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Dottorato di ricerca in Ordine internazionale e diritti umani, Sapienza, Università di Roma - Intercenter, Università di Messina

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OSSERVATORIO SULLA CORTE INTERNAZIONALE DI GIUSTIZIA N. 5/2020

1. THE APPELLATE FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE AND THE JURISDICTION OVER COUNTERMEASURES IN THE APPEALS RELATING TO THE JURISDICTION OF THE ICAO COUNCIL (2020)

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 of 14 July 2020

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 of 14 July 2020

1. Introduction

In the recent decisions of the cases *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)* ('ICAOA') and *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)* ('ICAOB'), both issued on 14 July 2020, the International Court of Justice ('ICJ') had the opportunity to focus on two issues that are not frequently addressed by it: its own appellate function and the adjudication of countermeasures as circumstances precluding the wrongfulness of international acts.

Both cases were filed on July 2018 as appeals to decisions of the Council of the International Civil Aviation Organization ('ICAO Council') that rejected the preliminary objections in proceedings commenced by Qatar challenging the legality of restrictive measures of civil aviation imposed against it. In the first case, the appeal refers to Qatar's complaint regarding the violation of the International Air Services Transit Agreement of 1944 ('IASTA'). The second appeal refers to the Convention on International Civil Aviation of 1944 ('Chicago Convention').

The cases are part of a broader diplomatic crisis opposing several countries in the Persian Gulf to Qatar. Alleging Qatar's violation of a series of treaty agreements, called 'Riyadh Agreements', on 5 June 2017 Bahrain, Egypt, Saudi Arabia and United Arab Emirates broke diplomatic relations with Qatar and imposed restrictive measures against it. Among those measures were aviation restrictions such as the denial of landing and overfly their territories by

Qatar-registered aircrafts, measures that would be contrary to the obligations contained in the Chicago Convention and the IASTA.

On 30 October 2017, Qatar filed two different applications to the ICAO Council regarding violations of the Chicago Convention by Bahrain, Egypt, Saudi Arabia and United Arab Emirates and the IASTA by Bahrain, Egypt and United Arab Emirates, Saudi Arabia not being a party to the latter. On 19 March 2018, the responding States raised before the ICAO Council two preliminary objections, arguing that it lacked jurisdiction to hear the dispute that involved matters beyond the scope of the Chicago Convention and the IASTA. They also claimed that Qatar had failed to meet the precondition of negotiation established by both instruments. The ICAO Council rejected the preliminary objections on 29 June 2018, treating them, in both cases, as one single objection.

On 4 July 2018, two separate proceedings were instituted before the ICJ against Qatar regarding both ICAO Council decisions. Due to the fact that Saudi Arabia was not a party of the IASTA, the Court denied the request of joinder the proceedings made by Qatar (see para. 11 common to both decisions), although it agreed to direct common action of the cases ('ICAOA' and 'ICAOB').

The cases have a similar basis of jurisdiction. ICAOA was filled by Bahrein, Egypt, Saudi Arabia and United Arab Emirates based on article 84 of the Chicago Convention, according to which «if any disagreement between two or more contracting States relating to the interpretation or application» of the 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», and which «any contracting State may (…) 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». ICAOB was filled by the same Appellants with the exception of Saudi Arabia and was based on article II, section 2 of the IASTA, which duplicates the text of article 84 of the Chicago Convention.

The Court invoked its previous ruling on the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan, 1972)* case in order to justify its jurisdiction to hear an appeal from a decision of the ICAO Council (ICAOA p. 17, para. 28; ICAOB p. 16, para. 28). In that occasion, the Court decided that its appellate function regarding the ICAO Council decisions must have been understood in broad terms and was not limited to decisions on the merits. Accordingly, it was competent to hear the appeal made by India to the decision of the ICAO Council that rejected its preliminary objections in proceedings initiated by Pakistan.

The Appellants presented three grounds of appeal in both ICAOA and ICAOB cases, contending, first, that the ICAO Council Decision of 29 June 2018 reflected a «manifest failure to act judicially» and a «manifest lack of due process in the procedure»; second, that the Council erred in fact and in law in rejecting the first preliminary objection raised by the Appellants, since the Council was required to decide questions that fell outside its jurisdiction, such as the lawfulness of the measures adopted by the appellants against Qatar; and third that the ICAO Council erred in rejecting the second preliminary objection raised by the Appellants according to which Qatar had failed to satisfy the precondition of negotiation provided in article 84 of the Chicago Convention. The Court analysed each of the three grounds of appeal against the decision of the ICAO Council separately, initiating with the second ground of appeal, which refers to the first preliminary objection presented to the ICAO Council.

