ORAL ARGUMENTS

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague,
from 19 June to 3 July, and on 18 August 1972,
Vice-President Ammoun presiding

FIRST PUBLIC SITTING (19 VI 72, 3 p.m.)

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

Also present:

For the Government of India:

H.E. Lt. General Yadavindra Singh, Ambassador of India at The Hague, *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, First Secretary, Embassy of India, The Hague, *as Deputy Agent*;

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*;

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

For the Government of Pakistan:

H.E. Mr. J. G. Kharas, Ambassador of Pakistan to the Netherlands, *as Agent*;

Mr. S. T. Joshua, Secretary of Embassy, *as Deputy Agent*;

Mr. Yahya Bakhtiar, Attorney-General of Pakistan, *as Chief Counsel*;

Mr. Zahid Said, Deputy Legal Adviser, Ministry for Foreign Affairs,

Mr. K. M. H. Darabu, Assistant Director, Department of Civil Aviation, *as Counsel.*

OPENING OF THE ORAL PROCEEDINGS

Le VICE-PRÉSIDENT faisant fonction de Président: La Cour se réunit aujourd'hui à l'effet de connaître de l'appel concernant la compétence du Conseil de l'Organisation de l'aviation civile internationale dans l'affaire entre l'Inde et le Pakistan.

Le Président étant le national de l'une des Parties en cause, il a cédé la présidence au Vice-Président en application de l'article 13, paragraphe 1, du Règlement de la Cour.

L'instance avait été introduite, le 31 août 1971, par une requête du Gouvernement indien interjetant appel de la décision du 29 juillet 1971 du Conseil de l'aviation civile internationale, décision ayant rejeté les exceptions préliminaires opposées par le Gouvernement indien à la requête et à la plainte dont le Gouvernement pakistanais avait saisi le Conseil le 3 mars 1971.

Les pièces de la procédure écrite ayant été déposées dans les délais fixés, l'affaire est en état.

La Cour ne comptant pas sur le siège un juge de la nationalité de l'appelant, le Gouvernement de l'Inde a désigné M. Nagendra Singh comme juge *ad hoc*, en application de l'article 31, paragraphe 2, du Statut.

Le Gouvernement du Pakistan a fait savoir qu'il n'avait pas d'objection à cette désignation.

J'invite en conséquence M. Nagendra Singh à prononcer l'engagement solennel prévu à l'article 20 du Statut de la Cour.

Mr. NAGENDRA SINGH: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

Le VICE-PRÉSIDENT: Je prends acte de la déclaration que vient de prononcer M. Nagendra Singh et le déclare installé en ses fonctions de juge *ad hoc* en la présente instance.

Je dois indiquer que la Cour, tenant compte de l'article 44, paragraphe 3, de son Règlement, et avec l'assentiment des Parties, a autorisé que dès ce jour les pièces de la procédure écrite soient mises à la disposition du public.

Ayant constaté la présence à l'audience des agents des Parties et de leurs conseils respectifs, je déclare la présente procédure orale ouverte.

STATEMENT OF LT. GENERAL YADAVINDRA SINGH

AGENT FOR THE GOVERNMENT OF INDIA

Lt. General YADAVINDRA SINGH: Mr. President and honourable Members of the Court, it is an honour and privilege for me to appear before this honourable Court as the Agent of the Government of India in the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*. I would first of all like to convey to the honourable Court the greetings of the Government of India and my own. India respects the rule of law and has deep esteem for this highest judicial organ of the international community.

Excellencies, in the present case, the Government of India has come in appeal against the decision rendered by the Council of the International Civil Aviation Organization on 29 July 1971, on the preliminary objections raised by India in relation to the Application and the Complaint filed by the Government of Pakistan on 3 March 1971.

The written pleadings of the Parties are already before the honourable Court. For the presentation of India's case my Government has deputed their Counsel who are sitting by my side. It is now my pleasant duty to introduce them to you. Mr. N. A. Palkhivala, Senior Counsel, Supreme Court of India, who is an eminent lawyer and is well known both in India and abroad, is our Chief Counsel for the case. He is assisted by Dr. S. P. Jagota, who is the Legal Adviser to the Ministry of External Affairs, Government of India, Mr. B. S. Gidwani, who is Deputy Director General of Civil Aviation, Government of India, Mr. Y. S. Chitale, who is an eminent advocate of the Supreme Court of India, and Mr. P. C. Rao, who is the Legal Adviser to the Permanent Mission of India to the United Nations in New York. They will be assisted by Mr. I. R. Menon, who is an expert in civil aviation matters.

My Government has requested Chief Counsel Mr. N. A. Palkhivala to present the whole of India's case himself. Therefore, I beg leave, Mr. President, for the Chief Counsel of India to address this honourable Court.

ARGUMENT OF MR. PALKHIVALA

CHIEF COUNSEL FOR THE GOVERNMENT OF INDIA

Mr. PALKHIVALA: Mr. President and honourable Members of the Court. I am happy and feel greatly honoured to be able to address this distinguished Court. In this oral proceeding I beg leave to repeat and reaffirm all the statements and submissions contained in India's pleadings, namely the Memorial and the Reply. I would like to elaborate some of the points which need elaboration and would like to put in proper perspective the real issues which arise in this appeal.

This appeal, Mr. President, is from the decision of the ICAO Council on the preliminary objections raised by India regarding the jurisdiction of the Council to entertain an Application and a Complaint filed by Pakistan against India following upon a hijacking incident which took place on 30 January 1971 and which resulted in the destruction of the Indian aircraft at Lahore in Pakistan on 2 February 1971. As a result of this hijacking incident India suspended the right of Pakistan to overfly India, and that document would be found at page 78, *supra*, of India's Memorial. The material words are: "the Government of India have decided to suspend, with immediate effect, the overflight of all Pakistani aircraft, civil or military, over the territory of India".

I think, Mr. President, and honourable Judges, you will not in this case be troubled with the question as to who is right and who is wrong, you will not be really called upon to decide the issue whether India was justified or unjustified in suspending this right of overflying. As I see the issue, the real issue before this Court is: did the ICAO Council have jurisdiction to go into the merits of this dispute, or, by the very terms of its Charter, was the ICAO Council incompetent to entertain the Application and the Complaint of Pakistan? I shall leave for the moment the Complaint of Pakistan to be dealt with at a later stage and shall confine my arguments to the Application of Pakistan before the ICAO Council.

When that Application of Pakistan was filed, India raised two major preliminary objections. One was that on the material date, which was 4 February 1971, on which date this note of India on page 78, *supra*, of India's Memorial, was promulgated, the Chicago Convention, which is the Convention on International Civil Aviation of 1944 and which for the sake of brevity I shall call hereafter "the Convention", and the International Air Services Transit Agreement of 1944 which I shall hereafter call "the Transit Agreement", were not in force between India and Pakistan. Alternatively, India argued that assuming they were in force between the two countries, the Convention and the Transit Agreement had been suspended by India on 4 February 1971 in exercise of its right under a rule of international law, which is well established and is reiterated in the latest pronouncement of this honourable Court.

These two contentions were both summarily rejected by the ICAO Council, without assigning any reasons, within a few hours of the arguments being concluded. Some of the members of the Council asked for time to consider the arguments urged by India, but the Council thought fit not to give any time but to proceed to a decision straight away. Logically the point which

should come first is the point that on 4 February 1971 the Convention and the Transit Agreement were not in force between India and Pakistan, and alternatively should come the second point that assuming they were in force, even then there was a right under international law, which India exercised, of suspending these two treaties as against Pakistan. But with your leave, I should like to take up the second point first, because that, as I see it, goes to the root of the matter and would enable this honourable Court to lay down a principle which would apply to a large number of international treaties which are in force, and where today, as a result of this decision of the ICAO Council, the countries would not know which exactly is the right forum for them to go to in a case like this. And, therefore, I propose to take first this point: assuming, against India, that the Convention and the Transit Agreement were in operation as between India and Pakistan on 4 February 1971, and India suspended these two treaties vis-à-vis Pakistan, did the ICAO Council have jurisdiction to deal with a dispute pertaining to such suspension?

After I have finished with this point, I shall deal with the question of the special régime which was in force between India and Pakistan on 4 February 1971. I will not repeat hereafter that the whole of the argument on the first point is on the assumption against myself that the Convention and the Transit Agreement were in force on 4 February 1971, which assumption, in India's submission, is really erroneous.

Now proceeding on that assumption, may I request the President and the honourable Members of the Court to turn to the operative words of the Convention, which confer jurisdiction on the Council in certain cases. The Convention is set out in India's Memorial, at page 299, *supra*, and the relevant article of the Convention, Article 84, is at page 322, *supra*. Article 84 runs as follows:

> "*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."

The jurisdictional words are "any disagreement . . . relating to the interpretation or application of this Convention". These words, "interpretation" and "application", are express words delimiting, circumscribing, the jurisdiction of the Council. They are not merely express words, but they are expressive and explicit words. They leave no doubt as to what are the limits of the Council's jurisdiction in dealing with international disputes. The jurisdiction of the Council to deal with disputes under the Transit Agreement is couched in equally expressive and explicit words. At page 328, *supra*, of India's Memorial is Article II, Section 2, of the Transit Agreement, which runs as follows:

> "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 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."

So whatever would be this honourable Court's decision regarding the limits of the Council's jurisdiction under the Convention would equally apply to the question of the limits of the Council's jurisdiction under the Transit Agreement. At page 330, *supra*, of India's Memorial are the Rules framed by the Council for the Settlement of Differences, which apply to the cases filed by Pakistan against India. Of these Rules, the relevant Rule is that contained in Article 1, paragraph (1):

"The Rules of Parts I and III shall govern the settlement of the following disagreements between Contracting States which may be referred to the Council:

(a) Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation (hereinafter called 'the Convention') and its Annexes . . .;

(b) Any disagreement between two or more Contracting States relating to the interpretation or application of the International Air Services Transit Agreement and of the International Air Transport Agreement (hereinafter respectively called 'Transit Agreement' and 'Transport Agreement') (Article II, Section 2, of the Transit Agreement; Article IV, Section 3, of the Transport Agreement)."

The argument which I propose to urge before this honourable Court would centre round three propositions:

The first proposition is that a dispute relating to termination or suspension is not a dispute relating to interpretation or application.

Secondly, the first proposition is unassailable in any event when the termination or suspension is effected, not under a provision of the treaty, but in exercise of the right of a sovereign State under a rule of international law *dehors* the treaty, and suspension in the present case was effected under such a rule of international law.

Thirdly, there are inherent limitations on the Council's jurisdiction which support and reinforce the argument regarding the scope of the words "interpretation" or "application". Further, the doctrine of inherent limitations provides an independent and separate ground for holding the Council's jurisdiction to be excluded in matters which may seemingly fall within the words "interpretation" or "application".

May I take these three propositions in order. The first proposition, Mr. President, is that there is a clear conceptual difference between termination and suspension on the one hand, and interpretation and application on the other. The concepts in law have jelled; they have crystallized. Decided cases and statutory history, the practice of the States and a vast number of international treaties, leave no doubt that when nations talk of "interpretation" or "application" they do not have in mind termination or suspension.

Nothing would have been easier than to provide in these multilateral treaties, the Convention and the Transit Agreement, that *any dispute* pertaining to these treaties shall be dealt with by the Council. Why put in the words "interpretation" or "application" unless the idea of the nations is to

limit, circumscribe and confine the jurisdiction of the Council to cases which alone are intended to be dealt with by the Council, and not cases of the type that have come before this august body, not cases which ordinary men, not familiar with jurisprudence and technicalities of international law, would be unable to deal with?

In support of my basic proposition regarding the distinction between "termination" and "suspension" on the one hand, and "application" and "interpretation" on the other, may I request this honourable Court to turn to the most important document on bilateral and multilateral treaties, the Vienna Convention on the Law of Treaties. A number of nations are parties to this Convention; India and Pakistan are not. But the legal concepts dealt with by the Vienna Convention and the validity of the conceptual differences which it has codified, do not depend upon the number of nations which subscribe to this Convention. The lack of support by India and Pakistan would not derogate from the validity of the conceptual differences embodied in this very famous treaty.

A most significant distinction is made by the Vienna Convention between "interpretation" and "application" on the one hand, and "suspension" and "termination" on the other. Part III of the Vienna Convention has the heading: "Observance, *Application and Interpretation* of Treaties." Part V of the Vienna Convention has the heading: "Invalidity, *Termination and Suspension* of the Operation of Treaties."

Part III deals with questions of application and interpretation. Part V deals with questions of termination and suspension. I think these words are conceptually so strikingly different. They do not overlap, they deal with separate and distinct subject-matters, and therefore the Vienna Convention deals with them in separate and distinct chapters.

The basic point is that when one talks of "interpretation" or "application" of a treaty, one necessarily postulates, presupposes, the continued existence and operation of the treaty. In other words, it is only a treaty which is in operation, which is in existence between two States, which can fall to be interpreted or applied. If a treaty has ceased to be in operation as a result of either termination or suspension, there is nothing to interpret and nothing to apply. This is the basic proposition on which I submit the conceptual difference is founded, as is illustrated by the Vienna Convention.

The word "application" is quite different from the word "operation". It is not as if the ICAO Council has been given the right to deal with disputes relating to the operation of the treaty, the duration of the treaty. Questions pertaining to operation are questions which occupy an area where suspension and termination play their part, because the whole effect of suspension or termination is to put an end, permanently or temporarily, to the operation of the treaty. So the concept of operation goes with the concepts of suspension and termination. On the other hand, the concept of application, which is quite different from the concept of operation, presupposes the continued operation of the treaty. The jurisdiction of the ICAO Council is limited to disputes which are in the field of application, and not in the field of operation.

In this connection may I just illustrate what type of questions will go before the Council. So far as the word "interpretation" is concerned, it would be a work of supererogation to illustrate cases of interpretation.

Cases of application of the treaty which can go before the Council may be illustrated by taking a few examples of disputes between nations regarding the application of the Convention or the Transit Agreement.

I shall take a few of the articles of the Convention to illustrate what are the types of dispute pertaining to the application of the Convention which would go before the ICAO Council.

At page 300, *supra*, of India's Memorial you have Article 5 of the Convention. That Article confers the right on aircraft on non-scheduled flights to overfly or make non-traffic landings in the territory of a contracting State:

> "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international . . . services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing."

This right to overfly or to make non-traffic stops has to be exercised subject to the provisions of the Convention, and the question of application would arise when one tries to apply the relevant provisions of the Convention to an existing state of affairs.

The circumstances may differ from country to country, and the question will be: how will you apply the provisions of the articles to the facts existing in a particular country? If there is a dispute as to the application of the Convention to the facts existing in a given country, that dispute goes to the ICAO Council.

For example, if one turns to page 301, *supra*, the Memorial, Article 9, one can see immediately how questions would arise of application of Article 9:

> "[Every] contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization."

Two nations may have a dispute as to whether in one of them military necessity or public safety requires restrictions or prohibitions of the type mentioned in Article 9. These questions, which are questions of facts, would be dealt with by the Council. A question may arise whether any distinction is being made between the aircraft of the State imposing the restriction or prohibition and the aircraft of other States. This kind of discrimination is prohibited by Article 9. One State may say "I have not indulged in discrimination", another State may say "No, on these facts you have". That is the case of application of the Treaty.

Or a dispute may arise whether the prohibited areas under Article 9 are reasonable in extent and location. A dispute as to reasonableness would go before the ICAO Council.

Article 11 says:

> "Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its

territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State" (Memorial, Annex H, p. 302, *supra*).

The whole object of Article 11 is to prevent discrimination between the aircraft of one country as compared to aircraft of another. On a given set of circumstances has there been discrimination or not? That is a question of application of Article 11 which will be decided by the Council.

And, finally, Article 16:

"The appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search [the] aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention" (*ibid.*, p. 303, *supra*).

A dispute may arise as to the application of Article 16. Does a particular State indulge in "unreasonable delay" in searching the aircraft of other States?

One or two examples may be taken from the Transit Agreement which begins in India's Memorial at page 327, *supra*.

The Transit Agreement is the counterpart of the Convention. The rights of overflying and making non-traffic landings which are conferred on non-scheduled services by the Convention are conferred on scheduled services by the Transit Agreement. Substantially the right is the same, namely, to overfly and make non-traffic landings. This right is conferred by Article 1, Section 1, of the Transit Agreement on scheduled air services:

"Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

(1) The privilege to fly across its territory without landing;
(2) The privilege to land for non-traffic purposes.

The privileges of this section shall not be applicable with respect to airports utilized for military purposes to the exclusion of any scheduled international air services. In areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities" (*ibid.*, Annex I, p. 327, *supra*).

Now here, for example, a dispute may arise as to the application of this article. *In a given case are there "active hostilities"? Is it a case of "military* occupation"? Likewise a question may arise under the same Article 1, Section 3, which reads as follows:

"A contracting State granting to the airlines of another contracting State the privilege to stop for non-traffic purposes may require such airlines to offer reasonable commercial service at the points at which such stops are made" *(ibid.)*.

A dispute may arise as to the application of Section 3. Is the commercial service required by the State a reasonable service, or is the demand unreasonable?

The final instance from Section 4 of the Transit Agreement:

"Each contracting State may, subject to the provisions of this Agreement,

(1) Designate the route to be followed within its territory by any international air service and the airports which any such service may use;
(2) Impose or permit to be imposed on any such service just and reasonable charges for the use of such airports and other facilities;" *(ibid.)*.

Whether the charges imposed by a State are "just and reasonable" is a question of application of the Transit Agreement. The honourable Court will see that these questions of application of the Convention and the Transit Agreement are questions which arise in the normal day-to-day operation of the treaties. They are questions which deal with the relation of the provisions of the treaties to an existing set of facts, and which are far removed from the region which the ICAO Council has sought to bring within its jurisdiction: the region of international confrontation between States—maybe political confrontation, maybe military confrontation. In those cases one deals with complex questions which this Court can deal with but not the ICAO Council. No-one was more conscious of the express limitations on its jurisdiction than the ICAO Council itself when it started functioning. When originally the ICAO Council was sought to be brought into existence, the suggestion was to give it the jurisdiction to deal with *all disputes* pertaining to the Convention and the Transit Agreement. But this proposal was ultimately negatived and the jurisdiction was expressly limited to two categories of questions only: questions pertaining to interpretation and questions pertaining to application.

The Council itself was fairly and reasonably conscious of this very clear limitation on its jurisdiction. India's Memorial, page 51, *supra*, paragraph 81, reproduces a resolution of the ICAO Council which is of very great importance and significance, I submit, in the solution of the problem which faces this honourable Court. I quote paragraph 81:

"It is also significant that the very First session of the ICAO Assembly *expressly drew attention to the fact that the jurisdiction of the Council* under Article 84 of the Convention is limited to decisions on disagreement relating to the interpretation or application of the Convention. Attention may be drawn in this connection to resolution A1-23, adopted at the First session by the ICAO Assembly in 1947 [their very first session]. The resolution reads as follows:

'A1-23: *Authorization to the Council to act as an Arbitral Body*

Whereas the Interim Agreement on International Civil Aviation provides, under Article III, Section 6 (8), that one of the functions of the Council shall be:

"When expressly requested by all the parties concerned, act as an arbitral body on any differences arising among Member States relating to international civil aviation matters which may be submitted to it. The Council may render an advisory report or, if the parties concerned so expressly decide, they may obligate themselves in advance to accept the decision of the Council. The procedure to govern the arbitral proceedings shall be determined in agreement between the Council and all the interested parties."

Whereas the Convention on International Civil Aviation contains no such provision and the competence of the Council of the Organization

in the settlement of disputes, as accorded to it by Article 84 of the Convention, is limited to decisions on disagreements relating to the interpretation or application of the Convention and its Annexes;

Now therefore the First Assembly resolves:

(1) That pending further discussion and ultimate decision by the Organization as to the methods of dealing with international disputes in the field of civil aviation, the Council be authorized to act as an arbitral body on any differences arising among Contracting States relating to international civil aviation matters submitted to it, when expressly requested to do so by all parties to such differences;' " [and the rest is not relevant].

The point I am seeking to make by reading this resolution of the Council in its First Session is that the Council was conscious that departing from the earlier suggestion or proposal, in the Convention as it emerged in the final shape a very limited jurisdiction was given to the Council, only disputes as to application or interpretation. The Council says that this means that there would be a large area where it would have no jurisdiction under Article 84. Therefore, let us resolve, says the Council, that we may act as an arbitral body if, apart from the obligatory provisions of the Convention, two States which are in disagreement choose to refer the dispute to us.

India and Pakistan could have chosen as a matter of separate arbitral agreement to appoint the ICAO Council as the arbitrator, but we have chosen not to do so. We having chosen not to do so, the Council's limited jurisdiction under Article 84 of the Convention is inadequate in scope to cover the type of dispute which arises in the present case.

I have finished with my first proposition, namely the conceptual difference between "application" and "interpretation" on the one hand, and "termination" and "suspension" on the other.

The second proposition is that in any event and any view of the matter, when the right of suspension or termination is exercised *dehors* the treaty, and not in pursuance of a provision of the treaty itself, a dispute regarding such suspension or termination cannot possibly involve a dispute as to interpretation or application of the treaty. The distinction is between a treaty itself conferring the right to suspend or terminate it, and a treaty not conferring such a right but the right being exercised, as this honourable Court said in the *Namibia* case, "outside of the treaty". If the right is exercised outside of the treaty, *ex hypothesi* you are not interpreting or applying the treaty.

To say that the right is exercised *dehors* the treaty and at the same time to say it involves a question of interpretation or application of the treaty, is a contradiction in terms.

So the second proposition hinges around this—whatever may be this honourable Court's decision in another case where a suspension or termination is brought about by virtue of a provision contained in the treaty itself, the decision in this case must take into account the fact that India has chosen to exercise a right under a rule of international law to suspend the treaty on grounds of material breach by Pakistan.

You will forgive me for repeating this, that at the moment the question is not whether India is right or wrong; at the moment the question is not whether India will be able to substantiate the case on merits. I am confident India would be able to substantiate its case on merits before a proper forum. But at the moment I am on a very limited question. If a right is exercised by a State

of suspending a treaty, and that right owes its source not to the treaty but to a rule of international law outside of the treaty, is it possible to say that a dispute pertaining to such suspension or termination involves the question of application or interpretation of the treaty? I submit not.

In this connection may I request the honourable Court to be good enough to turn once again to the Vienna Convention which the Court dealt with last year in an Advisory Opinion delivered just 363 days ago, 21 June 1971. To the extent to which it confers a right to suspend or terminate a treaty for material breach by the other State, the Vienna Convention only codifies a well-established principle of international law. I shall read that Judgment later.

The Vienna Convention draws a sharp distinction between the right of suspension or termination given by the treaty itself and exercised in terms of the treaty, and the right of suspension or termination not given by the treaty but exercised *dehors* the treaty.

The right to be exercised *dehors* the treaty is embodied in Articles 42 and 60 of the Vienna Convention. The right of suspension or termination which is conferred by the treaty itself is dealt with by Articles 54 and 57 of the Vienna Convention. Article 42 says:

> "1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
>
> 2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or [the word 'or' is the crucial word], of the present Convention. The same rule applies to suspension of the operation of a treaty."

In other words, Article 42 expressly postulates two distinct and different rights of suspension/termination. The right may be one which is to be found in the provision of the treaty itself or the right may be outside of the treaty. When it is outside of the treaty that right owes its source to a rule of international law, a well-settled rule which is codified by this Convention. And Article 60 deals specifically with this right under international law to suspend or terminate a treaty, and it reads as follows:

> "1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
>
> 2. A material breach of a multilateral treaty by one of the parties entitles:
>
> *(a)* the other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:
>
> (i) in the relations between themselves and the defaulting State, or
> (ii) as between all the parties;
>
> *(b)* a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;".

India has exercised its right under international law which is codified in Article 60, clause 2, subclause *(b)*. Omitting the irrelevant words, the right is this:

> "A material breach of a multilateral treaty by one of the parties

entitles ... a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State."

India has not denounced the Convention or the Transit Agreement, it continues to be a party to the treaties. All that it has done is that vis-à-vis Pakistan it has suspended them in whole or in part. I say in whole, but it is irrelevant whether it is in whole or in part. On the question of the Council's jurisdiction this particular question of whether the suspension is in whole or in part will have no bearing.

Since the right claimed is overflying, and that right was definitely suspended, it becomes irrelevant to consider whether the other rights which are not in dispute were suspended or not. In my submission they were, but that is, as I said, irrelevant to consider, and unless the honourable Court calls upon me to deal with this question of whole or part, I propose to leave it as being irrelevant to this Appeal.

India has exercised this right on account of a material breach by Pakistan, the material breach being a fact to which I shall refer later, not with a view to justifying India's conduct, because this honourable Court is not called upon to consider the validity of the justification for suspension, but only to show that as a law-abiding nation, India has observed the norms of good international behaviour, and acted in good faith. But the point I am on just now is that India has chosen to exercise this right under international law, codified in Article 60, clause 2, subclause *(b)*, of suspending the treaty vis-à-vis Pakistan alone. And therefore the question of interpretation or application of the treaty *ex hypothesi* cannot arise.

By contrast, if you look at Articles 54 and 57 you find the provisions which deal with the suspension or termination of a treaty in exercise of a right conferred by the treaty itself. If I may read Article 54:

Termination of or withdrawal from a treaty under its own provisions, or by consent of the party.

"The termination of a treaty, or the withdrawal of a party may take place,

(a) in conformity with the provisions of the treaty or
(b) at any time by consent of all the parties after consultation with the other contracting States."

When the termination is in conformity with the provisions of the treaty, in a given case, which is not the case here, a difficult question may arise, as to whether such termination involves a question as to the application of the treaty. It might be said that this very treaty is being applied at the stage of termination. I am not suggesting it would be covered by the words "application" and "interpretation". I am only indicating that a possible argument may be urged which may ultimately be rejected or may be accepted, that in a given case where the termination or suspension is in terms of the treaty itself, you are called upon to interpret the treaty or to apply the treaty. That question does not arise here. Just as Article 54 dealt with termination, Article 57 of the Vienna Convention deals with suspension, suspension in terms of the treaty when the treaty itself confers the right to suspend:

"The operation of a treaty in regard to all the parties or to a particular party may be suspended,

(a) in conformity with the provisions of the treaty, or

(b) at any time by consent of all the parties after consultation with the other contracting States."

May I summarize the argument I have just finished. When the suspension or termination of the treaty is under a rule of international law, what you are applying is the rule of international law. You are not applying the treaty at all. Therefore there can be no dispute as to the application of the treaty. The question of interpretation cannot arise because there is no clause of the treaty which deals with suspension or termination under which any right at all is exercised. By contrast, when a party seeks to exercise the right to suspend or terminate the treaty under an express provision which deals with the suspension or termination, one may or may not be able to say (I make no submission on that point because it is not relevant to this appeal), that in that case a dispute arises as to interpretation or application of the clause which is in the treaty itself and which is invoked to bring about suspension or termination.

The Court adjourned from 4.20 p.m. to 4.50 p.m.

One word more about the Vienna Convention before I pass on to the Advisory Opinion of this Court in the *Namibia* case. In the Vienna Convention there is a provision for resolution of international disputes, and those honourable Judges and others who were concerned with the formulation of the various provisions and the enunciation of the principles underlying the Vienna Convention will recall the great difficulty which the framers had in trying to make the nations agree upon a forum for the resolution of the disputes. In the Vienna Convention there is Article 65, which deals with the question as to what is to happen when a State has exercised its right to suspend or terminate a treaty outside of the treaty, the right being founded on a rule of international law as embodied in the Vienna Convention itself:

"1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in Article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, [like, for example, the objection of Pakistan here] the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations."

Article 33 of the Charter of the United Nations provides that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". The significant words are "of their own choice". In other words it is consent to the jurisdiction of a certain forum which is the very

foundation of compulsory adjudication in international law. There can be no arbitration without the consent of both the parties. I shall cite the cases, including some judgments of the distinguished Judges who are present today, which have emphasized that in the absence of clear consent there can be no competence of a forum to adjudicate upon a dispute. If the procedure is not followed under Article 33 of the Charter of the United Nations, or if it is followed and it fails, then Article 66 of the Vienna Convention may come into operation.

Even apart from the Vienna Convention, to which the two countries are not parties, we could, under the Statute of this Court, agree to refer the dispute to this honourable Court, but to ask the ICAO Council to do duty for the International Court of Justice is, I am afraid, to put it mildly, putting a strain on that Council which it just cannot possibly bear.

The honourable Court has only to look at the type of pleadings in this case to consider whether, Mr. President, you and your learned colleagues could ever think it possible that this dispute could be decided by the ICAO Council, which consists of people untrained in law, who have, in fact, no familiarity either with law or with court work. I have nothing to say against the Council, it is performing excellent functions, but it is performing those functions, as I shall make clear later, purely as an administrative body. To ask an administrative body to decide complicated questions of international law—what are the rights of the two States? when can suspension be justified? did India have the right under international law to effect the suspension?—is trying to read a consent into the jurisdiction clause of the Convention and the Transit Agreement, which consent does not exist and has never existed.

May I now request the honourable Court to come to the Advisory Opinion dated 21 June 1971 in the *Namibia* case. I would like to refer to paragraphs 91 to 98 of the Advisory Opinion. They are at pages 46 to 48 of the printed Opinion.

If I may say so, with respect, these paragraphs admirably sum up the whole point under international law which I have been struggling to establish, namely the right of a State to suspend a treaty in the exercise of a right outside the treaty.

Paragraph 91:

> "One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship."

I shall omit paragraphs 92 and 93 which apply this principle to the facts of that case.

I come to paragraph 94:

> "In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends on those international agreements which created the system and regulated its application. As the Court indicated in 1962 'this Mandate, like practically all other similar Mandates' was 'a special type of instrument composite in nature and instituting a novel international régime. It incorporates a definite agreement . . .' . . . The Court stated conclusively in . . . [the earlier] Judgment [that is the one reported in

I.C.J. Reports 1962] that the Mandate '. . . in fact and in law, is an international agreement having the character of a treaty or convention' . . . The rules laid down by the Vienna Convention on the Law of Treaties [this is the important passage: The rules laid down by the Vienna Convention on the Law of Treaties] concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

Paragraph 95:

"General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case. By stressing that South Africa 'has, in fact, disavowed the Mandate', the General Assembly declared in fact that it had repudiated it. The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship."

Paragraph 96:

"It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded."

This passage is of great significance in the present case because the Convention and the Transit Agreement are silent on the question as to what is to happen in the case of a material breach by a State and what are the rights of the other State in such an event.

The Convention and the Transit Agreement are silent but the silence of the Treaties does not exclude this right which is outside of the treaty.

May I read paragraph 98:

"98. President Wilson's proposed draft did not include a specific provision for revocation, on the assumption that mandates were revocable. What was proposed was a special procedure reserving 'to the people of any such territory or governmental unit the right to appeal to

> the League for . . . redress or correction of any breach of the mandate by the mandatory State or agency or for the substitution of some other State or agency, as mandatory'. That this special right of appeal was not inserted in the Covenant cannot be interpreted as excluding the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement."

Even in the dissenting opinion of Sir Gerald Fitzmaurice, if I read it right, the above principle is not questioned. The learned Judge says that you must make a distinction between institutions on the one hand and contracts and treaties on the other. What may justify the termination or suspension of a treaty or a contract would not necessarily justify the ending of an institution. That point does not arise in the present case. What I am at pains to make clear is that even Sir Gerald Fitzmaurice, in his learned opinion, does not say that there is no such right of suspension in respect of a treaty or a contract; but what the learned Judge says is that to an institution you must apply a different norm, or a different principle.

May I request attention to the dissenting opinion of Sir Gerald Fitzmaurice, the relevant passage being at pages 266 and 267, paragraphs 68 and 69:

> "68. In support of this view, comparisons are drawn with the position in regard to private law contracts and ordinary international treaties and agreements, as to which it may be said [that is what the learned Judge says] that fundamental breaches by one party will release the other from its own obligations, and thus, in effect, put an end to the treaty or contract."

Therefore, so far as the question of a treaty is concerned, there is no dissent, no dissent on the point that in the case of a material breach by one party a situation would be brought about where the other party can put an end to the treaty or contract.

> "The analogy is however misleading on this particular question, where the contractual situation is different from the institutional [the learned Judge regarded the mandate as an institution, not to be equated with a treaty or a contract],—so that what may be true in the one case cannot simply be translated and applied to the other without inadmissible distortions . . .
>
> 69. There is no doubt a genuine difficulty here, inasmuch as a régime like that of the mandates system seems to have a foot both in the institutional and the contractual field. But it is necessary to adhere to at least a minimum of consistency. If, on the basis of contractual principles, fundamental breaches justify unilateral revocation, then equally is it the case that contractual principles require that a new party to a contract cannot be imposed on an existing one without the latter's consent (novation). Since in the present case one of the alleged fundamental breaches is precisely the evident non-acceptance of this new party, and of any duty of accountability to it (such an acceptance being *ex hypothesi*, on contractual principles, *not* obligatory), a total inconsistency is revealed as lying at the root of the whole Opinion of the Court in one of its most essential aspects."

I am reading this passage because Pakistan, in my submission erroneously, reads this opinion as if it negatived the right under international law to

suspend or terminate a treaty for material breach on the part of the other State. This opinion does not say anything of that sort. It rests on the distinction between a treaty or contract on the one hand and an institution on the other, which distinction was material in Namibia's case but has no relevance to the present case. Therefore there is nothing in the dissenting opinion of Sir Gerald Fitzmaurice which supports Pakistan in the stand they have chosen to take in the present case.

Secondly, Sir Gerald Fitzmaurice does not say, and in fact the occasion never arose for the learned Judge to say, that questions as to interpretation or application can embrace and cover termination or suspension.

Thirdly, even putting the case at the highest against myself, assuming the International Court of Justice were one day to come to the conclusion, reversing its own opinion, that there is no such right in international law to terminate or suspend, that would only go to the merits of the termination or suspension, that cannot confer jurisdiction on the Council to decide the question of validity of termination or suspension. This honourable Court will appreciate that the whole pleading of Pakistan, if I may say so with great respect to my learned friend, proceeds on a confusion between the question of validity of suspension and the question of jurisdiction to go into the validity issue.

