INTERNATIONAL COURT OF JUSTICE: JUDGMENT IN THE APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL (India v. Pakistan)*

[August 18, 1972]

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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, PETRÉN, LACHS, ONGEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, Jiménez de Arechaga; Judge ad hoc NAGENDRA SINGH; Registrar AQUARONE.

*[Reproduced from the text provided by the International Court of Justice.

By 13 votes to 3, the Court rejected the Government of Pakistan's objections on the question of its competence and found that it had jurisdiction to entertain India's appeal. By 14 votes to 2, it held the Council of the International Civil Aviation Organization to be competent to entertain the Application and Complaint of the Government of Pakistan, and in consequence rejected the appeal made to the Court by India against the decision of the Council assuming jurisdiction in those respects.

President Zafrulla Khan and Judge Lachs appended Declarations to the Judgment. Judges Petrén, Onyeama, Dillard, de Castro and Jiménez de Arechaga appended Separate Opinions. Judge Morozov and Judge ad hoc Nagendra Singh appended Dissenting Opinions. None of these have been reproduced in I.L.M.]
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 Regime of 1966 and not by the Convention or the Transit Agreement. Any dispute between the two States can arise only under the Special Regime, 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 Regime of 1966 and not by the Convention or the Transit Agreement. Any dispute between the two States can arise only under the Special Regime, 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
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 prejudices 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.
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
tions: they would turn on considerations of equity and expediency such as would not constitute suitable material for appeal to a court of law.

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-

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 "Com­
plaint" 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 inapplicab­
liity of the Treaties as such, or of their jurisdictional clauses. Since there­
fore 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 pre­
sented 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 mat­
ter, the appeal to the Court contemplated by the Chicago Convention and
the Transit Agreement must be regarded as an element of the general
regime established in respect of ICAO. In thus providing for judicial re­
course 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 re­
lated Transit Agreement (see paragraph 17, supra). If so, then prima facie
the Council is competent. Nor could the Council be deprived of juris­
diction 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 particula­
form, cannot affect the competence of the tribunal or other organ con­
cerned,—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 Pakis­
tan'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 cer­
tain 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
confined to suspending overflights. As regards the earlier period, from 1965 onwards, the statement made in the Indian Memorial be
emergency"—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

(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 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 alter et alius; 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: 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 at least two 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 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 over-flight 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:

\[\text{Article 82 (first sentence)}\]

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."

\[\text{Article 83}\]

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, Ar-
ticles 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 notifica-
tion 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 Con-
vention appears in the Transit Agreement as Article III; and Artic-
le 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
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 Con-
tinental 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 implicitly 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 dis-
regard 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 inter-
pretation 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 appro-
priate to go into this matter, particularly as the alleged irregularities do
not prejudice in any fundamental way the requirements of a just proce-
dure. 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.

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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.