

**RESOLVING SKIES OF CONFLICT: ANALYSING ICAO
COUNCIL'S JURISDICTION IN THE GULF CRISIS (QUARTET
V. QATAR CASE)**

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1. FACTS

On June 5, 2017, four Arab countries: Bahrain, Egypt, the United Arab Emirates (UAE), and Saudi Arabia (“the Quartet”), severed their diplomatic and economic relations with Qatar.¹ They adopted a series of restrictive measures relating to terrestrial, maritime and aerial lines of communication against Qatar, including aviation restrictions. Pursuant to this, Qatar-registered aircraft and some non-Qatar-registered aircraft were denied the right to overfly the respective territories of Quartet. All the Qatar-registered flights were barred from landing at or departing from their airports, while prior permission was required for some non-Qatar registered aircraft.²

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¹ J Kinninmont, ‘The Gulf Divided The Impact of the Qatar Crisis’ (2019) Chatham House The Royal Institute of International Affairs <

https://www.chathamhouse.org/sites/default/files/publications/research/2019-05-30-Gulf%20Crisis_0.pdf> accessed 15 October 2023; ‘Qatar regrets the decision by Saudi Arabia, the United Arab Emirates and Bahrain to sever relations’ (2017) Ministry of Foreign Affairs <<https://www.mofa.gov.qa/en/all-mofa-news/details/2017/06/04/qatar-regrets-the-decision-by-saudi-arabia-the-united-arab-emirates-and-bahrain-to-sever-relations>> accessed 15 October 2023.

² ‘Qatar Airways seeks \$5bn compensation from blockading quartet’ *Al Jazeera* (22 July 2020)

< <https://www.aljazeera.com/news/2020/7/22/qatar-airways-seeks-5bn-compensation-from-blockading-quartet>> accessed 15 October 2023; ‘Qatar Airways Middle East

Quartet justified these measures, stating that the same was a consequence of “multiple, grave and persistent breaches of its [Qatar’s] international obligations relating to matters essential to [their] security]” under the 2014 Riyadh Agreements.³ The Riyadh Agreements were signed in the backdrop of the Arab Spring, a series of anti-government uprisings that started in late 2010. The agreements are based on the principle of non-intervention in the nations’ internal affairs. The Quartet alleged Qatar’s interference in internal affairs by violating its obligation under the Riyadh Agreements to “cease supporting, financing or harbouring persons or groups presenting a danger to national security, in particular terrorist groups”.

The Quartet reiterated these obligations through 13 demands it posed on Qatar to save itself from the countermeasures.⁴ It demanded a ban on Muslim Brotherhood organisation should and restrictions to be imposed on *Al-Jazeera* news network because they were linked to radical Islam and perpetuated terrorism.

Qatar categorically rejected all the demands. On numerous occasions, Qatar denied its association with terrorist organisations. Despite that, the aviation restrictions were not uplifted, and Qatar’s airline investment suffered a significant loss. Subsequently, Qatar invoked Article 84 of the

Landing & airspace restrictions; wider ramification for global aviation’ (05 June 2017) CAPA Centre for Aviation < <https://centreforaviation.com/analysis/reports/qatar-airways-middle-eastlanding--airspace-restrictions-wider-ramifications-for-global-aviation-348493>> accessed 15 October 2023.

³ C D Gaver, ‘What are the Riyadh Agreements?’ (2020) EJIL: Talk! < <https://www.ejiltalk.org/what-are-the-riyadh-agreements/>> accessed 15 October 2023; Richard Nephew, ‘The Qatari Sanctions Episode: Crisis, Response, and Lessons Learned’ (2020) Colombia: SIPA Centre on Global Energy Policy < https://www.energypolicy.columbia.edu/wp-content/uploads/2020/10/QatariSanctions_CGEP_Report_111522.pdf> accessed 15 October 2023.

⁴ P Wintour, ‘Qatar given 10 days to meet 13 sweeping demands by Saudi Arabia’ *The Guardian* (23 June 2017) <<https://www.theguardian.com/world/2017/jun/23/close-al-jazeera-saudi-arabia-issues-qatar-with-13-demands-to-end-blockade>> accessed 15 October 2023.

