INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL

(INDIA *v.* PAKISTAN)

JUDGMENT OF 18 AUGUST 1972

1972

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

APPEL CONCERNANT LA COMPÉTENCE DU CONSEIL DE L'OACI

(INDE c. PAKISTAN)

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APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL

(INDIA v. PAKISTAN)

Appeal from decisions of the Council of the International Civil Aviation Organization assuming jurisdiction in respect of an "Application" and a "Complaint" made to it by Pakistan concerning the suspension by India, in alleged breach of the 1944 Chicago International Civil Aviation Convention and International Air Services Transit Agreement, of flights of Pakistan civil aircraft over Indian territory—Competence of the Court to entertain this appeal—Interpretation of the jurisdictional clauses of these instruments—Jurisdiction of the Council to entertain the dispute between India and Pakistan—Question of whether this dispute involved a "disagreement . . . relating to the interpretation or application" of the Chicago Convention and Transit Agreement—Alleged irregularities in the procedure of the Council—Relevance of this question to the task of the Court in the present case.

JUDGMENT

Present: *Vice-President* AMMOUN, *Acting President;* President Sir Muhammad ZAFRULLA KHAN; *Judges* Sir Gerald FITZMAURICE, PADILLA NERVO, FORSTER, GROS, BENGZON, PETREN, LACHS, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA; *Judge* ad hoc NAGENDRA SINGH; *Registrar* AQUARONE.

In the Appeal relating to the Jurisdiction of the Council of the International Civil Aviation Organization,

between

the Republic of India,

represented by

H.E. Lt. General Yadavindra Singh, Ambassador of India to the Netherlands,

as Agent,

Dr. S. P. Jagota, Joint Secretary and Legal Adviser, Ministry of External Affairs, Government of India,

as Deputy Agent and Counsel,

Mr. T. S. Ramamurti, Secretary of Embassy,

as Deputy Agent,

assisted by

Mr. N. A. Palkhivala, Senior Advocate, Supreme Court of India,

as Chief Counsel,

Mr. B. S. Gidwani, Deputy Director General of Civil Aviation, Government of India,
Mr. Y. S. Chitale, Advocate, Supreme Court of India,
Mr. P. Chandrasekhara Rao, Legal Adviser, Permanent Mission of India to the United Nations, New York,

as Counsel,

and by

Mr. I. R. Menon, Civil Aviation Department, Government of India,

as Expert,

and

Pakistan,

represented by

H.E. Mr. J. G. Kharas, Ambassador of Pakistan to the Netherlands,

as Agent,

Mr. S. T. Joshua, Secretary of Embassy,

as Deputy Agent,

assisted by

Mr. Yahya Bakhtiar, Attorney-General of Pakistan,

as Chief Counsel,

and by

Mr. Zahid Said, Deputy Legal Adviser, Ministry of Foreign Affairs, Government of Pakistan,
Mr. K. M. H. Darabu, Assistant Director, Department of Civil Aviation, Government of Pakistan,

as Counsel,

THE COURT,

composed as above,

delivers the following Judgment:

1. By a letter of 30 August 1971, received in the Registry the same day, the Ambassador of India to the Netherlands transmitted to the Registrar of the Court an Application instituting an appeal from the decisions rendered on 29 July 1971 by the Council of the International Civil Aviation Organization ("ICAO") on the Preliminary Objections raised by India in respect of an Application and a Complaint brought before the Council by Pakistan on 3 March 1971. In order to found the jurisdiction of the Court, the Application relies on Article 84 of the Convention on International Civil Aviation signed at Chicago on 7 December 1944, Article II of the International Air Services Transit Agreement opened for signature at Chicago on 7 December 1944, and Articles 36 and 37 of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of Pakistan. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified.

3. In accordance with Article 13, paragraph 1, of the Rules of Court, the Vice-President acted as President in the case. Pursuant to Article 31, paragraph 2, of the Statute of the Court, the Government of India chose Dr. Nagendra Singh, Member of the Permanent Court of Arbitration, to sit as judge *ad hoc*.

4. The time-limits for the filing of the written pleadings were fixed, or extended at the request of the Government of India, by Orders of 16 September and 3 December 1971 and 19 January and 20 March 1972. The pleadings having been filed within the time-limits prescribed, the case was ready for hearing on 15 May 1972, the date on which the Rejoinder of the Government of Pakistan was filed.

5. The Government of Pakistan having advanced the contention that questions concerning the construction of the Convention on International Civil Aviation and the International Air Services Transit Agreement were in issue, the States other than those concerned in the case which are parties to these two instruments were notified in accordance with Article 63, paragraph 1, of the Statute. ICAO was also notified and copies of the written proceedings were communicated to it in accordance with Article 34, paragraph 3, of the Statute. By letter of 15 May 1972, the Registrar informed the Secretary General of ICAO, in accordance with Article 57, paragraph 5, of the Rules of Court, that 6 June 1972 had been fixed as the time-limit within which the Organization might submit its observations in writing. Within the time-limit fixed, the Secretary General stated that ICAO did not intend to submit observations.

6. Pursuant to Article 44, paragraph 3, of the Rules of Court, the pleadings and annexed documents were, with the agreement of the Parties, made accessible to the public as from the date of the opening of the oral proceedings.

7. Hearings were held from 19 to 23 and on 27, 28 and 30 June and 3 July, in the course of which the Court heard the oral argument and replies of H.E. Lt. General Yadavindra Singh and Mr. Palkhivala on behalf of the Government of India, and of H.E. Mr. Kharas and Mr. Yahya Bakhtiar on behalf of the Government of Pakistan.

8. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of India,

in the Application:

"May it please the Court to adjudge and declare, after such proceedings and hearing as the Court may see fit to direct, and whether the Respondent is present of absent, that the aforesaid decision of the Council is illegal, null and void, or erroneous, on the following grounds or any others:

A. The Council has no jurisdiction to handle the matters presented by the Respondent in its Application and Complaint, as the Convention and the Transit Agreement have been terminated or suspended as between the two States.
B. The Council has no jurisdiction to consider the Respondent's Complaint since no action has been taken by the Applicant under the Transit Agreement; in fact no action could possibly be taken by the Applicant under the Transit Agreement since that Agreement has been terminated or suspended as between the two States.
C. The question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed by the Special Régime of 1966 and not by the Convention or the Transit Agreement. Any dispute between the two States can arise only under the Special Régime, and the Council has no jurisdiction to handle any such dispute."

in the Memorial:

"May it please the Court to adjudge and declare, after such proceedings and hearings as the Court may see fit to direct, and whether the Respondent is present or absent, that the aforesaid decision of the Council is illegal, null and void, or erroneous, and may it further please the Court to reverse and set aside the same, on the following grounds or any others:

A. The Council has no jurisdiction to handle the matters presented by the Respondent in its Application and Complaint, as the Convention and the Transit Agreement have been terminated or suspended as between the two States.
B. The Council has no jurisdiction to consider the Respondent's Complaint since no action has been taken by the Applicant under the Transit Agreement; in fact no action could possibly be taken by the Applicant under the Transit Agreement since that Agreement has been terminated or suspended as between the two States.
C. The question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed by the Special Agreement of 1966 and not by the Convention or the Transit Agreement. Any dispute between the two States can arise only under that Bilateral Agreement, and the Council has admittedly no jurisdiction to handle any such dispute.
D. The manner and method employed by the Council in reaching its decision render the decision improper, unfair and prejudicial to India, and bad in law.