If the Council has no jurisdiction to deal with the case of suspension or termination *dehors* the treaty, in the exercise of a right asserted to exist outside the treaty, the Council cannot decide whether such a right exists, what are the limits of that right, were the limits of that right observed in the present case, were the conditions precedent to the exercise of that right in international law satisfied in this case. These are questions which the appropriate forum can deal with but not the Council. Therefore it is *not* to the point to say that India exceeded the right or India has no such right, because when you have dealt with that question you have not answered the question as to the limits of the Council's jurisdiction. The question still stares me in the face: what are the limits of the Council's jurisdiction, can it at all go into the question of the validity of the suspension? Therefore, assuming even Sir Gerald Fitzmaurice has said—the learned Judge has not—that there is no such right, it would only mean that my suspension would be pronounced to be wrongful by a court of competent jurisdiction, but that cannot, I repeat, confer jurisdiction on the Council to decide this question.

Pakistan has relied upon a footnote, which is footnote 42, to paragraph 67 in the dissenting opinion of Sir Gerald Fitzmaurice, and that footnote is this:

> "Note the intentional use of the phrase 'in treating it as terminated' and not 'in putting an end to it'. There is an important conceptual difference. Strictly speaking, all that one party alleging fundamental breaches by the other can do, is to declare that it no longer considers itself bound to continue performing *its own* part of the contract, which it will regard as terminated. But whether the contract *has*, in the objective sense, come to an end, is another matter and does not necessarily follow (certainly not from the unilateral declaration of that party)—or there would be an all too easy way out of inconvenient contracts."

This footnote deals with the question which again would be relevant in the appropriate forum which is entitled to deal with questions of suspension and termination in exercise of a right outside the treaty—the right having its source in international law. But I fail to see what relevance this footnote can have when the question is of the Council's jurisdiction.

The United States, in its written submission to this Court in the *Namibia* case, sets out the position in its written pleading at page 856, continued at page 857, of Volume I, of the *Pleadings, Oral Arguments, Documents* in the *Namibia* case. It is headed Section IV:

> "*A Material Breach of a Treaty Entitles the Other Party to Suspend its Operations in Whole or in Part*
>
> A second relevant rule of treaty law, codified in Article 60 of the Convention, deals with termination or suspension of the operation of a treaty as a consequence of its breach. Paragraph 3 of that Article restricts its application to cases of material breach, which is defined as:
>
> '*(a)* a repudiation of the treaty . . ., or
> *(b)* the violation of a provision essential to the accomplishment of the object or purpose of the treaty.'
>
> The basic principle embodied in the Article is that the material breach of a treaty on one side may give rise to a right on the other side to abrogate the treaty or suspend its operation in whole or in part. The commentary to the corresponding article in the Harvard draft summarizes traditional international law doctrine regarding breach and demonstrates that the principle has been recognized in municipal courts since late in the eighteenth century. [Then a citation is given.] The International Law Commission's 1966 Commentary on its Draft Articles on the Law of Treaties stated that 'the geat majority of jurists' recognized the principle expressed in Article 60 [of the Vienna Convention which I have already read]. At the Conference on the Law of Treaties, in which South Africa participated, no delegation denied the principle in the rather extensive debate in the Committee of the Whole; no delegation voted against the adoption of the article in the Plenary. The foregoing evidence is more than sufficient to establish that the principle in Article 60 may be regarded as representing existing law."

The reason why I am reading this is, not that a pleading would be relevant for this honourable Court's consideration, but this particular pleading summarizes, more briefly and more lucidly than I orally can, the reasons why the principle embodied in Article 60 of the Vienna Convention should be treated as representing well settled existing international law regarding treaties, and as dealing with an inherent right, which right is not to be treated as excluded although the treaty may be silent about it, namely the right of suspension and termination in an appropriate case.

May I read further from the same written pleading of the United States:

> "The fact that the Mandate is not a treaty between States does not affect the applicability to it of the treaty law contained in the Treaties Convention. Article 3 of the Convention provides that any of the rules set forth in the Convention may be applied to treaties between States and international organizations where such rules would be applicable 'under international law independently of the Convention'."

Sir Gerald Fitzmaurice did not reject the first submission that under a rule of international law there is the right of suspension or termination. What the learned Judge rejected was the second plea that this rule which is applicable to treaties should be applied to mandates, which are institutions as much as they are treaties, or even more institutions than treaties.

My endeavour is to point out that the unanimous opinion of the honour-

able Court in the *Namibia* case was that there is such a right in international law. The dissent was on the other question as to whether this right which applied to treaties could apply to institutions like mandates. The second point is irrelevant in the present case. The first point is relevant, on which there is no dissent.

I read further from the United States pleading in the same volume at page 857:

> "The rule relating to material breach, like that relating to *pacta sunt servanda*, was recognized before the adoption of the Convention as applying to all treaties, not only to those between States. Indeed, each of the Special Rapporteurs on the Law of Treaties, Brierly, Lauterpacht, Fitzmaurice, and (in his second report) Sir Humphrey Waldock, proposed an article on breach which would have applied to all written treaties without regard to the nature of the parties. It was only later, in 1965, in order to simplify the drafting of certain of the articles, principally those relating to the conclusion of treaties, that the International Law Commission removed from the scope of the Convention treaties to which one or more international organizations were parties. The rules relating to *pacta sunt servanda* and to material breach have been shown to be formulations of the law as it existed independently of the Treaties Convention, they are properly applicable to the Mandate. Therefore, if South Africa was in material breach of its obligations under the Mandate, the United Nations was entitled to terminate her rights and authority under the Mandate."

The United Nations was represented before this honourable Court in the *Namibia* case, and the United Nations supported the plea that there is such a right in international law of suspension or termination *dehors* the treaty even when the treaty is silent on the question of such suspension or termination. And that this honourable Court will be pleased to find in Volume II of the *Pleadings* at page 53, continued on page 54. It is under the heading "Basic Principle of Law applicable to the Case".

First, page 54, top paragraph:

> "Whether the relationship between South Africa and the international community is contractual, or the result of the establishment of an objective situation, or both, or whether it is a relationship *sui generis* which has no parallel in other fields of international law or in other geographical locations and historical situations, it is nevertheless governed by certain fundamental principles which apply in every legal system, including international law. One of those principles is the proposition that in any bilateral situation or, for that matter, in any multilateral relationship, a party which disowns its own obligations flowing from the relationship, or a party which does not fulfil the obligations incumbent upon it and arising from the relationship, cannot be recognized as retaining the right which it claims to derive from the relationship. This is a principle which is not restricted to the law of treaties, it would be applicable even if, contrary to the findings of the Court in its 1962 Judgment—which is *res judicata* vis-à-vis South Africa —one would assert that the Mandate was not, in July 1966, a treaty or a convention in force."

And the next paragraph:

> "In connection with this proposition, that is the right of the wronged

party to abrogate unilaterally the relationship, Lord McNair has said: '. . . the more elementary a proposition is, the more difficult it often is to cite judicial authority for it' (*Law of Treaties*, 1961, p. 554). However, there are also other authoritative pronouncements supporting this proposition. Thus, Judge Anzilotti said in his dissenting opinion in the case concerning *Diversion of Water from the River Meuse* (*Series A/B, No. 70, 1937*, p. 4 at p. 50): 'I am convinced that the principle underlying this submission *(inadimplenti non est adimplendum)* is so just, so equitable, so universally recognized, that it must be recognized in international relations also. In any case it is one of those "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute.' More recently, Sir Humphrey Waldock, as Special Rapporteur on the Law of Treaties of the International Law Commission, expressed the idea in the following terms: 'Nor is it easy to see how the rule could be otherwise, since good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect . . .'."

The final citation I would like to make from Volume II of the *Pleadings* in the *Namibia* case is one passage at page 623, where Mr. Stevenson of the United States answered a question put by a judge of the Court. First, the question of Judge Sir Gerald Fitzmaurice:

"It has been maintained on behalf of the United States that fundamental breaches of a contract by one party entitle the other to put an end to it. I would like to know how, in your view, exactly this would work in practice. For instance, it is evident that if a party could put an end to a contract merely by alleging fundamental breaches of it, and despite the denials of the other party, whether on the facts or as regards the existence of the obligation, there would always be an obvious and easy way out of contracts which one of the parties found onerous or inconvenient. What safeguards would you institute in order to prevent this, and how would or should such safeguards apply in the international field in the relations between States or between States and international organizations?"

And the reply of Mr. Stevenson of the United States:

"The doctrine of material breach as a basis of terminating a contract is a doctrine of municipal contract law which has been reflected in international treaty law. Obviously not every breach of a contract would justify the other party of terminating the contract, but only a breach of such significance as in the words of Article 60 (3) of the Vienna Convention on the Law of Treaties, would constitute a 'violation of a provision essential to the accomplishment of the object or purpose of the treaty'. If the party alleging breach were held by an international tribunal not to have established the material breach, the termination would not be legally justified and a party which had terminated the treaty on the basis of an alleged breach would be liable for an unjustified repudiation of a contract. The fact that in the international as opposed to a municipal legal system the other party cannot be assured of bringing a case involving material breach before an international tribunal, except where both parties have accepted the compulsory jurisdiction of an interna-

> tional tribunal is a problem relating to the efficacy of international law and institutions generally and not specially to the problem of the material breach doctrine. The best safeguard against misuse of the doctrine of material breach would be through the extension of the compulsory jurisdiction of the International Court of Justice or other appropriate international tribunals over legal disputes arising between States or between States and international organizations, at least with respect to those disputes which relate to *interpretation, application* and *termination* of international agreements."

This reply, which is commendable for its brevity and precision, sets out the correct position in international law and I would like to adopt it as my own argument in this case. I shall highlight the essential points made by Mr. Stevenson in reply to the learned Judge, Sir Gerald Fitzmaurice. First, Mr. Stevenson says that this right under international law does exist. It is true that you are exposing a nation to the possibility of having the treaty suspended or repudiated unjustifiably—that risk you run. But that is the risk which is attendant upon the inadequacy of international institutions. We have not reached the stage when international law is enforced in every case where a wrong is done, just as, at least in the theory of the law, wrongs under civil law are remedied and redress is given in municipal courts. And Mr. Stevenson says that the remedy lies not in ignoring this principle of international law but in bringing about an evolution of international law where compulsory arbitration, for example at the hands of the International Court of Justice, may be made binding on different nations. But you cannot say there is no such right of suspension; the right exists though there is this inadequacy, infirmity, of the machinery available for redress in the event of a wrong being done.

It is rather interesting that Mr. Stevenson draws a distinction between three types of disputes. Disputes relating to *(a)* interpretation, *(b)* application and *(c)* termination. What is covered by the Convention and the Transit Agreement are the first two categories, not the third. And termination is put by Mr. Stevenson as conceptually separate and distinct from interpretation and application.

I have finished with *Namibia's* case and if I may formulate now three propositions laid down in the *Namibia* case which are of direct relevance to the present Appeal:

First, Article 60 of the Vienna Convention, which gives the right to terminate or suspend a treaty to a nation as a sovereign State, embodies a general rule of existing international law.

Secondly, this right has its source outside of the treaty and it is not to be held as negatived or excluded merely because the treaty is silent on the point and does not confer such a right.

And thirdly, this right of suspension or termination can be exercised unilaterally, i.e., without the consent of the other party to the treaty.

The first proposition is in paragraphs 94 and 95; the second proposition in paragraph 96, and the third proposition in paragraph 101.

On these three propositions there is no dissent. On the other two propositions there is a dissent, and those are the propositions concerning a mandate. I shall leave them because they are of no relevance here.

This brings me to the end of the second point I was urging—namely that in any event in cases where a right of termination or suspension is exercised *dehors* the treaty, there cannot *ex hypothesi* be a question of interpretation or

application of the treaty, because you are applying a rule of international law outside the treaty, you are not applying the treaty at all.

Now I come to the third point which is a point of great interest and which applies to a large number of councils, tribunals, *ad hoc* bodies which are limited, if one may say so with respect, both in knowledge of international jurisprudence and limited so far as their functions, duties and powers are concerned. The third proposition is what I may call the doctrine of the inherent limitations. May I read India's Reply, paragraph 60. The heading of the Chapter is, "Inherent Limitations on the Council's Jurisdiction",

> "A. Composition, Powers and Functions of the Council
>
> 60. The Applicant submits that the vital point missed in the Respondent's Counter-Memorial is that the Council has inherent limitations on its jurisdiction, arising not only from the very words of the Convention and the Transit Agreement conferring the jurisdiction but inherent in the very composition and character, duties and functions of the Council. It is inconceivable that the contracting States intended the Council, which is not expected to consist of trained lawyers, jurists or judges, to decide questions of international law, to go into the legal rights and wrongs of political confrontations between States, to decide whether the conduct of a State was such as to justify termination or suspension of a treaty by the State which is specially affected by a material breach by another State, and to pronounce upon the validity of a sovereign State's exercise of its right under international law to terminate or suspend a treaty. Only a Court of International Law, duly equipped and qualified to weigh the evidence in its legal aspect and to lay down principles of international law, can deal with such disputes. The Council is clearly not such a body. It performs extremely useful functions in its own area which is far removed from that of a Court of International Law.
>
> 61. In short, the inherent limitations on the Council's jurisdiction are reflected in its composition, its limited powers and functions; and the limits of its jurisdiction are expressly circumscribed by the clear provision in the Convention and the Transit Agreement that only disputes relating to 'interpretation' or 'application' would be decided by the Council, or disputes relating to 'action under' the Transit Agreement.
>
> 62. The very points of international law raised by the Respondent in its Counter-Memorial,—challenging the right of India to suspend the Convention and the Transit Agreement,—themselves afford striking examples of the type of questions of far-reaching significance which arise when a sovereign State chooses to exercise its right under international law to terminate or suspend a treaty. The Council is not at all equipped to deal with the relative merits of the rival submissions in international law made by the Applicant and the Respondent."

Let us now go again to the Convention to see how limited the powers and functions of the Council are and what its composition is. A body composed as the Council is could not possibly have been intended to deal with complicated questions of international law. It is inconceivable—I use the word "inconceivable" advisedly, and I think that word does not overstate the case.

Would the honourable Court be pleased to turn to India's Memorial, pages 310-315, *supra*. What is this Council? This question of inherent limitations is a very important factor, because when I come to the authorities I hope to make good this point that ultimately what will decide the limit of jurisdiction is what the parties who agreed to confer the jurisdiction intended.

Nations have agreed to allow this Council, innocent of the complexities of international law, to deal with disputes regarding application or interpretation, knowing full well that the more far-reaching issues under international law of suspension or termination will not be comprised in these words "interpretation or application". If the law were to be laid down today differently, nations would think ten times before signing a treaty where a body of laymen are to decide questions of international law.

Please turn to page 310, *supra*, of India's Memorial. It is Part II of the Convention and the heading is "International Civil Aviation Organization". May I at the outset make one point which, in my submission, is of great significance. The Council is an administrative body, it is not a judicial body—I put it at the very forefront of this third proposition about inherent limitations. It is not equipped, and it is not expected to be equipped, to discharge the functions of a judicial forum and one has only to look at its functions, its duties, its powers, to see that it is a purely administrative body. In the course of administration of this Convention it can deal with questions of interpretation or application. But there is all the difference in the world between an administrative body deciding certain disputes regarding application and interpretation and an international court of justice dealing with questions of international law and the rights and powers of a sovereign State. First, I shall read Article 43:

> "An organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary."

The Council therefore is a part of this Organization. Article 44 reads as follows:

> "The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:
>
> *(a)* Insure the safe and orderly growth of international civil aviation throughout the world;
>
> *(b)* Encourage the arts of aircraft design and operation for peaceful purposes;
>
> *(c)* Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
>
> *(d)* Meet the needs of the peoples of the world for safe, regular, efficient and economic air transport;
>
> *(e)* Prevent economic waste caused by unreasonable competition;
>
> *(f)* Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
>
> *(g)* Avoid discrimination between contracting States;
>
> *(h)* Promote safety of flight in international air navigation;
>
> *(i)* Promote generally the development of all aspects of international civil aeronautics." (Memorial, Annex H, pp. 310-311, *supra*.)

Now the Council, which is a part of the Organization, has these objectives. These are the objectives of an administrative body. It is in order to implement and effectuate these objectives, that the Council has a limited jurisdiction to deal with questions of interpretation and application. How can it possibly bring in questions of sovereign rights and international law?

There are two bodies—the Assembly and the Council. I shall not waste any

time on dealing with the provisions relating to the Assembly. I shall only read one sentence in Article 48, clause *(a)*:

> "The Assembly shall meet not less than once in three years and shall be convened by the Council at a suitable time and place. Extraordinary meetings of the Assembly may be held at any time upon the call of the Council or at the request of any ten contracting States addressed to the Secretary General." (*Ibid.*, p. 312.)

If the Assembly is to meet "not less than once in three years", the real administrative work all falls on the Council, and it is the Council which has, therefore, to discharge the functions and achieve the objectives of a purely administrative nature set out in Article 44.

Now comes a very interesting and significant provision in Article 50 regarding the composition of the Council. The Court will see that the Council consists not of individuals, but of States. Can the learned judges conceive of a judicial court dealing with international law which consists not of human beings but of States? Would you please turn to Article 50, clause *(a)*:

> "The Council shall be a permanent body responsible to the Assembly. It shall be composed of twenty-seven contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years, and the members of the Council so elected shall hold office until the next following election." (*Ibid.*, p. 313.)

Twenty-seven contracting States constitute or compose the Council. India is one of the 27 States, so India can nominate "A" today, "B" tomorrow. In fact our nominees, like the nominees of most of the other countries, are completely innocent, as I said, of any knowledge of any branch of the law, leave aside international law. A State can change its representative any time. Does not one perceive here the inherent limitations on the jurisdiction of the Council arising from the very composition of the Council?

Articles 54 and 55, which deal respectively with the mandatory functions and the permissive functions of the Council, give a clear idea of what the Council is supposed to do. These two Articles leave no doubt that it is an administrative body and not a judicial authority at all. Article 54, "Mandatory Functions of Council", says:

> "The Council shall:
>
> *(a)* Submit annual reports to the Assembly;
>
> *(b)* Carry out the directions of the Assembly and discharge the duties and obligations which are laid on it by this Convention;
>
> *(c)* Determine its organization and rules of procedure;
>
> *(d)* Appoint and define the duties of an Air Transport Committee, which shall be chosen from among the representatives of the members of the Council, and which shall be responsible to it;
>
> *(e)* Establish an Air Navigation Commission, in accordance with the provisions of Chapter X;
>
> *(f)* Administer the finances of the Organization in accordance with the provisions of Chapters XII and XV;
>
> *(g)* Determine the emoluments of the President of the Council;
>
> *(h)* Appoint a chief executive officer who shall be called the Secretary General, and make provision for the appointment of such other personnel as may be necessary, in accordance with the provisions of Chapter XI;

(i) Request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds;

(j) Report to contracting States [Now this is where the function comes in where my learned friend would like the Council to deal with my case as a sovereign State] any infraction of this Convention as well as any failure to carry out recommendations or determinations of the Council;

(k) Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction;" (*ibid.*, pp. 314-315).

The clauses *(j)* and *(k)* are very important from our point of view. If my case ever goes back to the Council, it would be under *(j)* and *(k)* that the Council would be discharging its functions. In other words, it would be reporting to the contracting States or to the Assembly the question whether, under international law, India had the right to suspend the Convention; was the right duly exercised, etc.

These questions of vast complexity on which highly trained minds and highly equipped courts may have a difference of opinion are supposed to be dealt with by the Council. My point is that the type of report contemplated by Article 54 is regarding an infraction, which means that the Convention continues to be in operation, but if there is a breach or an infraction of a particular part of it; it is only that which will go by way of official report to the Assembly or to the other States.

The Court rose at 6.5 p.m.

SECOND PUBLIC SITTING (20 VI 72, 10 a.m.)

Present: [See sitting of 19 VI 72.]

Mr. PALKHIVALA: May it please the honourable Court, I was at page 315, *supra*, of India's Memorial, and I was reading Article 54 of the Convention which sets out the mandatory functions of the Council. The last clauses I read were clauses *(j)* and *(k)* of this Article which are the only ones under which the Council would be making a report in respect of this case, assuming it had jurisdiction to deal with this case.

Then follow clauses *(l)*, *(m)* and *(n)* which deal with the adoption of international standards and recommended practices, recommendations of the Air Navigation Commission, and the consideration of any other matter which may be referred by the contracting States.

Article 55 sets out the permissive functions of the Council. Those permissive functions deal with facilitating international air transport, delegating to the Air Navigation Commission additional duties, conducting research into all aspects of air transport and air navigation, which are of international importance, and communicating the results of the research to the contracting parties, facilitating the exchange of information between contracting parties, studying any matters affecting the organization and operation of international air transport, and investigation at the request of any contracting State of any situation which may appear to present avoidable obstacles in the development of international air navigation.

I have read these clauses in order to substantiate my point that the Council is a purely administrative body as regards the composition of the Council to which I have referred earlier, the Council consists not of individuals, but of States.

Now, in the context of these mandatory functions in Article 54, and permissive functions in Article 55, this honourable Court will have to consider what kind of burden in the realm of judicial adjudication was intended by the contracting States to be borne by this Council.

Let us now turn to the verbatim notes of the proceedings before the Council. I have nothing against the representatives who sat on the Council. In fact no blame attaches to them; I do not seek to criticize them at all, nor to condemn them for what they have done, I only say that these gentlemen were, from the very nature of the functions they were intended by the Convention to discharge, wholly unfit to go into the question which unfortunately Pakistan sought to raise before them. And, in the spirit not of criticizing but with a view to making this honourable Court understand what type of atmosphere prevailed, what kind of mental outlook was brought to bear by the respresentatives, may I request the Court to turn to India's Memorial, at page 258, *supra*.

The case was heard on 27 and 28 July and both parties finished their addresses in two days. It was India's request that some time should be given to the members of the Council to read the verbatim notes of the whole argument. It was also pointed out that it was clear that many of the gentlemen who sat on the Council were unable, quite frankly, to weigh and appreciate what was being said before them; would it be right that they should deal with this matter without even understanding what the full argument was?

But within 24 hours of the closing of the argument, rejecting India's request that a brief memorandum of arguments may be prepared or that verbatim notes may be expeditiously made available to the members, further rejecting India's request that at least the different governments may be consulted as to what they proposed to do in a matter which would involve the construction of perhaps a hundred international treaties rejecting all that, the Council came to a decision within 24 hours, after a discussion which is most significant because it completely proves the point I have been making. They came to the conclusion that India was wrong and they had jurisdiction to deal with the matter.

I am going to read some of the interesting passages which have a direct bearing on the proposition I am just now submitting. I may make it clear that I am not dealing with the point of irregularity, just now, in the method and manner of arriving at the decision. I am not on that. I am on the point that the very discussion which took place in the Council, the deliberations which preceded the decision of the Council, would leave no doubt that this Council was never intended by the parties to deal with questions of international law.

To save time I will read out only a few select passages.

Please turn to page 258, *supra*, of India's Memorial. This is the day when the arguments are over and the counsel for India and Pakistan have withdrawn and now the deliberations of the Council begin.

At page 258, *supra*, first line:

> "To that extent I shall therefore not be able to support [one member says] any positive action on the substance of the matter. For me it is essential to obtain legal advice on the arguments which have been presented before so participating."

This is, I am glad to say, the representative of the United Kingdom who says: I am sorry, my sense of justice prevents me from giving a decision unless I know whether the counsel is right or wrong in what he has been saying, and I have no means of knowing it.

Then, at paragraph 99, another representative of another country:

> "I should like to express almost the same view as the Representative of the United Kingdom has expressed, because I too am not a lawyer. During these two days we have heard many things linked very closely to international law and I too would like to have the possibility of consulting my Administration."

Then paragraph 102:

> "*Air Vice Marshal Russell:* [Some of these representatives are Air Marshals, some of them are Colonels, some of them are civil servants, not perhaps more than one of them a lawyer.] What I said, Mr. President, was that I could not participate in a substantive decision at this time, unfortunately being without legal training myself and not having had the opportunity to seek legal advice. I was not asking for time. I was simply saying that I was, unhappily, not in a position to evaluate from a strictly legal point of view the presentations which have been made to us."

Then, on the next page 259, *supra*, second line, Air Marshal Russell:

> "I am not a lawyer and at this particular moment I am perhaps a little bit sorry and a little bit glad that I am not a lawyer, but it is a fact that I am not and it would be unreasonable—I think that is the right word—for

me here and now to express, on behalf of my country, a substantive view on matters of quite complex law. All I am saying is that, for better or worse, I am not in a position to do so."

What this honourable Court is asked to do by Pakistan is to hold that this Council should deal with the various points which have been raised. When the members themselves say that they are unfit to deal with them, is it so unreasonable to expect them to do so.

On the same page 259, paragraph 110, last eight lines—this is another representative—Mr. Agésilas:

"I therefore believe that, as the Representative of Belgium said, a deferment of eight days would help a certain number of our colleagues to obtain advice or instructions and it would certainly be desirable that the largest possible number of Council members be in a position to participate in the taking of a decision. I, for one, would have no objection to an interval of the order . . ."

In other words the members say: we are not equipped to participate in this discussion. Same page 259, paragraph 112, last four lines:

"The question is simple and I think national administrations and legal services have had sufficient time to make up their minds on the validity of the preliminary objection, just as India and Pakistan have been able to make written submissions."

Now this is very interesting. What this rather frank and open-hearted member says is that governments have to make up their minds. They who hear the case, who would have heard the evidence, do not make up their minds; somebody else makes up their minds for them. Not one member says so, at least six members say openly that they have no minds of their own to make up—their Governments have to make up their minds.

Page 260, paragraph 114, last three lines. Now to this particular gentleman the question whether the Council has jurisdiction or not is a simple one which has to be resolved in this manner:

"Perhaps I am going to be a little brutal, but the question is as simple as this: Is the Council going to survive or die? Is it going to take its responsibilities or refuse them? For me the problem is no more complicated than that."

So the member says: I am not concerned with this question of international law, I am not concerned with what is the correct meaning of the words "application", "interpretation". I am only concerned with this: if one country says to my Council, "Take on the responsibility", am I going to take it on or not? Shall I deny the responsibility? If I deny the responsibility, the Council will die. If the Council is to survive, we must take all the responsibility which is offered to us. This is the body before whom I am asked to take my international disputes to be adjudicated on merits.

May I request you to turn to page 262; another respresentative of a member State of the Council, Mr. Mugizi. We had cited the *Namibia* case and the Vienna Convention, and this is what this gentleman says about the legal arguments, the cases, and the Vienna Convention:

". . . The *Namibia* case and all the other cases that have been cited and the Vienna Convention are the things which put us off. These are the things about which we need to consult lawyers whose business is much

wider than our business here. If we are to make consultations, to make sure that our advisers are going to look into all these matters that have been discussed yesterday and today, we need enough time. This is not something you can do after getting a summary of our deliberations yesterday and today, sending it to your Government and saying 'Will you give me a reply within 5 days?' It would take time. Either we delay the decision for 3 or 4 weeks and get advice on the implications of the Vienna Convention and all the cases which have been mentioned, or we take a decision now, basing it on the documents we have here. It all depends on what we consider to be the function of this Council. If the function of this Council is to deal with all aspects of international law, if our decisions must take due account of all the international decisions which have been made, of all the cases which have been cited here, then we have got to have time to examine these things and get proper advice, but if we are expected to deal only with the matters dealt with in the Chicago Convention, in the Transit Agreement and in the Rules for the Settlement of Differences, we can take a decision today. Things which put us off are matters which are not defined here. For instance, it was being argued that a convention could be suspended by one State in respect of another State or terminated by one State in respect of another State. This is the sort of thing about which I am in doubt. I myself did not know this could be done and I was prepared to deal with the matter recognizing that I am ignorant of anything outside the Convention. I would prefer to take a decision today, Mr. President . . ."

The gentleman, after saying all this, says in effect: "I am prepared to take a decision today. But if we are to defer it, the period of deferment should be long anough to permit sufficient consideration of the arguments."

Another interesting passage on page 263, paragraph 124, last six lines:

"Then, of course, there will have to be a meeting of lawyers [this is a Colonel who represented another State] specialized in international law, which will take 5 or 6 weeks. I therefore am in favour of taking a decision today . . ."

In other words, matters are so complex that highly specialized lawyers will take 6 weeks to deal with it.

"I therefore am in favour of taking a decision today, Mr. President, or in the extreme, 6 weeks from now, so that our administrations can study the new elements, and only the new elements, introduced in the masterly presentations of the Counsels for Pakistan and India."

Then comes another Major, page 263, paragraph 126, who is again quite frank and who does not seem to have a good opinion about lawyers. What he says is:

"I was going to say practically the same as the Representative of Spain. Eight or 10 days would be of no use to me. I shall have to wait 3 or 4 weeks for the detailed minutes. I would then have to send them to my country, the lawyers would meet—usually there are four of them, each with a different point of view. This would take 2 or 3 months, and I do not think that would be fair to the parties to the dispute."

Now consider the approach—this is the administrative approach. I am not blaming this gentleman at all. I repeat, the blame attaches to those who will

try to make them discharge functions which they are not appointed or qualified or equipped to discharge.

> "On the other hand, I am not a lawyer, but I understand that law is the natural order of things, and I do not think it necessary to go into further details. As other Representatives have said, the Council either is or is not competent to deal with this question. I have formed an opinion and I am ready to vote immediately."

The gentleman says: the matters are complex, I do not understand them, I am not equipped, I am not a lawyer, four lawyers will take different views. But the question is simple, "Has the Council jurisdiction or not?" To such a simple question, I can give a simple answer, I am ready to vote.

Now this was the second day of the hearing; the first day of the hearing was occupied wholly by arguments. The second day of the hearing left some time for the Council to deliberate, and I have read the deliberations of the afternoon of the second day of hearing. Now comes the final day when the decision is made and India's pleas are rejected,—29 July 1971. The relevant passages are from page 271, *supra*, onwards, paragraph 4, Mr. Borisov:

> "Mr. President, the Soviet Union was not a member of the Council when the Council previously discussed this question, first in Montreal and then in Vienna. It is quite clear that being present for the first time at a Council meeting on this question I met with some nuances on which I, like Representatives of some other countries, have to consult with my competent organs. I request time for such consultation after receiving the complete records from the Secretariat. I believe that a week or 10 days would be necessary for this."

The Soviet Representative again is honest enough to say, "I cannot make the decision, I must have some time. You cannot ask me to make a decision now—how will I decide?"

Paragraph 6, Major Charry:

> "I would like to have the Legal Bureau explain to us whether a decision taken today would not be valid, as the Representative of India says. May I hear what the legal secretariat has to say on this point?"

That is, the legal secretariat of the ICAO Council. In other words, the members of the Council seek advice on what the correct position is from their Secretariat.

Then paragraph 10 on the same page 271, last three lines:

> ". . . I am quite sure that they will need several months. So may I reiterate—I am ready to take a vote today but I shall not object to a delay if the time given is meaningful."

Now this gentleman again says that time would be needed, but it could be several weeks or months—so either you decide here and now and decide whichever way you like, or give a meaningful time lapse so that the matter may be fully considered.

On page 272, paragraph 16, Mr. Butler, the Representative of the United States says:

> "There is just one point I would like to make here and that is a reminder that we sit here as representatives of governments. We are not individual members of the Council. Our Governments are members of

> the Council and even though the Council may be sitting in a judicial capacity at this time, we sit as 27 governments, not as individuals. If 26 governments are prepared to go to a decision today, it is the decision of those governments, not of the individuals who sit at this Council table, and I think it is important for us to remember this. We are unlike the members of the World Court, for example, which sits in a judicial capacity; they sit in personal capacity as judges not responsible to national administrations. Here we represent governments, and it is important for all of us to remember this."

The implications of what Mr. Butler has quite rightly said on behalf of the United States Government are important. The members of the Council are the governments, not the individuals.

Now if this honourable Court were to hold that my appeal should be rejected —and I go back to hearing on merits before the Council—what I shall be driven to is this: that for the first time perhaps in the history of jurisprudence the trial will be held with all the judges *in absentia*. The governments are to decide but they do not hear me. Individuals hear me, but they do not decide. Now what is being said by the representatives gives a clue to what really were the functions of this Council. It was never intended that this Council should deal with rights of sovereign States under international law, because no judge can decide a matter *in absentia* when he has not even the opportunity of hearing what the parties have to say. I repeat that I am not at the moment on the point of irregularity in procedure; I am only on the point that this is the normal procedure, this is the ordinary administrative procedure which shows what was intended to be the limit to the Council's jurisdiction.

Then Air Vice Marshal Russell says on the same page 272, *supra*, paragraph 18, last three lines (Annexes to the Memorial):

> ". . . the Representative of India was saying that for reasons which he gave a decision taken now would not be taken legally, is it possible for me to be advised on how this point should be determined as a point of law?"

The President of the ICAO Council himself says, at page 273, paragraph 19:

> "I think the Representative of India said that the decision would be vitiated; those were the words that he used. I think the Secretary General feels that he cannot say that he agrees or disagrees with that position. This Council has to take a decision itself. If Representatives cannot decide by themselves, I suppose they will have to check with their own administrations. As the Representative of the United States just said, Council members are sitting as representatives of governments. I imagine also that if the decision of the Council on this question was contested, there is always a superior body to which India could apply."

—fortunately that is the position.

On the same page 273, paragraph 21, I am reading what the President of the ICAO Council said:

> "That, of course, is a matter of opinion. I think that one point Council members are now considering is this: was something brought forward in the hearing itself that was different from the written presentations and required them to seek further instructions?"

This is very important. In other words, the individuals who are supposed to

be my judges only act on their instructions—and instructions from individuals who have never heard my oral argument.

Then, paragraph 22—another Representative of a different State, Mr. Ollassa—

> "I consider what the Representative of India said [is] an assertion. The Government of India, like any other government, can make all the assertions it likes. In any event, after having read and re-read the documents, and though I did not hear all that has been said here [the Member said 'I did not hear all that has been said here'], I find that the arguments brought forward were, as the Representative of Belgium said, just an illustration of the preliminary objections we have received."