In the end, the judges unanimously decided to reject the appeal brought by the Appellants and decided that the ICAO Council has jurisdiction in both cases to review the applications submitted by Qatar on October 30, 2017. Judge *ad hoc* Berman voted against the decision.

2. The scope of jurisdiction ratione materiae

The Appellants challenged the ICAO Council jurisdiction over the dispute since it could not analyse the legality of the measures adopted by them against Qatar. According to the Appellants, the aviation restrictions were «lawful countermeasures» adopted in reaction to «multiple, grave, and persistent breaches» of international obligations of Qatar, especially breaches related to the Riyadh Agreements. In general terms, such agreements are a series of treaties concluded in 2013 and 2014 among the Member States of the Gulf Cooperation Council aimed at maintaining regional security by establishing obligations of non-interference in the internal affairs of the Member States, having no provisions related to civil aviation. Following the reasoning of the Appellants, the jurisdiction of the ICAO Council was limited to the interpretation and application of the Chicago Convention and the IASTA. The Council therefore lacked jurisdiction to hear the case, because of the existence of broader issues that could not be separated from the dispute relating to the airspace closure. Qatar, in contrast, argued that the claims submitted to the ICAO Council related to the interpretation and application of the Chicago Convention and the IASTA and that the jurisdiction of the Council was limited neither by the Conventions nor by the ICAO Rules for the Settlement of Differences.

In addressing this argument, the Court first considered the dispute as a disagreement between the parties relating to the interpretation or application of the Chicago Convention and the IASTA, determining that «a disagreement relates to the interpretation or application of the Chicago Convention if, "in order to determine [it], the Council would inevitably be obliged to interpret and apply the [Convention], and thus to deal with matters unquestionably within its jurisdiction"» (para. 46 common to both decisions). The Court noted that the fact that the disagreement is part of a larger political context does not prevent the ICAO Council from analysing it. Referring to its understanding in *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran, 1980)* and *Certain Iranian Assets (Islamic Republic of Iran v. United States of America, 2019 (I))*, the Court observed that legal disputes between states tend to occur in broader contexts and are only a single element in a wider political dispute.

The Court considered as unfounded the allegation of the Appellants according to which the restrictions they had adopted had to be qualified as countermeasures and therefore could not be analysed by the ICAO Council: «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» (para. 49 common to both decisions). Therefore, as decided in *India v. Pakistan*, defences on the merits «cannot affect the competence of the tribunal or other organ concerned» since «its competence must depend on the character of the dispute submitted to it and on the issues thus raised – not on those defences on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled» (*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, I.C.J Reports 1972, p. 61, para. 27). In this sense, it considered that the ICAO Council has jurisdiction to hear the claims of Qatar since the analysis of the defence on the character of the measures adopted by the Appellants did not constitute a preliminary objection affecting the Council's jurisdiction but is rather a matter related to the application and interpretation of the Chicago Convention and the IASTA.

The Appellants argued that Qatar's claims would be inadmissible for the same reasons on the basis of which the ICAO Council would have no jurisdiction over the dispute. The Council could not be considered in fact as a forum properly equipped to determine the violation of

international obligations in matters outside civil aviation and could not analyse the case properly without considering the defence based on countermeasures. In the Appellants' view, in any way its decision on the lawfulness of the countermeasures applied against Qatar would be incompatible with the consensual basis of jurisdiction and with the 'judicial propriety' of the settlement of disputes.

The Court refuted this argument by distinguishing the jurisdictional objection and the objection as to admissibility. Although both types of objection bring the proceedings to an end, a jurisdictional objection is related to the consent given by the parties to a contentious case, while the objection concerning admissibility is related to the existence of a legal reason why the Court should decline to hear the case. The Court observed that although the ICAO Rules for the Settlement of Differences do not mention the possibility of preliminary objections, this did not prevent the Council from deciding an admissibility objection. Accordingly, the Council would not be prevented from hearing preliminary objections to the admissibility *in limine litis* as argued by the Appellants (ICAOA pp. 23-24, para. 56; ICOAB p. 23, para. 56). This reasoning is based on the interpretation of its own 1946 Rules of the Court, which would have served as an inspiration for the ICAO Rules for the Settlement of Differences of 1975.

The Court also observed that the concept of «judicial propriety» is «difficult to apply to the ICAO Council», since it is not «a judicial institution in the proper sense of that term», but that in any case the integrity of Council's dispute settlement function would not be impaired by the analysis of matters outside the civil aviation field «for the exclusive purpose of deciding a dispute which falls within its jurisdiction» (para. 61 common to both decisions).