May it also please the Court to order that the costs of these proceedings be paid by the Respondent."

On behalf of the Government of Pakistan,

in the Counter-Memorial:

"In view of the facts and statements presented in the Counter-Memorial, may it please the Court to reject the Appeal of the Government of India and to confirm the decisions of the Council of the International Civil Aviation Organization and to adjudge and declare:

A. That the question of Pakistan aircraft overflying India and Indian aircraft overflying Pakistan is governed by the Convention and the Transit Agreement.
B. That the contention of the Government of India that the Council has no jurisdiction to handle the matters presented by Pakistan in its Application is misconceived.
C. That the Appeal preferred by the Government of India against the decision of the Council in respect of Pakistan's Complaint is incompetent.
D. That if the answer to the submission in C. above is in the negative then the contention of the Government of India that the Council has no jurisdiction to consider the Complaint of Pakistan, is misconceived.
E. That the matter and method employed by the Council in reaching its decisions are proper, fair and valid.
F. That the decisions of the Council in rejecting the Preliminary Objections of the Government of India are correct in law.

May it please the Court to Order that the cost of these proceedings be paid by the Appellant."

* * * * *

9. The present case concerns an appeal by India against decisions of the Council of the International Civil Aviation Organization ("ICAO") assuming jurisdiction in respect *(a)* of an "Application" by Pakistan made (i) under Article 84 of the Chicago International Civil Aviation Convention of 1944 ("the Chicago Convention" or "the Convention") and (ii) under Section 2 of Article II of the related International Air Services Transit Agreement of 1944 (the "Transit Agreement"), and also in accordance with Article 2 (Chapter on "Disagreements" of the Council's "Rules for the Settlement of Differences"); and *(b)* of a "Complaint" made by Pakistan under Section 1 of Article II of the Transit Agreement, and in accordance with Article 21 (Chapter on "Complaints") of the Council's Rules. Pakistan's case before the Council was based on alleged breaches by India of the Convention and Transit Agreement. In making her appeal, India invokes as giving her a right to do so, and as the foundation of the Court's jurisdiction to entertain it, the same

Article 84 of the Convention, and also Section 2 of Article II of the Transit Agreement. The above-mentioned provisions of these two instruments will be found set out in paragraphs 17 and 19 below.

10. The substance of the dispute between the Parties, as placed before the Council of ICAO ("the Council") by Pakistan on 3 March 1971, relates to the suspension by India of overflights of Indian territory by Pakistan civil aircraft, on and from 4 February 1971, arising out of a "hijacking" incident involving the diversion of an Indian aircraft to Pakistan. It should be mentioned here that hostilities interrupting overflights had broken out between the two countries in August 1965, ceasing in the following month, and that after this cessation the Parties adopted what is known as the Tashkent Declaration of 10 January 1966, by which, and more especially by a consequential Exchange of Letters between them dated 3/7 February 1966, it was agreed, *inter alia*, that there should be "an immediate resumption of overflights across each other's territory *on the same basis as that prior to 1 August 1965* . . .", i.e., prior to the hostilities—(emphasis added). Pakistan has interpreted this undertaking as meaning that overflights would be resumed on the basis of the Convention and Transit Agreement ("the Treaties"): but India has maintained that these Treaties having (as she alleges) been suspended during the hostilities, were never as such revived, and that overflights were to be resumed on the basis of a "special régime" according to which such flights could take place in principle, but only after permission had been granted by India,—whereas under the Treaties they could take place as of right, without any necessity for prior permission. This special régime, India contends, replaced the Treaties as between the Parties; but Pakistan denies that any such régime ever came into existence, and also claims that, not having been registered as an international agreement under Article 102 of the United Nations Charter, it cannot now be invoked by India. Consequently Pakistan maintains that, at least since January/February 1966, the Treaties have never ceased to be applicable, and that, in accordance with them (Article 5 of the Convention and Article I, Section 1, of the Transit Agreement), her civil aircraft have "the right . . . to make flights into or in transit non-stop across [Indian] territory and to make stops for non-traffic purposes *without the necessity of obtaining prior permission*"—(Convention, Article 5—emphasis added).

11. It must however be stated at the outset, that with these various matters, and with the substance of this dispute as placed before the Council, and the facts and contentions of the Parties relative to it, the Court has nothing whatever to do in the present proceedings, except in so far as these elements may relate to the purely jurisdictional issue which alone has been referred to it, namely the competence of the Council to hear and determine the case submitted by Pakistan. Subject to this necessary exception, the Court must avoid not only any expression of

opinion on these matters of substance, but any pronouncements which might prejudge, or appear to prejudge, the eventual decision, whatever it might be, of the Council on the ultimate merits of the case, if the Council is held to be competent to entertain these—(see also the case of *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No. 12.* p. 18).

12. For the sake of clarity it should be mentioned at this point that when, in the present Judgment, reference is made to the "merits" of the dispute or disagreement, what is meant is the merits of the case before the Council. When reference is intended to the substance of the purely jurisdictional issue now before the Court, the context will make this clear.

* * *

JURISDICTION OF THE COURT TO ENTERTAIN THE APPEAL

13. Before coming to the question of the Council's jurisdiction, the Court must deal with certain objections to its own jurisdiction to entertain India's appeal which have been advanced by Pakistan. India, for her part, contests the right of Pakistan to do this, because the objections concerned were not put forward at an earlier stage of the proceedings before the Court as "preliminary" objections under Article 62 of the Court's Rules (1946 edition). It is certainly to be desired that objections to the jurisdiction of the Court should be put forward as preliminary objections for separate decision in advance of the proceedings on the merits. The Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*. The real issue raised by the present case was whether, in the event of a party's failure to put forward a jurisdictional objection as a preliminary one, that party might not thereby be held to have acquiesced in the jurisdiction of the Court. However, since the Court considers its jurisdiction to be established irrespective of any consent of Pakistan's on that basis, it will now proceed to consider Pakistan's objections.

14. The chief of these is that the relevant jurisdictional clauses of the Treaties—namely Article 84 of the Convention and Section 2 of Article II of the Transit Agreement—only allow of an appeal to the Court from a decision of the Council on the merits of the dispute referred to it, and not from a decision concerning the Council's jurisdiction to entertain the reference, whether such jurisdiction is affirmed or rejected by the Council. Additionally or alternatively, Pakistan claims that since it is one of India's principal contentions that the Treaties are not in force at all (or at any rate in operation) between the Parties, *(a)* India cannot have any *ius standi* to invoke their jurisdictional clauses for the purpose of appealing to the Court, and *(b)* India must admit that the Court in any

event lacks jurisdiction under its own Statute because, in the case of disputes referred to it under treaties or conventions, Article 36, paragraph 1, of the Statute requires these to be "treaties and conventions *in force*" (emphasis added),—and India denies that the treaties and conventions here concerned are in force, in the sense that she alleges that they are at least suspended as between Pakistan and herself, or their operation is.

15. Pakistan adduces yet other grounds in support of the view that the Court should hold itself to be incompetent in the matter, such as the effect of one of India's reservations to her acceptance of the Court's compulsory jurisdiction under Article 36, paragraph 2, of its Statute. Also pleaded is the principle of the "*compétence de la compétence*" as making the Council's jurisdictional decisions conclusive and unappealable. But this prejudges the question, for if on other grounds it appears that these decisions must be held appealable, this principle could not be permitted to prevail without defeating *a priori* all possibility of appeal. Again, having regard to the date of the Treaties (1944), a query was raised concerning the position under Article 37 of the Court's Statute. This matter was however disposed of by the Judgment of the Court in the preliminary phase of the case concerning the *Barcelona Traction, Light and Power Company, Limited (New Application: 1962), I.C.J. Reports 1964*, at pages 26-39. In any event, such matters would become material only if it should appear that the Treaties and their jurisdictional clauses did not suffice, and that the Court's jurisdiction must be sought outside them, which, for reasons now to be stated, the Court does not find to be the case.