He also says that he is taking his instructions only from his administration or his government: that is on the same page (p. 273), last six lines:

> "We had these documents in Vienna; administrations have had time to read them. The explanations given here perhaps are considered by certain members of the Council to supplement what was said in the preliminary objections, but they may equally be considered simply as illustrating what was submitted in writing. At all events, that is what the People's Republic of the Congo thinks; what has been said merely illustrates the preliminary objections."

Then page 274, about the tenth or twelfth line from the top:

> "The question remains the same as it was in Vienna. The arguments have not changed it and they cannot change the solution."

In other words, the gentleman says that whatever may be the arguments they cannot change the solution which their governments have decided upon, namely that the Council must go on with the case. Then the first new paragraph on page 274, *supra*, the last two lines—". . . the question is clear to everybody, at any rate to governments who have had the preliminary objections to read".

On page 276 comes the Representative of Czechoslovakia, who said: please defer the matter so that we who do not understand what is being argued may consider it; and on page 276, the Representative of Czechoslovakia says, in paragraph 29: ". . . permit me to propose deferment of the Council's decision until 10 August 1971." That is supported by the Soviet Union.

Now comes the interesting voting on page 277, in paragraph 42:

> "*The President:* Is there further discussion before we go to the vote? Then I will take a vote on the Czechoslovak proposal that the decision of the Council on this question be deferred until 10 August. Those in favour please raise their hands. Opposed. Eight in favour [of deferment], no opposition, but . . . [because] 14 votes . . . [are required to carry a resolution] . . . the proposal has failed."

So eight members ask for time, nobody opposes the question of giving time, but because eight ask for time and not 14 which is the majority, the Council consisting of 27 members, the proposal fails.

This shows you what are intended to be the limits of the Council's jurisdiction, when this type of voting pattern determines the rights of nations' *existing sovereign powers.*

Then, another gentleman, Dr. Bradfield, says on page 277—the last paragraph—

> "We are in a position to state our opinion in a vote taken on this matter today. We wish to reiterate the point made by the Representative of the United States that this Council is a Council of States, not of individuals, and the opinion of Australia that the Council has competence to consider the dispute is an opinion of Australia as a State after consideration of the papers submitted by India by appropriate legal authorities in Australia. I, as Representative here in the Council, may not have the qualifications to express a legal opinion . . ."

I shall omit other pages and may I request the honourable Court to come straight now to pages 287 and 288, *supra*.

Page 287, paragraph 142 (to save time I shall omit some of the other sentences I had in mind to quote):

> "*Air Vice Marshal Russell:* I should like to record that I abstained from voting as being unable to participate at this time in a decision which turns entirely on points of law. I would have been in the same position on any proposal for a decision on a question of substance today. I am not, myself, sufficiently advised on the merits of the legal arguments which have been presented, although of course I accept that other Representatives are so prepared."

The Representative of the United Kingdom is so conscientious, he says I am sorry I will not vote because frankly you are asking me to vote on something I do not understand.

If this is the difficulty of the Council in understanding the proposition regarding the matter only of its jurisdiction, what would be their difficulties if they had to decide the complicated questions on merits—what is material breach; in what cases in international law can you suspend? Can you suspend a contract if the contract does not expressly provide for the power of suspension? If on a preliminary point the Council finds itself completely unqualified to deal with the matter, consider what would be its predicament if it is asked to deal with the merits.

The last passage at page 288, paragraph 146, Mr. Diallo:

> "Mr. President, my delegation voted for the competence of the Council to deal with the three questions put to us. This in no way prejudges the position we shall take on the substance of the disagreement. I did not believe [that] I had to abstain to make clear my Government's neutrality towards the two countries that have this disagreement, because we think it is more than a question of being on one side or the other. It is a question of saving the truth, of respecting the law and jurisprudence already established by the Council. If the Council declared itself incompetent on this question of overflight which two Contracting States are contesting, we think that in future it would no longer be sure on what it [is] . . . compentent and . . . [what it is not]."

In other words, Mr. Diallo has a very simple solution. If a Council starts deciding what cases are within its jurisdiction and what cases are not, look at the amount of trouble it will have every time. The best thing is to say that you are competent because then you eliminate all trouble in the future. This is what the respresentative says—he says that if the Council declares itself incompetent on this question of overflights, which the two Contracting

States are contesting, in future it would be no longer sure on what points it is competent and on what points it is not competent. The gentleman voted in favour of jurisdiction for two reasons: first, if you go into the question of competence you will have cases time and again in the future where the question of competence will be raised, and you will have the trouble of deciding this question every time. Get rid of that trouble by saying at the very outset that you are competent. The second reason why the gentleman voted in favour of the Council's jurisdiction is that if Pakistan is not allowed to overfly India it will be discrimination, and discrimination is prohibited by the Convention.

The representative did not appreciate that he was not dealing with the question of jurisdiction at all when he was dealing with the point of discrimination.

I have read, I think, enough to satisfy this honourable Court that when you read these verbatim notes of the proceedings before the Council you are taken back into the happy, naive world as it existed before the ungodly jungle of the law was created. Again, repeating that I am apportioning no blame to the representatives;—they are doing a very useful piece of work in their own legitimate sphere—I would like finally to summarize. The representatives from whose deliberations I have quoted, fall into four categories. First, the category of those whose governments had made up their minds which way they wanted to vote before the oral arguments took place and they stuck to that decision made before the oral hearing. Now when governments make up their minds, in more cases than not it would be the Civil Aviation Ministry, not the Ministry of Justice, because these questions are normally dealt with in the Civil Aviation Ministry.

The second category is of representatives who could not understand what was going on, but who thought they would like to consult their governments, or take instructions from their governments as to which way they should decide.

The third category is of those who wanted legal advice from the secretariat of the ICAO Council. This is like a court asking the Clerk or Registrar which way it should decide.

And, fourthly, those who knew that the problems were so vast and the arguments were of such complexity that they would need weeks and months to study. But these representatives, who came from aviation ministries, whose national airlines have made popular the slogan, "Fly now, pay later", chose to act on the principle "Decide now, deliberate later". And therefore they say "Let's make the decision now, the deliberations can take their course in our law or justice ministries". In this context perhaps the observations of Judge Gros in the *Namibia* case at page 326 may not be inapposite:

> "To deal with the problem by a rejection not giving reasons, and without adequate examination, is to confuse the preliminary with the prima facie. A preliminary question is the subject of exhaustive treatment and final decision; a prima facie examination can never, by definition, be thoroughgoing, and can never lead but to a provisional decision."

In other words, if a point is preliminary you do not deal with it on the basis of prima facie impression. Would this honourable Court say in the context of what I have pointed out—the constitution of the Council, the type of gentlemen who are appointed by their aviation ministries—would you say that this body was intended by the contracting States to deal with the type of questions which arise and which are going to occupy this Court for a few days? Am I

to deal with those questions there? If I am to deal with them there, forgive me for saying it would be a mockery of international adjudication. We may as well not have adjudication and let each State decide for itself what it will do. Adjudication must command respect. The Council is not a court—it is again not their fault. I have pointed out only some passages, but it is not as if I have chosen deliberately the passages which support me and left out others. If any of the judges would be pleased to go through the whole verbatim notes, they would find the whole is of one pattern.

The positive aspects I have already placed before this Court, namely that the words "application" and "interpretation" do not cover suspension and termination and, in any event, they do not when the right of suspension or termination is exercised *dehors* the treaty founded in a rule of international law.

It is interesting to look at Pakistan's Counter-Memorial and see its answers to this argument. I shall deal with them point by point.

Would you please turn to Pakistan's Counter-Memorial, page 383, *supra*, paragraph 38, and the discussion which goes up to paragraph 44 at page 385. I shall read paragraphs 38 and 41 together as they deal with the same point.

> "38. Article 60 of the Vienna Convention deals with the termination or suspension of a treaty. Paragraph 4 of the said Article provides that such a right is without prejudice to any provision in a treaty applicable in the event of the breach. Secondly, the right of unilateral termination or suspension of a treaty exists only in the case of its material breach by the other party. Thirdly, if one party claims suspension or termination of a treaty on the alleged grounds of material breach, and the other party objects thereto, then the party alleging material breach cannot act as a judge in its own cause and unilaterally suspend the treaty; the issue must be settled either by the consent of the parties or must be resolved through third-party settlement. And fourthly, such a right is subject to the doctrine of proportionate and/or disproportionate reprisal.
>
> . . . . . .
>
> 41. As submitted above, when one party claims suspension of the treaty on the grounds of 'material breach' and the other party objects thereto, the former is obliged to settle the issue by consent of the parties or by resort to third-party settlement. In the instant case, India cannot act as a judge in its own cause and arbitrarily suspend the agreements in question. The principle *nemo judex in re sua* is a general principle of law recognized in the jurisprudence of the Court."

The proposition is that you cannot suspend a contract, except with the consent of the other party or after a third-party settlement or adjudication.

The question of consent may be treated as having been set at rest by the Advisory Opinion in the *Namibia* case, paragraph 101, where there is a passage which I would like to read—just two sentences of that passage:

> "To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation would only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the

consent of the wrongdoer to such a form of termination cannot be required" (*I.C.J. Reports 1971*, p. 48).

I think the matter is so obvious that perhaps it really does not need elaboration. If I am asked to take the consent of the country which I regard as the wrongdoer, I shall never be able to suspend or terminate any treaty; then one can forget about one's right under international law to suspend or terminate a treaty. It is like saying that you cannot prosecute a thief without his consent —not that I am attributing anything to the other side, for whom I have respect and personal regard. I am talking generally of the legal position. Or it is like saying that you cannot terminate a contract in civil law when the other party has committed a breach unless the other party consents to such termination. To ask the wrongdoer to give his consent and make the right of the aggrieved party dependent upon the consent of the wrongdoer is to abrogate the right of suspension or termination altogether. This honourable Court has regarded the position as obvious, so it would be a work of supererogation to say anything more about it.

In this case there is a passage in the separate opinion of Judge Dillard (*I.C.J. Reports 1971*, p. 168), which I think has a direct bearing on what I have just read. This passage sums up, if I may say so, beautifully, the legal principle, and how it cannot possibly be otherwise. It is not possible to conceive of a law where the consent of the wrongdoer is required before you can suspend or terminate. At page 168, this is what the learned Judge says:

> "Law and what is legally permitted may be determined by what a court decides, but they are not only what a court decides. Law 'goes on' every day without adjudication of any kind. In answer to a question put by a judge in the oral proceedings, Counsel for the United States, in a written reply . . . declared:
>
> > 'The fact that in the international as opposed to a municipal legal system the other party cannot be assured of bringing a case involving material breach before an international tribunal except where both parties have accepted the compulsory jurisdiction of an international tribunal is a problem relating to the efficacy of international law and institutions generally and not especially to the problem of the material breach doctrine.'
>
> It is part of the weakness of the international legal order that compulsory jurisdiction to decide legal issues is not part of the system. To say this is not to say [this is what I am relying on] that decisions taken by States in conformity with their good faith understanding of what international law either requires or permits are outside a legal frame of reference even if another State objects and despite the absence of adjudication."

What the learned judge points out is, that where a State in its bona fide understanding of principles of international law makes a decision, it may be that another State will object to it, it may be that there is no third-party adjudication, but it does not mean that what it has done is illegal. There are millions of commercial contracts entered into in the world every year, of which innumerable contracts are terminated by one party on the ground of breach by another—unilateral decision, no third-party adjudication, no arbitration, no court. Is it suggested that all these businessmen are acting illegally? This example of the simple contract is very important. In fact, the

whole basis of this right of suspension or termination is analogous to the civil law of contract. It is well settled that a contract can be terminated by one party when there is a material breach by the other party, and the same principle applies to an international treaty, and, as the learned Judge says, the "law 'goes on'" without the requirement of an adjudication every minute. All business would come to a standstill if you did not give this elementary right to a party to terminate a contract on the ground of material breach by the other.

Now the point Pakistan is urging—Pakistan's assertion is very categorical and very clear—is that you must exercise your right of suspension in one of two ways, and there is no third way: (1) you consult me, and if I agree, you can suspend; (2) you go to an international forum, maybe an arbitration, maybe a court, maybe a council, and when it decides that you are right, then alone you can suspend. This way the right under international law is either abrogated altogether, or it is denuded of its very basic utility, because there are emergent situations which need to be dealt with. If I am asked to wait until some court decides the matter, the very mischief which I seek to prevent would be done. If there is no compulsory arbitration that is the infirmity of international jurisprudence, it has nothing to do with the rights of sovereign States.

Further, if Pakistan's contention is right, the Vienna Convention will have to be rewritten, because it says today exactly the opposite of what Pakistan is saying. What Pakistan is advancing as a proposition of law is unheard of in international jurisprudence. The consent of the wrong-doer and the necessity of having a third-party settlement before you can suspend, are things unknown to practices of nations, text-books on international law, decided cases and international treaties.

Look at Articles 60, 65 and 66 of the Vienna Convention in the context of what Pakistan has put forward as its plea in paragraphs 38 and 41 of the Counter-Memorial, which I have just read. Article 60 of the Vienna Convention, which confers the right to suspend or terminate a treaty is, as this honourable Court has said, a codification of an existing rule of international law. Article 65 is to be read with Article 60. It says:

> "1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim [the obligation is to notify]. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
>
> 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations."

The rest is not relevant.

Now I would like to make a few comments on Article 65. First, the requirement of giving notice to the other party and waiting for three months, except in cases of special urgency, is not a requirement of international law existing today. This particular provision is a super-imposition, which eminent jurists,

in the interests of international peace and international understanding and goodwill, have sought to introduce now as a rule of law to be embodied in the Convention.

So this requirement of notification is not a requirement I have to adhere to, because firstly, I am not a party to the Vienna Convention, and secondly, the Convention has not yet come into operation. In fact it is not even suggested by Pakistan that it is binding on me, so I will not take up any more time on that point.

The second point about Article 65 is that it requires no notification in cases of special urgency. The State which suspends the treaty has to decide—needless to say, in good faith—as to whether it is a case of special urgency or not.

The third thing about Article 65 is that it does not provide for third-party settlement. It only says that you try to follow the procedure of Article 33 of the Charter. Now Article 33 of the Charter, which the honourable Court is familiar with, says that you shall seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means. This again is a requirement which is sought to be superimposed by Article 65. India's rights under international law have no such superimposition attached to them.

This is made even clearer when you go to Article 66. It draws a distinction between cases where compulsory adjudication by this honourable Court is provided for and cases where compulsory adjudication by this Court is not provided for, and suspension is a case where compulsory adjudication, even by this honourable Court, is not provided for in Article 66. May I read Article 66:

> "If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:
>
> *(a)* any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;"

In the absence of arbitration, this honourable Court has jurisdiction in cases where Articles 53 and 64 apply, and it is a jurisdiction conferred by consent; it is a case of compulsory third-party settlement. What are those Articles? Those are Articles which deal with peremptory norms of general international law, called *jus cogens*. Articles 53 and 64 deal with those cases where a peremptory norm of general international law is violated by a treaty. If the norm existed at the time when the treaty was entered into, Article 53 applies. Article 64 deals with the complementary case where the peremptory norm of international law comes into existence after the treaty has been entered into. Article 53:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

Article 64:

> "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

It is only in these cases that, under Article 66, there is compulsory third-party settlement at the hands of this honourable Court. Now turn to clause *(b)* of Article 66, which applies in my case:

> "*(b)* any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V . . . [the other article in Part V is Article 60 under which you suspend or terminate] . . . may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations."

The Annex deals with the Conciliation Commission which has not yet been established. Clause 1 says: "1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations."

And then Clause 2 says that there will be four conciliators appointed, two by one party, two by the other. The next sentence says that: "The four conciliators shall . . . appoint a fifth conciliator chosen from the list, who shall be chairman." All these conciliators are to be from the list of qualified jurists maintained by the Secretary-General of the United Nations and this body will be called the Conciliation Commission. Clauses 6 and 7 of this Annex deal with the functions and powers of the Conciliation Commission:

> "6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute."

The point I am urging is this. Even under the Vienna Convention, which has superimposed restrictions on the right of a sovereign State under international law to suspend or terminate a treaty, there is no compulsory third-party settlement. What is provided for is only that you go before the Conciliation Commission, whose recommendations are not binding on you and they can only make recommendations; and even those Conciliation Commission Members are qualified jurists.

The Court adjourned from 11.20 a.m. to 11.50 a.m.

I have just read to the Court Article 66 and the Annex of the Vienna Convention and I was pointing out that the most significant feature of Article 66 is that whereas in other cases the nations agreed to compulsory third-party settlement at the hands of this Court, the nations did not agree to this third-party settlement, even at the hands of this Court, in cases where they exercise their right of suspension or termination of a treaty, which is a right founded on international law.

For years the most eminent jurists of the world struggled, and struggled hard, to bring about some degree of harmony between nations, some of whom wanted compulsory adjudication and others did not. Ultimately, but for the *via media* of the formula evolved in Article 66 and the Annex, there would have been no Vienna Convention at all.

Please turn to the United Nations Conference on the Law of Treaties, first session, March-May 1968, page 356, paragraph 38.

Judge Jiménez de Aréchaga, the leader of the Uruguayan delegation as he then was, points out how from the point of view of his State, there would be problems, even if, where you have no third-party adjudication or compulsory settlement, you provide for the giving of the notice or notification, as in Article 65. This is what is said on behalf of Uruguay in paragraph 38, at page 356:

> "A State which alleged a breach of a treaty by other States would normally do so in good faith; it would really be the victim of a breach of the treaty by another party. It could not, however, immediately cease to apply the treaty; it would have to initiate the procedure laid down in article 62 [which corresponds to our present Article 65] and await the result before being relieved of its obligations."

Then Judge Jiménez de Aréchaga requests the Commission to deal with this point and see that injustice is not caused.

By using the words "except in case of urgency", the Commission has taken care of urgent or emergency situations where you can suspend even without notice to the other party.

May I draw the honourable Court's attention to the United Nations Conference on the Law of Treaties, Second Session, April-May 1969, page 256, paragraphs 15 and 16:

> "15. Mr. DE CASTRO (Spain) said that the results achieved at the first session had been most encouraging and it would indeed be unfortunate if the Conference now failed to adopt a convention on the law of treaties. [In fact the Convention was on the verge of not being agreed upon at all and the learned Judge says it would be a pity if we are not going to have some agreed solution.] At the first session, a number of delegations had objected to Part V of the draft on the ground that, in their view, its adoption would upset the stability of treaty relations. On the other hand, at least one important delegation had indicated that it could not support the convention unless provision was made for the compulsory settlement of disputes about the validity of international treaties. The two-thirds majority required for adoption of the convention might not be secured unless some formula which met those two points of view, were included in the convention. Those were the considerations which had prompted the Spanish delegation to submit its own proposal for a new article 62 . . . [corresponding to the present Article 65].
>
> 16. Agreement on a procedure for the settlement of disputes likely to satisfy a majority of States would be difficult to achieve, since [mark the words] States were naturally reluctant to submit to an international body matters of vital concern to them, particularly if they were not convinced that the international body concerned would act impartially in settling disputes. Moreover, care would have to be taken to separate purely legal disputes from essentially political controversies."

It is inconceivable that nations consented to give to numerous small administrative bodies the jurisdiction which they decided not to give even to the International Court of Justice in the Vienna Convention, namely compulsory jurisdiction to deal with disputes relating to the exercise by a sovereign State of its right to suspend or terminate a treaty.

I submit that this is a very significant aspect. You have clear evidence of years and years of discussions and debate, negotiations, attempts to reach understanding between States, on the question whether the International

Court of Justice should be given the jurisdiction, as a matter of compulsory third-party settlement, to deal with cases where disputes arise when one State exercises its right to suspend or terminate a treaty on account of material breach by another party.

Ultimately the States did not want even that. So, in the Vienna Convention there is no such provision, and in the case of a breach by one State the other State has a right to suspend or terminate the treaty without going through any third-party settlement procedure. I ask again, is it conceivable that the same nations, which fought so vehemently to protect their sovereign rights and not permit compulsory third-party settlement to be imposed upon themselves, would agree to go to the small administrative bodies and let them deal with the disputes? Does it make any sense in the background of the Vienna Convention deliberations, which went on for years and years? I find it inconceivable—unless the nations are split personalities or they entered into all these treaties completely ignorant of what they were dealing with, which is not a presumption to be made against nations.

It is not the question of the ICAO Council only. There must be scores of treaties, bilateral and multilateral, where administrative bodies like the ICAO Council are given jurisdiction to deal with disputes pertaining to interpretation or application. This point, I submit, is of the greatest significance when the Court comes to consider what really did the nations consent to when they gave their consent to submit to the limited jurisdiction of the ICAO Council?

May I refer you to the book on *The Law of Treaties* by Rosenne, 1970 edition, pages 77 to 87. One paragraph, which begins at the foot of page 77 and is continued on page 78:

> "That problem—the problem of third party determination of treaty-law disputes—had dogged the codification work of the International Law Commission and in fact its existence, and hesitation in facing up to it, was, as we have seen, one of the factors which held up progress on the law of treaties before 1962. Two of the previous Special Rapporteurs, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, had firmly proposed bringing the whole matter within the compulsory jurisdiction of the International Court of Justice as an instance of last resort, coupled with presumptions unfavourable to the claimant State if it declined to submit a concrete case to adjudication. Sir Humphrey was more guarded, but nevertheless in 1963 partly retained this element of judicial settlement as the final resort. The International Law Commission refused to go so far and left matters at the compromise, which now appears in article 65 of the Vienna Convention, in this respect virtually unchanged. That compromise is based on Article 33 of the Charter of the United Nations, although it goes beyond it in one respect at least. Strictly speaking, that provision only applies to disputes of a relatively grave nature to which Chapter VI of the Charter itself refers; under article 65 of the Vienna Convention, however, this is extended to all disputes relating to the invalidity or termination of treaties, whether or not that dispute is one which endangers international peace and security."

In the book by B. P. Sinha, entitled *Unilateral Denunciation of Treaty because of Prior Violations of Obligations by Other Party*, one relevant passage is at page 206:

> "It is well established in international law that a violation of a treaty, irrespective of its effects, does not ipso facto operate to annul the obliga-

tions either of the innocent party or of the defaulting party. It merely endows an innocent party with certain alternatives or rights of action. An innocent party may choose to opt to regard a violated treaty as subsisting and thus condone or ignore breaches of obligations by other party or parties. It may decide to do no more than to lodge a diplomatic protest with the guilty party. It may seek the remedy of specific performance or it may demand reparations in adequate form for damages caused by violations, or both. It may simultaneously make a diplomatic protest and seek the remedies of specific performance and indemnity. It may choose to resort to unilateral suspension of a part or whole of its obligations under a violated treaty or, under certain valid conditions, it may resort to unilateral denunciation."

Now this paragraph points out what are the alternatives open to the aggrieved State. Pakistan says I should have gone to third-party settlement, I should have negotiated. Well, these are not obligatory courses of action. The choice is mine, and if I choose to resort to the alternative of suspending or terminating the contract, only a forum which is competent to deal with this dispute can go into the matter on merits, and no-one else.

In the same book (pp. 209, 210) there is a paragraph which I should like to read to this honourable Court:

"The concept of sovereignty continues to frustrate the process of third party adjudication of disputes relative to treaty interpretation and application. Although it is almost universally recognised that these disputes are suitable for third party adjudication, the fact remains that under international law a party to a treaty, in the absence of an agreement, has the right to refuse to submit to third party adjudication of disputes resulting from divergences of opinion relative to interpretation or application of treaty norms. The admission of such a right is tantamount to the recognition of go-it-alone or unilateralism not only in regard to the determination of the occurrence and nature of a treaty violation but also in respect of the need and necessity for reprisals. The advent of the World Court at The Hague and the United Nations has not basically altered these realities."

It is a sad commentary on the stage we have reached in international co-operation, but there it is, that nations are still unwilling to submit to third-party settlement when the dispute is as to the exercise of their sovereign rights, and this basic fact is, in my submission, the most fundamental point which should determine the Court's approach to the question as to the scope of the words "interpretation" and "application".

"Besides, parties to treaties have traditionally been reluctant to seek or submit to third party adjudicatory processes for the settlement of disputes pertaining to treaty application. The most usual method for the settlement of such disputes has been diplomatic negotiations. Although there are several instances of the exercise of the right of unilateral denunciation, in no instance did a denouncing party seek or receive a prior authorization or approval from an international judicial authority."

This is very important. There is no recorded instance in the history of international jurisprudence where, when the sovereign right of a State to suspend or terminate a treaty has been exercised, an administrative body has dealt with the matter on the ground that it is a matter of interpretation or application.

In short, all nations have gone so far on the basis that they have the right to suspend or terminate without waiting for third-party settlement first, and as the learned author says, there are several instances of their exercise of the right of unilateral denunciation, but no instance where a denouncing party sought or received a prior authorization or approval from an international judicial authority.

I am reading further on page 210:

> "The fear of the abuse of the right of unilateral denunciation appears to be exaggerated. [This fear that nations would lightly mala fide exercise this right of suspension and termination appears to be exaggerated.] There is no denying the fact that this right is liable to be used as a pretext by contractants of international agreements to relieve themselves of their solemnly undertaken obligations. However, the sanction of self-interest has, as a whole, operated to deter the use of this right in a reckless manner. There are cases where contracting parties showed disinterest in violated treaties and thus let them fade away or fall into desuetude. In some cases complaining parties contemplated or threatened to invoke this right but preferred to terminate their obligations in accordance with the termination clauses stipulated in the treaties. Although for more than one hundred and fifty years the general consensus has been in support of this right [150 years], parties to international agreements have, on the whole, made a sparing use of this right. A few spectacular instances of the invocation or exercise of this right exist. But they ought not to be confused with the normal pattern of behaviour of states in this regard."

When this Court construes the words "interpretation" or "application", I do submit it will decide the matter not on the basis that nations will act in bad faith. There will be stray cases of dishonest invocation of the right to suspend, but the Court will deal with the matter on the basis that you must assume honesty and bona fides on the part of nations. The presumption is of bona fides, not of mala fides, and that construction will be put upon the jurisdiction clause which will be consistent with this presumption. Nations do not lightly exercise this right of suspension and termination—as the author says for 150 years this right has been recognized, but it has been very sparingly used. The limits of the Council's jurisdiction cannot change when in a particular case it is alleged by the wrong-doer that the aggrieved party has not acted bona fide.

If the Council has jurisdiction to deal with the matter, it will deal with it in all cases whether the exercise is bona fide or mala fide. If it has no jurisdiction to deal with this dispute, it cannot deal with it whether the exercise of the right is bona fide or mala fide. In other words, the limits of jurisdiction do not depend on the question as to what would be the ultimate decision on the facts of a case, because that makes nonsense of the whole basic concept of jurisdiction. Jurisdiction is at the threshold—either you have jurisdiction at the threshold or you have not; and if the ICAO Council has no jurisdiction at the threshold to deal with questions of suspension under international law, then surely it cannot be invested with jurisdiction because my opponent chooses to say that I have not acted bona fide. If the law were different, in every case the wrong-doer can always say: no, the aggrieved party is really not aggrieved, it is acting mala fide, and therefore every one of the small administrative bodies will start deciding these questions of suspension under international law.

I am emphasizing this because Pakistan has, curiously enough, confused

the merits of the dispute with the question of jurisdiction. It has started with the premise that on merits India is wrong, and then wants to draw the conclusion that the Council has jurisdiction to deal with it. It is really reversing the process of rational thought.

On page 210, in Mr. Sinha's book, may I read the last paragraph:

> "The concept of unilateral denunciation is essentially analogous to one of the general principles of law of contract of most civilised states that an innocent party has the right to be relieved of its obligations because of substantial breaches of obligations on the part of another party. Since the consent of states is evidenced not only by specific provisions in treaties and by practice on international level but also by the general manifestations of legal consensus or conscience in *foro domestico* it is reasonable to maintain that private law analogy in respect of unilateral denunciation signifies that this concept being in accord with the general manifestations of the juridical conscience of humanity ... has the implied support or approval of states."

May I also refer in this connection to the *Yearbook of the International Law Commission*, 1966, Volume II, pages 262 and 263. This *Yearbook of the International Law Commission* has summarized the difficulties which the Commission faced when dealing with the question of compulsory judicial settlement. I may read a few sentences, in paragraphs 3 and 4 on pages 262 and 263:

> "In 1963, some members of the Commission were strongly in favour of recommending that the application of the present articles should be made subject to compulsory judicial settlement by the International Court of Justice, if the parties did not agree upon another means of settlement. Other members, however, pointed out that the Geneva Conventions on the Law of the Sea and the two Vienna Conventions respectively on Diplomatic and on Consular Relations did not provide for compulsory jurisdiction. While not disputing the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles, these members expressed the view that in the present state of international practice it would not be realistic for the Commission to put forward this solution of the procedural problem."

The Law Commission found it unrealistic to suggest to the States that even the International Court of Justice should have compulsory jurisdiction; while Pakistan finds it quite realistic to say that the ICAO Council should have such a jurisdiction.

> "After giving prolonged consideration to the question [I am reading further], the Commission concluded that its appropriate course was, first, to provide a procedure requiring a party which invoked the nullity of the treaty or a ground for terminating it to notify [to] the other parties and give them a proper opportunity ... [of stating] their views [etc.]."

The other aspect of this passage, which I would also like to emphasize here, is that it shows that it is not a part of international law, as alleged by Pakistan, that you must have third-party settlement before you exercise your right of suspension, because if that were the law, there would have been no difficulty facing the Law Commission in codifying that law.

There is no such law and there has never been such a principle of international law. Never in the history of international law has it been a principle

that before you have a third-party settlement you cannot exercise your right of suspension. That is proved by the various passages I have read, and they show that Pakistan's submission in law is completely unfounded.

May I refer to one interesting passage from Whiteman's *Digest of International Law*, Volume 14, pages 273 and 275. It is true that in our case we are dealing with a hijacking incident. Maybe a time will come when nations will realise that India was right in treating such an incident, not by itself but in conjunction with the reaction of the wrong-doing State to such an incident, as a matter of grave concern, and perhaps the world is already drifting towards that point of view.

It may be a coincidence, but not without significance, that the hearing of this case began before this honourable Court on the day when, for the first time in world history, the airlines the world over decided not to fly as a protest against this word-wide evil.

In Whiteman's Volume 14, they were dealing with a much greater danger to humanity than highjacking, namely the danger of nuclear warfare, and the question was regarding the Nuclear Test Ban Treaty, 1963. The United States was asked, "Well you have this treaty with Russia, but suppose Russia were to do something which would amount to a material breach, would the United States ask for an adjudication, settlement, etc., or would it promptly suspend and repudiate the treaty?" The United States gave an answer which, as a matter of principle, applies equally to all treaties. Although the gravity of the situation would not be the same in the case of other treaties, the principle is the same. Page 473 of *Whiteman's Digest of International Law*, Volume 14:

> "Article IV of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, signed August 5, 1963, on behalf of the United States, the United Kingdom, and the Union of Soviet Socialist Republics, . . .
>
> . . . Senator Humphrey of Minnesota asked the Secretary the following question: 'Mr. Secretary, if the Soviets were to abrogate the treaty and were to have an explosion in one of the prohibited environments—let us say in the atmosphere or under water and we knew it—would we have to wait 90 days before we can respond with our answer either to test or to leave the obligations of the treaty?'
>
> Secretary Rusk replied:
>
> 'It is our view that we would not have to wait 90 days, because the obligation of the Soviet Union not to test in the prohibited environment is central to the very purposes and existence of this agreement, and it is clearly established through precedents of American practice and international law *over many decades that where the essential consideration* in a treaty or agreement fails through violation on the other side that we ourselves are freed from those limitations'."

He goes on to say that he would make available to the Committee a legal brief on the matter. This legal brief is set out on page 474:

> "The question has been raised whether the United States would have to give 3 months' notice prior to withdrawing if another party conducted nuclear weapon tests in the atmosphere, or committed some other act in *plain violation of the treaty. The answer is 'no'*.
>
> A breach of treaty obligations by one party is considered in international law to give other parties the right to terminate their obligations under the treaty. Article IV is not intended as a restriction of that right."

Article IV provided that 90 days' notice would have to be given for withdrawal from the treaty, and the legal note says that Article IV is not intended to be a restriction on the right under international law. I am emphasizing this because one of the points of Pakistan is that I should have followed the procedure of denunciation which requires one year's notice. In other words, if any of the other States commit a breach, I must, with the patience of Job, undergo and endure all that is inflicted on me and wait for 12 months, that is the right way to react to a material breach!

> "The three original parties recognised that events other than violations of the treaty might jeopardize a country's 'supreme interests' and require that country to resume testing in the prohibited environments. Article IV permits withdrawal, upon 3 months' notice, in this case. If another party violated the treaty, the United States could treat the violation as an 'extraordinary event' within the meaning of Article IV, or it could withdraw from the treaty immediately."

And then the legal brief quotes certain passages from Lauterpacht's *International Law*:

> "In international law, violation of a treaty by one party makes the treaty voidable at the option of the other parties. *I. Lauterpacht, 'Oppenheim's International Law'* 947 (8th edition 1955); see also Restatement, Foreign Relations, section 162 ... [this is the important passage]. Whether there has been a violation, and whether it is serious enough to justify termination is for each party, acting in good faith, to decide."

It is not the wrong-doer who decides whether the breach is material or not, it is the aggrieved party which decides in good faith whether the breach is material or not. So Pakistan's opinion as to its own conduct is irrelevant. What is relevant is India's opinion as to the seriousness of Pakistan's conduct following upon the highjacking incident. All that the law requires is that you must act in good faith, and there is no circumstance whatever to suggest that India has not acted in good faith.

I have finished with Pakistan's plea in their Counter-Memorial that there should be a third-party settlement procedure followed before India could exercise the right of suspension. May I go back to that Counter-Memorial and deal with the other point that India cannot be a judge in its own cause. This matter can be disposed of very briefly. It is wrong to say that India was acting as a judge. India made an administrative decision, not a judicial decision.

When a country suspends or terminates a treaty because of material breach by another State, it is not acting as a judge, it is discharging no judicial function. The well-known maxim that a man cannot be a judge in his own cause cannot possibly apply. It makes an administrative decision. If Pakistan is right here, then the right of suspension and termination can never be exercised. You can never exercise it without first going to compulsory jurisdiction procedure and having a third party to decide whether you are entitled to suspend or not. Is that the rule of international law? I have cited authorities which clearly negative this view, and I am not aware of any case, any text-book or any practice supporting the view that a nation has no right as a sovereign State to judge for itself whether the conduct of another State amounts to a material breach or not.