3. Procedural precondition to the exercise of jurisdiction

Another ground of appeal presented by the Appellants was that the ICAO Council lacked jurisdiction because Qatar failed to meet the negotiation precondition established by Article 84 of the Chicago Convention. In the Appellants' opinion, Qatar did not make a genuine attempt to initiate negotiations. Drawing a parallel with its jurisprudence on compromissory clauses, the Court agreed that the precondition for negotiation imposes on Qatar the obligation to make a genuine attempt to negotiate with the other concerned States prior to filing an application to the ICAO Council. However, the Court considered that the communications sent by Qatar to the ICAO Council in June and July 2017 and the objections presented at the Extraordinary Session of the ICAO Council of July 31 2017 satisfied this precondition and that negotiations were not «a realistic possibility» due to the Appellants' refusal to address the matter (ICAOA p. 31, para. 96; ICAOB p. 31, para. 97). The Court also rejected the argument according to which Qatar failed to comply with the condition established in Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences, which requires that a statement of negotiations shall be attached to the memorial presented to the ICAO Council.

4. Procedural irregularities

The last ground of appeal referred to the possible existence of irregularities in the procedures of the ICAO Council that would have affected the requirements of a just procedure. According to the Appellants, the decision of the ICAO Council contained flaws in the procedures and grave violations of the principle of due process and violations of the ICAO Council's own rules, such as absence of legal justification for the decisions of the Council, vote by secret ballot and insufficient time to raise objections. The Court accepted Qatar's argument

that the Council's decision was «objectively correct» and recalled the *India v. Pakistan* decision, according to which the ICAO Council's decision regarding its jurisdiction was an «objective question of law» (*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, I.C.J Reports 1972, pp. 69-70, para. 45). The Court stated that the alleged irregularities did not prejudice the requirements of a just procedure.

5. Appellate v. supervisory function of the Court

The decision leaves three open questions that have not been analysed in depth by the Court. The first question concerns the legal character of the Court's 'appellate' or 'supervisory' function regarding the ICAO Council. In its *1972 India v. Pakistan* decision the Court used contradictory terms in that regard. Appeal against Council decisions was seen as involving the «possibility of ensuring a certain measure of supervision by the Court over those decisions» (*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, I.C.J Reports 1972, p. 60, para. 26), what could make the judicial function of the Court be understood as institutional. Furthermore, the possibility for the Court to carry out a general assessment of the acts adopted by the ICAO Council by exercising a supervisory function can be further supported by the fact that the Chicago Convention and IASTA «enlist the support of the Court for the good functioning of the [International Civil Aviation] Organization». (*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, I.C.J Reports 1972, p. 60, para. 26). It seems useful to remember that the terms «supervisory functions» had already been used by the Court six years before in the *South West Africa cases (Liberia v. South Africa and Ethiopia v. South Africa)* to designate the function of the Council of the League of Nations as an organ for the control of the Mandates instituted by that organization (*South West Africa (Ethiopia v. South Africa) (Liberia v. South Africa)*, Second Phase, I.C.J Reports 1966, p. 40, para. 67).

Despite the above language, in *1972 India v. Pakistan* the Court seemed to understand its role in relation to the decisions of the ICAO Council as limited to the review of specific legal issues, and not as involving the administrative control of the Council's acts. This is evidenced by the understanding of the Court in relation to the allegation of procedural irregularities made by India in 1972, when it decided that the decision on the jurisdiction of the ICAO Council was an «objective question of law» that would therefore be independent of the existence of procedural irregularities in the Council's decision. In this sense, the role of the Court would not be to verify the conformity of the acts of the ICAO Council with its rules and internal procedures, but only the jurisdiction and merits of the appeals raised. Thus, «if there were in fact procedural irregularities, the position would be that the Council would have reached the right conclusion in the wrong way» (*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, I.C.J Reports 1972, pp. 69-70, para. 45).

The ICAOA and ICAOB decisions, conversely, seem to prefer the term «appellate function», which confines the Court's powers to the review of specific legal acts issued by the ICAO Council, related either to supervision as to jurisdiction and supervision as to the merits. By adopting a more careful terminology concomitantly with references to its *India v. Pakistan* decision, the Court seems to corroborate the previous distinction while seeking to give more precision to the terms used in the precedent. This was done, for instance, when the Court denied the Appellants' claim that it would be its role to exercise «its supervisory authority in respect of procedural deficiencies by the ICAO Council» as «the guardian of the integrity of the international judicial process» (Reply of the Kingdom of Bahrain, the Arab Republic of Egypt,

the Kingdom of Saudi Arabia and the United Arab Emirates of 27 May 2019, p. 54), reaffirming the precedent of 1972 but adjusting the misleading term used in it.