16. It will be convenient to deal first with the contention that India is precluded from affirming the competence of the Court because she herself maintains (on the merits of the dispute) that the Treaties are not in force between the Parties, which contention, if correct, would entail that their jurisdictional clauses were inapplicable, and that the Treaties themselves did not fulfil the conditions contemplated by Article 36, paragraph 1, of the Court's Statute, in order that the Court should have jurisdiction in respect of disputes referred to it under those Treaties. The Court however holds that this contention of Pakistan's is not well-founded for the following reasons, some of which have been advanced in the Indian arguments on this part of the case:

(a) What India has affirmed is that the Treaties—which are multilateral ones—are suspended (or that their operation is suspended) as between herself and Pakistan. This is not the same thing as saying that they are not in force in the definitive sense, or even that they have wholly ceased to be in force as between the two Parties concerned.

(b) Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.

If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative—i.e., whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting.

(c) The argument based on preclusion could also be turned against Pakistan,—for since it is Pakistan not India which denies the jurisdiction of the Court, and affirms the force of the Treaties, it must be questionable whether she can be heard to utilize for that purpose an Indian denial of the force of the Treaties, put forward only as a defence on the merits, which, *ex hypothesi*, have not yet been pronounced upon. The question of the Court's jurisdiction on the other hand, is necessarily an antecedent and independent one—an objective question of law—which cannot be governed by preclusive considerations capable of being so expressed as to tell against either Party—or both Parties.

(d) It is significant that Pakistan also advances the complementary argument that India's appeal to the Court on the basis of the jurisdictional clauses of the Treaties necessarily involves an implied admission that those Treaties really are in force,—thus seeking to place India on the horns of a seemingly inescapable dilemma;—for according to this doctrine a party, by the mere fact of invoking the jurisdictional clause of a treaty, could be held to have made an admission adverse to itself as regards the very matter in respect of which it had invoked that clause. The Court considers this to be an unacceptable position. Parties must be free to invoke jurisdictional clauses, where otherwise applicable, without being made to run the risk of destroying their case on the merits by means of that process itself,—for their case could never either be established or negatived by means of a judicial decision unless a clause conferring jurisdiction on a court to decide the matter could be invoked on its own independent, and purely jurisdictional, foundations.

17. Greater weight is to be attached to Pakistan's contention that in the case of these Treaties, the jurisdictional clauses themselves do not allow of India's appeal in the present case because, on their correct interpretation, they only provide for an appeal to the Court against a final decision of the Council on the merits of any dispute referred to it, and not against decisions of an interim or preliminary nature such as are here involved. These clauses read as follows:

Article 84 of the Convention

Settlement of Disputes

"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. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. 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. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

Section 2 of Article II of the Transit Agreement

"If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation. the provisions of Chapter XVIII of the above-mentioned Convention—[*nota:* this Chapter contains Article 84 above quoted]—shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention."

On the wording of these provisions the case in favour of Pakistan's interpretation of them is as follows. The disagreement on interpretation or application which is to be decided by the Council under Article 84 is a disagreement on a substantive issue of merits, and it is this which is to "be decided by the Council". Consequently, the words giving a right of "appeal from the decision of the Council" ("the" decision, not "a" decision) must be confined to such a decision. Also, the disagreement that is referable to the Council under Article 84, and hence ultimately appealable, has to be one that could not "be settled by negotiation". Such a disagreement would normally be confined to the substantive merits of the issue involved, since disagreements about jurisdiction are (so the argument runs) not usually in the negotiable category. This consideration reinforces the view that only those decisions of the Council that consist of final decisions on the merits are appealable under Article 84. It is also pointed out that the Council's "Rules for the Settlement of Differences" (in Articles 5 and 15) provide for different procedures for dealing with the two types of decision, and that in the case of jurisdictional decisions, the rules do not include any obligation to give reasons for the decision, as should normally be the case for an appealable decision.

18. This view would certainly have to be regarded as correct in respect of any procedural or otherwise genuinely interlocutory decisions of the

Council, such as decisions about the manner in which a case was to be presented to it; as to the time-limits within which written pleadings were to be deposited; or as to the production or admissibility of documents or other evidence, etc. The Court however thinks that a decision of the Council relative to its jurisdiction to entertain a dispute does not come within the same category as the matters just mentioned, even though, like them, it necessarily has a preliminary character;—for although, in the purely temporal sense, a preliminary question is involved, that question is, in its essence, a substantial question crucially affecting the position of the parties relative to the case, notwithstanding that it does not decide the ultimate merits. In consequence, the Court considers that for the purposes of the jurisdictional clauses of the Treaties, final decisions of the Council as to its competence should not be distinguished from final decisions on the merits. In support of this view the following further points may be noted:

(a) Although a jurisdictional decision does not determine the "ultimate merits" of the case, it is a decision of a substantive character, inasmuch as it may decide the whole affair by bringing it to an end, if the finding is against the assumption of jurisdiction. A decision which can have that effect is of scarcely less importance than a decision on the merits, which it either rules out entirely or, alternatively, permits by endorsing the existence of the jurisdictional basis which must form the indispensable foundation of any decision on the merits. A jurisdictional decision is therefore unquestionably a constituent part of the case, viewed as a whole, and should, in principle, be regarded as being on a par with decisions on the merits as regards any right of appeal that may be given.

(b) Nor should it be overlooked that for the party raising a jurisdictional objection, its significance will also lie in the possibility it may offer of avoiding, not only a decision, but even a hearing, on the merits,—a factor which is of prime importance in many cases. An essential point of legal principle is involved here, namely that a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established.

(c) At the same time, many cases before the Court have shown that although a decision on jurisdiction can never directly decide any question of merits, the issues involved may be by no means divorced from the merits. A jurisdictional decision may often have to touch upon the latter or at least involve some consideration of them. This illustrates the importance of the jurisdictional stage of a case, and the influence it may have on the eventual decision on the merits, if these are reached—a factor well known to parties in litigation.

(d) Not only do issues of jurisdiction involve questions of law, but these questions may well be as important and complicated as any that

arise on the merits.—sometimes more so. They may, in the context of such an entity as ICAO, create precedents affecting the position and interests of a large number of States, in a way which no ordinary procedural, interlocutory or other preliminary issue could do. It would indeed be hard to accept the view that even the most routine decisions of the Council on points of the interpretation or application of the Treaties should be automatically appealable, while decisions on jurisdiction, which must *ex hypothesi* involve important general considerations of principle, should not be, despite the drastic effects which, as already noticed (*supra*, sub-paragraph *(a)*), they are capable of having.

(e) A concluding consideration is that supposing an appeal were made to the Court from the final decision of the Council on the merits of a dispute;—it would hardly be possible for the Court either to affirm or reject that decision, if it found that the Council had all along lacked jurisdiction to go into the case. This shows that questions relating to the Council's jurisdiction cannot in the last resort be excluded from the Court's purview: it is merely a question of what is the stage at which the Court's supervision in this respect is to be exercised. Clearly, not only do obvious reasons of convenience call for such exercise as early as possible—in the present case, here and now—but also substantial considerations of principle do so,—for it would be contrary to accepted standards of the good administration of justice to allow an international organ to examine and discuss the merits of a dispute when its competence to do so was not only undetermined but actively challenged. Yet this is precisely what the Court would be allowing if it now held itself not to have jurisdiction to deal with the matter because it could only hear appeals from final decisions of the Council on the merits.