So to invoke the doctrine *nemo judex in re sua*, a man cannot be a judge in his own cause, is really to abrogate this right under international law to take

administrative action without waiting for third-party settlement or third-party adjudication. That finishes the objections raised by Pakistan in paragraphs 38 and 41 on pages 383 and 384, *supra*, of their Counter-Memorial.

I come to the next objection, which is at page 384, *supra*, of Pakistan's Counter-Memorial, paragraph 39:

> "Article 95 of the Convention, and Article III of the Transit Agreement, expressly provide the procedure for denunciation and the method by which a party may withdraw therefrom. India cannot thus unilaterally denounce, terminate or suspend the Convention and the Transit Agreement save in conformity with the provisions of the aforementioned agreements."

This point of Pakistan rests on the assumption that the right given to India is circumscribed and limited by Article 95 of the Convention and Article III of the Transit Agreement, and India has no right of suspension outside those Articles. Apart from the fact that this proposition, with respect to Pakistan, is unstateable, the real point is that, even assuming Pakistan were right, this question can only be decided by a competent forum which has the right to go into the merits and validity of the suspension. If there is a competent forum which has the jurisdiction to go into the validity of suspension, of the justification for the suspension, Pakistan can argue all that before that forum, but today we are on the limited point whether the ICAO Council has the jurisdiction to deal with it. On the point whether the ICAO Council has jurisdiction, is it at all relevant whether I exercise my right validly or invalidly, justifiably or unjustifiably? All these are questions which go to the merits of the dispute, not to the question of the jurisdiction of the ICAO Council. So all this is irrelevant. Apart from its being irrelevant, may I point out how it will not bear scrutiny. Article 95 of the Convention at page 325, *supra*, of India's Memorial, reads thus:

> "*(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."

Now there are four answers to this point urged by Pakistan.

The first is that the concept of denunciation embodied in Article 95 is wholly different from the concept of suspension. This Article does not deal with the right of suspension at all. It has no concern with the doctrine of material breach. What I am invoking is the right to suspend or terminate on account of material breach by the other party. By contrast this Article deals with a case where there may be no breach at all, material or immaterial, but a nation says "I am sick and tired of ICAO, kindly let me get out. I do not allege any breach against anybody, I just do not want to continue in this Organization." It will then invoke Article 95.

The second point is that denunciation under Article 95 means complete withdrawal of the State denouncing, from the Convention. In other words, denunciation is against all other parties to the Convention. That is why it is said that the United States of America "shall at once inform each of the contracting States". It applies where I want to get out of the Organization and cease to be a party to the Convention. The Article from its very nature

can have no application when I want to suspend or terminate the treaty, not as against all the other contracting States, but only as against a particular State which is the wrongdoer.

The third point is the time-factor—the two cumulative time-limits mentioned here. First, no right of denunciation for three years. What happens if there is a material breach during the period of three years? Supposing in the very first year of the operation of the treaty there is a material breach by one State, do I wait for three years before exercising my right as a sovereign State? The other time-factor is that the notice must be of one year. And to this one-year requirement there is no exception—no emergency, no urgency, no impending disaster is put here as an exception to the one-year period of the notice. Surely this Article cannot deal with cases of material breach requiring prompt action.

Fourthly, and lastly, if the whole Convention is silent on the question of suspension or termination for material breach and it only deals with denunciation which is a different concept, as held in paragraph 96 of the Advisory Opinion of this honourable Court in the *Namibia* case, the silence of the treaty does not negative or exclude the existence of such a right.

I read now paragraph 40 of that Counter-Memorial:

> "The Respondent contends that the allegations of the Government of India in relation to the hijacking incident, quite apart from the fact that these are false, do not relate to the breach of the Convention or the Transit Agreement, let alone any 'material breach' thereof. No question therefore arises regarding the suspension of the Convention or Transit Agreement on the grounds of 'material breach'. It is not open to India to arbitrarily suspend the operation of these agreements on the basis of a bare and unjustified assertion which, in reality, has no bearing on the obligations under the Convention and the Transit Agreement. In the events that have happened it is clear that India has not acted in good faith."

I cannot conceive of an independent mind saying that "it is clear that India has not acted in good faith". You may say that India has taken a wrong view of what is its right under international law. I would be able to satisfy the appropriate forum that it is the right view. But the allegation of mala fides is wholly groundless.

To attribute lack of good faith to your opponent is easy. But the point at issue again is this: I am not shirking this question of good faith, I shall deal with the question of the circumstances in which India acted and the justification India had for its action. I shall deal with that later, unless the Court asks me not to deal with it. But although I propose to deal with it later, at the outset I want to say two things about this particular plea. First, like paragraph 39, paragraph 40 also suffers from the infirmity of mixing up the merits of the dispute with the ICAO Council's jurisdiction. The whole appeal before this Court is on the question of the Council's jurisdiction, not the merits of the case. Pakistan, all the time, mixes up the question of jurisdiction with merits. If Pakistan is able to substantiate its assertion that there was no material breach on its part, a court of competent jurisdiction—if there is such a court before whom the parties go—will decide in Pakistan's favour. But what bearing has this assertion on the question of the limits of the ICAO Council's jurisdiction? This is my first answer.

My second answer to paragraph 40 is that, as I have already pointed out by reading the relevant passages, it is for the aggrieved State to decide, not

for the wrongdoing State, as to whether there has been a material breach. Now Pakistan's deciding this matter in its own favour is irrelevant. It is India which has taken action, it is India which has to decide according to its lights as to whether the conduct of Pakistan amounted to a material breach and India has decided this on the correct understanding and application of international law.

Thirdly, if Pakistan alleges that India cannot decide for itself whether there has been a material breach, can it be suggested that Pakistan can decide this question for itself? If neither India nor Pakistan can decide for itself whether there has been a material breach, does it therefore follow that the ICAO Council has jurisdiction to decide this question?

When you come to paragraph 40 and the other paragraphs, we are miles away from the real issue arising in this apeal, the real issue being *not* justification for India's conduct, not the merits of the case, but the limits of the ICAO Council's jurisdiction. My submission is that apart from the fact that India has acted in absolute good faith and there has been a material breach on the part of Pakistan, this particular plea of Pakistan is wholly irrelevant to the question arising in this appeal. After I have finished the legal argument, I shall go to the facts and show what Pakistan's conduct has been in this case.

In paragraph 41 two other points are made by Pakistan. One is that the Advisory Opinion of the Permanent Court of International Justice in the *Treaty of Lausanne* case applies here. I have gone through that case and I will not trouble the Court by reading it. The case has no relevance to what you are to consider. In that case the point was whether the concept of unanimity of opinion was satisfied when the State which was interested in the dispute itself voted against the majority view. What the Court said is that when a treaty refers to unanimity of opinion, it means unanimity of opinion excluding the interested States. The relevant passage is in *P.C.I.J., Series B, No. 12* and I am reading the Advisory Opinion at pages 32 and 33:

> "The votes of the representatives of the Parties are not, therefore, to be taken into account in ascertaining whether there is unanimity, but the representatives will take part in the vote, for they form part of the Council and, like the other representatives, they are entitled and are in duty bound to take part in the deliberations of that body. The terms of paragraphs 6 and 7 of Article 15 of the Covenant and of the new clause to be inserted in Article 16, clearly show that in the cases therein contemplated the representatives of the Parties may take part in the voting and that is only for the purpose of determining whether unanimous agreement has been reached that their votes are not counted . . ."

Then Pakistan cites a passage from the Law Commission's Commentary which says that in Article 60 of the Vienna Convention the right to suspend or terminate—

> ". . . is not a right arbitrarily to pronounce the treaty terminated. If the other party contests the breach or its character as a 'material breach', there will be a 'difference' between the parties with regard to which the normal obligations incumbent upon the parties under UN Charter and under general international law to seek a solution . . . will apply".

Now that means that under Article 33 of the United Nations Charter we have to follow the procedure. But how does that give jurisdiction to the ICAO Council? It is difficult to see what is the relevance of this quotation.

The Court rose at 1 p.m.

THIRD PUBLIC SITTING (21 VI 72, 11.15 a.m.)

Present: [See sitting 19 VI 72, Judge Lachs absent.]

Le VICE-PRÉSIDENT, faisant fonction de Président: Le conseil de l'Inde a indiqué à l'audience d'hier qu'il examinerait les circonstances dans lesquelles l'Inde a agi après le détournement de l'avion et la manière dont elle peut justifier son action. Le conseil de l'Inde a ajouté: «Je traiterai de cela plus tard à moins que la Cour me demande de ne pas en parler».

Après en avoir délibéré, la Cour a décidé que peuvent être exposés les seuls faits pertinents pour la solution de la question de compétence et qu'ils doivent en tout cas être traités brièvement. Nous allons donc reprendre maintenant l'audience et j'annonce qu'il n'y aura pas de suspension étant donné que la séance a été ouverte un peu tard.

Mr. PALKHIVALA: May it please the honourable Court. Yesterday I had been replying to Pakistan's various points dealing with the question as to whether the ICAO Council had jurisdiction to deal with the matter on the ground that the words "interpretation" and "application" are wide enough to cover "suspension", and, according to Pakistan, further, the suspension effected by India was illegal and unjustified.

I had finished the point dealt with in Pakistan's Counter-Memorial in paragraph 41.

May I say a few words about the remaining points made by Pakistan on the same issue.

The next point, made by Pakistan in paragraph 42 of its Counter-Memorial, is that India could not suspend the agreements but should have pursued its remedy before the ICAO Council under the Convention and the Transit Agreements. I submit this is patently erroneous because the well-settled international law is that these various remedies available to the aggrieved State are alternative remedies and it is open to the State to make its own choice. If India made the choice, as in fact it did, of suspending the treaties, it is not to the point to say that another remedy, another mode of redress, was open to India.

The next point made by Pakistan is in paragraph 43 of the Counter-Memorial. Pakistan says that India must be treated as having forfeited, so to speak, its right to suspend the treaties because after the hijacking incident it sent a letter dated 4 February 1971 to the ICAO Council and the letter contains this paragraph:

> "The Government of India would like to reiterate its declared policy of condemning and curbing acts of unlawful seizure of aircraft and unlawful interference with civil aviation. It deplores the detention of passengers and crew members in Pakistan for a period of two days and the destruction of the hijacked aircraft. This is contrary to the principles of the Chicago Convention and other international conventions, Article 11 of the Convention on Offences and Certain Other Acts committed on Board Aircraft, signed at Tokyo on 14 September 1963, Article 9 of the Convention for the Suppression of Unlawful Seizure of Aircraft adopted at The Hague on 16th December 1970."

Pakistan's plea is that because India wrote this letter to the ICAO Council

it means that, having regard to the principle which is set out in Article 45 of the Vienna Convention, India could no longer invoke the material breach by Pakistan as a ground for suspending the treaty. What we have done in this paragraph is *not* to invoke the ICAO Council's jurisdiction to deal with the dispute. We have not done that at all. We have merely reported to the ICAO Council a certain incident which was contrary to the spirit and the letter of various international treaties and I submit it is impossible to say that this letter amounts to acquiescing in the jurisdiction of the ICAO Council.

It is true that the Chicago Convention is referred to, but so are the treaties signed at Tokyo and at The Hague in 1963 and 1970, respectively. To these two treaties—the Tokyo and The Hague Treaties—neither India nor Pakistan is a party, The very fact, therefore, that we have invoked those two other treaties—the Tokyo and The Hague Treaties—shows that the treaties referred to in the letter are not the treaties which India regards as being in force between India and Pakistan. The treaties referred to here are those which have a bearing on safety of international aviation; and the Chicago Convention is referred to here in that context as being a treaty which has a bearing on the safety of international aviation.

The ICAO Council is, so to speak, the keeper of the world's conscience, so far as safety of international aviation is concerned. It is to the Council in that capacity, that this communication is addressed.

Finally, putting the case at the highest in favour of Pakistan, it would only mean that there is a point which Pakistan may argue on the merits of suspension, but it has no bearing on the question of the ICAO Council's jurisdiction to go into the merits of suspension.

The final point, which perhaps may be rightly described as a desperate point, is the one contained in paragraph 44 of Pakistan's Counter-Memorial. It is that by lodging an appeal to this Court India has acquiesced in the continuation of the treaties between India and Pakistan. The simple answer to that point is that India is still a party to the Convention and the Transit Agreement and it honours these two treaties and treats them as in operation vis-à-vis the other contracting States, other than Pakistan. If the ICAO Council gives a wrong judgment, if it assumes jurisdiction which it does not possess under the treaties, surely by India filing an appeal which is provided for by the treaties themselves, it cannot be said that India acquiesced in the continued operation of the treaties vis-à-vis Pakistan. If Pakistan were right, the result can only be described as absurd: India must accept the ICAO Council's decision and not take the matter in appeal; or alternatively it can go to this Court but merely to suffer dismissal of the appeal on the ground that it has acquiesced in the operation of the treaties vis-à-vis Pakistan.

After that, Pakistan, in paragraph 45, tries to explain away the *Namibia* case on the ground that that case dealt with only that situation where a certain authority, like the United Nations, has supervisory powers over a State, like the South Africa State, and this decision would have no bearing here since India does not possess supervisory powers over Pakistan.

The passages I have read from the *Namibia* Opinion leave no doubt that these two points—first the point of the right under international law to suspend or terminate a treaty on the ground of material breach, and the second point that the United Nations had supervisory powers over South Africa are separate and distinct. I think it would be an injustice to the learned judges—who have written their very clear opinions—to say that they have not observed the distinction between the two. Every judge who has dealt with the matter in his opinion, either dissenting or concurring, has borne in mind

the distinction between these two arguments, which are separate and distinct.

In the Advisory Opinion of the Court, paragraphs 94 and 95 deal with the question of the right of suspension and termination on the ground of material breach. Paragraphs 102 and 103 deal with the other question, namely the supervisory functions and powers of the United Nations over South Africa.

Further, the two points were kept separate and distinct, both in oral pleadings and in the written pleadings.

In the oral statement of the Secretary-General of the United Nations, which is to be found in Volume II of the *Pleadings, Oral Arguments, Documents* of the *Namibia* case, at pages 53 and 58, it will be found that the representative of the United Nations treats these two points as separate and distinct.

Sir Gerald Fitzmaurice put a question which is the fourth question in the same Volume II of the *Pleadings*, at page 63, and the learned Judge's question is this:

> "Assembly resolution 2145 appears to be based upon, and to embody, what is in effect a *judgment of law*, namely that fundamental breaches of the Mandate for South West Africa have occurred, legally justifying its revocation or termination. Is it the Secretary-General's view that the Assembly has the power to make legal determinations of this kind—that is of a kind that would normally fall within the province of a court of law, such as this Court? If so, where, in his view, would the line of distinction come between the judicial functions of the Assembly, if it had such functions, and those of this Court which is equally a main organ of the United Nations, and its principal organ?"

The answer, it is interesting to note, of the representative of the United Nations deals with the two points separately, at page 490 of Volume II. The power under international law to terminate on ground of material breach is dealt with in paragraph 59 on page 490, and the second power, that is the power to terminate the Mandate in the exercise of the United Nations supervisory authority is dealt with in paragraph 60:

> "In a second role, that of the supervisory authority of the Mandate for South West Africa, the General Assembly must clearly have had the right to make determinations both of fact and of law, as the absence of such a right would have rendered its authority nugatory."

This is the second role, apart from the first one which is, under international law, as a contracting party.

And finally, the United States Government in its written pleadings, as well as in oral arguments before the Court, has kept these two points separate and distinct. In Volume II of the *Pleadings*, page 501, the oral statement by Mr. Stevenson, on behalf of the United States, first deals with the right of suspension under international law on the ground of material breach, and then he says:

> "Now even if the Court were not to accept the argument that termination of South Africa's rights under the Mandate by the General Assembly was justified by the treaty doctrine of material breach, it is my government's view that the General Assembly had the right to terminate South Africa's rights in the General Assembly's capacity as successor to the League of Nations supervisory responsibility."

So the point made by Pakistan in paragraph 45 is clearly erroneous. In

paragraph 46 Pakistan refers to Judge Hardy Dillard's observations which I have already read (*I.C.J. Reports 1971*, p. 168). Then it refers to Judge Sir Gerald Fitzmaurice's observations in paragraph 47, which I have already dealt with, and I have pointed out how the learned judge, if I read his opinion correctly, does not dispute the proposition of international law which I have been advancing earlier. That finishes the points made by Pakistan on this particular issue.

One question which is directly linked with the question of the jurisdiction clause is: what is the right canon of interpretation to be applied to the jurisdiction clause? In other words, how do you construe the words "interpretation" or "application". On that point it would be difficult to improve upon what Sir Gerald Fitzmaurice has said in *I.C.J. Reports 1962*. The relevant passage is at page 473, and I am invoking this principle as the right principle to be adopted when the question is whether any international body has been given compulsory jurisdiction. The words of the learned Judge are:

> "Moreover, quite apart from any question of onus of proof, a duty lies upon the Court, before it may assume jurisdiction, to be conclusively satisfied—satisfied beyond a reasonable doubt—that jurisdiction does exist. If a reasonable doubt—and still more if a very serious doubt, to put it no higher—is revealed as existing, then, because of the principle of consent as the indispensable foundation of international jurisdiction, the conclusion would have to be reached that jurisdiction is not established. In short, the doubt would, according to the normal canons for the interpretation of jurisdictional clauses, have to be resolved against the existence of jurisdiction."

The Council, instead of bearing in mind this proposition, acted in exactly the contrary manner. Many representatives had grave doubts, and the Council, instead of resolving the doubts against the existence of jurisdiction, decided that the best thing was to sweep the doubts under the carpet. The next passage which again lays down the correct principle to be applied to jurisdiction clauses, particularly when the jurisdiction is compulsory, is a passage in the *British Year Book of International Law*, 1958, Volume XXXIV, at page 88. This is an article by Judge Sir Gerald Fitzmaurice, where the learned Judge says:

> "To sum up—what is required, if injustice is not to be done to the one party or the other, is neither restricted nor liberal interpretations of jurisdictional clauses, but *strict proof* of consent."

"*Strict proof* of consent." The matter is not in the realm of semantics, and the question is not of liberal or strict interpretation. The matter has to rest on this foundation: strict proof that the parties to the Convention and the Transit Agreement consented to give to this administrative body the right to decide whether the exercise of their right under international law as sovereign States to suspend or terminate a treaty could be adjudicated upon by that body. And in the same case the learned Judge has, on page 89, the last 12 lines, elaborated this point a little further:

> "If inference is piled on inference, and reference on reference, then the connexion between the point of departure and the point of emergence, though it may technically exist, may be inadequate to support the inference of true consent. Particularly is this the case where a consent given, primarily and ostensibly in relation to a given class of case, is held

by such a process of reference to be applicable to other classes of disputes which were certainly not in the immediate contemplation of the State concerned when it gave its arbitral undertaking."

I submit that it is reasonably clear that it was not in the contemplation of the contracting States when they signed the Convention and the Transit Agreement to let this body decide questions of international law and exercise of sovereign rights.

The next authority I would like to refer to is *P.C.I.J., Series A, No. 2,* page 60. If I may read just one passage from the opinion of Judge Moore:

"The international judicial tribunals so far created have been tribunals of limited powers. Therefore no presumption in favor of their jurisdiction may be indulged. Their jurisdiction must always affirmatively appear on the face of the record."

If this proposition applies to judicial tribunals, which are created with limited powers, I submit it applies *a fortiori* to administrative bodies like the ICAO Council.

The final passage in my support which I would like to refer to is the one reported in *I.C.J. Reports 1950,* at page 8, where the Opinion of this honourable Court quotes a passage from an earlier Judgment of the Permanent Court of International Justice:

"As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig* (*P.C.I.J., Series B, No. 11,* p. 39):

'It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'"

These are the relevant cases on the point of the right principle of construction to be applied to a jurisdiction clause.

I would now like to deal with the cases cited by Pakistan and show how they do not support its case. Pakistan has dealt with these cases in its Counter-Memorial in paragraphs 49 to 55, pages 386-389, *supra.*

The first case they have referred to is the case of *Certain Expenses of the United Nations.* Now the passage there says: "In the interpretation of a multilateral treaty . . . its particular provisions should receive a broad and liberal interpretation."

That brings me to a very important point. There is a vast difference between the rule of construction to be applied to a jurisdiction clause, of which the foundation is strict proof of consent, and the rule to be applied to the general provisions of a treaty, which must be the rule which gives effect to the intention of the treaty and makes it workable. In short, what the learned Judge is referring to here as "broad and liberal interpretation" is not a principle to be applied to a jurisdiction clause. This is the point missed in Pakistan's Counter-Memorial. This passage from the *Certain Expenses of the United Nations* case has no bearing on the question of construing a jurisdiction clause. The second case which has been referred to by Pakistan is *Interpretation of Peace Treaties,* a Judgment of this Court reported in *I.C.J. Reports 1950,* and the relevant passage is at page 74. In that case the question was whether on the facts of the case it could be held that a dispute existed between the Parties and the Court said that on the facts of the case a dispute did exist.

This case has no bearing here, because it has never been disputed by India

that a dispute does exist between India and Pakistan. I find Pakistan having quoted at least three cases which are all cases on the question: did a dispute exist? Nobody says in the present case that a dispute does not exist between India and Pakistan. The real point in this case is not as to the existence of a dispute, the real point in this case is: does the dispute relate to interpretation or application of the treaty?

The Judgment in *I.C.J. Reports 1950* shows that the Court was not concerned with termination or suspension.

The next case referred to by Pakistan is the case reported in 1924, *P.C.I.J., Series A, No. 2*, the relevant passage being at pages 11 and 12—that is the *Mavrommatis Palestine Concessions* case. In that case also the Court is dealing with the question as to whether a dispute existed between the rival parties, and the Court defines what a dispute is by saying:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. The present suit between Great Britain and Greece certainly possesses these characteristics."

The other case cited by Pakistan is the *Factory at Chorzów* case which is reported in 1927, *P.C.I.J., Series A, No. 9*. Now there the treaty was continuing, there was no question of the treaty being suspended or terminated and the Court did not consider and was not called upon to consider whether a dispute pertaining to termination or suspension is a dispute as to interpretation or application.

> "Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted to the Permanent Court of International Justice."

That is how the treaty read, and then the Court goes on to say that—

> ". . . when such a power to go into the question is given to the Court the doctrine of effective interpretation brings in the power to award reparations."

The doctrine of effective interpretation has been invoked by Pakistan at more places than one, both in its Counter-Memorial and in its Rejoinder, and I shall deal with it separately, as a distinct point.

Before I come to that, I shall go on with Pakistan's Counter-Memorial which deals with the *South West Africa* case, 1962, at page 388, *supra*, paragraph 51. That case is, in my submission, very important and supports what I am saying. The case is reported in *I.C.J. Reports 1962*, beginning at page 319 and the relevant passages are at pages 326, 332-335, 343 and 347. Ethiopia and Liberia filed Applications, alleging that South Africa had committed various breaches of the Mandate and under Article 7 of the Mandate all disputes pertaining to interpretation or application of the Mandate could come before this honourable Court. I will read first Article 7, which is set out in the Judgment at page 343:

> "The question which calls for the Court's consideration is whether the dispute is a 'dispute' as envisaged in Article 7 of the Mandate and within the meaning of Article 36 of the Statute of the Court . . .
>
> The Respondent's contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate, which mentions 'any dispute whatever' arising between the Mandatory and another

Member of the League of Nations 'relating to the interpretation or the application of the provisons of the Mandate'."

Ethiopia and Liberia raised certain points purely on merits and they said that South Africa had failed to discharge its obligations under the Mandate. So the dispute was whether on a proper interpretation and application of the Mandate, South Africa had committed breaches. South Africa filed Preliminary Objections and raised two points among others. It raised the point that the Mandate should not be regarded as a treaty at all, and therefore, the jurisdiction of this Court, under Articles 36 and 37 of the Statute of the Court, could not be invoked, because they refer to treaties. The second point which South Africa made was that in any event the treaty was not in force, whereas Articles 36 and 37 of the Statute of the Court referred to treaties in force.

The Court ruled that the treaties were in force and that the Court would deal with the questions on merits which had been raised by Ethiopia and Liberia.

The Applications made by Ethiopia and Liberia, which start at page 322 of the *I.C.J. Reports 1962* make it clear that there was no dispute raised by Ethiopia or Liberia as regards the termination or suspension of the Mandate. In fact they proceeded on the basis that the Mandate did exist and continued in operation.

Then one finds, on page 326, South Africa raising the point that *(a)* the Mandate is not a treaty; and *(b)* in any event it is no longer a treaty in force.

At page 332 the Court comes to the final conclusion that the Mandate is a treaty.

On page 333 is the passage which directly supports what I am saying:

> "The Respondent [that is South Africa] further argues that the casualties arising from the demise of the League of Nations are not therefore confined to the provisions relating to supervision by the League over the Mandate but include Article 7 by which the Respondent agreed to submit to the jurisdiction of the Permanent Court of International Justice in any dispute whatever between it as Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate. [Now comes the important sentence.] If the object of Article 7 of the Mandate is the submission to the Court of disputes relating to the interpretation or the application of the Mandate, it naturally follows that no Application based on Article 7 could be accepted unless the . . . Mandate, of which Article 7 is a part, is in force."

The last sentence leaves no doubt that the Court held that once the Mandate itself ceases to be in force no application based on the jurisdiction clause, which deals with disputes pertaining to "interpretation" or "application", can possibly be accepted by the Court. The Court continues:

> "This proposition, moreover, constitutes the very basis of the Applications to the Court.
>
> Similar contentions were advanced by the Respondent in 1950, and the Court in its Advisory Opinion ruled:
>
> > 'The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.' "

And the Court goes on to quote from the earlier case, on page 334:

> "Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to . . . [these] provisions.";

and the relevant passage goes up to the middle of page 335.

This case, which is the one case dealing with the clause "disputes relating to the interpretation or application", is relevant. Pakistan has cited it. I use it as an authority in support of my own submissions. May I formulate what emerges from this case, to the extent to which it is relevant to our case.

(1) The Applications of Ethiopia and Liberia raised disputes relating to the interpretation or application of the Mandate, and not to its termination.

(2) The Respondent challenged this Court's jurisdiction on the ground that the Mandate was not a treaty, and that, in any event, the Mandate having come to an end there was nothing to interpret or apply under Article 7 of the Mandate, and there was no treaty in force within the meaning of Articles 36 and 37 of the Statute of the Court.

(3) The Court ruled that: *(a)* the continued existence of the Mandate had already been decided by the Court in an earlier case and that decision was clearly right; and *(b)* the Respondent could not exercise all the rights of the mandatory and yet dispute the existence of the Mandate.

(4) The Court did not hold—and this is important—that a dispute relating to the termination of the Mandate is a dispute relating to its interpretation or application. On the contrary, the Court expressly held, at page 333, that if the Mandate had come to an end, no application based on the article dealing with disputes as to "interpretation" or "application" could be accepted by the Court.

(5) There was no question of inherent limitations on the Court's jurisdiction, unlike the ICAO Council. In fact, it was the only court in the world which could possibly have jurisdiction in the matter.

(6) Any dispute as to this Court's jurisdiction is settled by this Court's own decision (Art. 36, para. 6, of the Statute of the Court).

It is difficult to see how this case can possibly help Pakistan.

The other case cited by Pakistan is the decision of the House of Lords in *Heyman* v. *Darwins*. It is the case reported in *All England Reports*, 1942, Volume 1, at page 337, and I should like to read the relevant passages at pages 339, 344, 345 and 353.

This case has been pressed into service by Pakistan on the ground that any dispute pertaining to termination could be decided by the arbitrator—in the present case the ICAO Council.

In this House of Lords case it was held and, if I may say so with respect, rightly held, that the arbitration clause covered disputes pertaining to termination of the contract. But you will see how widely the arbitration clause was framed. In fact this case is an excellent example of how widely framed your jurisdiction clause should be if you want the jurisdiction to be exercised by the designated body on questions of termination or suspension.

The words of the arbitration clause are set out at page 339 of this judgment, in the speech of Lord Chancellor Simon. This is the arbitration clause:

> "If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising

hereout the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act, 1889, or any then subsisting statutory modification thereof."

Contrast the words of our treaties—disputes relating to interpretation or application—with the words of this arbitration clause: ". . . any dispute . . . in respect of this agreement or any of the provisions herein contained or anything arising hereout . . ." It was on this clause that the House of Lords held that a dispute as to termination could be decided by the arbitrator, and every Law Lord makes it a point to state expressly that his decision turns on the wide scope of the arbitration clause.

First Viscount Simon, the Lord Chancellor, at page 339, last paragraph:

"The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on *(a)* what is the dispute, and *(b)* what disputes the arbitration clause covers. To take *(b)* first, the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties 'in respect of' the agreement or in respect of any provision in the agreement or in respect of anything arising out of it."

Viscount Simon, at page 344, says:

"Notwithstanding the general validity of the above observations, the governing consideration in every case must be the precise terms of the language in which the arbitration clause is framed."

In Lord Macmillan's speech at page 345, last but one paragraph:

"Arbitration clauses in contracts vary [very] widely in their language, for there is no limitation on the liberty of contracting parties to define as they please the matters which they desire to submit to arbitration. Sometimes the reference is confined to practical questions arising in the course of the execution of the contract; sometimes the most ample language is used so as to embrace any question which may arise between the parties in any way relating to the contract. Consequently, many of the reported cases are concerned with the interpretation of the scope of the terms of reference, for an arbitrator has jurisdiction only to determine such matters as, on a sound interpretation of the terms of reference, the parties have agreed to refer to him."

In our case, to borrow the words of the learned Law Lord, the arbitral clause is restricted so as to take in and cover only those questions which arise in the course of the execution of the treaty.

One more quotation from page 353, from the speech of Lord Wright:

"I should prefer to put it that the existence of his jurisdiction in this, as in other cases, is to be determined by the words of the submission. I see no objection to the submission of the question whether there ever was a contract at all or whether, if there was, it had been avoided or ended. Parties may submit to arbitration any, or almost any question. In general, however, the submission is limited to questions arising upon or under or out of a contract which would prima facie include questions whether it has been ended and if so, what damages are recoverable . . ."

I rely on this case, Mr. President, as showing by contrast what kind of jurisdiction clause there should be if the ICAO Council was intended to have the consent of the States to decide the type of question which arises here.

I now come to the principle of effective interpretation invoked by Pakistan. The answer to this plea of effective interpretation is a fairly simple one. The doctrine of effective interpretation can never be the foundation for the establishment of jurisdiction which otherwise does not exist. It can only enable a court to extend its jurisdiction beyond what is stated on a strict construction of the words, and that extension is on the ground that the parties must have intended to consent to such additional powers being exercised in order to give effective scope to the adjudication procedure. In other words, if there is a particular dispute which is outside the jurisdiction clause, you can never establish jurisdiction by invoking the effective interpretation principle. But if there is a dispute which is clearly within the jurisdiction clause, like, for example, a dispute as to whether there has been a breach of an existing contract, then an incidental power may be inferred to award reparations or damages. Such incidental powers may be invoked under the doctrine of effective interpretation.

May I refer to Mr. Shihata's book on *The Power of the International Court to Determine its Own Jurisdiction*, published in 1965. The relevant passage is at pages 194 and 195:

> "In interpreting jurisdictional instruments, the International Court has relied on the principle of effective interpretation . . . perhaps more than on any other traditional method. This principle, sometimes referred to in practice as interpretation by necessary implication, has certainly enabled the Court to extend its jurisdiction to certain areas despite lack of proof that the parties specifically accepted the Court's power to adjudicate them. It is particularly responsible for the establishment of jurisdiction over questions incident to the merits of a dispute already within the Court's jurisdiction.
>
> The extension of jurisdiction by necessary implication (that is, for the purpose of making the original acceptance of jurisdiction fully effective) normally assumes that some substantive jurisdiction has already been conferred on the Court. It has always been relied upon to justify the extension, rather than the original establishment of jurisdiction."

If, as in the present case, the jurisdiction to deal with questions of suspension and termination does not exist, one cannot invoke the principle of effective interpretation to vest such a jurisdiction in the ICAO Council.

There is a very interesting discussion on this topic in the *British Year Book of International Law*, 1949, Volume XXVI. Ten pages are relevant, pages 73 to 83, but as a concession to the shortness of human life I shall read only a few sentences from page 83, fourth line from the top. This is an article by Professor Lauterpacht on "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties":

> "On the other hand, the principle of effectiveness is in the last resort no more than an indication of intention, to be interpreted in good faith, of the parties. It is the intention of the authors of the legal rule in question —whether it be a contract, a treaty, or a statute—which is the starting-point and the goal of all interpretation."

In other words, even the doctrine of effective interpretation ultimately rests on the foundation that the parties must have intended as a matter of necessary implication to confer such a jurisdiction.

Again on page 83, last five lines:

> "The law-creating autonomy and independence of judicial activity may be an unavoidable and beneficent necessity. But they are so only on condition that the judge does not consciously and deliberately usurp the function of legislation. That fact sets a natural limit even to a principle as cogent as that of effectiveness. It is a principle which can give life and vigour to an intention which is controversial, hesitant, or obscure. It cannot be a substitute for intention; it certainly cannot claim to replace it."

To sum up. First, that the doctrine of effective interpretation can never be the foundation of jurisdiction. In the present case, Pakistan is seeking to make it a foundation.

Secondly, the doctrine of effective interpretation can apply only to make, so to speak, clear what was the unexpressed intention of the parties. It can never be a substitute for the intention or for the consent which is absent. In the present case, I submit, where the consent is patently absent—a consent which the entire history of sovereign States over the past many years has shown they are unwilling to give even to the highest court in the world—I say that where such a consent is sought to be invoked by the back-door, on the ground that the principle of effective interpretation supports such a plea, it is a misuse of that principle.

Thirdly, this doctrine of effective interpretation has been applied by the World Court to its own jurisdiction. When the World Court had jurisdiction to decide questions of breach it has held that it had the incidental jurisdiction to award reparation. To seek to apply this principle to administrative bodies to whom expressly limited powers are given is, I submit, trying to invoke a new principle unknown to international law.

