para. 63 (Oct. 30, 2018) (holding that any state party must respect and ensure the right to life of "all persons over whose enjoyment of the right to life it exercises power or effective control [including] persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner").

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Second, as for attribution, the Court's conclusion that R.S.'s conduct was unattributable to Azerbaijan because it was not committed in official capacity is sound, though its reasoning is problematic. Here the Court does not engage at all with the ILC Articles, in particular with the commentary on Article 4 (on conduct committed in official as opposed to private capacity) and Article 7 (on the attribution of *ultra vires* acts, when these are committed in official capacity). The Court's references to planned and spontaneous activity and to the absence of superior orders (i.e., that R.S. acted *ultra vires*) do not necessarily imply that R.S.'s act was carried out in a private capacity. For example, a police officer who tortures a detainee contrary to domestic law and superior orders is nonetheless acting in his official capacity.[14] However, its conclusion is nonetheless sound, since R.S. was not acting under the color of state authority.

The Court did engage with the ILC Articles with respect to attribution by acknowledgement and adoption; indeed *Makuchyan* represents the most important jurisprudential application of the rule codified in Article 11 since the ICJ in *Tehran Hostages*. The crux of the Court's decision was that Azerbaijan undoubtedly endorsed or approved what R.S. had done, but that this could not be equated with the *adoption* of the conduct as the state's own (paras. 115–18). This dovetails with the approach of the ILC and the ICJ, which effectively required a reasonably explicit decision or statement by a governmental authority adopting the relevant conduct. The relatively strict approach of the ICJ and the ILC now also has the imprimatur of a human rights court which otherwise tends to employ more expansive standards. While it is possible to argue that the ILC set the bar too high,[15] the line between approval and adoption is a reasonably clear, common sense one. One can approve of many things without necessarily assuming responsibility for doing those things.

Third, the case sets a marker on the compatibility of pardons with the procedural aspect of the right to life. Domestic (let alone international) judicial review of pardons and clemency is extremely limited, rarely going into whether a pardon is substantively justified.[16] The Court attempted to avoid these difficulties by assessing whether Azerbaijan violated Article 2 by *releasing* R.S., not by *pardoning* him. Yet the former was formally conditioned on the latter, and Azerbaijan's justification for both steps was identical.[17] In reviewing the release, the

[14] The Court has frequently failed to properly distinguish between the private conduct of a state organ and *ultra vires* official conduct. Marko Milanović, *Special Rules of Attribution of Conduct in International Law*, 96 Int'l L. Stud. 295, 379–85 (2020).

[15] *See* Cedric Ryngaert & Kushtrim Istrefi, *An Azeri Kills an Armenian Soldier at a NATO Training in Budapest: The ECtHR Decides a Rare Case of State Responsibility and Presidential Pardon*, Strasbourg Observers (June 29, 2020), *at* https://strasbourgobservers.com/2020/06/29/an-azeri-kills-an-armenian-soldier-at-a-nato-training-in-budapest-the-ecthr-decides-a-rare-case-of-state-responsibility-and-presidential-pardon.

[16] *See generally* Andrew Nowak, *Pardon Power*, *in* Max Planck Encyclopedia of Comparative Constitutional Law, paras. 28–30 (2015). The question of the scope and reviewability of pardon powers reemerged in the final days of the Trump administration. *See* Frank O. Bowman III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. Leg. & Pub. Pol'y __ (forthcoming 2021), *available at* https://ssrn.com/abstract=3728908; Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y. Times (Nov. 25, 2020), *at* https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html; *see also* General Comment No. 36, *supra* note 13, para. 27 (Human Rights Committee noting that "[i]mmunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.").

[17] Judge Pinto de Albuquerque argued that the Court should have ruled on the pardon directly (diss. op., Pinto de Albuquerque, J., paras. 14–18).

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Court for the first time implicitly reviewed the justifiability of an individual pardon.[18] The Court thus makes an important contribution to the fight against impunity for grave human rights violations. While pardons and amnesties remain "primarily matters of member States' domestic law," the Court has signaled that pardons in Europe may be reviewed internationally (para. 160). This adds to the Court's prior case law on the impermissibility of amnesties that foster impunity for grave human rights violations,[19] built upon the pioneering case law of the Inter-American Court of Human Rights.[20]

Fourth, in deciding that Hungary did not violate Article 2, the Court set out a specific standard of care in prisoner transfer cases that could violate the rights of third parties. Most cases dealing with cross-border transfers involve the rights of the transferee (especially *nonrefoulement*). Here the transfer affected the rights of the transferee's victims and their relatives. The Court imposed a standard of actual or constructive knowledge ("should have been aware" (para. 180))[21] on part of the sending state that the transfer would lead to a situation violating a third party's rights. But what does constructive knowledge actually require? The Court acknowledged that the circumstances of the case "could have aroused suspicion as to the manner of the execution of R.S.'s prison sentence," but it did not hold that Hungary had a duty of verification prior to proceeding with the transfer (para. 196). Hungary was not required, for example, to obtain additional assurances that R.S. would continue to serve his prison sentence in Azerbaijan. Without tangible evidence of Hungary's actual knowledge that Azerbaijan would release R.S., its request that Azerbaijan specify the procedure to be followed upon R.S.'s return to his country under the Transfer Convention was sufficient for the Court to hold that Hungary fulfilled the standard of care (*id.*).

This appears to be a lower standard of care than the Court demands of transfers implicating *nonrefoulement*. There, the Court requires a sending state to refrain from extradition or expulsion when there are *substantial grounds for believing* that the person will be exposed to a *real risk* of a serious violation of the Convention in the receiving state.[22] In order to mitigate this risk, the sending state can try to obtain sufficient diplomatic assurances, but these need to be weighed against the circumstances prevailing at the material time on a case-by-case basis.[23] The Court does not explain why transfers affecting the rights of the transferee and those affecting the rights of third parties warrant different culpability standards.

Finally, the case is remarkable for the Court's finding that R.S.'s release was motivated by a racially discriminatory animus against Armenians. Relying on the conduct and statements of the Azerbaijani government, the Court concluded that the applicants had established a "convincing prima facie case" that their decisions "were racially motivated" (para. 218). The Court then shifted the burden of proving (lack of) discriminatory intent to Azerbaijan—in contrast to *Nachova*, where the Grand Chamber declined to do so with regard to the violation of the

[18] *See also* Ryngaert & Istrefi, *supra* note 15).

[19] *See most notably* Marguš v. Croatia [GC], App. No. 4455/10, paras. 131–39 (2014).

[20] See, for example, the leading judgment in *Barrios Altos*. Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, para. 41 (Mar. 14, 2001). *See more* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203, 1207 (2011).

[21] For more on knowledge standards in the Court's jurisprudence, see Vladislava Stoyanova, *Fault, Knowledge and Risk Within the Framework of Positive Obligations Under the European Convention on Human Rights*, 33 LEIDEN J. INT'L L. 601 (2020).

[22] *See* Saadi v. Italy [GC], App. No. 37201/06, para. 125 (2008).

[23] *Id.*, para. 148.

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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).