* *

19. The foregoing paragraphs deal with the question of the Court's jurisdiction to entertain India's appeal as it arises generally on the relevant jurisdictional clauses. A special jurisdictional issue exists however, not on Pakistan's "Application" to the Council, but on her "Complaint" (see paragraph 9, *supra*) ostensibly made under and by virtue of Section 1 of Article II of the Transit Agreement, which reads as follows:

"A contracting State which deems that action by another contracting State under this Agreement is causing injustice or hardship to it, may request the Council to examine the situation. The Council shall thereupon inquire into the matter, and shall call the States concerned into consultation. Should such consultation fail to resolve

> the difficulty, the Council may make appropriate findings and recommendations to the contracting States concerned. If thereafter a contracting State concerned shall in the opinion of the Council unreasonably fail to take suitable corrective action, the Council may recommend to the Assembly of the above-mentioned Organization that such contracting State be suspended from its rights and privileges under this Agreement until such action has been taken. The Assembly by a two-thirds vote may so suspend such contracting State for such period of time as it may deem proper or until the Council shall find that corrective action has been taken by such State."

The special objection advanced by Pakistan to the existence of any right of appeal to the Court relative to Council action under this provision extends not merely to appeals about questions concerning the Council's competence in the matter of "complaints" which the Council may be requested to examine, but also to appeals regarding the eventual results of the Council's action under this same provision (i.e., its findings, recommendations, etc.),—in short, appeals relating to the "ultimate merits" of the "complaint" as dealt with by the Council. The gravamen of Pakistan's objection is in effect that the right of reference to the Council and thence by way of appeal to the Court, given by Section 2 of Article II, applies, in the context, only to a "disagreement . . . relating to the interpretation or application" of Section 1 itself, and not to the substance of the "complaint" the Council is requested to examine by reason of that Section, or to the outcome of what the Council does about it. In other words, provided the Council applies Section 1 correctly, following the prescribed courses and taking the prescribed steps, the result is non-appealable, and so, *a fortiori*, would be any decision of the Council to assume jurisdiction in respect of a "complaint" made by virtue of this Section.

20. The Court has no doubt that the situation contemplated by Section 1 of Article II of the Transit Agreement is quite a different one from that of Article 84 of the Convention (and hence of Section 2 of Article II of the Transit Agreement),—so that whatever may be the exact legitimate range of a "complaint" made under Section 1, its primary purpose must be to permit redress against legally permissible action that nevertheless causes injustice or hardship. In other words, the basic situation contemplated by Section 1 is where a party to the Agreement, although acting within its legal rights under the Treaties, has nevertheless caused injustice or hardship to another party—a case not of illegal action—not of alleged breaches of the Treaties—but of action lawful, yet prejudicial. In such a case it is to be expected that no right of appeal to the Court would lie,—for the findings and recommendations to be made by the Council under this Section would not be about legal rights or obliga-

tions: they would turn on considerations of equity and expediency such as would not constitute suitable material for appeal to a court of law.

21. This is not to say that a "complaint" can never deal with matters that would primarily form the subject of an "application", or allege illegalities as having caused the injustice or hardship complained of. But if it does so, then to that extent it necessarily assumes the character of an "application". In short, it follows from the very nature of the distinction described in the preceding paragraph, that in so far as a "complaint" exceeds the bounds of the type of allegation contemplated by Section 1, and relates not to lawful action causing hardship or injustice, but to illegal action involving breaches of the Treaties, it becomes assimilable to the case of an "application" for the purposes of its appealability to the Court. Unless this were so, the following paradox would arise. If for the reasons urged on behalf of Pakistan, its "Complaint" were non-appealable, but the "Application" (which alleges a "disagreement" under both Convention and Transit Agreement, involving charges of breaches of these Treaties) were appealable, then, the Council having assumed jurisdiction in respect of both "Application" and "Complaint", it would result that if the Court should allow the appeal on the "Application" (i.e., find that the Council has no jurisdiction to entertain it), nevertheless the non-appealable "Complaint" could and would still go on before the Council, although the issues it involved were almost identical. Therefore, although precluded by the Court's decision from pronouncing on the question of the alleged breaches of the Treaties in respect of the "Application", the Council would be able to make these very same pronouncements under the head of the "Complaint", thus defeating the whole purpose of the Court's decision which should have had the effect of preventing the Council pronouncing at all on the question of the alleged breaches. Naturally the Council would in any case be in no way prevented from dealing with those aspects of the matter that related to injustice and hardship.

22. While drawing attention to the above considerations, the Court does not wish to make any final pronouncement on the theory of the matter because it recognizes that this is an area in which it may be difficult to draw hard and fast distinctions or say definitely on which side of the line a given case may fall. In the present one, however, the Court entertains no doubts at all. Pakistan's "Application" and "Complaint" are set out in Annexes A and B of the Indian Memorial before the Court, and even a brief glance at them shows not only that the "Complaint" makes exactly the same charges of breaches of the Treaties as the "Application", but that it does so in almost identical language. The same applies to the redress requested, except that the "Application" asks for damages and the "Complaint" does not. In all other respects the various remaining heads of redress are the same in both cases.

23. It is evident therefore that this particular "Complaint" does not—

or for the most part does not—relate to the kind of situation for which Section 1 of Article II was primarily intended, namely where the injustice and hardship complained of does not result from action by the other party concerned of a definitively illegal character, but where the Treaties are applied lawfully but prejudicially. In the present case it is abundantly clear, from the whole tenor of the "Complaint", that although it does duly allege injustice and hardship (but so also does the "Application"), this injustice and hardship was such as resulted from action said to be illegal because in breach of the Treaties.

24. Having regard to these considerations, the Court must hold the Council's decision assuming jurisdiction in respect of Pakistan's "Complaint" to be appealable in so far as it covers the same ground as the "Application".

* *

25. To sum up on the question of the Court's jurisdiction to entertain India's appeal, the conclusion in respect both of Pakistan's "Application" and of her "Complaint" to the Council must be that, for the reasons given above, the various objections made to the competence of the Court cannot be sustained, whether they are based on the alleged inapplicability of the Treaties as such, or of their jurisdictional clauses. Since therefore the Court is invested with jurisdiction under those clauses and, in consequence (see paragraphs 14-16 above), under Article 36, paragraph 1, and under Article 37, of its Statute, it becomes irrelevant to consider the objections to other possible bases of jurisdiction.

* *

26. Before leaving this part of the case, and since this is the first time any matter has come to it on appeal, the Court thinks it useful to make a few observations of a general character on the subject. The case is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it). Yet in the proceedings before the Court, it is the act of a third entity—the Council of ICAO—which one of the Parties is impugning and the other defending. In that aspect of the matter, the appeal to the Court contemplated by the Chicago Convention and the Transit Agreement must be regarded as an element of the general régime established in respect of ICAO. In thus providing for judicial recourse by way of appeal to the Court against decisions of the Council concerning interpretation and application—a type of recourse already figuring in earlier conventions in the sphere of communications—the Chicago Treaties gave member States, and through them the Council, the possibility of ensuring a certain measure of supervision by the Court over those decisions. To this extent, these Treaties enlist the support of the Court for the good functioning of the Organization, and therefore the first reassurance for the Council lies in the knowledge that means exist for determining whether a decision as to its own competence is in

conformity or not with the provisions of the treaties governing its action. If nothing in the text requires a different conclusion, an appeal against a decision of the Council as to its own jurisdiction must therefore be receivable since, from the standpoint of the supervision by the Court of the validity of the Council's acts, there is no ground for distinguishing between supervision as to jurisdiction, and supervision as to merits.