I have taken some time over this, because Pakistan has cited a number of cases which can be easily explained and do not even have to be dealt with at length once these three points which I have made are borne in mind. Pakistan has dealt with cases where the International Court undoubtedly had jurisdiction to hear the dispute on merits. The question was, "What was the relief it could give?" And on the principle of effective interpretation it gave that relief which made litigation in the International Court meaningful. This principle would have no application here.

Without reading the cases cited by Pakistan, I may merely refer to them as they appear in Pakistan's Counter-Memorial on page 389, *supra*, paragraphs 54 and 55. The first case referred to by Pakistan is the case of *Certain German Interests in Polish Upper Silesia*, reported in *P.C.I.J., Series A, No. 9*, p. 23. It was a case where the Permanent Court had jurisdiction to deal with the dispute, and it said that, incidental to that jurisdiction, it would have the power to award reparation. The second case is the *Free Zones* case which is reported in *P.C.I.J., Series A, No. 22*, p. 13, where again the Court, admittedly having jurisdiction to hear the dispute, said that, on the facts of that case, the jurisdiction extended to granting a certain relief. The third case is the *Corfu Channel* case, reported in *I.C.J. Reports 1949*, p. 26. There again, the Court having jurisdiction to deal with the dispute on merits, said that by invoking the principle of effective interpretation, it would award compensation.

In our case, when would this principle of effective interpretation be capable of being invoked? It would be, if the ICAO Council had jurisdiction to deal with the question of suspension and termination and Pakistan had raised the point about compensation. Even there, the principle would not help Pakistan,

correctly speaking; but I am saying that in such a case there is a possibility of somebody arguing that the principle can be invoked. Here it is unarguable.

Now that brings me to the end of the specific points raised by Pakistan regarding the legal position as to the ICAO Council's jurisdiction. I would like this honourable Court to note two propositions, as they emerge from the pleadings, so that I may be able thereby to limit and narrow the issues between the two Parties.

First, Pakistan has disputed the factum of suspension in September 1965, when military hostilities broke out. Secondly, Pakistan has not disputed the factum of suspension in February 1971 but has contended that *(a)* India had no right to suspend the treaty and therefore the suspension was illegal and ineffective and the treaties continued in operation and *(b)* a dispute relating to suspension is a dispute relating to interpretation or application of the treaty.

(India's submission is that a dispute regarding the validity or effectiveness of, or legal justification for, suspension, is a dispute relating to the interpretation or application of a rule of international law *dehors* the treaties.)

The aforesaid two propositions clearly appear in the written pleadings before the ICAO Council, the oral argument before the ICAO Council and the written pleadings before this honourable Court. In India's Memorial, page 128, *supra,* the relevant paragraphs are 17, 19 and 20, and paragraph 23 also, on page 129, which represent Pakistan's case before the ICAO Council on this question of suspension in 1971. The factum not being disputed, the legal right to suspend is disputed and the efficacy in law of the suspension is disputed. And what is said is that suspension is a matter of interpretation and application.

On page 128, paragraph 17:

> "Since the Convention and the Transit Agreement can only be terminated or suspended in accordance with the express provisions provided therein for this purpose, India cannot unilaterally purport to denounce the Convention and the Transit Agreement except in those terms."

Paragraph 19:

> "Assuming that the question exists regarding termination or suspension of the Convention as between India and Pakistan, the Council still has jurisdiction since a disagreement regarding the continuance in force of a Treaty is a disagreement regarding the application of that Treaty. Further it also involves a question of its interpretation."

Paragraph 20:

> "The abrogation, termination or suspension of an international treaty can take place only in accordance with recognized principles of international law, i.e., in conformity with the provisions of the treaty. Therefore, the Convention and the Transit Agreement can only be abrogated, terminated or suspended in accordance with the express provisions provided therein for this purpose. . . . This being the case, India cannot abrogate, or terminate or suspend the Convention and the Transit Agreement vis-à-vis Pakistan . . ."

Page 129, paragraph 23:

> "The termination of the Convention and the Transit Agreement can only take place in accordance with the recognised principles of international law, i.e., in conformity with the provisions of . . . multilateral treaties."

Without reading from the other pleadings, I may just mention that in Pakistan's Counter-Memorial you will find the same position set out at pages 382 to 385, *supra*. On page 382, about the 1965 incident, Pakistan says the Convention and the Transit Agreement were *not* suspended. For the 1961 incident Pakistan says there was no right to suspend (pp. 383 to 385).

So far as the first preliminary objection is concerned I have almost concluded, there is no controversy as to any relevant fact. The only controversy is about the legal issue—the limits of the ICAO Council's jurisdiction.

In the light of what I have so far said, I would like to formulate now the questions which would have to go to the ICAO Council and would have to be decided by it if I were to lose this appeal and the matter is to be sent back for determination by the Council on merits. The very formulation of the questions would give some idea as to what would be within the Council's jurisdiction and what was, according to the understanding of nations, accepted to be outside its jurisdiction.

First question: Upon the outbreak of military hostilities in September 1965, did India, as a sovereign State, have the right, and did it exercise the right, under a rule of general international law existing *dehors* the treaties, to suspend the treaties vis-à-vis Pakistan?

Second question: If there had been no suspension of the treaties in 1965, or no continuation of suspension after February 1966, had India the right to suspend them in February 1971, in exercise of its right as a sovereign State, the right being founded on a rule of international law and existing *dehors* the treaties?

Third question: If the suspension of the treaties was in February 1971 and not in 1965, was the suspension justified in the circumstances of the case, and was it effective in law on a proper application of the principles of international law?

I have left out, in formulating these three questions, the other question about the Special Régime started in February 1966, because I have not yet come to that which is a different question. I would like this honourable Court to consider the cogency of my argument as to jurisdiction in the light of these questions which indisputably would have to be decided by the ICAO Council if my argument is rejected.

Now, I shall close my submission on this, by requesting the honourable Court to consider the logical consequences of my appeal on this ground not being accepted.

First, there are a large number of treaties which are being signed every decade among nations, where nations have chosen to give to small administrative bodies, not in the same street as the International Court of Justice, the power to deal with disputes pertaining to interpretation or application. Nations would have to think many times before they ever sign such a treaty again. No nation has had experience up until now of this startling situation where it is told that because it has accepted a similar jurisdiction clause, its sovereign rights to terminate or suspend treaties are now subject to the jurisdiction of the ICAO Council or similar bodies. So if States are to know hereafter that this is the unforeseen consequence—you are virtually compromising some of your sovereign rights—they will refuse to sign such treaties. The cause of international co-operation, of which, I take it, this honourable Court is, in a sense, both the custodian and the promoter, would suffer a severe set-back.

Secondly, as regards the scores of treaties already signed, where this limited jurisdiction—jurisdiction limited to interpretation or application—is

conferred on administrative bodies, they would hereafter have the right to deal with questions of sovereignty, international law and the type of questions which concretely arise in this case. It is true that normally nations do not suspend or terminate treaties lightly. But a State is not going to sign a treaty on the footing that the possibility of the treaty having to be suspended is a remote one. Otherwise, why did nations react so violently to the sensible proposal that the International Court of Justice should, as a matter of compulsory jurisdiction, deal with these questions? If States react so violently, despite the fact that the chance of suspension or termination is a remote one, to the suggestion that this Court should be clothed with such compulsory jurisdiction, one wonders whether any nation would have the temerity to sign a treaty where the same jurisdiction is sought to be given to relatively small administrative bodies.

Thirdly: a decision against me on the ground so far covered would unsettle *the existing understanding and practice of nations. The claim of Pakistan to* have this matter adjudicated by the ICAO Council is a claim without a precedent. Although there are so many similar treaties in operation, never has such a claim been made, never has any council or analogous body upheld such a claim. So the understanding and practice of States would be unsettled and there would be a serious set-back to the orderly growth and development of international law.

Fourthly, in order to maintain the rule of law, governments must be of laws and not of men. In order to maintain the rule of international law, *international courts must be of men and not of governments. This principle* would have to be reversed and an international court of justice can hereafter consist of governments and not men, like the ICAO Council.

Finally, a decision on this point against me would bring the very concept and machinery of international adjudication into—forgive my using the word—contempt. I have read out to the Court the verbatim record of the proceedings before the Council. If this were to be the forum for international adjudication, would it bring the concept and machinery of international adjudication into respect? I have taken some pains and some time to deal with the matter, because it does not concern merely this hijacking or overflying business. In fact perhaps both countries could have overflying later, with benefit to each. The real issue in this appeal is of the most far-reaching importance and it transcends this transient dispute between India and Pakistan. Your decision will be of great importance in the development of international law.

May I go on to the next point, which is a brief one—the point peculiar to the Complaint as distinct from the Application made by Pakistan. Both Pakistan and India were agreed before the ICAO Council that the agreements on the question of its jurisdiction regarding the Application would apply to the Complaint. If it has no jurisdiction to deal with the Application, it undoubtedly has no jurisdiction to deal with the Complaint. But there is one point about the Complaint which is an additional point for holding that the Council had no jurisdiction, and that additional point is the one I shall now deal with.

Please turn to India's Memorial, page 328, *supra*, Article II, Section 1 of the Transit Agreement:

> "A contracting State which deems that action by another contracting State under this Agreement is causing injustice or hardship to it . . ." [such a State may file a Complaint].

The opening two lines postulate two conditions. Firstly, there must be action by a contracting State under the Agreement—the crucial word is "under": unless the action is taken under the Agreement the question of a Complaint, under Article II, Section 1, cannot arise. Secondly, the action must be such that another contracting State deems the action to cause injustice or hardship. India has taken no action under the Transit Agreement at all. All that it has done is suspend the Agreement. I think it is a clear misuse of the preposition "under" to say that the suspension of a contract in exercise of an international law principle amounts to action under the Agreement.

On page 330 you have the Council's Rules for the Settlement of Differences, and the relevant article is Article 1, paragraph 2:

> "(2) The Rules of Parts II and III shall govern the consideration of any complaint regarding an action taken by a State party to the Transit Agreement and under that Agreement, which another State party to the same Agreement deems to cause injustice or hardship to it."

Now Pakistan tried to get over this difficulty, which may appear insuperable, by saying that if India suspends or terminates the Transit Agreement, it amounts to inaction, and inaction is covered by the word action. As I have said in my Memorial, paragraph 88, "no action whatever was taken by India under the Transit Agreement. Action under the Transit Agreement is the very antithesis, the direct converse, of suspension of the Transit Agreement which is what has happened in the present case." My point is that two ideas which are wholly contradictory of each other cannot be said to be embraced in one term. Undoubtedly India has taken action. The act of suspension is action on the part of India, but it is not action under the Transit Agreement.

I have come, Mr. President, to the end of this point regarding the complaint, and tomorrow I shall be dealing with the question of Special Régime. When I deal with that question I shall bear in mind, Mr. President, what you were pleased to say at the beginning of the session this morning.

The Court rose at 1 p.m.

FOURTH PUBLIC SITTING (22 VI 72, 10.05 a.m.)

Present: [See sitting of 19 VI 72, Judge Lachs absent.]

Mr. PALKHIVALA: May it please the honourable Court. There are a couple of things left regarding the submission I finished yesterday which I shall deal with and then pass on to the next topic.

One was the point which arises out of what, Mr. President, you mentioned to us yesterday, namely that we should not go into facts except those which are strictly relevant to the question of the ICAO Council's jurisdiction. It is India's submission that the ICAO Council had no jurisdiction to go into the question of suspension of the two treaties and therefore the question of bona fide suspension by India on the ground of material breach on the part of Pakistan would be undoubtedly a question on merits, and, therefore, the facts pertaining to the issue—as to whether the right of suspension under international law was exercised bona fide by India and whether Pakistan's conduct amounted to a material breach, would not be relevant, either strictly or otherwise, to the question of the Council's jurisdiction. Therefore, I propose not to deal with those facts which centre around hijacking and Pakistan's conduct concerning the incident. But I am reserving my right to deal with these facts if Pakistan, when it comes to reply to my argument, goes into these facts, and it is with this express reservation that, at this stage, I propose not to deal with those facts.

The other point which remains is that which arises out of Pakistan's Rejoinder at page 478, *supra*, paragraphs 60-61. The last sentence of that paragraph runs as follows:

> "Further, the fact that an appeal has been provided to the International Court of Justice against the decisions of the Council, it is clearly indicative of the competence of the Council to go into the various matters and issues under the Convention and the Transit Agreement."

I should like to make three submissions in answer to this point of Pakistan.

First, the words "disputes relating to interpretation or application" are words which occur in a number of treaties which confer this limited jurisdiction on different bodies, and in most of these treaties the right of appeal to this Court is not provided for. Surely the construction of the words "interpretation or application" cannot vary as between a treaty where a right of appeal to this Court *is* provided for, as compared to another treaty where such a right is *not* provided for.

The question whether the exercise of the right under international law to suspend a treaty—is covered by the words "interpretation or application"—is a question which would have to be decided irrespective of the totally irrelevant question as to whether a right of appeal to the World Court is given by the treaty or not. Whatever judgment this honourable Court gives in this appeal would undoubtedly apply to all treaties, even those treaties where there is no right of appeal to this Court.

Secondly, it will be recalled that at the time of the drafting of the Vienna Convention most nations opposed the idea of compulsory jurisdiction being given even to this Court. This makes it clear that the objection of the States is not so much to the identity of the body which is to exercise compulsory

jurisdiction as it is to the principle of compulsory jurisdiction itself. It is this basic objection of States to compulsory jurisdiction which has to be taken into account in deciding the scope and ambit of the clause which does provide for limited compulsory jurisdiction in the ICAO Council.

The third point in answer is that the reason why the right of appeal is provided to this Court is that there are matters of vast importance—financial and commercial importance—which arise as a result of interpretation or application of the treaties, and the object of providing for an appeal to this Court was to safeguard the nations against the possibility of a wrong decision on such matters at the hands of the ICAO Council. Thus, the idea of providing an appeal to this Court was not to surrender the sovereign right of a State to effect suspension to the compulsory jurisdiction of *any* forum, but the idea was to safeguard the contracting parties against the possibility of error on the part of the ICAO Council in other important fields.

This finishes the argument on the first ground and I need hardly add that this argument, if accepted is by itself sufficient to dispose of the whole appeal.

But there is an alternative ground of appeal which, again by itself, is sufficient to dispose of the whole appeal, in case the decision is in my favour, and that is the ground of the Special Régime. It is an independent separate ground on which we challenge the jurisdiction of the ICAO Council. Very briefly stated, this ground of objection to the ICAO Council is that after the military hostilities between the two countries in September 1965, when an attempt was made to make the two countries come closer together, and when the Tashkent Declaration was signed on 10 January 1966, the result of all that was not to revive the Convention or the Transit Agreement as between the two countries—those two treaties had been suspended on the outbreak of hostilities and the suspension continued even after the Tashkent Declaration of January 1966. But the two countries entering into a bilateral arrangement which I shall hereafter call "the Special Régime", which is evidenced by some very crucial documents of February 1966, and is further evidenced by the consistent practice of the two countries right from February 1966 up to January 1971, when the hijacking incident took place.

Therefore, the plea which we made before the ICAO Council was that, assuming India committed a breach, the breach was of the bilateral agreement or the "Special Régime" which had commenced in February 1966 and which continued in operation up to the material date when the dispute arose between the two countries which went to the ICAO Council.

It is common ground between the two Parties that the ICAO Council had no jurisdiction to deal with any question relating to a bilateral treaty. Therefore, if I succeed in establishing that there was the bilateral treaty—the "Special Régime"—between the two countries, I have established my case that the ICAO Council had no jurisdiction to deal with the dispute. This "Special Régime" is such, in its terms, that it excludes clearly the operation of the Convention and the Transit Agreement, at least so far as the question of overflying and making non-traffic landings is concerned. The terms of the "Special Régime" are completely inconsistent with the provisions of the two treaties regarding overflying and non-traffic landings.

At the commencement of my argument on this point, may I state one important fact. At the time when military hostilities broke out in September 1965 there were three agreements in operation—that is common ground—the Convention, the Transit Agreement and the Bilateral Agreement of 1948 between India and Pakistan, which is set out at page 110, *supra*, of India's Memorial. This Bilateral Agreement of 1948 is an agreement under which the

two countries operated their national airlines in each other's State. It even had traffic rights in Pakistan. The air traffic between the two countries was managed by the national airlines of the two countries and also by other foreign airlines. So Air India (AI) had not only the right to overfly, but the right to land in Pakistan, even for traffic purposes, and likewise Pakistan International Airlines (PIA) had a corresponding right to overfly and to land in India even for traffic purposes.

I am not disputing that the Agreement of 1948 was consistent with the Convention and the Transit Agreement. There is a point to be made about the 1948 Agreement which I shall make when I come to the later developments and deal with Pakistan's allegation that normal conditions prior to September 1965 were restored—the fact is they were not restored and the Agreement of 1948 was never revived after its suspension.

The military hostilities which broke out are referred to in paragraph 12 of India's Memorial. According to India, Pakistan made a massive armed attack on Indian territory; according to Pakistan, India made an armed attack on Pakistan territory. However, both the countries are in complete agreement that military hostilities did break out and, for the purpose of this appeal, that is sufficient. When the military hostilities broke out, India took one important step which is set out in India's Memorial at page 120, *supra*. It is a crucial document and I shall read it. It is the notification issued by the Government of India on 6 September 1965:

> "Whereas the Central Government is of opinion that in the interests of the public safety and tranquillity, the issue of an order under clause *(b)* of sub-section (1) of section 6 of the Aircraft Act, 1934 . . . is expedient:
>
> Now, therefore, in exercise of the powers conferred by clause *(b)* of sub-section (1) of the said section 6, the Central Government hereby directs that no aircraft registered in Pakistan, or belonging to or operated by the Government of Pakistan or persons who are nationals of Pakistan, shall be flown over any portion of India."

The effect of this particular notification is clear; it wholly negatives Pakistan's right to overfly India or to make non-traffic or traffic landings. Landings are not referred to here, but the compulsions of geography would leave no doubt that landings would be equally prohibited because if you cannot cross the border of India and cannot fly over Indian territory at all, it is impossible to have any landings. This notification, which is of 6 September 1965, near the commencement of military hostilities, continued in operation. After some days of military hostilities there was a cease-fire and, ultimately, the Tashkent Declaration was signed by the two countries. This Declaration is set out at page 352, *supra*, of India's Memorial, and is dated 10 January 1966. The relevant portion of it is clause VI which is at page 353:

> "The Prime Minister of India and the President of Pakistan have agreed to consider measures towards the restoration of economic and trade relations, communications, as well as cultural exchanges between India and Pakistan, and to take measures to implement the existing agreements between India and Pakistan."

The material words are: ". . . to consider measures towards the restoration of . . . communications", and ". . . to take measures to implement the existing agreements . . .".

It is clear that the Tashkent Declaration itself did not revive any agreement or treaty, but it provided that measures would be taken thereafter to imple-

ment the existing agreements and to consider restoration of communications. Therefore, this is an expression of intention of the Parties regarding future action; it represents in no sense a decision to revive any agreement. On the next page, i.e., 354 of the Memorial, are the two letters, one addressed by the Prime Minister of India to the President of Pakistan, dated 3 February 1966, and the reply dated 7 February 1966 from the President of Pakistan to the Prime Minister of India. The wording of these letters is, from Pakistan's point of view, important and that has been referred to in half a dozen places, and therefore I should like to deal with it in some detail.

First, the Prime Minister of India writes to the President of Pakistan:

> "Our Foreign Minister and Defence Minister, on their return from Tashkent, informed us of your desire for the early resumption of over-flights of Pakistani and Indian aircraft across each other's territory. We had thought that this matter would be settled at a meeting between the Ministers of both countries within a few days along with other problems connected with the restoration of communications. As it appears that *such a meeting might take some time, we would be agreeable to an* immediate resumption of over-flights across each other's territory on the same basis as that prior to 1st August 1965. Instructions are being issued to our civil and military authorities accordingly.";

and the President of Pakistan replies:

> "Your High Commissioner, Mr. Kewal Singh, has delivered your message to me in Larkana this afternoon. I am glad to learn of your constructive decision in a matter which is of high benefit to India and Pakistan. I am also issuing immediate instructions to our Civil and Military authorities to permit the resumption of air flights of Indian and Pakistani planes across each other's territories on the same basis as that prior to . . . First of August 1965."

After these two letters comes an important document which is at page 120 of the Memorial submitted by the Government of India. It is another notification dated 10 February 1966, and it is the single most important document, in my submission, on this particular aspect of the matter. At page 120, the first notification, which I have already read, is of 6 September 1965. The second notification of 10 February 1966 amends the earlier notification—

> "*Whereas* the Central Government is of opinion that in the interests of the public safety and tranquillity it is necessary so to do:
>
> *Now, therefore*, in exercise of the powers conferred by clause *(b)* of *subsection (1) of Section 6 of the Aircraft Act, . . . the Central Government* hereby makes the following amendment to the notification of the Government of India in the late Ministry of Civil Aviation No. GSR 1299 dated the 6th September, 1965, namely:
>
> In the said notification, after the words 'any portion of India', the following words shall be inserted, namely:
>
> 'except with the permission of the Central Government and in accordance with the terms and conditions of such permission'."

Therefore, if one reads now the amended notification as it came into force on 10 February 1966, the material parts would be this: ". . . no aircraft registered in Pakistan, or belonging to or operated by the Government of Pakistan or persons who are nationals of Pakistan, shall be flown over any portion of India except with the permission of the Central Government and in accordance with the terms and conditions of such permission".

The effect of these two notifications, read together, is that the prohibition on Pakistan aircraft overflying India continued, but with the exception that in the event of the Government of India giving its permission, overflying could be done in accordance with the terms and conditions of that permission.

Now in order to appreciate, in the right perspective, this question of the special régime, I would request this Court to consider separately three questions that clarify the three aspects which go to make up this one issue.

First, did India have the right under international law to suspend the treaties in September 1965?

Secondly, did India in fact suspend the treaties at that time?

Thirdly, did the treaties continue under suspension after February 1966 and did a special régime commence in that month?

On the pleadings of India and Pakistan these three questions clearly emerge; the formulation of the three questions, which I believe is accurate, itself shows how the ICAO Council had no jurisdiction to deal with any of the three questions. The question of the ICAO Council's jurisdiction is to a large extent clarified, if not solved, by a precise formulation of the issues which would have to go before the ICAO Council in the event of this appeal being lost.

The first question, did India have the right under international law to suspend the treaties on the outbreak of military hostilities in September 1965, is clearly a question of interpretation and application of international law, and not of the treaties.

The second question, did India in fact suspend the treaties at that time —that is, in September 1965—is a question which goes to the factum of suspension, in other words, it goes to the operation of the treaties, and not the application of the treaties. I have already made my submission on the clear distinction between the concepts of operation of a treaty and application of a treaty. If a Council has no jurisdiction to deal with questions of suspension, it would obviously have no jurisdiction to decide on the factum of suspension.

The third question, did the treaties continue under suspension after February 1966, and did a special régime commence in that month, are also questions outside the ICAO Council's jurisdiction for the reasons I have already given regarding question two, and for the additional reason that the ICAO Council has no jurisdiction to consider any dispute regarding a bilateral treaty, and the special régime which India pleaded was a bilateral treaty.

Having formulated the three questions, and made my submission that each one of them was outside the ICAO Council's jurisdiction, and that therefore really the questions do not fall to be considered, I shall nevertheless proceed to make my submissions on each of them to show how, both on facts and in law, Pakistan is mistaken in saying that the three questions should be decided against India and in further saying that the ICAO Council is the right forum to decide the questions one way or the other.

The first question which I shall deal with is the right to suspend a treaty in times of military hostilities. Now Pakistan's point is a simple one on this issue. Pakistan says that there is a provision in the Convention, that is Article 89, which deals with situations like those of war, and therefore you cannot take any action except under Article 89, and if you take action under Article 89, you are excluding international law—you are excluding any question of a right being exercised *dehors* the treaty, and since you have acted under the treaty the ICAO Council has jurisdiction to deal with the dispute. This is Pakistan's argument.

Article 89 of the Convention, which is in India's Memorial, at page 323, *supra*, says:

> "*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."

Now, the material word—the most significant word—in this Article is the word "affect"—the "provisions of this Convention shall not *affect* the freedom of action of any of the contracting States". I shall request the Court to compare Article 89 of the Convention with Article 73 of the Vienna Convention.

Article 73 of the Vienna Convention runs as follows:

> "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

Article 89 of the Chicago Convention is very similar to Article 73 of the Vienna Convention. These two Articles do not confer a right, they merely declare that existing rights outside the treaty remain *unaffected*. This is not my gloss—the Chicago Convention expressly says that the freedom of action shall not be affected. The mistake made by Pakistan is to think that under Article 89 of the Chicago Convention some right is conferred which is exercised by India. There is no right conferred. Article 89 merely declares that such rights as India may have under international law—State practice, State usage, custom of nations in times of belligerency—all those customs, rights, practices, remain unimpaired.

Now when India acted on the outbreak of military hostilities and promulgated the notification of 6 September 1965 prohibiting Pakistan from overflying India, it was not exercising any right under Article 89, it was exercising its right under international law, practice and usage, which right is left undisturbed by Article 89.

The Court's decision on this Article is again of great importance because it will apply equally to Article 73 of the Vienna Convention. I submit, under the Vienna Convention also, if a State is to suspend a treaty vis-à-vis another State which is at war with the first State, such suspension would be the exercise of a right, not under Article 73 of the Vienna Convention, but under international law, practice and usage.

In short, the function of Article 89 of the Chicago Convention, like the function of Article 73 of the Vienna Convention, is merely to leave undisturbed rights outside the treaty in certain situations. What are the rights outside the Chicago Convention or the Vienna Convention? A nation has the right undoubtedly to suspend the operation of treaties vis-à-vis another State with whom there is a state of hostility or war. This is a matter of State practice and usage; there are no clear-cut principles of law regulating the exercise of this right, but nations have from time immemorial exercised this right and it has become now a matter of State practice and usage of which any court would take judicial note. In McNair's *Law of Treaties*, the relevant discussion is from page 724 to page 728. I have the 1961 edition here. At page 726 it is said:

"*Multi-partite treaties to which one or more neutral States are parties.* These treaties, while remaining in operation during the war between Great Britain and the neutral parties, were regarded as being in suspense during the war as between Great Britain and enemy parties. In some quarters the view was held that upon the conclusion of peace these treaties would automatically revive as between Great Britain and any enemy parties, and that they could only be annulled or varied by agreement between the belligerents where that could be done without injuring the rights of neutral parties, so that it was unnecessary to revive them specifically by the Treaty of Peace. However that may be, a number of such treaties were specifically revived by the Treaties of Peace, for instance . . ."

In Julius Stone's *Legal Controls of International Conflict*, 1954 edition, the relevant discussion is on pages 447-450. Page 448:

"Oppenheim suggests that where such treaties have many other States besides the belligerents as parties, and establish common rules for the permanent conduct of the parties, they remain in force, even though the belligerents may be compelled by war conditions to suspend their operation in whole or in part."

Page 449:

"Further than that State practice has not been uniform, tending, if anything, to treat all inter-belligerent treaty relations, including those of a multilateral and legislative character, as abrogated by war, and requiring express renewal if they are to be maintained after the peace."

Just one other passage from Bin Cheng's book on *The Law of International Air Transport*, 1962 edition. The author here quotes from Judges Anzilotti and Huber in the *Wimbledon* case and the quotation is as follows:

"In this respect, it must be remembered that international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions. If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention. This right possessed by all nations, which is based on generally accepted usage, cannot lose its *raison d'être* simply because it may in some cases have been abused . . . The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation."

Now in the case of communications—and the Convention and the Transit Agreement deal with communications—the whole basis is peaceful conditions. If there is war, or there are military hostilities, the whole foundation for the continuity of the treaty is displaced. The Convention and the Transit Agreement do not choose to define what the rights of the parties will be in the event of war or military hostilities. It merely says that whatever their rights are, the States can exercise them. In short, Article 89 permits all the freedoms available

to a State under State practice and international law, and one of those rights is the right of suspension. Therefore, I submit, India had clearly the right *dehors* treaties to suspend them and Pakistan's contention that India had no such right—and its right was only under Article 89—is misconceived.

I come now to the second question: did India in fact suspend the treaties in September 1965? As I stated yesterday, while Pakistan has not disputed the factum of suspension in 1971, it has disputed the factum of suspension in September 1965, and that is why it becomes necessary to deal with it here. I submit the record leaves no doubt that India did suspend the treaties vis-à-vis Pakistan in September 1965.

The whole essence of the Convention and the Transit Agreement is the right to overfly another State's territory without that State's prior permission, and the right to make non-traffic landings in another State's territory without that State's prior permission.

In India's Memorial at page 300, *supra*, is Article 5 of the Convention:

> "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes *without the necessity of* obtaining prior permission."

The corresponding provision is Article 1, section 1, of the Transit Agreement, which is at page 327.

The right is "without the necessity of obtaining prior permission". If prior permission is needed, then the Convention is not in operation. I need not repeat that the suspension may be partial, *qua* overflying and landing, but it is not relevant to consider whether it was total or partial in this case. It is enough to note that, at least so far as overflying and landing are concerned, there was clearly suspension, because the two notifications, which we have seen at page 120, *supra*, of India's Memorial, expressly say that Pakistan shall not overfly India except with the permission of the Government of India.

Another question may arise: why should it not be regarded, as Pakistan says, as a breach? My answer is that suspension and breach are not mutually exclusive concepts. Suspension is an act of a sovereign State which temporarily suspends the operation of the treaty, wholly or in part, that is, puts the treaty in a state of suspended animation. If the suspension is justified, it involves no breach. If it is unjustified it does. So by asking the question—as Pakistan has asked—has India committed a breach?—the question whether India has suspended the treaty, or not, is not answered, because the point of breach goes to the merits of the justification for suspension. It has nothing to do with the factum of suspension. In an appropriate forum the question can be considered: has India suspended rightly or wrongly? But the question of a breach, or no breach, has no bearing whatever on the factum of suspension.

Now how did India act in this matter? In the exercise of its right as a sovereign State it promulgated a law. The notification is the law. It promulgated a law which destroyed the whole essence and foundation of the Convention and the Transit Agreement, vis-à-vis Pakistan, at least so far as overflying and landings are concerned. The act of promulgating a law which effectually suspends a treaty is an act of a sovereign State. If this is not suspension, it is difficult to see what would be. If by an administrative order a

State could suspend, if by merely writing to Pakistan: "Please note the treaty is suspended" India could suspend, surely this is an *a fortiori* case of suspension, where the suspension takes the shape and form, not merely of a communication to the other State, but the promulgation of a binding law which goes completely counter to the very essence of the treaties. And the conduct of the parties after this, I submit, leaves no doubt that there was suspension. In other words, my argument about the factum of suspension does not merely rest at what I have so far said, but it is further supported and fortified by the subsequent conduct of the two States from February 1966 to February 1971, and that conduct I shall deal with under the third question, to which I come now directly.

The third question is: did the suspension continue after January 1966—the Tashkent Declaration—and did a special régime commence in February 1966?

Pakistan's whole case is that, as a result of the two letters between the Prime Minister of India and the President of Pakistan, flights were restored on the old basis and the old treaties and agreements were revived. The first thing to be noted is that out of the three treaties one was, admittedly, not re-animated, and that is the Bilateral Agreement of 1948 under which the Pakistan national airline came to India for traffic landings and Indian national airlines landed in Pakistan for traffic purposes. Out of the three agreements one was clearly never revived. That has been admittedly the position since September 1965. So, first of all, it is clear that the old basis was not revived—the Bilateral Agreement of 1948 was a very important part of the old basis.

This undisputed fact is set out in India's Memorial, page 30, *supra*, paragraph 14:

> "The Air Services Agreement of 1948, which was suspended in 1965 as aforesaid, has never been revived. Since 1965 the airlines of Pakistan have never operated within India and the airlines of India have never operated within Pakistan; the traffic between the two countries continues to be handled only by third country airlines until this date."

Now therefore out of the three treaties, one admittedly has remained suspended up to date. . .

If the old basis had been restored, the notification of September 1965 would have been repealed—it could not have continued as a prohibition on Pakistan aircraft overflying India. If the notification of September 1965 prohibiting Pakistan from overflying India had been repealed, Pakistan could have argued that the two treaties, the Convention and the Transit Agreement, were restored and the suspension ended. But the notification was not repealed. On the contrary the notification of February 1966 continued the prohibition with one exception only, i.e., the permission of the Government of India. Now these are two completely contradictory and inconsistent documents, the Convention saying no permission should be asked for, and the notification saying Pakistan shall ask for permission, otherwise Pakistan shall not overfly. These two contradictory and completely inconsistent documents are stated by Pakistan to lead still to the inference that the Convention was revived! It is extremely difficult to see by what process of mental gymnastics one could come to this conclusion.

The signals which are set out at page 117, *supra*, again make it clear that when with the permission of the Government of India Pakistan could overfly India, it was to be done on a *reciprocal* basis and on a *provisional* basis. There

is no question of reciprocity under the Convention or the Transit Agreement; if those agreements are in operation you do not have to impose a condition of reciprocity—the two treaties speak for themselves; and you do not make the arrangement provisional because the two treaties are enduring, they are not provisional treaties.

When the signals revive overflying on a reciprocal basis and on a provisional basis, read with the notification of February 1966 which makes the permission of the Indian Government obligatory, I submit they leave no doubt that the Convention and Transit Agreement were not revised. May I request you to turn to the signals at page 117, *supra*, of the Memorial. The first signal says: "Our Government has agreed to restoration of overflights of scheduled services between India and Pakistan . . ."

The next signal says—this is from the Director-General of Civil Aviation, Pakistan, to the Director-General of Civil Aviation, India:

> "We have received instructions from our Government that Government of India has agreed on a reciprocal basis to the resumption of overflights of each others territory by our respective airlines . . ."

On page 118, *supra*, is an important signal from the Director-General of Civil Aviation, Pakistan, to the Director-General of Civil Aviation, India: "All former routes over Pakistan territory as existed prior to 1/8/1965 will be available to IAC and AII on a provisional basis." These two are the national airlines of India—IAC and AII—the first is domestic, the second is international—Pakistan says the old routes will be made available on a provisional basis.

Now even here, may I repeat, it is not as if IAC or AII, our national airlines, could land in Pakistan as before for traffic purposes. No, that prohibition continues, all that is stated is that the routes for *overflying* would be on a *provisional* basis.