1944 Convention on International Civil Aviation (“Chicago Convention”) against the Quartet before the International Civil Aviation Organisation Council (“Council”).

Article 84 read with Article 2 subparagraph (g) of the International Civil Aviation Organisation Rules for the Settlement of Differences (“ICAO Rules”) states that any disagreement on the interpretation and application of the Convention and its Annexes could be referred to the Council, provided parties made an attempt at ‘negotiation’. This precondition is satisfied if the negotiations reach a point of futility or deadlock. Qatar claimed that any genuine attempt at negotiation would be futile in this case because of the severed diplomatic ties and unwillingness of the Quartet address the dispute between them. Thus, Qatar argued that the precondition of negotiation under Article 84 of the Chicago Convention is fulfilled.

2. A SUMMARY OF THE LEGAL PROCEEDINGS

On October 30, 2017, Qatar initiated proceedings before the Council under Article 84 of the Chicago Convention and the 1944 International Air Service Transit Agreement (“IATA”). Qatar alleged that Quartet violated fundamental principles of the Chicago Convention, its Annexes and other rules of international law. It requested the Council to urge the Quartet to withdraw, without any delay, all aviation restrictions on Qatar-registered aircraft and comply with its obligations under Article 2⁵, Article 3*bis*⁶, Article 4⁷, Article 5⁸, Article 6⁹, Article 9¹⁰, Article 37¹¹ and Article 89¹² of

⁵ Chicago Convention art. 2.

⁶ *Ibid* art. 3*bis*.

⁷ *Ibid* art. 4.

⁸ *Ibid* art. 5.

⁹ *Ibid* art. 6.

¹⁰ *Ibid* art. 9.

¹¹ *Ibid* art. 37.

¹² *Ibid* art. 89.

the Chicago Convention and its Annexes. It sought from them to negotiate in good faith the future harmonious cooperation in the region of international civil aviation.

On March 19, 2018, the Quartet raised two preliminary objections before the Council. First, the Council lacked jurisdiction. It contended that the issue was regarding Qatar's breach of counter-terrorism obligations and the obligation to not interfere in Quartet's internal affairs, which arose in a wider international law context, including whether the aviation measures could be characterised as lawful countermeasures.

Second, Qatar must fulfil the pre-condition of negotiation under Article 84 of the Chicago Convention read with the ICAO Rules. By majority, the Council rejected all preliminary objections on June 29, 2018. The Quartet instituted two appeals against the Council's decision on preliminary objections before the International Court of Justice ("ICJ") on July 4, 2018. As per Article 84, an appeal against the Council's decision must be submitted before ICJ.

2.1. Arguments of the parties

Quartet filed the first appeal on procedural irregularity, the Council's incompetence, and on the non-fulfilment of the precondition of negotiation. Bahrain, Egypt, and UAE jointly filed another appeal under Article II, Section 2 of the IASTA, as Saudi Arabia is not a party to IASTA.

The Quartet raised three grounds of appeal. First, the Quartet challenged the procedure adopted by the ICAO Council. Second, the Quartet asserted that the Council 'erred in fact and in law' by rejecting the first preliminary objection on the Council's lack of competence to hear the dispute. They argued that the real issue was "Qatar's long-standing violations of its obligations under international law other than under the Chicago Convention". Further, they claimed that the countermeasures

were lawful under international law. Countermeasures are circumstances that are capable of precluding the wrongfulness of an act that is otherwise unlawful.¹³ In contrast, Qatar contended that the dispute is a 'disagreement' under Article 84, even if it arose in a wider context because it relates to the interpretation and the application of the Chicago Convention.