* * *

JURISDICTION OF THE COUNCIL OF ICAO TO ENTERTAIN THE MERITS OF THE CASE

27. The Court now turns to the substantive issue of the correctness of the decisions of the Council dated 29 July 1971. The question is whether the Council is competent to go into and give a final decision on the merits of the dispute in respect of which, at the instance of Pakistan, and subject to the present appeal, it has assumed jurisdiction. The answer to this question clearly depends on whether Pakistan's case, considered in the light of India's objections to it, discloses the existence of a dispute of such a character as to amount to a "disagreement . . . relating to the interpretation or application" of the Chicago Convention or of the related Transit Agreement (see paragraph 17, *supra*). If so, then prima facie the Council is competent. Nor could the Council be deprived of jurisdiction merely because considerations that are claimed to lie outside the Treaties may be involved if, irrespective of this, issues concerning the interpretation or application of these instruments are nevertheless in question. The fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned,—otherwise parties would be in a position themselves to control that competence, which would be inadmissible. As has already been seen in the case of the competence of the Court, so with that of the Council, 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. It is desirable to stress these points because of the way, perfectly legitimate though it was, in which the Appeal has been presented to the Court.

28. Before proceeding further, it will be convenient to re-state Pakistan's claim in its simplest form, and without going into any details or side issues. It is to the effect that India, by suspending—or rather, strictly, refusing to allow overflight of her territory by Pakistan civil aircraft—was in breach of the Treaties, which Pakistan claims have never ceased to be applicable, and both of which conferred overflight rights, and certain landing rights, on Pakistan,—and that this suspension, or rather prohibition, did not take place, or was no longer taking place, in the particular circumstances—viz. "war" or declared "state of national emer-

gency"—in which, according to Article 89 of the Convention (cited *infra*, paragraph 40), it could alone (so Pakistan contends) be justified. Consequently the legal issue that has to be determined by the Court really amounts to this, namely whether the dispute, in the form in which the Parties placed it before the Council, and have presented it to the Court in their final submissions (*supra*, paragraph 8), is one that can be resolved without any interpretation or application of the relevant Treaties at all. If it cannot, then the Council must be competent.

29. In effect, India has sought to maintain that the dispute could be resolved without any reference to the Treaties, and hence that, this being so, it is a dispute with which the Council can have no concern, and which lies entirely outside its competence. The claim that the Treaties are irrelevant to the present situation regarding Pakistan overflights is based on and involves the following main contentions:—

(1) The Treaties are not in force, or they are suspended, because

(a) they were or became terminated or suspended as between the Parties upon the outbreak of hostilities in 1965 and have never been revived, but were replaced by a "special régime" in respect of which the Council could have no jurisdiction, and according to which Pakistan aircraft could only overfly India with prior permission (see as to this, paragraph 10, *supra*);

(b) India in any case became entitled under general international law to terminate or suspend the Treaties as from January 1971, by reason of a material breach of them, for which Pakistan was responsible, arising out of the hijacking incident that then occurred.

(2) The issue involved by the case presented to the Council by Pakistan is one of the termination or suspension of the Treaties, not of their interpretation or application which alone the Council is competent to deal with under the relevant jurisdictional clauses. This contention postulates that the notion of interpretation or application does not comprise that of termination or suspension.

30. The first of these main contentions, under both its heads, clearly belongs to the merits of the dispute into which the Court cannot go; but certain preliminary points are relevant to the jurisdictional aspects of the case and to a correct appreciation of the Indian position in that respect.

(a) As regards the contention that the Treaties were terminated or suspended, such notices or communications as there were on the part of India appear to have related to overflights rather than to the Treaties as such; although, admittedly, overflight rights constitute a major item of the Treaties, and a termination or suspension may well relate to part only of a treaty. Thus the Indian Note of 4 February 1971, following upon the hijacking incident, was in terms

confined to suspending overflights. As regards the earlier period, from 1965 onwards, the statement made in the Indian Memorial before the Court, paragraph 12, was to the effect that the "Convention and the Transit Agreement as between the two States were . . . suspended wholly *or in any event in relation to overflights and landings for non-traffic purposes*" (emphasis added).

(b) India does not appear at the time of the hijacking incident to have indicated which particular provisions of the Treaties—more especially of the Chicago Convention—were alleged to have been breached by Pakistan. She was not of course in any way obliged to do so at that stage, but the point is a material one on the jurisdictional issue for reasons to be stated later (see *infra*, paragraph 38). What was alleged in a Note of 3 February 1971, preceding the above-mentioned Note of 4 February, was a "violation of all norms of international behaviour and of International Law". In the same way, in the letters of 4 and 10 February addressed on behalf of the Government of India to the President of the Council of ICAO concerning the hijacking incident, Pakistan's action was stated to be not in accordance with "international law and usage and custom"; and again, a "deliberate act . . . in violation of international law, usage and custom" (letter of 4 February); and similarly (letter of 10 February), to be "in clear violation of international law". But with regard to the Treaties, all that was stated (letter of 4 February) was that Pakistan's action was "contrary to the principles of the Chicago Convention and other international Conventions". The only specific provisions mentioned were certain articles of the Tokyo and Hague Conventions about unlawful acts on board aircraft, and not provisions of the Chicago Convention or Transit Agreement. Later, in the Indian Preliminary Objections of 28 May 1971, made before the Council, the charge was of conduct which "amounted to the very negation of all the claims and objectives, the scheme and provisions of the Convention . . . and . . . Transit Agreement". Similarly, in the proceedings before the Court, the charge of "material breach of treaty" was not particularized much more fully than in the language used in paragraph 27 of the Indian Memorial, where the hijacking incident was characterized as amounting to "a flagrant violation of international obligations relating to the assurance of safety of air travel, enjoined by the Convention and the Transit Agreement and also by . . ." (here several other conventions and instruments were specified).

(c) As mentioned, the justification given by India for the suspension of the Treaties in February 1971 (if in fact anything other than a quasi-permanent prohibition of overflights was involved) was not said to lie in the provisions of the Treaties themselves, but in a principle of general international law, or of international treaty law, allowing of suspension or termination on this ground—and the 1969 Vienna

Convention on the Law of Treaties was in particular invoked. In consequence, so it was said, the Chicago Convention and Transit Agreement were irrelevant and had no bearing on the matter, because the Indian action had been taken wholly outside them, on the basis of general international law.