The essential point which Pakistan in my submission, has missed is that in the letters of the Pakistan President and our Prime Minister, the "basis" referred to is not the framework of the Convention and the Transit Agreement at all, the basis is that we shall have our old routes and procedures restored. The framework of the treaties is an insertion which Pakistan wants to make into documents which do not refer to the Convention or the Transit Agreement at all, at any stage. Not a single document over a period of six years says that the Convention or the Transit Agreement are restored as between the two countries.

If Pakistan is right, and if the two treaties were no longer under suspension but revived, how could you possibly have India's notification of February 1966 under which Pakistan is prohibited from overflying India without the Indian Government's permission? Then Pakistan should have protested and said: "The treaties are revived, we do not need anyone's permission." There is no answer to this point.

Pakistan's only answer is that you cannot take advantage of your municipal law to defend a breach of an international treaty. My answer is simple. I am not relying on my municipal law to justify a breach of the treaty, I am relying upon my municipal law to show that the treaties continued under suspension. In other words, my municipal law in the form of the notifications, is not my defence, not my shield, to guard me against a charge of breach. Notifications are evidence, clear categorical evidence, which was notified to the whole world, as I shall presently point out. They are evidence that the two treaties were never revived, as between India and Pakistan.

The Court adjourned from 11.20 to 11.55 a.m.

In considering whether there was continuation or suspension of the two treaties, this honourable Court will be pleased to bear in mind an admitted fact, that the relations between the two countries, even after the Tashkent Declaration of January 1966, did not become normal. There is a dispute as to whose fault it was; there is no dispute that relations were not normal and this is an important part of my argument. Unless one adverts to the fact, one may wonder why the suspension continued for years. Therefore, in order to understand the background of the suspension and the continuity of suspension, I request the Court to turn to India's Memorial, page 32, *supra*, paragraphs 22 and 23, which set out facts. In Pakistan's Counter-Memorial and Rejoinder, these basic facts are not disputed. While the basic facts are not disputed, the inference is a matter of dispute. I have set out various important basic facts which would show how far from normal the relations between the two countries continued to be, even after the Tashkent Declaration. Paragraph 22 of India's Memorial:

> "The hope of normalization of relations between India and Pakistan and the restoration of the status quo *ante* the armed conflict, unfortunately did not materialize. Normalcy was not established and has not been established up to date. Despite several gestures of good will and several unilateral actions on the part of the Government of India to establish normalcy, Pakistan did not reciprocate. For example, India unilaterally lifted the embargo on trade on 27 May 1966, and invited Pakistan to do likewise. Till now, Pakistan has not reciprocated. On 27 June 1966, India unilaterally decided to release all cargoes seized during the conflict except military contraband. India also proposed to exchange seized properties on 26 March 1966, repeated the gesture on 25 April and 28 December 1966, and on several occasions thereafter. The only response from Pakistan was to start auctioning the vast and valuable Indian properties seized by them during the conflict and appropriate the proceeds to their National Treasury—all in violation of the Tashkent Declaration. India offered to increase cultural exchanges, liberalize visa procedures, establish bilateral machinery for settling mutual problems,—all without receiving any positive response.
>
> 23. From 1966 onwards Pakistan has continued its policy of confrontation bordering on hostility against India, some instances of which are listed hereunder:
>
> (1) Confiscation of all properties of Indian citizens and of the Government of India in Pakistan. These remain confiscated to this day.
> (2) Confiscation of all Indian river boats on East Bengal rivers which are an essential life line for the transport of the produce of Eastern India to the port of Calcutta.
> (3) The continued ban on passage of Indian boats and steamers on rivers, streams or waterways of East Bengal.
> (4) Continued ban on trade and commerce with India.
> (5) Continued ban on civil air flights, railway and road communications between the two countries.
> (6) Continued ban on entry into Pakistan of Indian newspapers, books, magazines, etc., printed or published in India.
> (7) Continued assistance with arms, ammunition and training, to rebel elements in areas of Eastern India.

(8) Continued attempts to foment, through sabotage and infiltration, disturbances in Jammu and Kashmire.
(9) Intensive hate-propaganda against India on the Radio and in the Press, which continues unabated to this day."

The next paragraph points out how the suspension continued against this background. The Court, I need hardly add, will make a sharp distinction between inferences, which each Party can draw in his own favour, and basic facts. Though Pakistan does dispute India's inference that Pakistan has not co-operated, and it does say generally that the fault is all India's—that is a matter of inference. But the basic facts which are set out in paragraphs 22 and 23 are not denied. Pakistan's reply is in the Counter-Memorial, paragraph 15. Without disputing one single basic fact, Pakistan's reply in its Counter-Memorial, paragraph 15, is as follows:

> "After the Tashkent Declaration attempts were made to normalize relations and towards that end telecommunications were revived. The Indus Water Treaty of 1960 was implemented. The dispute over the Rann of Kutch was referred to an International Arbitration Tribunal and was resolved. Overflights were resumed on the same basis as that prior to 1 August 1965. The Government of India had agreed in February 1966 to forego their alleged right to demand prior settlement of outstanding issues and consented to resume mutual overflights. However, in spite of all possible efforts by Pakistan, relations did not fully improve because of India's intransigence and its refusal to resolve the Kashmir dispute which is the basic cause of tension between the two countries. Pakistan has always been ready and willing to settle peacefully all disputes with India through the accepted international procedures of negotiation, mediation and arbitration. Pakistan had also proposed the establishment of a self-executing machinery for the resolution of all outstanding disputes but the Government of India rejected it."

What is relevant is not to find out where the blame lies, but to take into account the admitted fact that relations between India and Pakistan did not become normal. So it is not like two other countries which may have a war and then become members of a common market. The confrontation and the hostility, unfortunately continue, and it is against that background that this Court will consider the plea of continued suspension of the two treaties from 1965 up to date.

The various bans imposed by Pakistan are listed in paragraph 23 of India's Memorial. The questions of Kashmir, the Rann of Kutch, the Indus River are not relevant to the commercial bans which I have referred to in paragraph 23 of India's Memorial. When on the same basis Pakistan says that overflying was restored, as it was prior to 1965, it ignores the essential fact that the traffic between the two countries, through their own national airlines was never restored. So to say that the "basis" was the same as before is a clear mis-statement of fact.

Against this background, you will kindly consider the question of the continued suspension. Here again, Pakistan asserts that there was no suspension, or continuation of suspension, after 1965. I assert to the contrary. Let the Court look at the basic facts and then decide for itself, because a mere assertion by one Party would help nobody—we could keep on asserting until the end of time what our particular stand is.

The material breach of basic facts is set out in India's Memorial, paragraph 20, page 32, *supra*:

"The material features of the Convention and the Transit Agreement are the two cumulative rights—

(i) to overfly, *and*
(ii) to land for non-traffic purposes,

both *without* the necessity of obtaining prior permission of the Government of the other State. Neither of these two rights was restored, as between India and Pakistan, at any time after September 1965. Under the Special Agreement of 1966 overflying was permitted only with the permission of the Government of India (or Pakistan, as the case may be) and in accordance with the terms and conditions of such permission. The right to land for traffic or non-traffic purposes was not revived at all in any form; and was not covered by the Special Agreement of 1966. Pakistan had to seek India's special *ad hoc* permission in case any Pakistan aircraft wanted to land in India for non-traffic purposes. Thus, the Special Agreement of 1966 and the practice of the two countries after that date were wholly inconsistent with the Convention and the Transit Agreement, and leave no doubt whatever that those two treaties which had been suspended in 1965, were not revived as between India and Pakistan."

In this paragraph India has set out four basic facts. First, that under the Convention and the Transit Agreement there is the right to overfly and to land for non-traffic purposes without obtaining prior permission, and this right was not restored. Secondly, after 1966 overflying was allowed by each Government only with its permission to the other country's aircraft. Pakistan could not overfly India without the Indian Government's permission. Thirdly, apart from the question of overflying, the right to land was not restored at all, and fourthly, if ever any Pakistan aircraft wanted to land it had to take the express permission of the Government of India.

These four basic facts are not disputed by Pakistan in its Counter-Memorial. The relevant paragraphs in the Counter-Memorial are 13, 21, 32, 34 and 35, in which Pakistan does not allege that its planes overflew India without India's permission after 1966 or that they landed in India without India's permission; Pakistan kept on repeating its inference that the treaties were still in operation, but it did not dispute the crucial basic facts. Pakistan's Counter-Memorial, paragraph 13, sets out the Prime Minister's letter. There is a dispute as to the construction of the letter: what do the words "same basis" mean? If I may read paragraph 13:

"On 3 February 1966 the Prime Minister of India wrote to the President of Pakistan as follows . . .

In reply, the President of Pakistan, *inter alia*, stated . . .

It is thus clear that in view of the decision at the highest level, overflights across each other's territory were resumed on the basis of the Convention and the Transit Agreement which even by India's own admission were in operation between the Parties prior to 1 August 1965."

It is a matter of inference, but again the basic facts are not disputed here. Paragraph 14:

"Moreover the conduct of India, subsequent to the armed conflict of 1965, shows that the Convention and the Transit Agreement continued to be in operation between the two countries."

Two other instances are quoted, which I am going to deal with after I have finished with this particular point.

Paragraph 21:

> "Pakistan has also adhered to and acted in accordance with the objective of the Convention and the Transit Agreement. It has taken and continues to take all possible measures to ensure safety of flights in its airspace. This is substantiated by the fact that the air services of 23 international airlines . . . operate . . ."

and the rest of the paragraph says that Pakistan is quite safe for overflying and therefore India should overfly Pakistan.

Then paragraph 32 again refers to the Prime Minister of India's letter to the President of Pakistan, and the Pakistan's President's reply, which I have already dealt with.

Paragraph 34:

> "Pursuant to Article VI of the Tashkent Declaration the Prime Minister of India and the President of Pakistan exchanged letters . . ."

—again reference to the two letters.

Then paragraph 35:

> "Any domestic legislation of the Government of India whereby Pakistan's right to overfly was made subject to permission in each . . . [State] is irrelevant. It is a well-established principle of international law that no State may invoke the provisions of its internal laws as justification for its failure to perform its obligations under treaties. Article 27 of the Vienna Convention on the Law of Treaties reflects customary international law and states as follows:
>
> > 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . .' "

—that is all.

Now at the stage of the Memorial and the Counter-Memorial, therefore, you have this position: India categorically asserts that the consistent, invariable practice of the two States has been, since 1966, not to permit overflights or landings without the government's permission—and no denial of that fact. On these pleadings, it is clear that the two treaties could not have been revived because if they were revived you could not possibly compel the other country to ask for your government's permission.

Now the last paragraph I just read is rather significant: in it Pakistan accepted the fact, by necessary implication, that the notification of the Government of India of February 1966 was inconsistent with the two treaties. That is a necessary implication of Pakistan's plea in paragraph 35, because it expressly says that the notification of February 1966 cannot justify India in committing a breach of the treaties, and the question of committing a breach of the treaties can arise only if the notification is inconsistent with the treaties. Thus the inconsistency between the diametrically opposite provisions of the Government of India's notification and of the two treaties—is an accepted fact.

Even in Pakistan's Rejoinder, on page 460, *supra*, paragraph 13, Pakistan accepts the fact that India's notification—that is India's municipal law—is inconsistent with the two treaties, and it says, on page 463:

> "It is not now open to the Applicant to rely on municipal law [that is, the notification] in an attempt to avoid international obligations."

Then again, if you turn to page 469, the second sentence:

> "India's Notification dated 10 February 1966 which provided that 'Pakistan flights over India could take place only with the permission of the Central Government and in accordance with the terms and conditions of such permission' could not absolve India from its obligations under the Convention and the Transit Agreement."

This reaffirms the very important position that both Parties are agreed that India's municipal law—that is, the notification of February 1966—is inconsistent with the two treaties.

With that as the starting point, just consider what further steps India took. This notification, completely inconsistent with the two treaties, was, as I said in my Memorial, acted upon for six years, and Pakistan had to get permission every time. Does it not establish my case that the suspension of the two treaties did not end?

Further, this particular notification, which has been referred to in the various passages I have just read, was not only promulgated in India, it was promulgated to the world by being communicated to the ICAO Council and communicated to all the airlines who get what are called aeronautical information circulars. The aeronautical information circulars are issued by all countries which are concerned with international aviation, and these circulars issued by India specifically mention the fact that, as distinct from other countries, Pakistan was prohibited from overflying India.

Please turn to India's Reply, page 433, *supra*. This is the Government of India's Aeronautical Information Circular No. 27 of 1965, dated 8 September 1965, which says:

> "Attention of all concerned is invited to Notification No. G.S.R. 1299 dated the 6th September, 1965 . . . issued by the Government of India, Ministry of Civil Aviation, reproduced below . . ."

Now this aeronautical information circular goes to the ICAO Council and it goes to all the airlines of the world. It reproduces in full the notification of 6 September 1965, which I have already read, prohibiting altogether Pakistan aircraft from overflying India.

When in February 1966 the prohibition continued, but with the exception of cases where the Indian Government expressly gave permission, that was also made the subject-matter of another aeronautical information circular, and that circular is set out on page 434, *supra*, of India's Reply. It is dated 21 February 1966:

> "[The] Attention of all concerned is invited to Notification . . . dated 10 February, 1966 . . . issued by the Government of India . . . This is to be read with A.I.C. [that is, Aeronautical Information Circular] No. 27/1965."

This circular reproduces in full the second notification of 10 February 1966.

Further, there are lists, which are published periodically, which are also called aeronautical information circulars in which India sets out—and that is the usual practice of all nations—a list of all the relevant circulars which aircraft of different nationalities have to bear in mind as representing the correct legal and factual position in India, if they want to come to India. That is at page 435, *supra*, of India's Reply. Just by way of example, we have set out two circulars giving the lists of the relevant notifications in force: one of 2 March 1970, which is at page 435 of India's Reply and the other of 15 January 1971, which is at page 441, *supra*.

I shall refer to the first circular at page 435: the date is given 2 March 1970, and then the words: "The following circular is hereby promulgated for information, guidance and necessary action." Then come the words: "Aeronautical Information Circulars: current as on 1st March 1970." The whole list is given. The Court is concerned with the entry on page 437, *supra*, where the number in the first column is "27", the date is 8-9-1965 and the title of the circular is: "Notification—Prohibition of Flights—Pakistan (G.S.R. 1299)." It is referred to as "prohibition": is it consistent with the Convention and the Transit Agreement? Omitting three items on the same page, you have a reference to the second aeronautical circular: there the number is "8", the date is 21-2-1966: "Notification—Prohibition of Flights—Pakistan."

Now the important thing to notice is that even the second notification of February 1966 which said that Pakistan can overfly with the permission of the Government of India, is described in these official aeronautical circulars as: "Prohibition of flights—Pakistan." The lists which we published in 1966, 1967, 1968, 1969, 1970 and 1971 all contain reference to these two *prohibitions* on Pakistan in the list of circulars in effect. We have annexed only two of these lists to save the time of the Court.

The second circular annexed is the latest one up to the date of the filing of this appeal, and that is the one dated 15 January 1971. The circular is on page 441, *supra*.

Now, here again one finds the notification prohibiting Pakistani flights on page 442, last entry: "Notification—Prohibition of Flights—Pakistan." The second notification is on page 443, the fourth item: "Notification—Prohibition of Flights—Pakistan." Thus to the whole world India proclaimed from 1965 up to the present date, whenever these aeronautical circulars had to go out to different countries that so far as Pakistan is concerned there is prohibition. I think, Mr. President, you will forgive me for saying that in the light of this evidence still to maintain that the Convention and the Transit Agreement were in operation for all these years between the two countries is just to shut one's eyes to undisputed and indisputable basic facts.

Pakistan does not dispute that these aeronautical information circulars were issued, they cannot dispute it—in fact they have reached the whole world—and they kept on reaching the world year after year because the list was published every year of the current notifications in force—Pakistan's answer is "Well, you put it in the aeronautical information circular, but you did not put it in the aeronautical information publication". When I come to the additional documents[1] which are going to be placed before the Court, I shall point out how completely misconceived this plea on fact is, but at the moment it is sufficient to say that the notifications being wholly inconsistent with the two treaties and the notifications being made known to the world at large for six years are facts which are undisputed.

Now at this stage, the stage of the Counter-Memorial, as the Court has already seen, we had no dispute that in every case Pakistan had to ask for permission.

When we filed our Reply to Pakistan's Counter-Memorial we chose to point out examples—and we gave a few—where Pakistan expressly asked for permission for landing and, in some cases, the permission was given and in others India denied that permission. That is set out on page 409, *supra*, of India's Reply. Paragraph 18 sets out specific cases as follows:

---

[1] See pp. 719-742, *infra*.

> "After the Tashkent Declaration in 1966, there was not a single case in which Indian aircraft overflew Pakistan, or made a non-traffic halt in Pakistan, without the permission of the Pakistan Government. Further, there was not a single case in which Pakistan aircraft overflew India, or made a non-traffic halt in India, without the permission of the Indian Government. In some cases, the permission asked for was refused or granted subject to special conditions."

Then examples are given how if Pakistan wanted to land at Delhi, or at any other place, they asked for permission and we have given the details, which I need not read, of how either the permission was granted or refused. When we say this, Pakistan files a Rejoinder where, for the first time, they dispute what they did not dispute in the Counter-Memorial and they say "No, we always overflew India without permission"—an assertion made without a single example cited.

I would like to be very fair and very courteous to my opponents, but I am afraid that here the bounds of fairness to the Court have been transcended. You have an opportunity of filing a Counter-Memorial, I tell my learned friends, you do not dispute the most essential basic facts, then in your Rejoinder, for the first time, you choose to dispute them and even that denial is without a single example being cited to Pakistan aircraft landing in India without permission, or overflying India without permission. Because of this startling and surprising procedure adopted by Pakistan, we have now additional documents. If ever there was a case where additional documents have to be admitted in the interest of justice it is this, because you have an amazing situation where a party having a full opportunity of denying a most crucial fact, chooses not to deny it in the Counter-Memorial, but chooses to say something about it in its final Rejoinder.

Now while Pakistan in its final Rejoinder has not given one single example where they overflew India or landed in India without permission, because of the bare denial, unsupported by facts, we have been compelled to present some documents where we have given specific examples of permissions sought by Pakistan. This contradicts their statement of fact, which is patently false, that in no case did they ask for permission.

I will come to those facts later, but before that I would like the Court to look at the summary at pages 413 and 414, *supra*, of India's Reply. I would be, saving the time of the Court if, instead of presenting an oral argument which must unavoidably contain some repetition, I would read what is stated there and make brief comments on each clause as I go along. It is just two pages, but it sets out the whole case in a nutshell. The propositions are set out on pages 413 and 414 of India's Reply. I will omit the first seven lines of paragraph 25 and read clause (1):

> "(1) The Tashkent Declaration did not confer an isolated right as regards aviation. It embodied a package deal. It was not open to either India or Pakistan to disregard some of the material provisions of the Declaration and claim the benefits of the other provisions. It is a historical fact that Pakistan refused to respect and observe the terms of the Tashkent Declaration, and therefore the status quo *ante* the armed conflict was never restored. Pakistan's refusal to abide by the Tashkent Declaration is proved by the basic facts set out in paragraphs 22 and 23 of the Applicant's Memorial."

I have pointed out how in its Counter-Memorial Pakistan has not disputed those basic facts. To continue with the quotation:

"Further, Article VI of the Tashkent Declaration merely stated that the Prime Minister of India and the President of Pakistan 'have agreed to consider measures towards the restoration of economic and trade relations, communications, . . . and to take measures to implement the existing agreements between India and Pakistan'. The Tashkent Declaration itself did not embody any agreement or decision to revive the Convention and the Transit Agreement as between the two countries.

(2) The letters between the Prime Minister of India and the President of Pakistan in February 1966 referred to resumption of overflights 'on the same basis as that prior to 1st August 1965'. This 'basis' related to the fixing of routes, procedures for obtaining permission, etc., and the basis was not the Convention or the Transit Agreement . . ."

Now here if I may pause for a minute, the word "basis" is used both by the Prime Minister of India and the President of Pakistan. The word is ambiguous I concede that. Surely then it is not merely the assertion of one party or the other which can decide what "basis" meant, but the basic facts can decide it. The simple fact of the matter here is that the "basis" did not mean that the overflights were to be resumed within the framework of the two treaties. What the "basis" was is indicated in Pakistan's own signal, which is very important on this point and which is to be found on page 118, *supra*, of India's Memorial. It is India's case that the word "basis" meant the routes and the procedures. The basis on which flights were to be restored was that the old routes would become available, the old procedures would become available, but not that the rights under the two treaties would be available now to India or Pakistan. In other words, the "basis" was not the rights and the freedoms under the two treaties, the "basis" was a matter of routes and procedures and this is exactly what Pakistan itself understood the word "basis" to mean, as you will see from their signal in India's Memorial, page 118. It is a signal from the Director-General of Civil Aviation, Pakistan, to DGCA, India and the first sentence is relevant:

"Para one in accordance with agreement between our Governments all routes and procedures which existed prior to first August were to be restored . . ."

"All routes and procedures . . . were to be restored"—that is correct. It is a far cry from restoring routes and procedures to restoring freedoms and rights under two international treaties.

Surely the overflights could take place on the same routes and following the old procedures, but with the permission of the Government of India, so far as our country is concerned, and the permission of the Government of Pakistan, so far as their country is concerned. There is no inconsistency between reviving the old basis of routes and procedures and letting the two treaties remain in suspension. In fact for six years this is exactly what happened. The routes were revived, the procedures were revived, but not the freedoms and rights under the two treaties.

Then, I read further, on page 413, *supra*, of India's Reply, clause 3 of paragraph 25:

"The suggestion of the Respondent in its Counter-Memorial that the 'basis' on which overflights were resumed was the Convention and the Transit Agreement, is patently erroneous, as is shown by the following

facts: [Now, these are important facts and I would like the Court's attention to be specifically drawn to the significance of each, as I go along.]

(a) The essence of the Convention and the Transit Agreement is the *cumulative and inseverable* rights to overfly across each other's territory and to land in each other's territory for non-traffic purposes. These rights constituted a *single, indivisible* arrangement or bargain. The aforesaid letters in February 1966 referred merely to overflights and did not at all deal with the right to land in each other's territory."

This is a point of great importance to my case. It is common ground between India and Pakistan that the letters of February 1966 between the two countries referred only to overflights; they did not refer to landings at all. Now, the two treaties—the Convention and the Transit Agreement—deal with two cumulative inseverable rights which constitute a single bargain between contracting States. The two freedoms are put together in a single sentence in both the Convention and the Transit Agreement. How can one possibly say that the letters of February 1966 revived the Convention and the Transit Agreement when, on the very face of the letters, they referred only to overflying and not to landing. The countries did not say a word in the two letters so far as landing goes. Now, if the idea was to revive the two treaties, did the President of Pakistan and the Prime Minister of India suffer from such ignorance of the English language, and were they so ill-versed in the ways of diplomacy, that they could not express themselves? They could not tell each other: the treaties are revived? Did they have to use the word "basis" when they wanted to revive international treaties? Is that the way international treaties are revived? Now, my point is that the very fact that the two treaties dealt with two cumulative rights comprising a single bargain, and the letters referred only to one aspect, one part, of the bargain—shows that the intention could not have been to refer to the treaties when the word "basis" was used. Equally important is the second clause, on page 414, *supra*, clause *(b)*, which I read:

"*(b)* While the aforesaid letters expressed the willingness of the Prime Minister of India and the President of Pakistan to resume overflights, the actual terms of the Agreement were later embodied in the signals exchanged between the two countries and the Notification dated 10 February 1966 issued by India. The signals and the Notification show that the resumption of overflights was on a provisional basis and on a basis of reciprocity and 'with the permission of the Central Government and in accordance with the terms and conditions of such permission'. Such a basis for having overflights is in flat contradiction to the basis provided for overflying under the Convention and the Transit Agreement under which the freedom of overflying has to be on an enduring basis and *without the permission* of the Government concerned. [I will say no more about this because I have covered this point, I hope, adequately already.]

(c) The Notification of 10 February 1966 was issued by India to implement and give legal shape to the special Agreement of 1966 and it was declaratory of the understanding of the two Governments with regard to the resumption of overflights."

If I may pause here for a minute. There is a notification published by the Government of India on 10 February 1966. Pakistan is immediately made aware of that notification. That notification is completely inconsistent —Pakistan does not dispute that—with the Convention and the Transit Agreement. If the understanding between the two Governments was to revive the two treaties, would you expect Pakistan to make no protest? Would it quietly accept the notification? There was no protest from Pakistan. Now, if municipal law—the law of India—categorically says something which is contrary to the two treaties, and Pakistan does not protest, and that law—the notification—is contemporaneous evidence of what the parties intended by the word "basis" used in the Prime Minister's letter, does it leave any room for doubt as to whether the parties intended the two treaties to be revived? This is contemporaneous evidence. The signals are of the first half of February, the revival, according to Pakistan, of the treaties is at the same time, and India's notification is at the same time. The notification singles out Pakistan for a specific prohibition, and no other country of the world. I say, in the light of this evidence, it is unstatable that the two treaties were revived. I read further in clause *(c)*:

> "*(c)* ... The Notification was embodied in the Aeronautical Information Circulars issued by India, which were circulated to ICAO and given international distribution visualised in Annex 15 of the Convention. There was no protest or objection by Pakistan or any other party against the Notification or any Circulars embodying the Notification which negatived the freedom of overflying under the Convention and the Transit Agreement. [In the Rejoinder these basic facts are not disputed.]
>
> *(d)* Between 1966 and 1971 Pakistan aircraft invariably complied with the said Notification dated 10 February 1966, and overflew India only with the permission of the Indian Government. Further, on a number of occasions between 1966 and 1971 Pakistan asked for express permission to let its aircraft land in India. [The reference is made to the examples cited earlier in this Reply.] Such request for permission would have been wholly unnecessary if the Convention and the Transit Agreement had been in operation between the two countries after 1966, as suggested by the Respondent. Further, permission to land for non-traffic purposes was in fact refused in several cases by India, as mentioned *ante*, in negation of the freedom assured by the Convention and the Transit Agreement. It is inconceivable that Pakistan would have asked for permission or accepted the refusal without protest, as it did, if the two treaties had been in operation between India and Pakistan."

This fact remains undisputed in Pakistan's Rejoinder—that even when permission to land was refused to Pakistan there was no protest.

Now, on these facts my submission is that I have proved the case that between India and Pakistan the suspension of the Convention and the Transit Agreement continued.

I come now to the two specific instances which are sought to be pressed into service by Pakistan to show that the Convention and Transit agreement were revived as between the two countries. They have no specific instance —not a single one—of overflying or landing in India without the Indian Government's permission. However, they cite two cases unconnected with

overflying or with landing, but which, according to them, show that there was revival of the two treaties: Pakistan's Counter-Memorial, paragraph 14, first incident is in clause *(a)*:

> "In 1969, an Indian aircraft met with an accident in East Pakistan. In accordance with the provisions of the Convention, Pakistan investigated the accident. Invoking Annex 13 to the Convention, India nominated its representative on the enquiry and requested Pakistan to grant the necessary facilities to the Indian representative and advisers."

Now this . . . "Invoking Annex 13 to the Convention, India nominated its representative . . ." is a false statement. I have contradicted it in my Reply, and in the Rejoinder my contradiction is accepted. Surely, in pleading before the Court, Parties should be a little more careful how they state the basic facts.

> "Pakistan afforded full facilities to India in accordance with the Convention and Annex 13. During the course of the investigation, the Pakistan Inspector examined the Duty Air Traffic Controller of Calcutta Airport in order to ascertain whether the provisions of ICAO Document 4444 had been complied with by them."

Now the simple facts are these. An Indian aircraft crashed in Pakistan. Pakistan—in fairness to it it must be said—gave all facilities for a proper investigation. Our representatives went to Pakistan; we never invoked the Convention for claiming the right to go to Pakistan. There was an investigation and some findings were given. Instead of taking up your time and arguing this orally, if I may just request you to turn to a few sentences in India's Reply which are set out on page 410, paragraph 21, clause (i):

> "Pakistan's allegation that 'Invoking Annex 13 to the Convention, India nominated its representative on the enquiry and requested Pakistan to grant the necessary facilities to the Indian representative and advisers' is incorrect. The first intimation of the accident referred to was received from Pakistan which sent a signal to India stating, *inter alia*—
>
> 'Nature of the accident not known. Aircraft destroyed. Awaiting nomination of yr representative.'
>
> In reply, the D.G.C.A., India, sent a signal stating, *inter alia*—
>
> 'V.N. Kapur Controller of Aeronautical Inspection Calcutta nominated as our representative on the inquiry. Please advise the place and date on which his presence is required.'
>
> The two telegrams referred to above make it clear that it was Pakistan which invited India to nominate its representative and there was no question of India 'invoking' Annex 13 to the Convention."

I need not read the rest.

Then we point out that actually, even apart from the Convention, most civilized countries have their own municipal laws under which they provide for investigation into an accident. India and Pakistan certainly have such a provision in their law. Pakistan law is Rule 77A under which you hold an investigation into the crash of an aircraft, and you invite the foreign country to which the aircraft belongs to send representatives to participate in the enquiry. Pakistan's law is set out in India's Reply at page 411, *supra*, and if I may read the four lines following Rule 77A before I close for the day:

"It may be noted that the foregoing Rule [i.e., Pakistan's Municipal Law] envisages participation in inquiries and investigations by a representative of the country of registration, regardless of the question whether such a country is a party to the Convention or not."

The Court rose at 1 p.m.

FIFTH PUBLIC SITTING (23 VI 72, 10 a.m.)

Present: [See sitting of 19 VI 72, Judge Lachs absent.]

Mr. PALKHIVALA: May it please the honourable Court. Yesterday I dealt with the first of the two events relied upon by Pakistan in its Counter-Memorial for suggesting that the Convention and the Transit Agreement continued in operation between the two countries after February 1966. The first event which Pakistan relies upon was the crash of an Indian aircraft in East Pakistan in respect of which Pakistan ordered an investigation into the causes of the crash and India sent its representatives to participate in that investigation. Pakistan's contention is that because you send someone to participate in the investigation it means you regard the Convention and the Transit Agreement as being in operation between the two countries.

Now, on that point, I had requested the Court's attention to India's Reply, paragraph 21, page 410, *supra*, and that is where I was when the Court rose yesterday. I had read clause *(i)*, which points out that Pakistan's allegation that India invoked Annex 13 to the Convention for the purpose of nominating its representative on the enquiry to be held in Pakistan is clearly incorrect. It was Pakistan which sent a signal, as set out in paragraph 21 of India's Reply, at page 410. India, in reply, sent one Mr. V. N. Kapur. India did not invoke any provision of the Convention for taking part in the enquiry.

The second point is set out in clause *(ii)* in India's Reply, the same paragraph. It is pointed out in that paragraph that civilized nations have their own municipal laws under which investigations are made into crashes of aircraft whether belonging to the country holding the investigation or to a foreign country. India has such a law. Pakistan has such a law, which is set out in that clause *(ii)* of India's Reply, paragraph 21, and the last sentence on page 410, clause *(ii)*, paragraph 21, is relevant. It may be noted that the foregoing rule—that is the Pakistan rule providing for an investigation into an air crash—envisages participation in enquiries and investigations by a *representative of the country of registration regardless of the question whether* such country is a party to the Convention or not.

We further point out, in the same paragraph 21, that all over the world the same practice is followed, whether the country is a signatory to the Convention or not. We give, for example, the instance of an Indian aircraft meeting with an accident in Nepal in March 1958 when, also, India's representative went to Nepal to participate in the investigation, although Nepal is not a party to the Convention. Pakistan says in the Rejoinder they are not aware of this incident. Possibly they are not; but the whole file referring to the accident in Nepal, where India participated in the enquiry without Nepal being a party to the Convention, is available here for inspection by my learned friends.

The last thing pointed out about this incident by India is in clause *(v)* of paragraph 21, at page 411, *supra*, of India's Reply, where we point out that Pakistan's considering whether the Indian pilot had followed the provisions of ICAO Document 4444 does not mean that between India and Pakistan the Convention was in operation. These provisions lay down the norms, the standards, of safe, efficient and competent aviation, and, whether you are a party to the Convention or not, you would naturally follow these provisions

which are for safety in aviation. We would follow those standards and norms wherever our aircraft flies, in any part of the world. If it flies over Pakistan, we would follow the same norms of safe, efficient aviation, whether the Convention is in force between Pakistan and India or not.

So, to conclude from India following the safety norms that it went on the basis of the Convention being in force between India and Pakistan is really to state the unstatable.

The second incident, which is referred to in Pakistan's Counter-Memorial —and the only other—is the one set out on page 374, *supra*, paragraph 14, clause *(b)*. That incident, as related by Pakistan is as follows:

> "*(b)* During the Middle East/South East Asia Regional Air Navigation Meeting held in Manila in November-December 1968, an informal meeting took place between the representatives of Pakistan and India on 21 November 1968 under the Chairmanship of the President of the ICAO Council to resolve the matter concerning the boundary between Lahore and Delhi Flight Information Regions. It was agreed that the Civil Aviation Administrations of the two countries should meet under the auspices of ICAO to resolve the matter. The matter involved was the implementation of recommendations of the Limited Regional Air Navigation Meeting held in Geneva in 1965. A meeting was accordingly held in Bangkok in 1971."

Now, the answer to that is, again, fairly simple. India and Pakistan continued to be parties to the Convention. It is only as between the two countries *inter se* that the Convention stands suspended. The good offices of ICAO and its President are always available for any assistance India or Pakistan may want. As the Court is probably aware, the Flight Information Region is the region which comes within a particular station. Suppose an aircraft flies from one country to another, it is a matter of agreement between the two countries as to the distance up to which the first country will direct and assist the aircraft and beyond which the other country's ground staff will take over. On this point countries have to agree because, otherwise, there would be a certain interval or area when the plane will be without any assistance from the ground.

There was a dispute between India and Pakistan as to the extent to which Pakistan should give guidance to the aircraft in the air, and beyond what boundary or point India should take over. For this, under the good offices of the ICAO President, the countries met in Bangkok and an informal meeting was held between India and Pakistan under the chairmanship of the ICAO President and the delegations of the two countries agreed to make certain recommendations to their Governments. These recommendations have no relevance to the question of operation of the Convention between the two countries. This is set out in paragraph 22 of India's Reply.