On the third ground of appeal, the Quartet argued that the precondition of negotiation is only met when the negotiations are attempted and become futile or deadlocked. Qatar countered this argument and stated that it made genuine attempts to negotiate with the Quartet, not just within the framework of the Chicago Convention but also within the World Trade Organisation's ("WTO") framework and sought intervention from Kuwait to resolve the dispute, among other things. Alternatively, Qatar claimed that it has no obligation to attempt to negotiate if the other party is unwilling to negotiate, as such an attempt would be futile. Thus, per Qatar, the condition under Article 84 of the Chicago Convention was fulfilled.

2.2. Summary of the Judgment

On July 14, 2020, the ICJ pronounced its judgment in favour of Qatar by rejecting all grounds of appeal. On the second ground of appeal, the ICJ held that the dispute between the parties was a disagreement concerning the interpretation and the application of the Chicago Convention and its Annexes and falls within the scope of Article 84 of the Chicago Convention. It stated that a disagreement arising in a larger political context does not deprive the Council from exercising its jurisdiction under

¹³ *Gabčíkovo-Nagymaros Project (Hungary vs. Slovakia)*, Judgment, ICJ. Reports 1997, p. 55, para. 82

Article 84.¹⁴ It relied on the court's reasoning in *United States of America v. Iran*, where it was held that "legal disputes between sovereign States by their very nature are likely to occur in political contexts..."¹⁵ Further, the court added that even if aviation measures are to be characterised as lawful countermeasures under international law, this in itself did not preclude the jurisdiction of the Council.

The ICJ rejected the third ground of appeal and stated that Qatar made genuine attempts at negotiation. It referred to a series of communications and attempts by Qatar before and outside the Council's framework to solve the dispute. On whether the negotiations reached a point of futility or deadlock, the court stated the threshold of this must be assessed not from the "theoretical impossibility of reaching a settlement" but that "no reasonable probability exists that further negotiations would lead to a settlement".¹⁶

3. ANALYSIS

In January 2021, the Gulf blockade was finally resolved after four years of impasse when the Quartet signed a 'solidary and stability' deal with Qatar, facilitated by Kuwait and the United States. Qatar Airways sought compensation against the Quartet for destroying its airlines' investment through arbitration.¹⁷ Although the parties ultimately reached a political

¹⁴ *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, ICJ. Reports 2020, p. 81.

¹⁵ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ. Reports 1980, p. 20, para. 37.

¹⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ. Reports 2012 (II), p. 446, para. 57.

¹⁷ T Jones, 'Qatar Airways launches treaty claims over blockade' *GAR* (22 July 2020) <<https://globalarbitrationreview.com/qatar-airways-launches-treaty-claims-over-blockade>>.

consensus,¹⁸ a question still remains: How do parties fulfil the precondition of negotiation in such disputes of a political nature?

Pre-negotiation conditions are present in agreements through a 'compromissory clauses'.¹⁹ But what meaning must be given to the term negotiation is a question of fact that should be determined on a case-to-case basis. For instance, in the present case, Qatar made numerous attempts at negotiation through various communications, meetings and discussions before the Council. Qatar approached Kuwait in an attempt to negotiate the dispute. It made press statements before various United Nations bodies. Qatar attempted to negotiate outside the framework of the Chicago Convention through the WTO. It contacted Saudi Arabia with the facilitation of the United States of America.

Unlike Qatar's case, where it attempted to address the dispute in 1952, the Council facilitated negotiations between the parties in the Disagreement between India and Pakistan. As per the brief facts, India complained to the Council against Pakistan for barring Indian commercial aircraft from India to Afghanistan to fly over West Pakistan. Pakistan considered its western part a prohibited area where aircraft could not land or the air space could not be used for non-traffic purposes. India was ready to invoke Article XI (on dispute settlement) of the 1948 Air Service Agreement between India and Pakistan.²⁰

¹⁸ Steve Holland & Aziz El, 'Breakthrough reached in Gulf dispute with Qatar' *REUTERS* (05 January 2021) <https://www.reuters.com/article/us-gulf-qatar-usa-idUSKBN29924S/> accessed 15 October 2023; Ali Harb, 'Saudi Arabia agrees to end blockade on Qatar, opens airspace and land border' *MEE* (Washington, 04 January 2021) < <https://www.middleeasteye.net/news/saudi-arabia-qatar-end-blockade> > accessed 15 October 2023.