31. In considering further the Indian contentions described in paragraph 29, *supra*, a convenient point of departure will be the question mentioned in sub-paragraph *(c)* of paragraph 30 because, in the proceedings before the Court, this question assumed almost more prominence in the Indian arguments than any other. Furthermore, it involves a point of principle of great general importance for the jurisdictional aspects of this—or of any—case. This contention is to the effect that since India, in suspending overflights in February 1971, was not invoking any right that might be afforded by the Treaties, but was acting outside them on the basis of a general principle of international law, "therefore" the Council, whose jurisdiction was derived from the Treaties, and which was entitled to deal only with matters arising under them, must be incompetent. Exactly the same attitude has been evinced in regard to the contention that the Treaties were suspended in 1965 and never revived, or were replaced by a special régime. The Court considers however, that for precisely the same order of reason as has already been noticed in the case of its own jurisdiction in the present case, a mere unilateral affirmation of these contentions—contested by the other party—cannot be utilized so as to negative the Council's jurisdiction. The point is not that these contentions are necessarily wrong but that their validity has not yet been determined. Since therefore the Parties are in disagreement as to whether the Treaties ever were (validly) suspended or replaced by something else; as to whether they are in force between the Parties or not; and as to whether India's action in relation to Pakistan overflights was such as not to involve the Treaties, but to be justifiable *aliter et aliunde*; —these very questions are in issue before the Council, and no conclusions as to jurisdiction can be drawn from them, at least at this stage, so as to exclude *ipso facto* and *a priori* the competence of the Council.

32. To put the matter in another way, these contentions are essentially in the nature of replies to the charge that India is in breach of the Treaties: the Treaties were at the material times suspended or not operative, or replaced,—hence they cannot have been infringed. India has not of course claimed that, in consequence, such a matter can never be tested by any form of judicial recourse. This contention, if it were put forward, would be equivalent to saying that questions that prima facie may involve a given treaty, and if so would be within the scope of its jurisdictional clause, could be removed therefrom at a stroke by a unilateral declaration that the treaty was no longer operative. The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to

purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension, —whereas of course it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon. Such a result, destructive of the whole object of adjudicability, would be unacceptable.

*

33. The Court now proceeds to the last main category of Indian contention which, though more nearly relevant to the purely jurisdictional issue than those so far discussed, is nonetheless, like them, closely bound up with the merits. This contention is to the effect that Article 84 of the Chicago Convention, and hence by reference Section 2 of Article II of the Transit Agreement, only allows the Council to entertain disagreements relating to the "interpretation or application" of these instruments,—whereas (according to India) what is involved in this case is not any question of the interpretation or application of the Treaties, but of their termination or suspension,—and since (so India contends) the notion of interpretation or application does not extend to that of termination or suspension, the Council's competence is automatically excluded. Alternatively expressed, the Indian contention is that, since the Treaties have been terminated or suspended, it follows *ex hypothesi* that no question of their interpretation or application can arise, such as alone the Council would be competent to consider: non-existent treaties cannot be interpreted or applied.

34. It is evident that this contention, although getting much nearer to the real issue of what the Council can properly take cognizance of under the jurisdictional clauses of the Treaties, having regard to their actual wording, involves the same underlying assumption that the Treaties have in fact been (validly) terminated or suspended, and also that a unilateral act or allegation of India's in that sense suffices. In consequence three strands to this Indian contention can be seen to be interwoven: (i) the Treaties are terminated or suspended, so they cannot be interpreted or applied at all; (ii) the question whether they have been (validly) terminated or suspended, is not one of interpretation or application; (iii) in any event the answer to that question depends on considerations lying outside the Treaties altogether. On each of these grounds India contends that the issues involved are not within the Council's terms of reference which are limited to interpreting and applying the Treaties. Once more it is evident that, with respect to all three strands of this Indian contention, with the possible exception of certain aspects of the second one, the argument involves and depends upon questions of merits. In relation to it, the Parties debated at considerable length whether the notion of the interpretation and application of a treaty can, at least in some circumstances, embrace that of a termination or suspension of it; and also as

to whether any inherent limitations on the powers of the Council to deal with certain types of legal questions must be presumed. But until it has been determined by the proper means that what is involved is indeed an issue solely of termination or suspension of the Treaties, and further that no question of their interpretation or application arises or can arise (and this is the only real issue involved here), the problem of whether the one notion is comprised by the other can, for present purposes, be regarded as hypothetical.

* *

35. Thus far, only the negative aspects of the case have been examined; that is, the reasons why the various contentions so far considered do not have any real bearing on the question of the competence of the Council. It is now time to turn to the positive aspects, from which it will appear not only that Pakistan's claim discloses the existence of a "disagreement . . . relating to the interpretation or application" of the Treaties, but also that India's defences equally involve questions of their interpretation or application.

36. The nature of Pakistan's "Application" and "Complaint" to the Council, the full texts of which are set out in Annexes A and B of the Indian Memorial in the proceedings before the Court, has already been indicated in general terms in the discussion (*supra*, paragraph 22) about the Court's jurisdiction to entertain the appeal on Pakistan's "Complaint". Specific provisions of the Treaties—in particular Article 5 of the Convention and Section 1 of Article I of the Transit Agreement—were cited by Pakistan as having been infringed by India's denial of overflight rights. The existence of a "disagreement" relating to the application of the Treaties was affirmed. There can therefore be no doubt about the character of the case presented by Pakistan to the Council. It was essentially a charge of breaches of the Treaties,—and in order to determine these, the Council would inevitably be obliged to interpret and apply the Treaties, and thus to deal with matters unquestionably within its jurisdiction. (As will be seen later—*infra*, paragraphs 38-43—the underlying issue of the continued applicability of the Treaties themselves, is one that would equally require an examination of certain provisions of them both.)

37. India also, in the terms indicated in paragraph 30 *(b)*, *supra*, has made charges of a material breach of the Convention by Pakistan, as justifying India in purporting to put an end to it, or suspend its operation and that of the Transit Agreement. Thus the case is one of mutual charges and counter-charges of breach of treaty which cannot, by reason of the very fact that they are what they are, fail to involve questions of the interpretation and application of the treaty instruments in respect of which the breaches are alleged. It is however possible to be more specific than

this, for not only do Pakistan's claims cite particular articles of the Treaties, but both India's counter-charges and her defences to those of Pakistan, can be seen to involve various treaty provisions. These will now be considered in turn.

38. In the first place, India's allegation of a material breach of the Treaties by Pakistan, as justifying India in treating them as terminated or suspended, is inherently and by its very nature, one that must involve the examination of the Treaties in order to see whether, according to the definition of a material breach of treaty contained in Article 60 of the 1969 Vienna Convention on the Law of Treaties, there has been (paragraph 3 *(b)*) a violation by Pakistan of "a provision essential to the accomplishment of the object or purpose of the Treaty". The fact that, as has been seen in paragraph 30 *(b)*, *supra*, India has in very comprehensive language alleged a material breach of the Treaties, can only increase the need for considering what particular provisions are involved by this allegation. Even if the allegation, because of its generality, is to be regarded as one of conduct on the part of Pakistan amounting to a complete "repudiation of the treaty" (see paragraph 3 *(a)* of Article 60 of the Vienna Convention), it would still be necessary to examine the Treaties in order to see whether, in relation to their provisions as a whole, and in particular those relating to the "safety of air travel" which India herself invoked (end of paragraph 30 *(b)*, *supra*), Pakistan's conduct must be held to constitute such a repudiation.

39. Next, as regards the Indian claim that the Treaties had been replaced by a special régime, it seems clear that certain provisions of the Chicago Convention must be involved whenever two or more parties to it purport to replace the Convention, or some part of it, by other arrangements made between themselves. These provisions read as follows:

Article 82 (first sentence)

Abrogation of Inconsistent Arrangements

"The Contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings."

Article 83

Registration of New Agreements

"Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible."

There is no need for comment here, except to say that any special régime instituted between the Parties, and more especially any disagreement (such as there certainly is) concerning its existence and effect, would im-

mediately raise issues calling for the interpretation and application by the Council of the above-quoted provisions.