Incidentally, the date 1971, mentioned by Pakistan, is incorrect. It should be 1970, when the meeting was held in Bangkok.

Now, neither of these two incidents has any relevance to the real question arising between the Parties, namely, did India and Pakistan revive the Convention and the Transit Agreement after February 1966? The two incidents referred to by Pakistan have nothing to do with either overflying or landing in each other's territory.

There is just one more thing which I should like to point out, which I mentioned yesterday but I would now like to give the precise references. I had mentioned yesterday that in India's Memorial, paragraph 20, page 32, *supra*,

India had set out four basic facts from which it wants this honourable Court to draw the inference that the Convention and the Transit Agreement continued under suspension from 1965 onwards up to date. Two of the facts which are mentioned in paragraph 20 of India's Memorial are, that for overflying, Pakistan had always to ask India's permission; it is only permission, not special permission which you ask for on each occasion, because you may ask for permission for the next six months. So what India says is—I am repeating the exact words:

> "Under the Special Agreement of 1966 [that is the Special Régime] overflying was permitted only with the permission of the Government of India . . . [I am emphasizing the word 'permission']."

By contrast, India points out, using words accurately, I hope, that when it comes to landing for non-traffic purposes: "Pakistan had to seek India's *special* . . . permission . . .", because landing has to be for each aircraft separately. On scheduled services, Pakistan did not land in India after 1965 and India did not land in Pakistan. But if a plane on a non-scheduled flight wanted to land, it had to be with special permission, special to that particular plane, and it could not be general permission for a period of, say, six months.

In its Counter-Memorial, what Pakistan has done is this. It has said nothing about the question of landing at all—in other words, not contradicted the fact that for landing, special permission was necessary. As far as overflying is concerned, Pakistan says that no "special permission" was necessary. But that is not controverting or denying what India has said, because India has never alleged that *special* permission was necessary for overflying. All that India has said is that permission was necessary.

If I may refer to Pakistan's Counter-Memorial, page 377, *supra*, paragraph 21:

> "Pakistan maintains that overflights across each other's territory were restored and resumed on the same basis as that prior to 1 August 1965. It is denied that the overflights were restored on a provisional basis or on the basis of reciprocity or were subject to special permission as alleged by India."

India has made no such allegation. The real allegation of India that overflying had to be with the "permission" of India, not "special permission", that fact stands uncontradicted; and about landings, as I have already said, Pakistan makes no statement at all.

In this state of affairs, it becomes necessary, when you look at Pakistan's Rejoinder, to see whether Pakistan is entitled now to bring in material which it never did at the stage of the Counter-Memorial. I have no objection to it being looked at; it is factually wrong. All that I want is that, according to the elementary notions of natural justice, I should have an opportunity of meeting a point which Pakistan had the chance of making at the stage of the Counter-Memorial and chose not to make at that stage.

I must say in fairness to Pakistan, they do not object to the production of new documents by India[1]. What they do say, is that the notes which I have annexed to the new documents cannot go as a part of the written pleadings, according to the Rules of this Court. Pakistan is right there—I am willing that the notes be withdrawn. I shall use the notes as part of my oral argument. The object of those notes was not to go beyond the Rules of the Court; the object was to assist the Court in understanding why these documents are

[1] See pp. 719-742 and p. 787, *infra*.

sought to be put before the Court at this stage. The documents which are proposed to be produced fall into groups A to G. The honourable Court will direct that the notes be withdrawn, and only the basic documents will go on record under the Rules of the Court.

Among the new basic documents which India has filed in Court, Group A deals with Pakistan's case which is set out for the first time in its Rejoinder on page 463, *supra*, and the case is this if I may read paragraph 18:

> "The statement made in Paragraph 18 of the Reply by the Applicant is denied. It is stated that there are two types of aircraft operations: *(a)* scheduled and *(b)* non-scheduled. In respect of scheduled services no permission is required under the Transit Agreement for either non-traffic landings of for flying across the territories of the parties to the Agreement. [Now *the* sentence.] There is not a single case where permission was sought by either Pakistan or India in respect of scheduled services for making non-traffic landings or flying across other's territory."

This allegation that permission was not sought by either country in a single case after 1965 for scheduled services, either in respect of overflying or in respect of landing, is a factually incorrect statement. We have chosen not to burden the Court's record with a voluminous mass of material which would cover all the cases; we have picked out at random a few examples. In Group A are the documents which show—they are photostat copies—Pakistan's national airlines seeking permission for overflights for scheduled services. In Group B are documents under which Pakistan has granted permission to India for overflights for scheduled services. That disposes of the scheduled services point.

As regards non-scheduled services, Pakistan says in paragraph 18 of its Rejoinder:

> "In the case of non-scheduled services, no prior permission is required for making non-traffic landings under Article 5 of the Convention. [That is correct. Under the Convention no permission is required.] However, in respect of overflights of non-scheduled flights, the State overflown has a right to require landings in its territory. [Now the important sentence.] It is denied that prior permission was requested for non-scheduled flights to make non-traffic landings in India. As regards instances enumerated in Paragraph 18 by the Applicant, it is stated that the instances firstly, relate to non-scheduled flights and secondly, relate to obtaining Air Defence Clearances as required under the Air Defence Regulations laid down in the Aeronautical Information Publication of India and apply to all aircraft irrespective of their nationality and do not apply to Pakistan aircraft only. The Air Defence Clearance does not constitute 'prior permission' as alleged by the Applicant."

What I have just read involves two propositions. First, it involves the proposition that in respect of non-scheduled services, for landing no permission was asked for. "It is denied that prior permission was requested for non-scheduled flights to make non-traffic landings in India": this statement is factually untrue. India has given five specific examples in its Reply to show that permission was asked for after 1966 for landings in respect of non-scheduled flights. Further instances are in Groups C and D of the new documents. In Group C we have placed the documents where Pakistan sought permission for landings in respect of non-scheduled flights, and in Group D are the documents showing that Pakistan granted permission to India for landings for non-scheduled flights. Therefore these Groups C and D, in

addition to the five examples already cited in India's Reply, show that Pakistan's factual statement is untrue, that in no case was permission asked for.

The second proposition of Pakistan is equally untrue. It says that the instances given by India in its Reply, the five examples of permission being asked for for non-scheduled landings, "relate to obtaining Air Defence Clearances as required under the Air Defence Regulations . . .". If only Pakistan had checked up chronology, it would not have made this incorrect statement. The Air Defence Clearance Regulations came into force in India for the first time in 1968; whereas four out of the five instances given by India in its Reply pertain to the period before Air Defence Clearance Regulations came into force.

In Group G we have set out the Air Defence Clearance Regulations on their entry into force for the first time in 1968. The reference to them only serves to create a confusion when really the position is very clear on the facts. In India, what Pakistan requires is permission for overflying, that is what Pakistan alone requires, in contrast to the other countries with whom India has the operative provisions of the Convention and the Transit Agreement in force. But every country in the world requires—and Indian aircraft also require—clearance under the Air Defence Clearance Regulations. These Regulations have nothing to do with permission for overflying; they are the Regulations under which, before any plane takes off, Indian or non-Indian, it has to get clearance from defence authorities if the flying is within certain zones. In short, these Air Defence Clearance Regulations apply only to certain areas, and they cover all aircraft, Indian or non-Indian. Now to refer to that here is obviously to side-track the real issue.

Group E deals with another incorrect statement made by Pakistan. Pages 460 and 461, *supra*, of Pakistan's Rejoinder deal with the point India has made in its Reply, that the notifications of September 1965 and February 1966, prohibiting Pakistan aircraft from overflying India, were notifications which were promulgated to the whole world by being put in aeronautical information circulars. Now Pakistan makes the point—a somewhat surprising point—in its Rejoinder that India put those notifications in the aeronautical information *circulars*: if the idea was really to let the world know that there s such a prohibition on the aircraft of another country overflying India, then such a prohibition should have been promulgated in the aeronautical information *publication*, which is a separate volume.

There is a twofold answer to this. First you do not have to promulgate the regulations in aeronautical information publications, as distinct from aeronautical information circulars. The reason is that every aeronautical information publication, on the very title page, says categorically that the regulations which are not set out in the publication are all set out in the aeronautical information circulars to which reference should be made. So anyone reading the publication is told right on the front page in bold capital letters that if he wants to have detailed information he must go to the aeronautical information circulars.

The second point, and a point conclusive against Pakistan, is that Pakistan itself has prohibited the overflights of the aircraft of certain countries and it has not published the notification in the Aeronautical Information Publication. What Pakistan says should be published in the aeronautical information publication is really not correct. We have got Pakistan's own aeronautical information publication, which does not contain the prohibitions which it has imposed on the aircraft of certain countries overflying Pakistan. There-

fore, Pakistan's own conduct is clearly against the theory which it chooses to propound before the Court.

We have got also the aeronautical information publications of other nations also which prohibit overflights of Israel and certain other countries and do not publish the notifications in their aeronautical information publications. So the plea of Pakistan—that I have published the notifications in the wrong place—that I have published them Pakistan does not dispute, but it says that I have published them in the wrong place, is contrary to Pakistan's own practice and the practice of other countries. Those aeronautical information publications of Pakistan, India and other countries are available for inspection by my learned friends and by the Court.

Group E deals with this point. There we have given instances of Pakistan, Iraq and Egypt prohibiting overflights of certain countries like Israel, Rhodesia or the United States of America, while those prohibitions are not contained in their aeronautical information publications. The truth of the matter is that what I have done is the correct thing and it is done by other countries.

Group F is not my document. It is a document referred to in paragraph 78 of Pakistan's Rejoinder. They rely on the document, but on a proper reading of the document it supports me. Because Pakistan has chosen not to annex the document, which it has relied upon, I am placing it before the Court.

With these preliminary words, may I request the Court to omit the notes and merely look at the basic new documents, Groups A to G. I will not read every document in every group but only one document in each Group to save the Court's time.

Take Group A, that is, Pakistan seeking India's permission for overflights for scheduled aircraft. Group A.1 is the document of February 1967 where Pakistan International Airlines Corporation, which, like Indian Airlines and Air India, is a 100 per cent. government-owned corporation, asked for India's permission to overfly India for a certain period; and the words are, in the last but one line: "You are requested to please give us necessary permission."

Then, in Group B, you have the cases where Pakistan granted permission to India for overflights over Pakistan by Air India, that is, India's national airline, and if I may read again only one document, that is, B.1, the third line: "Permission accorded to . . . India to operate to their scheduled service overflying Pakistan territory on the prescribed . . . [routes] . . .", etc.

Then, group C deals with Pakistan seeking permission for landings for non-scheduled flights. For an example, I want to take out the one which is the longest.

So far as C.6 is concerned, I have got the original file of the basic documents. The whole file is here, but, since the documents are numerous, we have kept the original file for inspection by my learned friends, and I shall only state the summary of those documents in my own words since the notes will disappear from the record. Out of this file of several documents the one placed before the Court is C.6. Now the facts of the incident are these. On 3 November 1969 the DGCA Pakistan requested the DGCA India to confirm that there would be no objection to the ferry flight of a Beaver Aircraft AP.AVH from Lahore to Dacca on 6/7 November morning with technical landing at Delhi.

On 4 November 1969, DGCA Pakistan was informed that the matter was under consideration. On 5 November, Pakistan followed up the earlier request with a diplomatic note. They also sent a signal on 6 November requesting to "rush" permission.

The request to "rush" permission was repeated by the DGCA Pakistan

on the afternoon on 7 November, giving a revised itinerary of the proposed flight on 8 November. India decided to turn down Pakistan's request to operate the flight Lahore/Delhi/Dacca. Accordingly, DGCA Pakistan was informed by a signal on the evening of the 7th that the flight would have to be from Karachi via Ahmedabad-Calcutta. The DGCA Pakistan was also asked by signal to furnish a new itinerary with the stipulation that the flight should not—repeat, should not—operate without clearance from DGCA India.

On receipt of this signal, DGCA Pakistan replied, on 8 November, to the effect that the proposed flight was on the route Lahore/Delhi/Dacca, and furnished a revised itinerary for 9 November. The DGCA India sent back a signal disapproving of the flight Lahore/Delhi/Dacca and insisted that the flight should be routed from Karachi via Ahmedabad and Calcutta. The DGCA Pakistan stated that the aircraft was stationed at Lahore and requested again for clearance of the flight from Lahore via Delhi.

On 10 November an explanation was furnished by DGCA Pakistan why the aircraft could not fly from Karachi via Ahmedabad, and again requested that the permission might be granted. The request was turned down by India finally on 10 November 1969. Yet my learned friend says that in no case did he ask for permission for landing in India for non-scheduled flights.

So far as D is concerned, we have given here an example of Pakistan granting permission to India for landing in Pakistan on a non-scheduled flight.

"E" sets out the entries from Jeppesen's *Airway Manual*, which is the standard airway manual, which shows that Pakistan has prohibited overflying by Rhodesian and Israeli aircraft. Now this prohibition, which is in force, is not in Pakistan's aeronautical information publication (AIP), as I have already pointed out, though it may well be the subject-matter of an aeronautical information circular, just as India has made a similar prohibition against Pakistan the subject-matter of a circular.

The next document in "E" pertains to Iraq. Iraq has also prohibited aircraft of the United States of America from overflying or landing in Iraq, but you will not find that prohibition in the AIP Iraq. And, finally, Egypt has prohibited aircraft of Israel, South Africa and Portugal, but this prohibition is not in the AIP Egypt, though it may well be the subject-matter of circulars.

Finally, in E, you have document E.4, which sets out the front page of AIP India. It says in bold letters what I have already said: "Consult Notams and aeronautical information circulars for latest information." In the AIP itself we have got a paragraph which is reproduced in E.5, which points out how this type of information will be found in the circulars and those circulars would contain notifications issued under the the Indian Aircraft Act and Rules.

Group F is the document which is referred to by Pakistan in paragraph 78 of its Rejoinder.

Group G deals with the air defence clearance regulations which Pakistan has invoked and which are completely irrelevant to the question of permission for overflying. In this Group we point out how these defence regulations came into force only in 1968, and they apply to all aircraft, Indian and non-Indian, and they apply only to certain defined areas where certain defence activities may be carried on.

Having finished with these new documents, the final point I have to make about the special régime is this. The special régime, as set out in the notifications which are reproduced on page 120, *supra*, of India's Memorial, Annexure 3, was that Pakistan was prohibited from overflying India except with the

permission of the Indian Government. After the hijacking incident, all that the Indian Government did was to withdraw that permission, which it was undoubtedly entitled to do. The prohibition on Pakistan aircraft overflying and landing in India was in force as early as September 1965. Permission was given from time to time, either general permission or special permission, between February 1966 and February 1971, and in February 1971 that permission was withdrawn—that is all that happened in reality. Now, if this permission was wrongly withdrawn, it is a dispute pertaining to the bilateral agreement or the special régime of 1966. At the time of the voting before the ICAO Council, Pakistan accepted the position that the Council had no jurisdiction to deal with disputes pertaining to bilateral agreements. It is only if this Court comes to the conclusion that there was no special régime or bilateral agreement from February 1966 onwards that the submission I have already made will arise for decision, namely that in that event the Court will be pleased to hold that the Convention and the Transit Agreement which were, on that reading of the situation, in operation, suspended in February 1971.

In short, if the special régime argument is rejected, the necessary corollary is that the Convention and the Transit Agreement had continued in force up to February 1971. In that event those two treaties should be held to have been suspended by India in February 1971.

This completes the argument as to the Council's jurisdiction. There is just one point I should like to revert to and that is the point about the Complaint. No action was taken by India *under* the Transit Agreement. I shall only say a few words about it. In that connection I would request the Court to turn to India's Reply, where we have set out a certain document of the ICAO Council. The point, as the Court will be pleased to recall, is this: if a State has suspended the Transit Agreement, it cannot be said to be a case of action *under* the Transit Agreement, whereas a Complaint is competent only in cases where action is taken *under* the Transit Agreement. This is the special point peculiar to the Complaint of Pakistan as distinct from its Application before the ICAO Council. Now, on that point India's Reply, paragraph 76, quotes a relevant extract from a document of ICAO:

> "Termination or suspension of the Transit Agreement, or even a breach of the Transit Agreement, cannot be the subject-matter of a Complaint under Section 1 of Article II. Dr. Eugene Pepin, the then Director of the Legal Bureau of ICAO, in reply to a question from the Chairman of the Working Group nominated by the Council for preparing the Rules for the Settlement of Differences, gave the following answer at the Working Group meeting on 14 July 1952:
>
> > '... in the Air Transport and Air Transit Agreements there is a case of complaints which involve not something wrongly done in respect to the provisions of the Convention but something done in accordance or in pursuance to the provisions of the Agreements but which causes hardship or injustice to another party. Therefore I think there is a fundamental difference between a disagreement, which is something contrary to the Convention, and a complaint which is something exactly pursuant to the Convention but which causes injustice'."

This opinion clearly supports the proposition I have been urging, namely that the case of suspension cannot be said to be a case of action *under* the Transit Agreement. There are other documents of the ICAO Council, which

are not on record, which express exactly the same view and they are after this document in point of time.

I come now to the final submission in the case. If I am right in what I have so far submitted, this final point does not arise for consideration. It can be an additional ground for resting the Court's decision in my favour, but it need not be dealt with, if I am right on the first and/or second preliminary objection. The final submission is this. Assuming that the ICAO Council had jurisdiction to deal with the case, they have dealt with the case in a manner and have followed a method which clearly vitiates the decision in law. This will involve only a look at the admitted facts and at the Rules of the Council, which it had to observe in coming to a decision.

May I request the Court to turn to India's Memorial, page 54, *supra*, paragraph 93. In particular, I refer to the three grounds which are set out there in support of the submission that the manner and method adopted by the Council vitiated the decision:

> "(1) The decision of the Council was vitiated by the fact that the questions were framed in the wrong manner. The propositions put to vote were framed in a negative manner, namely, 'The Council has no jurisdiction . . .', instead of being framed in a positive way, namely, 'The Council has jurisdiction . . .'."

Now, before the voting began India pointed out that the propositions should not be framed as they were. I shall now mention how this type of framing of the questions is wrong and how, in fact, it has resulted in a miscarriage of justice. The Rules for the Settlement of Differences (India's Memorial, Annex J) deal with the question as to how an application or a complaint is to be dealt with. Article 52 of the Convention sets out what should be the voting pattern in order to support a proposition.

First of all, I refer to India's Memorial, page 314, *supra*, Article 52, which reads: "Decisions by the Council shall require approval by a majority of its members." Now, this is the crucial basis for approval of a resolution. It requires approval by a majority of its members. The number of members of the Council is 27, and what is needed is a majority of this number, which means that 14 must be in favour of a proposition.

Now some may vote, some may abstain from voting. To take the concrete case of the Complaint, the proposition before the Council was that the Council had no jurisdiction to deal with the Complaint. The number who voted in support of the view that the Council had jurisdiction to deal with the Complaint, was 13.

If you would kindly turn to the facts as they are set out in clause 2 of paragraph 93 of India's Memorial:

> "The decision of the Council as regards the Complaint is directly contrary to Article 52 of the Convention which provides that 'decisions by the Council shall require approval by a majority of its members'. The Council's decision that it had jurisdiction to consider the Respondent's Complaint was not supported by a majority of the Members of the Council. As regards the Council's decision on the Complaint, the Applicant submits that there was gross miscarriage of justice as a result of the question having been been wrongly framed. If the question had been rightly framed and if the proposition that the Council had jurisdiction to consider the Respondent's Complaint had been put to vote, the decision of the Council would have been in favour of the Applicant on the same pattern of voting."

The Court will find the pattern of voting in India's Memorial, at page 286, *supra*. The Court will kindly recall that the proposition put to vote was this: the Council has no jurisdiction to deal with the Complaint. If I read paragraph 135 I think it will make it clear:

> "We go now to the next question, concerning Case No. 2: [that is the Complaint] that the Council has no jurisdiction to consider Pakistan's Complaint. The Complaint has to do with the Transit Agreement; therefore only those States that are parties to that Agreement, except India, are entitled to vote. I will ask those who think that the Council has no jurisdiction to consider Pakistan's Complaint to so indicate by saying 'Yes' [so if you say 'Yes' it means Council has no jurisdiction] and those who disagree with that to say 'No' . . ."

Therefore, if a member says "Yes" it means Council has no jurisdiction, and if a member says "No" it means the Council has jurisdiction.

Thirteen people said "No"—that means the Council has jurisdiction; and the United States said "Yes"—that means the Council has no jurisdiction. Then the final decision, as set out by the President, is on page 287, *supra*, paragraph 137: "*There was one vote in favour* [that is saying Council had no jurisdiction], *13 votes against and 3 abstentions.*"

What is the practical outcome of this voting? Thirteen people said that the Council had jurisdiction to deal with the Complaint. Suppose the proposition had been put in the affirmative form: the Council had jurisdiction to deal with the Complaint; then 13 would have voted in favour and the proposition would have been lost because, under the Rules of the Council the majority of the members have to vote in favour, otherwise the proposition is lost.

The Council has a curious rule—that, although the parties to the Transit Agreement are fewer in number than parties to the Convention, it is the total number of members of the Council of which the majority must vote in favour of a proposition even in cases arising under the Transit Agreement. I will not waste your time arguing this in detail because this is common ground and it is not disputed even by the ICAO Council. The ICAO Council accepts the proposition that 14 must vote in favour of a proposition before it can be carried even in cases arising under the Transit Agreement.

The point at issue, therefore, so far as the Complaint is concerned is a very simple one. The Council itself accepts the position that 14 must vote in support of a proposition. I repeat that if the proposition had been put this way: the Council has jurisdiction to deal with the Complaint, then 13, on the actual pattern of voting, would have voted in support and the proposition would have been lost. Because the proposition was put in the negative way —the Council has no jurisdiction—that proposition was also lost, because 14 did not support it. Thus on the same pattern of voting, I lose or I win, just depending on which way the question is framed. That shows the importance of framing the question in the right way.

My point is that it is for the party which goes before the Council to prove affirmatively that the council has jurisdiction. On that point there is a luminous passage in the opinions of Judges Sir Percy Spender and Sir Gerald Fitzmaurice, in the *South West Africa* cases:

> ". . . we must begin by recalling that, since the burden of establishing the jurisdiction of the Court lies on the party asserting it, and this must be established conclusively . . . it is for the Applicants to show that the Mandate is beyond reasonable doubt a 'treaty or convention in force' . . ." (*I.C.J. Reports 1962*, p. 473).

On this point there is no dissent, even in the Judgment of the Court. If the burden is on the party asserting jurisdiction, surely the proposition should have been that the Council has jurisdiction—and then with the 13 votes only in favour of the Council having jurisdiction, the proposition would have been lost. There is no answer to this point as to the wrong method adopted by the Council, which has resulted in the decision being exactly the contrary of what it should have been, and would have been, if the proposition had been framed the right way, so as to throw the burden on Pakistan to prove jurisdiction. The well-established rule, laid down by this Court repeatedly, is that there is no presumption as to jurisdiction.

So the first point is that the propositions should have been in the affirmative. As far as the voting on the Application is concerned, as distinct from the Complaint, even if the proposition had been put in the affirmative, I concede that I would have lost the proposition on the voting as it took place, because more than 14 voted in favour of the view that the Council had jurisdiction to deal with the Application. But even there, for another reason which I shall now mention, the wrong frame of the question, I submit, resulted in miscarriage of justice.

If I may quote from the same opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice, in the *South West Africa* cases *(I.C.J. Reports 1962)* at page 465, where the learned Judges say:

> "These difficulties are not merely technical, though these exist. They spring rather from the fact that the case belongs to a type the outcome of which is liable to be dominated, or at least strongly influenced, by the character of the initial approach to it."

Now, the initial approach to this case did make all the difference. The initial approach of the Council was: India must prove that the Council has no jurisdiction, and that approach is reflected in the questions. Therefore, the questions are framed this way, viz. that the Council has no jurisdiction. The correct approach should have been that India has to prove nothing; there is no presumption as to jurisdiction; it is for Pakistan to prove that there was jurisdiction.

Therefore, my complaint regarding the framing of the propositions as regards both the Application and the Complaint is that they reflected the totally wrong approach of the Council, which resulted in the Council not adverting to the real issue, namely had Pakistan given strict proof of consent by the contracting States to the Council's jurisdiction in a case of suspension under international law?

These are the two points, which I have finished, in paragraph 93, and the third point in paragraph 93, is the following:

> "(3) The decision of the Council was further vitiated by another fact. The Council was acting as a judicial body and each of its members had to discharge his duty as a judge. Although some of the members asked for time to consider the issues of far-reaching importance which had been raised by the Applicant and asked for verbatim notes of the oral hearing, their request was turned down, with the result that some of the judges were unable to participate in the deliberations and in the final decision of the Council."

Some representatives expressly said that they were not in a position to decide. Now here comes a clear and obvious miscarriage of justice. Here is a court, let me call it "a court" without meaning disrespect to the word "court",

where by a majority of the votes available in the Council the matter is decided. So if any judge abstains from voting it can be a mark against me, his mere abstention is enough to prejudice my case. And the point here is not whether you can count up the votes and determine which way the decision would have gone if everybody had been given time; the point is that justice must not only be done, but must be seen to be done.

I cannot conceive of a decision which would be upheld by an appellate court when, as the record shows, numerous members told the learned President of the Council they had not understood what had been argued and they would like to have time. Even when time was asked for on a resolution moved by Czechoslovakia and supported by Russia, not one voted against time being given. The Court will recall that. The resolution was lost because only eight persons voted for deferring the decision.

In other words, there is nobody who says, let the matter not be deferred; but others abstained. Merely because the others abstained, time was not given, and the resolution moved by Czechoslovakia for deferring the decision was lost. Now the point is that if there is a body sitting as a body of 27, and 14 members have to vote in favour of a proposition, it is necessary that everybody must have the chance of voting—not voting as mechanical robots, but voting as minds having been applied to the problem before coming to a decision in the matter. There was no decision in law. The process of decision-making was not adhered to, as is required by the judicial process; that process was flouted.

India has quoted various passages from representatives of the United Kingdom, Czechoslovakia, the Soviet Union and Uganda, who say that they are not in a position to decide this matter, please give us time. Those passages are all set out in India's Memorial, paragraph 96. To show how grave and well-founded the objection of these gentlemen was, I have to read a few sentences. First, in Air Marshal Russell's statement—the representative of the United Kingdom:

> "I could not regard it as reasonable for me, myself, to participate in a decision here and now on the merits of the Preliminary Objection, which for me turns entirely on questions of law. To that extent I shall therefore not be able to support any positive action on the substance of the matter. For me it is essential to obtain legal advice on the arguments which have been presented before so participating . . ."

Now the Court will make a distinction between this case and the cases where the judge abstains from voting, as for example in the United States, where Justice Frankfurter was asked to deal with a matter involving the making of raucous noises on the street. He said in effect: "My own feelings are so strongly engaged in the matter—I have been myself a victim of these noises by people who have no civic sense—that I will not decide this matter."

That kind of abstention is a different thing, where a judge being equipped and able to decide, chooses not to decide. But this is a case where a man who was supposed to judge says: I want to decide but I am not in a position to decide today; today is not the time for me to decide because I want to study and understand. And yet the Council goes to a decision.

The representative of Czechoslovakia says "I am not a lawyer . . . I too would like to have the possibility of consulting my Administration". The Soviet Union representative says "I must request time for such consultation after receiving the complete records from the Secretariat. I believe that a

week or ten days would be necessary . . .". The representative for Uganda says:

> "I myself would be prepared to take a decision now and it would then be understood that my decision would be limited to my knowledge of the Convention, the Transit Agreement and the Rules for the Settlement of Differences."

He then goes on to say that if the decision had to be that day he would not take into account the *Namibia* case and the other principles of international law argued. So the representative from Uganda says that relevant arguments which have been urged, on international law, the *Namibia* case, etc., would be ignored by him if the decision had to be rendered that day—and therefore he says: if you give time, give sufficient time to examine all these things. I read further from the representative of Uganda's statement:

> "If the function of the Council is to deal with all aspects of international law, if our decisions must take due account of all the international decisions which have been made, of all the cases which have been cited here, then we have got to have time to examine these things and get proper advice."

These quotations show that the most elementary principles of natural justice were flouted, natural justice which requires that a man who acts as a judge must have the chance to consider what he has to decide, and if he wants time to decide he should have the time. If this is not a miscarriage of justice it is difficult to say what would be. The decision is therefore, on the very face of it, unsustainable, even assuming the Council had jurisdiction.

The Court adjourned from 11.20 a.m. to 12 p.m.

QUESTIONS BY JUDGE SIR GERALD FITZMAURICE

Le VICE-PRÉSIDENT faisant fonction de Président: Avant que je donne la parole à M. le conseil principal de l'Inde, sir Gerald Fitzmaurice voudrait poser un certain nombre de questions.

Judge Sir Gerald FITZMAURICE: Mr. Palkhivala, I am not now so much intending to ask you questions to which I expect specific answers. I am putting to you certain points which occurred to me as I listened to your argument, —and I hope that you may be able to deal with them later on, during, perhaps, the second round of speeches.

Now amongst the contentions you advanced in support of the view that the Council of ICAO has no jurisdiction in this case you maintained that there are certain inherent limitations on that jurisdiction,—and in particular that the Council has no competence to deal with matters that involve questions of international law.

On that basis you have argued that whereas the Council is competent under Article 84 of the Chicago Convention to deal with matters involving the interpretation or application of that Convention, it could not be entitled to go into questions of termination or suspension because—and here I cite your own words taken from page 524, *supra*, where you said this speaking of the Council:

> ". . . it [the Council] can deal with questions of interpretation or application. But there is all the difference in the world between an administrative body deciding certain disputes regarding application and interpretation and an international court of justice dealing with questions of international law and the rights and powers of a sovereign State."

From this it would seem to follow that, in your view, whereas questions relating to the termination or suspension of treaties are questions of international law, questions relating to the interpretation or application of treaties are *not* questions of international law.

Now what I want to put to you is whether this really *is* your contention, —namely that questions of treaty interpretation and application are not questions of international law. If, on the other hand, that is *not* your contention, then what, so far as any *inherent limitations on the jurisdiction of the Council are concerned*, is the basis of the distinction you seem to make between interpretation or application (which you say are matters within the Council's inherent jurisdiction) and termination or suspension (which you say are not matters within its inherent powers)?

Continuing the second part of what I want to say: the point I have just put is of course, as you will realize, quite separate from another of your principal contentions, namely that the notion of the interpretation or application of a treaty is quite distinct from, and does not comprise, that of its termination or suspension, and to that proposition I now come.

Viewed as an abstract question of law, I express no opinion on it one way or the other, except to draw your attention to the possibility—in case you care to consider its implications—that it may itself involve a question of treaty interpretation.

But leaving that on one side, the point I want to put to you is this: As you

said yesterday Mr. Palkhivala, it is argued on behalf of Pakistan that not only does the Chicago Convention not provide for suspension but, by implication, it rules it out, because the relevant article, Article 89, merely provides that in case of war or other declared state of national emergency, the provisions of the Convention "shall not affect the freedom of action of any of the contracting States". In other words, according to this argument, States are permitted, in the circumstances indicated, to *disregard* the provisions of the Convention so long as the emergency lasts, but (Pakistan contends) there is no suspension of the basic obligation,—and when the emergency ceases, this licence to disregard automatically ceases also.

Now this argument may or may not be correct, and I say nothing about that, especially as it seems to me to be one that appertains to the merits of the case. But the question I have been asking myself is this: does not this argument—whether correct or incorrect—does it not itself involve a question of the interpretation and application of Article 89 of the Convention? In short, precisely as part of the process of determining whether the argument is correct or not, do you not have to interpret and apply Article 89? Or do you suggest, Mr. Palkhivala, that Article 89 is wholly irrelevant? Yet you yourself gave us your own interpretation of that Article yesterday. This point has been troubling me a good deal, and I would much appreciate hearing your views upon it in due course.

Continuing: there is another way in which the same basic idea can be put —or which involves a different aspect of it. Pakistan alleges that there has been a breach of the Convention by India because, the emergency being over (or so Pakistan contends), India has nonetheless continued to withhold what would normally have been Pakistan's rights under the Convention. This is the essence of the question that Pakistan has submitted to the Council of ICAO.

Now here again it is quite immaterial whether this contention is correct on its merits or not. The relevant point is, so it seems to me, does not an allegation that there has been a breach of a convention necessarily involve at the least a question of the *interpretation* of that convention,—for how else do you decide whether the allegation is correct or not? On page 560, *supra*, you yourself cited "a dispute as to whether there has been a breach" as an example of a dispute which, other things being equal, would be "clearly within the jurisdiction clause". The context was different, but the principle was the same.

Please note that according to the Pakistani point of view the relevance of this issue would not be affected by the correctness or otherwise of India's contention that her action was in any event justified under general principles of international law,—for what Pakistan has submitted to the Council is whether—irrespective of that—the Indian action is justified under the *Convention*; and *that* question, so Pakistan contends, is a question which necessarily involves the interpretation of the Convention, and must therefore be within the competence of the Council under Article 84.

But this is not the end of the matter,—for it is not only Pakistan that alleges a breach of the Convention (by India). It is also India which alleges a breach—a material breach—by Pakistan, as justifying India's attitude and action. Now, if the Council of ICAO does have jurisdiction in this case, it is precisely these allegations and counter-allegations of breaches of the Convention by both Parties which it would have to go into;—and consequently, the question which I ask myself is this: how would it be possible for the Council to consider these matters without interpreting and applying the

relevant provisions of the Convention under which the breaches are said to arise, whatever these may be?—and if this is so, then must not the issues submitted by Pakistan to the Council necessarily involve—to use the language of Article 84 of the Convention—a "disagreement . . . relating to the interpretation or application of this Convention", and hence be within the jurisdiction of the Council? This seems to me to be precisely the argument contained in paragraph 55 of Pakistan's Counter-Memorial (p. 389, *supra*), and you did not appear to me to deal specifically with that paragraph, as such, Mr. Palkhivala, or with the contention set out in the last three sentences of it.