6. The nature of the ICAO Council

The second question briefly addressed relates to the way in which the Court understands the nature of the ICAO Council. The position of the Court was criticized by Judge Gevorgian and Judge *ad hoc* Berman. According to the former, the Court erred in admitting that issues not related to civil aviation fall within the competence of the ICAO Council, which would be an organ of a primarily technical and administrative nature and to whose procedures the jurisdictional principles of the Court should not apply (Declaration of Judge Gevorgian, para. 8-13). The latter similarly emphasized the primarily administrative nature of the body and questioned whether the Parties to the Chicago Convention would have endowed it any judicial power to settle disputes between them in a binding manner (Separate Opinion Judge *Ad Hoc* Berman, para. 7).

To be true, the Court adopts an ambivalent position regarding the nature of the organ. On the one hand, it maintains that the concept of «judicial propriety» cannot be applied directly to the Council since the organ, even though having the function of settling disagreements between its members relating to the interpretation or application of the Chicago Convention and the IASTA, could not be considered a judicial institution in the proper sense of the term, because it is composed of representatives of the States Parties. On the other hand, the Court sent a message unambiguously directed to the organ, asserting 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», thereby identifying some of the features that are typical of jurisdictional bodies. The Court tried to harmonize the non-judicial character of the ICAO Council with the atypical functions of judicial settlement of disputes attributed to it. Not being very successful in its attempt to reconcile both aspects, the Court at the end adopted an unconventional solution and addressed the Council seeking to reinforce the judicial character of its decisions, which would facilitate the exercise of its own appellate function in the future.

7. Jurisdiction over countermeasures

The last point concerns the Appellants' claim that the aviation restrictions imposed on Qatar would be lawful countermeasures adopted in response to violations of obligations arising under instruments other than the Chicago Convention or the IASTA. Specifically, the Appellants claimed that the restrictions were «non-reciprocal countermeasures», that is, they did not involve the suspension of performance of correspondent or directly connected obligations, such as obligations of the same treaty (Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates, p. 18). According to the Appellants, the ICAO Council could not determine the legality of the non-reciprocal measures since it would not have jurisdiction to analyse the non-compliance by Qatar with obligations other than those contained in the Chicago Convention and the IASTA.

The Court devoted little space to the matter in its decision. One of the few cases in which the Court has examined countermeasures so far is the judgment on the *Gabčíkovo-Nagymaros Project*, although in that case the obligations breached belonged to the same treaty and the measures could be considered as reciprocal (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, I.C.J Reports 1997, pp. 55-57, para. 82-87). In the ICAOA and

ICAOB cases the Court chose not to analyse the merits of the Appellants' defence according to which the restrictions would be countermeasures, as made in the *Gabčíkovo-Nagymaros Project* case. The Court, as quoted above, only indicated that «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». As a conclusion, «a possible need for the ICAO Council to consider issues falling outside the scope of the Chicago Convention solely in order to settle a disagreement relating to the interpretation or application of the Chicago Convention would not render the application submitting that disagreement to it inadmissible» (para. 61 common to both decisions).

The Court did not directly state that the ICAO Council was competent to examine issues outside the Chicago Convention and the IASTA, but specifically determined that the taking into account questions falling outside them was admissible «in order to settle a disagreement relating to the interpretation or application». Questions dealing with the jurisdiction of the ICAO Council regarding the consent of the parties or the subject-matter of the dispute are not properly analysed, such as the possibility of consideration of obligations that are not within its material competence and that go beyond the limits of the State's consent to the resolution of the dispute. Likewise, it is not clear whether and to which extent the legality of a countermeasure could constitute a disagreement relating to the interpretation or application of the IASTA or the Chicago Convention. Ultimately, such a position could give bodies created by treaties to resolve disputes regarding its interpretation and application the power to adjudicate the legality of countermeasures adopted in response to violations of international obligations not covered by the treaty.

The Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001 by the International Law Commission provide that countermeasures already taken must be suspended when «the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties» (Draft Articles on Responsibility of States for Internationally Wrongful Acts, article 52, 3(b)). The application of this rule, which is intended to avoid the aggravation of a dispute, can hardly be claimed in the context of the current ICJ proceedings, insofar as they concern the issue of the jurisdiction of the ICAO Council, and not the substantive dispute involving countermeasures. On the other hand, the ambiguous nature of the ICAO Council also cast doubt on the application of such a rule before that organ, since according to the International Law Commission the term «court or tribunal (…) does not refer to political organs» (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, pp. 136-137, para. 8).

BERNARDO MAGESTE