40. Finally, as regards the contention which formed the sub-stratum of the whole Indian position, namely that the Treaties were or became terminated or suspended between the Parties,—Pakistan, in the course of the proceedings before the Court, contended that these matters by no means lay outside the ambit of the Treaties but were, on the contrary, regulated, at least implicitly, by two provisions of the Convention, Articles 89 and 95, which read as follows:

Article 89

War and Emergency Conditions

"In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council."

Article 95

Denunciation of Convention

"*(a)* Any contracting State may give notice of denunciation of this Convention three years after its coming into effect by notification addressed to the Government of the United States of America, which shall at once inform each of the contracting States.

(b) Denunciation shall take effect one year from the date of the receipt of the notification and shall operate only as regards the State effecting the denunciation."

(A provision having broadly the same effect as Article 95 of the Convention appears in the Transit Agreement as Article III; and Article I of this Agreement (Sections 1 and 2) covers the same sort of ground as Article 89 of the Convention so far as concerns rights of overflight and of landing for non-traffic purposes. These Articles need not be quoted here.)

41. In connection with the provisions cited in the preceding paragraph, Pakistan pleaded the rule (approved by the Court in the *North Sea Continental Shelf* cases—*I.C.J. Reports 1969, Judgment*, paragraph 28), according to which, when an agreement or other instrument itself provides for the way in which a given thing is to be done, it must be done in that way or not at all. On this basis Pakistan contended that not only was there no provision for the suspension of the Convention as such, but that this possibility was impliedly excluded by Articles 89 and 95. All that was afforded (by Article 89) was a right in certain specified circumstances to disregard the Convention, and temporarily to stop granting the rights it provided for. As soon as these circumstances ceased to exist (as, in the instant case, Pakistan contended that they had), this licence to disregard came to an end, and the obligation to resume the full operation

of the rights provided for by the Convention automatically revived. Such was Pakistan's contention.

42. In the proceedings before the Court, India gave a different interpretation of this provision. This was, broadly, that Article 89 was a mere enabling, or in a certain sense saving, clause, the object of which was to make it clear that the Convention left intact, and was not intended to affect, the rights which in certain circumstances the parties might derive from sources outside the Convention, under general international law or otherwise. The Article was (so India said) an example of, or equivalent to, a type of clause often found in treaties, to the effect that the provisions of the treaty were without prejudice to the rights *ab extra* of the parties in certain respects: it had no direct bearing on the present case.

43. The Court must obviously refrain from pronouncing on the validity or otherwise of the opposing views of the Parties as to the object and correct interpretation of Articles 89 and 95, since this touches directly upon the merits of the case. But this opposition cannot but be indicative of a direct conflict of views as to the meaning of the Articles, or in other words of a "disagreement . . . relating to the interpretation or application of [the] Convention":—and if there is even one provision —and especially a provision of the importance of Article 89—as to which this is so, then the Council is invested with jurisdiction, were it but the only such provision to be found, which is clearly not the case. However, the Court having thus decided that the Council is competent, is not called upon to define further the exact extent of that competence, beyond what has already been indicated.

* * *

44. There is one more matter which the Court has to consider. It was strenuously argued on behalf of India, though denied by Pakistan, that irrespective of the correctness in law or otherwise of the Council's decision assuming jurisdiction in the case, from which India is now appealing, it was vitiated by various procedural irregularities, and should accordingly, on that ground alone, be declared null and void. The argument was that, but for these alleged irregularities, the result before the Council would or might have been different. Consequently, it was said, if the Court endorsed the Indian view as to the existence of these procedural irregularities, it should refrain from now pronouncing on the question of the Council's jurisdiction, declare the latter's decision null and void, and send the case back to it for re-decision on the basis of a correct procedure.

45. The Court however does not deem it necessary or even appropriate to go into this matter, particularly as the alleged irregularities do not prejudice in any fundamental way the requirements of a just procedure. The Court's task in the present proceedings is to give a ruling as to

whether the Council has jurisdiction in the case. This is an objective question of law, the answer to which cannot depend on what occurred before the Council. Since the Court holds that the Council did and does have jurisdiction, then, if there were in fact procedural irregularities, the position would be that the Council would have reached the right conclusion in the wrong way. Nevertheless it would have reached the right conclusion. If, on the other hand, the Court had held that there was and is no jurisdiction, then, even in the absence of any irregularities, the Council's decision to assume it would have stood reversed.

* * * * *

46. For these reasons,

THE COURT,

by thirteen votes to three,

(1) rejects the Government of Pakistan's objections on the question of its competence, and finds that it has jurisdiction to entertain India's appeal;

by fourteen votes to two,

(2) holds the Council of the International Civil Aviation Organization to be competent to entertain the Application and Complaint laid before it by the Government of Pakistan on 3 March 1971; and in consequence, rejects the appeal made to the Court by the Government of India against the decision of the Council assuming jurisdiction in those respects.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of August, one thousand nine hundred and seventy-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of India and to the Government of Pakistan, respectively.

(Signed) F. AMMOUN,
Vice-President.

(Signed) S. AQUARONE,
Registrar.

President Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I much regret I am unable to agree that Article 84 of the Convention read with Articles 5 (4), 15 and 18 of the Rules for the Settlement of Differences provides a right of appeal against a decision of the Council of ICAO rejecting a preliminary objection to its competence to handle an application or complaint. It seems to me that the considerations that have impelled the Court to arrive at the opposite conclusion do not carry the matter any further than the desirability of a provision to that effect. However strong that desirability may be it cannot serve as a substitute for the lack of such a provision in the Convention read with the relevant rules. The entire scheme of the Rules excludes the possibility of an appeal against a decision of the Council rejecting a preliminary objection against its competence. The remedy for the correction of this situation, if a correction should be desired, would be by way of amendment of the Convention and the Rules, and not by reading into them a meaning which they are not capable of bearing.

Nor am I able to agree that Section 1 of Article II of the Transit Agreement contemplates only cases of injustice or hardship occasioned by action which is lawful but is prejudicial, and that to the extent to which a complaint under that Section alleges unlawful action as the cause of the injustice or hardship complained of, it becomes assimilable to the case of an application for the purposes of appealability to the Court.

In view, however, of the finding of the Court that the Council of ICAO has jurisdiction to entertain the Application and Complaint laid before it by the Government of Pakistan on 3 March 1971, a finding with which I am in entire agreement, my dissent on the question of the admissibility of India's appeal assumes a purely academic aspect.

A large part of the submission of India's counsel to the Court was devoted to the exposition of irregularities of procedure alleged to have been committed by the Council of ICAO in dealing with India's Preliminary Objection to its assumption of jurisdiction in respect of Pakistan's Application and Complaint. The purpose of this exposition was to persuade the Court to hold that the proceedings before the Council were vitiated by these alleged irregularities and that the decision of the Council on India's Preliminary Objection was thus rendered void and of no effect and should consequently be set aside.

These alleged irregularities fall broadly into two categories; those relating to the "manner and method" of arriving at the decision appealed against, and those resulting from failure to comply with the requirements laid down in Article 15 of the Rules for the Settlement of Differences.

As regards the first category, India's objections and suggestions were thoroughly debated in the Council (Memorial of India, Annex E, *(e)*, Discussion, paras. 50-84) and the rulings of the President were upheld by

the Council. Nothing urged by India's counsel in his submissions to the Court in this context has served to raise any doubt in my mind concerning the correctness and propriety of the President's rulings and of the procedure followed by the Council.