¹⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 140; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 445, para. 56.

²⁰ Agreement between the Government of India and the Government of Pakistan relating to the Air Services 1948.

The Council intervened and instituted a working group for the parties to resolve the dispute amicably. The Council requested that Pakistan allow Indian aircraft to separate its international air service over the Delhi-Peshawar-Kabul route. To this, Pakistan suggested opening two alternate corridors, one on the direct line between Lahore and Kandahar for the aircraft operating between Delhi and Kabul and the other on the direct line between Karachi and Kandahar for aircraft operating between Bombay or Ahmedabad and Kabul. It stated that the government cannot reopen the original route due to national security, military necessity and administrative issues. Hence, this suggestion was considered by the working committee as a possibility that the negotiations between the parties have yet to reach the deadlock.

The working group sent a report to the Council in January 1953 on the solution they had reached. Subsequently, Pakistan proposed in good faith that the government would release the required quantity of aviation fuel needed by the Indian airlines in Afghanistan and provide additional operational facilities in the proposed route. In the end, India accepted the offer, and both parties informed the Council that they had amicably reached a peaceful settlement.²¹

In both these cases, it could be seen that there should be a willingness to address the dispute, and it's not relevant whether the parties themselves make an attempt or whether the attempt at negotiation is facilitated by the Council or a third State. The same criteria could be applied to determine whether the negotiations have reached a point of deadlock or futility.

This could also be assessed as whether the basic position of parties has subsequently evolved through diplomatic channels and other routes.²² In

²¹ Report of the ICAO Council, 1952.

²² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012 (II), p. 446, para. 59; Immunities and Criminal Proceedings

the present case, before the Council, Qatar called for the Quartet to consider lifting the 'unjust air blockade'. Quartet claimed that Qatar never directly addressed the dispute's subject matter within the Chicago Convention's framework. Despite that, the ICJ held that Qatar may not have directly addressed the issue because of the hostilities, but it tried to touch upon the essence of the Chicago Convention when it requested Quartet to lift the unjust air blockade. Before the Council, the Quartet defended the legality of the countermeasures and asserted that the Council must limit its discussion to the matter before it. This showed the unwillingness of the Quartet to give any opportunity to Qatar, and it realistically made it impossible for the latter to address the dispute.

Similarly, in 1972, ICJ witnessed a case where India and Pakistan reached a deadlock in their negotiations. According to the facts, a dispute arose when India suspended Pakistan's commercial aircraft from flying over its territory after the 1971 hijacking incident, where an Indian aircraft was diverted to Pakistan by a terrorist organisation. Pakistan approached the ICAO Council under Article 84 for the alleged breach of the provisions of the Chicago Convention and the IASTA. According to Pakistan, the negotiations could not occur between the two countries as there were hostilities after the hijacking incident.

India rejected these allegations by stating that the Chicago Convention and the IASTA were suspended during hostilities, and the aviation restrictions imposed were governed through the 1966 Special Agreement.²³ The ICAO Council ordered in its preliminary objections against India. An appeal was filed against this decision to the ICJ, which Pakistan challenged. The ICJ passed a judgment purely on the

(Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 317, para. 76).

²³ Tashkent Declaration 1966.

jurisdictional issue. The court stated that the Council was competent to hear the issue that this was a disagreement between the parties under Article 84 which had reached a deadlock due to the hostilities between the parties.²⁴

4. CONCLUSION

While the ICJ judgment on *Quartet v. Qatar* addressed certain issues pertaining to the precondition of negotiations under Article 84 of the Chicago Convention, which gave some academic clarity, the judgment could not solve the dispute. It could only be sorted when the parties reached a political consensus. Regarding the threshold of negotiation, it is now clear that the attempts at solving the dispute must be considered from the standard of whether the parties are willing to solve the dispute. If the parties are unwilling, this could indicate that the negotiations have become futile or deadlocked.

²⁴ Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, ICJ Reports 1972, p. 46.