As regards the second category, the brief answer to India's objections is that Article 15 of the Rules for the Settlement of Differences has no relevance to a decision on a preliminary objection. The subject of Preliminary Objection and Action Thereon is dealt with in Article 5 of the Rules. This Article is comprised in Chapter III of the Rules, which deals with Action upon Receipt of Applications. The Article is self-contained and comprehensive. The procedure for dealing with a preliminary objection is prescribed in paragraph (4) of Article 5 which runs as follows: "If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules." This is exactly what the Council did.

Article 15 of the Rules is contained in Chapter IV which prescribes the procedure to be followed in respect of "Proceedings", which start after a preliminary objection has been disposed of and which relate to the merits of the case. Article 15 which is headed "Decision" obviously has reference to a decision on the merits, and does not relate back to a decision on a preliminary objection disposing of the question as a preliminary issue before the commencement of proceedings on the merits.

The record of the discussion before the Council does not show that India urged compliance by the Council with the requirements of Article 15. Even before the Court some of the alleged irregularities were mentioned for the first time in the oral submissions of counsel and the list was expanded in reply. Be that as it may, it is clear that Article 15 of the Rules has no application to a decision on a preliminary objection. The Council rightly proceeded on that assumption and not a single member gave expression to a difference of view.

Judge LACHS makes the following declaration:

Feeling as I do that there are certain observations which should be made on some aspects of the Judgment, I avail myself of the right conferred by Article 57 of the Statute of the Court and append hereunder the following declaration.

I

While I fully agree with the findings of the Court concerning its competence to entertain the appeal, I wish to comment further on the interpretation of Article 84 of the Chicago Convention on International Civil

Aviation and Section 2 of Article II of the International Air Services Transit Agreement.

In examining the sense and import of "the decision", as used in Article 84, its strict verbal meaning should constitute a point of departure but cannot be conclusive, for there is no qualifying word to relieve us of the task of interpretation. It is true that the use of the definite article and the singular ("the decision") relates that term directly to the action to be taken by the Council under the first sentence of the Article. This would seem to point to the conclusion that "the decision" contemplated must be one whereby the Council disposes of "any disagreement between two or more contracting States relating to the interpretation or application" of the Convention and its Annexes which "cannot be settled by negotiation".

However, it is not only by decisions on substance that the Council can dispose of disagreements. Hence it is not only from such decisions that appeal may be made—and I do not, in this connection, find it possible to maintain that the Rules for the Settlement of Differences can be so construed as to restrict appealability to any greater extent than the Convention itself. Moreover, had the drafters definitely wished to exclude appeals on issues other than those of substance, they could easily have done so by suitably qualifying the term "decision": there are well-known precedents for such drafting.

This is, of course, not so say that appeal is allowable "from every order, or any order of the Council", which, as counsel for Pakistan suggested, would "defeat the very purpose of the Convention" (hearing of 27 June 1972). The matter has to be viewed in the light of the repercussions which the decision in question could have on the positions of the Parties in regard to the case. In the present instance we are concerned with a decision on a jurisdictional issue, and so a line has to be drawn and the question answered as to the side of the line on which "decisions on jurisdiction" lie. The answer is of course implicit in the crucial importance which such decisions invariably have (as stressed in para. 18 of the Judgment). This is borne out by the entire history of international adjudication, where these issues are much more vital than in the municipal context.

There is, however, a more general aspect to these issues. Great caution and restraint have been exercised by this Court and its predecessor when ascertaining their own jurisdiction. As Judge Lauterpacht pointed out: "Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it." (*The Development of International Law by the International Court*, 1958, p. 91.)

This restraint has had its *raison d'être* in the clear tendency not to impose more onerous obligations on States than those they have expressly

assumed. However, in regard to appeals from other fora, this very criterion imposes limits on the Court's caution in assuming jurisdiction.

Indeed, the same reasons which underlie the necessity of interpreting jurisdictional clauses strictly impel one to adopt an interpretation of provisions for appeal that would lend maximum effect to the safeguards inherent in such provisions. For, as between the "lower forum" and "the court of appeal", there exists as it were a see-saw of jurisdictional powers. Hence to apply a restrictive interpretation of rights of appeal—and thus of the powers of the "court of appeal"—would obviously entail an extensive interpretation of the jurisdictional powers of the "court of first instance". This would in fact imply more onerous obligations on the States concerned: something which (as indicated above) international tribunals have continuously endeavoured to avoid. To restrict the rights of States to seek relief from what they deem to be wrongful decisions would to some extent, at least, defeat the very object of the institution of appeals. If that is so in general, it applies in particular to issues of jurisdiction, which, as indicated earlier, are in the international field comparable in importance to issues of substance. Thus this aspect confirms the justification for the exercise of what the Judgment describes (para. 26) as "a certain measure of supervision by the Court" (cf. resolution of 25 September 1957 by the Institut de droit international, *Annuaire 1957*, pp. 476 ff.).

II

While I agree that the ICAO Council is competent to entertain the Application and Complaint submitted to it, I wish to comment on some procedural issues which have been raised in regard to the decision from which an appeal has been made. India advanced a series of submissions on the subject (Memorial of India, paras. 93-99 and 106 D). Pakistan for its part, denied them (Counter-Memorial, para. 59).

Article 54 *(c)* of the Convention on International Civil Aviation provides that: "The Council shall ... determine its organization and rules of procedure." Within the powers thus vested in it, the Council approved, on 9 April 1957, the "Rules for the Settlement of Differences". These were intended to "govern the settlement of ... disagreements between Contracting States which may be referred to the Council", and "the consideration of any complaint regarding an action taken by a State party to the Transit Agreement" (Art. 1 (1) and (2)).

In the light of these provisions the contracting States have the right to expect that the Council will faithfully follow these rules, performing as it does, in such situations, quasi-judicial functions, for they are an

integral part of its jurisdiction. Such rules constitute one of the guarantees of the proper decision-making of any collective body of this character and they set a framework for its regular functioning: as such, they are enacted to be complied with.

The records of the meeting of the Council on 29 July 1971 do indicate that some provisions of the Rules for the Settlement of Differences were departed from. In general, of course, not all departures from established rules affect the validity of decisions, but there are some which may prejudice the rights and interests of the parties. It is therefore reasonable, if one of the parties concerned should submit before this Court that procedural irregularities occurred, that these submissions should attract the Court's attention. Thus the objections raised by India are well taken.

I therefore regret that the Court has not gone into the matter and has limited itself to giving "a ruling as to whether the Council has jurisdiction in the case" (Judgment, para. 45). To pronounce upon any formal deficiencies the Court may find in the decision-making of the Council, or to draw that body's attention to them, would surely come within that "supervision by the Court over those decisions" referred to in a passage of the Judgment (para. 26) which I mentioned earlier and to which I fully subscribe.

Moreover, it is to be taken into account that the Council, in view of its limited experience on matters of procedure, and being composed of experts in other fields than law, is no doubt in need of guidance, and it is surely this Court which may give it. Such guidance would be of great importance for the further conduct of this case and future cases, and in the interest of the confidence of States entrusting it with the resolution of disagreements arising in the field of civil aviation.

Judges PETRÉN, ONYEAMA, DILLARD, DE CASTRO and JIMÉNEZ DE ARÉCHAGA append separate opinions to the Judgment of the Court.

Judge MOROZOV and Judge *ad hoc* NAGENDRA SINGH append dissenting opinions to the Judgment of the Court.

(Initialled) F. A.

(Initialled) S. A.