As I said, I do not expect any reply now, but perhaps you will be able to deal with those points later in the course of the oral hearings.

Mr. PALKHIVALA: I am grateful to you, Judge Sir Gerald Fitzmaurice, for enabling me to have the opportunity of clarifying these significant points, and I shall, with the permission of the Court, deal with them next week. In fact, if the President will permit me, I would like to deal with them on Monday before my learned friend begins the address or, if the Court prefers, I shall deal with them not on Monday, but when I come to reply to my learned friend.

Le VICE-PRÉSIDENT: Je voudrais poser la question à M. l'agent du Pakistan pour qu'il nous dise lui-même ce qu'il préfère. Voudra-t-il prendre la parole dès le début de l'audience pour la plaidoirie du Pakistan, ou bien acceptera-t-il que M. Palkhivala puisse répondre à ces questions avant qu'il ne prenne la parole? J'adresse la question à M. l'agent du Pakistan, auquel je laisse évidemment la possibilité de répondre plus tard, s'il le désire.

Mr. KHARAS: Mr. President and the honourable Members of the Court, as fresh evidence has now been submitted by the Indian counsel, we may have to file certain documents[1] to controvert the argument. For this purpose we are trying to obtain the necessary material, which is likely to take some time. We regret, therefore, that we would be unable to commence our argument on Tuesday, 27 June, as previously indicated. With the Court's permission, therefore, we would like to commence our argument on Thursday, 29 June.

Le VICE-PRÉSIDENT: La question que j'ai voulu vous poser est celle-ci: des points ont été soulevés par M. le juge sir Gerald Fitzmaurice. M. le conseil principal de l'Inde a dit qu'il répondrait plus tard, mais la question se pose de savoir si vous accepteriez qu'il réponde avant que vous preniez la parole la semaine prochaine. Voilà la question que je pose. Si vous pouvez y répondre maintenant, nous vous écoutons; sinon, vous pouvez peut-être faire votre réponse en temps voulu mais de façon que M. le conseil de l'Inde sache à quoi s'en tenir.

Mr. KHARAS: May I, with your permission, consult my Chief Counsel for a moment.

We have no objection, Mr. President. At any time that the Indian counsel would like to give the reply he may do so.

Le VICE-PRÉSIDENT: Monsieur l'agent du Pakistan, vous venez de dire que vous seriez obligé de commencer votre plaidoirie jeudi et non pas mardi, parce qu'il y a des recherches à faire. La lettre de M. l'agent de l'Inde a été présentée le 19 de ce mois. Vous y avez répondu immédiatement le 20 en disant que vous étiez en train de recueillir des renseignements sur les docu-

[1] See pp. 743-765, *infra*.

ments dont il s'agit. Donc un certain nombre de jours sont déjà passés depuis que la demande a été formulée et que vous en avez été saisi. La Cour avait exprimé le désir que les plaidoiries qui seraient faites aient toute la clarté mais également toute la brièveté possible et il semble que peut-être, si vous faisiez un effort, vous pourriez commencer les plaidoiries mardi. Si les documents ne sont pas arrivés — il faut évidemment tout prévoir —, vous pourriez répondre à M. l'agent de l'Inde ou à M. le conseil de l'Inde en ce qui concerne ces points lors du secound tour de plaidoiries qui aura probablement lieu. Mais, évidemment, notre vœu est que vous puissiez commencer mardi et que vous fassiez accélérer l'envoi des documents que vous avez déjà demandés depuis un certain temps. Tel est le vœu que j'exprime. J'espère que vous pourrez le réaliser.

Mr. KHARAS: Whatever the Court desires. We would be only too happy to accede to the request and that would mean that we would be prepared to start on Tuesday, 27 June.

Le VICE-PRÉSIDENT: Je vous remercie, Monsieur le représentant du Pakistan. Je voudrais ajouter que vous pouvez évidemment commencer, le cas échéant, avec d'autres points. D'après ce que vous avez dit, votre plaidoirie demandera deux à trois jours. Vous pouvez de votre côté commencer par un certain nombre de points qui ont été déjà exposés par la partie indienne et en arriver, à la fin, si c'est indispensable, aux autres points qui ont été soulevés par les documents que l'Inde a présentés et au sujet desquels vous avez déjà reçu une indication du point de vue de la Cour.

ARGUMENT OF MR. PALKHIVALA (cont.)

CHIEF COUNSEL FOR THE GOVERNMENT OF INDIA

Mr. PALKHIVALA: The submission I was making to the Court is regarding the manner and method employed by the Council in reaching its decision, and in India's submission the manner and method were such as to vitiate the decision. I had finished with the first point which is set out in India's Memorial at page 54, *supra*, paragraph 93, which says that the mistake made by the Council—a mistake which is grave and serious enough to vitiate the decision—was to frame the propositions in the negative, and the submission I had made was that the matter is not one merely of grammar or semantics, the matter is one of the basic approach to the question of jurisdiction. The propositions as framed reflected the approach of the Council to the question of jurisdiction, which approach is directly contrary to the correct approach as laid down by this honourable Court. On that point I would request the Court kindly to turn to India's Memorial at pages 280 and 281, *supra*. The approach of the Council, which proceeds on the footing of assumption of jurisdiction and throws the onus on India of proving that the Council had no jurisdiction, is an approach which is clearly reflected in paragraphs 62, 70 and 71. I will read paragraph 62:

> "*The President:* No, I am sorry, Pakistan has not said anything. Pakistan has, of course, replied to India but the Council was working on the basis that it had jurisdiction. India comes with the preliminary objection: you have no jurisdiction. The Council has to decide on the position of India. If the Council does not accept it, we continue as we were."

The material words are that "the Council was working on the basis that it had jurisdiction".

Paragraph 70 contains the statement of Mr. Clark:

> "It would seem clear, at least to my Delegation, that by adopting this resolution the Council was acting as if it had jurisdiction in this case. If we now have a challenge to that jurisdiction, it would be, we would submit, a question which would have to be upheld by the Council by a statutory majority, because the Council has already, in adopting this resolution, acted as if it had jurisdiction and now we have a challenge to the jurisdiction. So in my view there is no question that the statutory majority required is to uphold the challenge to the jurisdiction rather than to affirm the fact that the Council does have jurisdiction."

And then the President continues in paragraph 71:

> "That is how I saw the issue and in non-juridical language I said that we would continue as we were before the preliminary objection was filed, unless by 14 votes the Council decided otherwise."

Now these paragraphs leave no doubt that the President and, at least some of the other members who spoke, go on the assumption of jurisdiction and want to put the onus on India, contrary to the rule of international law that

the party coming before the tribunal has to give strict proof of consent to the tribunal's jurisdiction.

The second ground for saying that the Council's decision is vitiated by the manner and method employed is the one set out in paragraph 93 of India's Memorial, where the point has been made, and I have dealt with it, that the wrong framing of the question resulted in the Council's deciding in favour of jurisdiction regarding the Complaint, whereas on the same pattern of voting the decision would have been that the Council had no jurisdiction to deal with the Complaint, if the proposition had been put in the affirmative. On that point I have already drawn attention to the voting pattern. What remains to be done is now, regarding this second ground, to draw the Court's attention to the summary of documents and facts, as set out in India's Reply at page 430, *supra*, paragraph 78, which reads:

> "The Applicant submits that, under Article 52 of the Convention, the Council would have to observe the requirement of approval by a majority of the total number of its members for any decision taken, even where, in accordance with Article 66 *(b)* of the Convention, some of the Council Members did not have the right to vote because they had not accepted the Transit Agreement. This position of the Applicant has been clarified in a Memorandum of 10 August 1971 submitted by the Secretary-General of ICAO to the Representatives on the Council. The President of the Council also repeatedly maintained that a statutory majority of 14 votes is necessary for any decision of the Council, since there are 27 members of the Council as it is constituted at present. The Applicant reiterates that the decision of the Council in regard to Pakistan's Complaint was supported by 13 members only, whereas the minimum number required . . . is 14; and hence the decision was invalid in law."

The third point set out in India's Memorial in paragraph 93, clause 3, is the point about time not being given to the members when the members specifically asked for time. In that connection I would like to refer, to complete the record on this point, to a passage in India's Memorial, page 277, *supra*, paragraph 42. This is the voting on the proposal for deferment, for postponement of the case before the decision is reached. The actual motion to defer the decision is in paragraph 29 on page 276, where the representative of Czechoslovakia says: "After the consultation, permit me to propose deferment of the Council's decision until 10 August 1971. Thank you." And the next paragraph reads: "30. *The President:* Is that proposal supported? Supported by the Soviet Union. . . ." So the motion is duly proposed and duly supported, or seconded. In paragraph 42, on page 277, is the voting and I will read this paragraph:

> "42. *The President:* Is there further discussion before we go to the vote? Then I will take a vote on the Czechoslovak proposal that the decision of the Council on this question be deferred until 10 August. Those in favour please raise their hands. Opposed. Eight in favour, no opposition, but of course 14 votes have not been obtained, and so the proposal has failed."

This is the point I am emphasizing—that eight specifically and affirmatively asked for the postponement, not a single State opposed the proposal, and yet the proposal was lost on the ground that is was not carried by a majority of 14. So without a single member raising his voice in support of the position

that the Council must straightaway go to a decision and not let the various governments consider the matter, the matter is put to a vote and decided. This is most extraordinary and I submit it amounts to gross miscarriage of justice.

That finishes the three points which are set out in India's Memorial—the three grounds on which we say that the method and manner vitiated the decision.

The fourth ground is set out in India's Reply at page 430, *supra*, paragraph 79:

> "The decision of the Council was further vitiated by the fact that the propositions put to vote [5] in respect of Pakistan's Application and Complaint were neither introduced nor seconded by any member of the Council as required in Rules 41 and 46 of the 'Rules of Procedure for the Council'."

Footnote 5 is relevant: "The President of the Council who put the propositions to vote is not a member of the Council, and no one seconded the propositions." What the Rules of Procedure of the Council require is that *(a)* a proposal can be moved only by a member of the Council and by no non-member. The President of the Council is a non-member, and it was he who moved the propositions. The Rules of Procedure further require that the proposition must be seconded by a member. No one seconded the proposition in this case. The relevant Rules are set out in India's Reply, at page 455, *supra*,—the relevant Rules are 41 and 46 of the Rules of Procedure of the Council:

> "Rule 41. Any Member of the Council may introduce a motion or amendment thereto, subject to the following rules . . ." [the following rules are not relevant, but the relevant part is what I have just read]: "Any Member of the Council may introduce a motion . . . [no non-Member]."

Rule 46 on the same page says: "With the exception of motions and amendments relative to nominations, no motion or amendment shall be voted on, unless it has been seconded."

Here the facts are clear. No Member moved any of the motions and it was not seconded by anybody. You will find that on page 267, *supra*, of India's Memorial, paragraph 2: "The President then expressed his intention of putting to a vote the following propositions based on the preliminary objection:", and then the voting is given on the next page, and the actual discussion is from pages 278 up to 287. I will not read these ten pages. You will notice from those pages that it was only the President, a non-Member, who moved the resolution, and no one seconded it. Therefore, under the Rules of Procedure for the Council the decision is patently vitiated.

The final point which is apparent from the record of the proceedings is that whereas under the Rules which are binding on the Council, every decision has to be supported by reasons, in this case, the Council gave a decision without any reasons at all. The decision of the Council will be found in Pakistan's Counter-Memorial, page 398, *supra*, because by the time we had prepared our Memorial the decision had not been received by us. The heading is: "Decision of the Council dated 29 July 1971 . . ." The facts are set out in the first paragraph, and the second paragraph states: "On 29 July 1971, the Council decided not to accept the Preliminary Objections aforesaid."

Please turn to India's Memorial to look at the relevant Rules which require reasons to be given for the decision. These are "Rules for the Settlement of Differences", under which Rules these proceedings took place. One Rule which is relevant is Article 5 on page 331, *supra*:

> "*Preliminary Objection and Action Thereon*
>
> (1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection.",

and clause (4) of the same article:

> "(4) 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 . . ."

So it is a decision of the Council on the preliminary issue. Every decision has to be supported by reasons as set out in Article 15 (2) on page 334:

> "The decision of the Council shall be in writing and shall contain:
>
> . . . . . .
>
> (v) the conclusions of the Council together with its reasons for reaching them;".

My submission is, that under the Rules of the Council, a decision rendered without reasons for reaching it is not a decision according to law. It is not a decision according to law, because these Rules are binding Rules and, so to speak, have the same force as the Charter of the Council itself. The Council has to work within the framework of these Rules. The Charter of the Council, of which the Rules are a part, does not permit the Council to come to conclusions without reasons; and here they have come to conclusions without any reasons at all. In fact—the entire Verbatim Record is before the Court—not one single reason is given. Only the propositions were put to the vote by the President, nothing more, and the votes are taken. This is no way to reach a decision. In the eye of the law it is no decision. These are the five distinct and independent grounds on which I submit that the decision of the Council is vitiated in law.

For the convenience of the Court, and in order that the argument which has ranged over a wide field may not have its most significant aspects lost, I have tried to prepare a summary of the submissions orally urged before the Court, and I would like to state this summary on the first two points, namely the point regarding the special régime and the point regarding "the scope of interpretation" or "application". Mr. President, although I had expected to be able to finish today, I think I will need about half an hour next week (perhaps before my learned friend begins, in fairness to him) when I can *(a)* deal with Sir Gerald Fitzmaurice's points, and *(b)* give a brief summary of the argument on the third point (decision vitiated by illegal manner and method) which I have urged today, because it will not be possible for me to finish the summary today. If the Court pleases I can do it on Monday, or on Tuesday before my learned friend begins. I will continue until 1 o'clock, or as long as the Court would like me to, today.

Le VICE-PRÉSIDENT: Monsieur Palkhivala, vous avez fait évidemment de louables efforts afin d'être aussi bref que possible tout en exposant les points que vous aviez à défendre d'une façon très claire. Maintenant, c'est un second effort que je vous demanderai de faire, si vous voulez bien, pour que

vous puissiez terminer votre plaidoirie ce matin. La Cour serait disposée à prolonger l'audience mais évidemment dans une mesure qui serait acceptable. Donc vous avez la parole pour terminer votre plaidoirie ce matin, espérant que vous pouvez le faire dans un laps de temps qui ne sera pas trop long.

Mr. PALKHIVALA: I shall certainly bow to the Court's ruling and I shall finish my argument today, subject only to giving a carefully worded reply to the points made by Sir Gerald Fitzmaurice next week.

SUMMARY OF THE SUBMISSIONS MADE ON BEHALF OF INDIA

The jurisdiction of the ICAO Council is a strictly limited one. It extends only to disagreements "relating to the interpretation or application" of the Convention or the Transit Agreement. Any other types of disputes or disagreements are outside the competence of the Council.

Further, the Council has no jurisdiction whatever in cases of disputes as to bilateral agreements between two States. At the time of voting by the Council members, the Respondent accepted the position that the Council had no jurisdiction to handle any dispute under a special régime or a bilateral agreement.

The Council should have held, on the following two grounds, that the Application and the Complaint were incompetent and not maintainable and that the Council had no jurisdiction to hear them and handle the matters contained therein.

The first ground: the question of overflying was governed only by the special agreement—the special régime—of 1966, regarding which the Council had no jurisdiction.

The question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India has continued to be governed since February 1966, not by the Convention or the Transit Agreement, but by the special régime of 1966, which was brought into operation in the following circumstances:

Before military hostilities broke out between India and Pakistan, in September 1965, three agreements were in operation between the two countries: the Convention, the Transit Agreement and the India-Pakistan Bilateral Air Services Agreement of 1948.

By a notification dated 6 September 1965, which is the law of India, the Government of India put a total prohibition on any Pakistan aircraft overflying any portion of India. The effect of this notification was necessarily to suspend the operation of all the aforesaid three treaties and since then none of the three treaties has been revived at any time between the two countries.

The Tashkent Declaration merely stated that measures would be taken to implement the existing agreements, but normalcy was not restored and most of the measures contemplated by the Tashkent Declaration for restoring goodwill and co-operation were never implemented.

In the letters exchanged between the Prime Minister of India and the President of Pakistan, in February 1966, it is mentioned that the two States were agreeable to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1 August 1965. But the expression "the same basis" did not mean that the overflights would be within the framework of the three treaties. It really meant that all routes and procedures which existed prior to 1 August 1965 would be restored, as is actually stated in the signal from DGCA Pakistan to DGCA India on 9 February 1966. That the agreement was not to restore the three treaties is conclusively proved by the following facts:

Firstly, the bilateral agreement of 1948 was admittedly never revived. Since 1965 the airlines of Pakistan have never operated within India and the airlines of India have never operated within Pakistan; the traffic between the two countries continues to be handled only by third-country airlines until this date.

Secondly, the essence of the Convention and the Transit Agreement is the cumulative and inseverable rights to overfly across each other's territory, and to land in each other's territory for non-traffic purposes. These rights constituted a single, indivisible arrangement or bargain. The aforesaid letters, in February 1966, referred merely to overflights and did not at all deal with the right to land in each other's territory.

Thirdly, the signals exchanged between the two countries in February 1966 show that the resumption of overflights was on a provisional basis and on a basis of reciprocity. The most significant document is India's notification dated 10 February 1966 which amended the aforesaid notification of 6 September 1965 and provided that the prohibition on Pakistan aircraft overflying any portion of India would continue "except with the permission of the Central Government"—that is, the Government of India—"and in accordance with the terms and conditions of such permission".

Pakistan does not dispute that this notification is directly contrary to the Convention and the Transit Agreement under which the freedom of overflying is assured without the permission of the government concerned. The said notification of 10 February 1966 affords unequivocal contemporary evidence as to what the parties really intended as the basis for restoring overflights in February 1966. It was clearly the basis of a special régime which negatived any question of revival of the Convention or the Transit Agreement.

Fourthly, the notification of 10 February 1966 which gave legal shape to the special régime was embodied in the Aeronautical Information Circulars —AICs—issued by India which were circulated to ICAO and given international distribution. There was no protest or objection by Pakistan or any other party against the notification or any circulars embodying the notification which expressly negatived the freedom of overflying under the Convention and the Transit Agreement. The AICs specifically referred to the notifications as dealing with "prohibition of flights—Pakistan".

Fifthly, between 1966 and 1971, Pakistan aircraft overflew India only with the permission of the Indian Government, both on scheduled as well as non-scheduled flights. Further, during that period, Pakistan always asked for special permission to let its aircraft land in India and such permission was, in fact, refused by India in several cases. Likewise, India overflew or landed in Pakistan only with the permission of the Pakistan Government.

On the pleadings before this Court, three questions have been put in issue: did India have the right under international law to suspend the treaties in September 1965? Did India, in fact, suspend the treaties at that time? Did the treaties continue under suspension after February 1966, and did the special régime commence in that month?

The ICAO Council has no jurisdiction to deal with any of the three questions, since the questions involve either the interpretation or application of international law, or relate to the suspension of treaties in the exercise of the right of a sovereign State outside of the treaties, or relate to a bilateral agreement.

As regards the first question, India had the right to suspend the Convention and the Transit Agreement under international law and under well-established State practice and usage. Article 89 of the Convention; like Article 73 of the

Vienna Convention, does not confer any right. It only leaves untouched and undisturbed rights under international law and State practice and usage. The suspension of the treaties by India was an exercise of such rights *dehors* the treaties.

As regards the second question, the factum of suspension of the Convention and the Transit Agreement is conclusively proved by the aforesaid notification of 6 September 1965, read with the notification of 10 February 1966, which expressly prohibited Pakistan aircraft from overflying India, thus necessarily ruling out any question of landings in India, except with the permission of the Indian Government. The said notifications are relied upon by India, not as a justification for non-performance of the Convention and the Transit Agreement, as is wrongly suggested by Pakistan, but as clear contemporary uncontradicted evidence of the special régime which commenced in February 1966.

As regards the third question, the continuation of suspension after February 1966 and the commencement of the special régime in that month are conclusively proved by the facts referred to herein above.

After the hijacking incident, on 4 February 1971, India merely refused to give permission to any Pakistan aircraft to overfly India. This withdrawal of permission was entirely within the competence of India under the special régime and was effected bona fide and with full justification. The dispute raised by Pakistan relating to this withdrawal was a dispute relating to the special régime and was clearly outside the jurisdiction of the ICAO Council.

The second ground: there was no disagreement relating to the "interpretation" or "application" of the Convention or the Transit Agreement.

If it is held that there was no special régime and that the Convention and the Transit Agreement were in operation at the commencement of February 1971, India submits that its action on 4 February 1971 constituted suspension of the two treaties. Pakistan, while not disputing the factum of suspension in February 1971, has contended that: *(a)* India had no right to suspend the treaties and, therefore, the suspension was illegal, ineffective and the treaties continued in operation, and *(b)* a dispute relating to suspension is a dispute relating to interpretation or application of the treaties.

India submits: the first proposition is that a dispute relating to termination or suspension is not a dispute relating to interpretation or application.

Secondly, the first proposition is unassailable in any event when the termination or suspension is effected not under a provision of the treaty but in exercise of the right of a sovereign State under a rule of international law *dehors* the treaty.

Thirdly, there are inherent limitations on the Council's jurisdiction which support and reinforce the argument regarding the scope of the words "interpretation" or "application". Further, the doctrine of inherent limitation provides an independent and separate ground for holding the Council's jurisdiction to be excluded in matters which may seemingly fall within the words "interpretation" or "application".

There is no disagreement between India and Pakistan relating to the interpretation or application of the Convention or the Transit Agreement. The words "interpretation" and "application" postulate and pre-suppose the continued existence and operation of the treaty as between two States. When the treaty is terminated, or suspended in whole or in part, as between two States, any dispute relating to such termination or suspension cannot be referred to the Council, since in such a case no question of interpretation or application can possibly arise, there being no treaty in operation as between

the two States. The words of limitation in the jurisdiction clause—"interpretation" and "application"—are not only express words of limitation, they are expressive and explicit.

The conceptual difference between interpretation and application on the one hand, and suspension and termination on the other, is so well settled that it should be treated as being beyond the pale of controversy. The significant example of this conceptual difference is provided by the Vienna Convention on the Law of Treaties. The heading of Part III of the Vienna Convention is: "Observance, Application and Interpretation of Treaties", and the heading of Part V is: "Invalidity, Termination and Suspension of the Operation of Treaties." These two subject-matters are treated as separate and distinct.

Further, there is a sharp distinction between the "application" of a treaty, and "operation" of a treaty. Suspension or termination affects the operation of the treaty. The Council's jurisdiction is restricted to disputes relating to application and does not embrace disputes relating to operation.

In the present case, the suspension was clearly under a rule of international law which confers the right on a sovereign State to suspend the treaty on ground of material breach by another contracting State. The existence of this right was expressly upheld in the decision of this Court, handed down last year, in the *Namibia* case. This rule of international law is codified in Articles 42 and 60 of the Vienna Convention, as distinct from the right of suspension or termination which may be given by the treaty itself and which is dealt with by Articles 54 and 57 of the Vienna Convention. The *Namibia* case has further laid down that: *(a)* since the aforesaid right under international law has its source outside of the treaty, it is not to be treated as excluded because the treaty is silent on the point; and *(b)* this right under international law can be exercised unilaterally, that is, without the consent of the other party to the treaty.

The inherent limitations on the Council's jurisdiction cry aloud for recognition.

The Council has inherent limitations on its jurisdiction, arising not only from the very words of the Convention and the Transit Agreement conferring the jurisdiction, but inherent in the very composition and character, duties and functions, of the Council. It is most significant that the members of the Council are States and not individuals; and the States are mostly represented by nominees of their Aviation Ministries. It is inconceivable that the contracting States intended the Council, which is not expected to consist of trained lawyers, jurists or judges, to decide questions of international law, to go into the legal rights and wrongs of political confrontation between States, and to pronounce upon the validity of a sovereign State's exercise of its right under international law to terminate or suspend a treaty. The Council performs extremely useful functions in its own area, which is far removed from that of a court of international law. The Council is an administrative body and not a judicial one.

Jurisdiction simply does not exist outside the scope of the consent given by the parties to the treaty. Consequently, jurisdiction ought, at the very least, not to be assumed in cases in which there is room for any serious doubt as to whether consent was given, and whether it covers the dispute. Jurisdiction ought only to be assumed if it is quite clear that the parties have agreed to its exercise in relation to the dispute before the Council. The doctrine of effective interpretation has no relevance to this case. That doctrine, which has been invoked for extending the jurisdiction of this Court to incidental or conse-

quential matters arising from disputes which are clearly within the jurisdiction of this Court, cannot be invoked to establish or confer jurisdiction in respect of a dispute which is outside the jurisdiction clause.

The many years' history of the deliberations of nations which preceded the final draft of the Vienna Convention shows how reluctant the nations are to give compulsory jurisdiction, even to the International Court of Justice. Even under the Vienna Convention this Court has no compulsory jurisdiction in a case where the State has exercised its right under international law to suspend or terminate a treaty. It is inconceivable that nations gave to the administrative body, namely the ICAO Council, that compulsory jurisdiction which they have refused to give even to this Court.

A dispute regarding the validity and effectiveness of, or legal justification for, the suspension of a treaty is a dispute relating to the interpretation or application of a rule of international law outside of the treaty, and consequently the Council has no jurisdiction to deal with the dispute which arises in the present case.

If this Court were to hold that disputes as to termination or suspension by a sovereign State in exercise of its right under a rule of international law, which has its source outside the treaty, can be adjudicated upon under the jurisdiction clause, which deals only with disputes relating to interpretation or application of the treaty, the following consequences would ensue:

Firstly, there are scores of international treaties in existence today which confer such limited jurisdiction on various bodies most of whom are administrative in character. These bodies would all have jurisdiction to deal with complicated questions of international law and the right of suspension, under international law, granted to sovereign States: a jurisdiction which was never in the contemplation of the contracting States.

Secondly, the decision of this Court would unsettle the existing understanding and practice of nations. No decision, no authority, no State practice and no practice or understanding of any body or tribunal, under any similar treaty, supports the proposition of Pakistan that a question relating to the termination or suspension by a sovereign State, under a rule of international law, is a question relating to interpretation or application of the treaty.

Thirdly, hereafter States will be most reluctant to sign any treaty conferring similar jurisdiction on bodies established under the treaty. Thus the cause of international co-operation would be impeded and retarded instead of being promoted.

Fourthly, in order to maintain the rule of law, governments must be of laws and not of men. In order to maintain the rule of international law, international courts must be of men and not of governments. The ICAO Council is composed of governments which involves adjudication by "remote control"—to use a phrase of modern technology.

Fifthly, to ask the Parties in this case to deal with their complex questions for adjudication at the hands of a council which is patently unequipped and unqualified to deal with the subject-matter, would be only to bring the concept and machinery of international adjudication into disrespect.

Summary of the argument on the manner and method employed by the Council in reaching its decision, which has vitiated the decision.

There are five grounds on which the manner and method employed by the Council should be treated as having gone to vitiate the decision.

The first ground is that the Council formulated the propositions which were put to the vote in a negative manner, instead of formulating them in a positive manner. This formulation of the propositions was not a matter

merely of grammar or of semantics, it was a matter which went to the basic approach which was brought to bear on the preliminary objections of India. The formulation of the propositions, as the President of the Council himself indicated, reflected the approach of the Council which was that the presumption is of jurisdiction and it is for India to rebut the presumption. This wrong approach, as reflected in the wrong formulation of the propositions, vitiated the entire judicial process and the final decision reached in the case.

The second ground: the formulation of the proposition in the wrong manner, namely in the negative form, resulted in the proposition regarding jurisdiction to deal with the Complaint being decided in a manner which was exactly the contrary of the manner in which the question would have been decided on the same pattern of voting had the proposition been framed in the positive way. It was only 13 States which declared their support for the proposition that the Council had jurisdiction and those 13 States fall short of the requisite number of 14 which is required to carry any proposition under the Rules binding on the Council. So if the proposition had been framed thus—whether the Council has jurisdiction to deal with the Complaint of Pakistan—the proposition would have been lost.

The third ground: the Council was acting as a body which had to be judicial in its approach and in its decision-making process. There were representatives of the member States who asked for time to consider the matter and who said that they wanted to take part in the decision-making process, they did not want to abstain from the decision-making process. It was decided that no time would be given and the Council should proceed to a decision straight away. The most crucial fact on this aspect of the matter is that when the proposal to postpone the hearing to enable the Governments to consider the arguments urged by India was put to vote, 8 members supported the plea for postponement and not a single member opposed the proposition for postponement; and yet because 14 did not support the proposal for postponement, the proposal was lost.

There was not that functioning of the judicial process which must precede any decision, and the decision therefore was of representatives who did not understand, on their own admission, the pros and cons of the issue. The decision was further vitiated by the fact that other members abstained who would have voted one way or the other if they had time to consider the merits of the preliminary objections and then come to a decision.

The fourth ground of objection is that Rules 41 and 46 of the Rules of Procedure of the Council require that every proposal must be moved by a member of the Council, and, secondly, it must be seconded by another member. In the present case, no member of the Council moved any of the propositions regarding India's preliminary objections. The propositions were moved by the President of the Council who is not a member of the Council, and, further, no one seconded any of the propositions.

Fifth, and finally, the Rules for the Settlement of Differences require that the Council must give reasons for its decision. In the present case the Council has given a decision without any reasons at all, and such a decision is no decision in law.

I am grateful to you, Mr. President, for the patience and courtesy with which I have been heard.

QUESTION BY JUDGE JIMÉNEZ DE ARÉCHAGA

Le VICE-PRÉSIDENT: Je dois vous remercier et je vais donner la parole à M. le juge Jiménez de Aréchaga qui a une question à poser.

Judge JIMÉNEZ DE ARÉCHAGA: I will appreciate it if in your oral reply you examine the question of the jurisdiction of this Court to entertain an appeal against a decision of the ICAO Council with respect to a Complaint submitted under Section 1 of Article II of the Transit Agreement.

Le VICE-PRÉSIDENT: A cette question il est également possible de répondre au début de la séance prochaine si M. l'agent du Pakistan y consent. L'audience est renvoyée à mardi 10 heures du matin pour entendre les réponses du conseil de l'Inde si M. l'agent du Pakistan qui prendra la parole ce jour-là n'y voit pas d'inconvénient.

The Court rose at 1.20 p.m.

SIXTH PUBLIC SITTING (27 VI 72, 10 a.m.)

Present: [See sitting of 19 VI 72.]

ARGUMENT OF MR. PALKHIVALA (cont.)

CHIEF COUNSEL FOR THE GOVERNMENT OF INDIA

Le VICE-PRÉSIDENT faisant fonction de Président: Je souhaite savoir si M. Palkhivala désire prendre tout de suite la parole afin de répondre aux questions qui ont été posées par M. le juge sir Gerald Fitzmaurice et par M. le juge Jiménez de Aréchaga ou bien si M. l'agent du Pakistan a l'intention de présenter tout d'abord les conseils du Pakistan. Peut-être y a-t-il un accord entre vous. Je m'en remets à vous.

Mr. PALKHIVALA: I have taken the permission of the Counsel for Pakistan to give my reply now to the points put to me by Judge Sir Gerald Fitzmaurice and the question put to me by Judge Jiménez de Aréchaga.

May it please the honourable Court. My submissions on the points put to me by Judge Sir Gerald Fitzmaurice on 23 June 1972 are as follows:

I

It is not my contention that questions relating to the interpretation or application of treaties are not questions of international law. Disputes relating to interpretation or application of treaties may involve questions of international law, and the ICAO Council has jurisdiction to deal with international law to the extent that it becomes necessary to do so in interpreting or applying the Convention and the Transit Agreement.

When I said that the inherent limitations on the Council's jurisdiction —which are implicit in its composition, powers and functions and explicit in the delimiting jurisdictional words "interpretation" and "application" of the treaties—made the Council incompetent to deal with questions of international law, I meant, in the universe of discourse, international law, which is the source of titles, powers and rights of sovereign States *dehors* the two treaties (hereinafter referred to in Sections I to IV as "*substantive international law*"). The right of a State to suspend a treaty on the ground of material breach is a rule of such substantive international law. Neither interpretation nor application of the two treaties can involve any question of substantive international law. The ICAO Council is a principal administrative organ of ICAO which is a functional international organization. By contrast, the International Court of Justice is the principal judicial organ of the international community. Unlike the ICAO Council's jurisdiction, this Court's jurisdiction covers not only "the interpretation of a treaty" but embraces "any question of international law" (Art. 36 of the Statute of the Court); and it can apply and deal with all the principles, the entire gamut, of international law. (Art. 38 of the Statute of the Court.)

Thus, while the International Court of Justice has no inherent limitations on its jurisdiction but can take the whole field of international law as its

province, ICAO Council has inherent limitations on its jurisdiction arising from:

(a) its being the chief administrative organ of a functional international organization;
(b) its being composed not of lawyers, judges or jurists, but of governments or States;
(c) its quasi-judicial functions being expressly restricted to adjudicating upon disputes relating only to the interpretation or application of the two treaties;
(d) all substantive international law and rights arising thereunder being excluded from the Council's jurisdiction by express jurisdictional words.

The aforesaid factors form the basis for excluding from the Council's jurisdiction all rules of international law other than those which are relevant for the limited purpose of interpreting or applying the two treaties.

The real test is not whether the applicant asks for the treaties to be applied or interpreted. The Council's jurisdiction cannot depend upon the form or wording of the applicant's claim. The real test is, in adjudicating upon the merits of the dispute, would the Council be required to interpret or apply a rule of substantive international law. The inherent limitations on the Council's jurisdiction preclude such adjudication.

II

It is true that since there is a dispute as to the interpretation of the words "interpretation or application", which occur in the Convention and in the Transit Agreement, the Council would have to construe these two words in the first instance. But the words "interpretation" and "application" are jurisdictional words; the jurisdiction of the Council is restricted to cases covered by those words properly construed. The Council cannot enlarge its own jurisdiction by erroneously construing these two words which delimit its jurisdiction. Such erroneous assumption of jurisdiction would be corrected by this Court on appeal.

The possibility of termination or suspension of a treaty involving a question of the interpretation or application of the very treaty may arise where action is taken under a provision contained in the treaty for termination or suspension. But that possibility cannot arise when the termination or suspension is under substantive international law.

About Article 89 of the Convention the following points may be noted:

(i) In any view of the matter, Article 89 is irrelevant for determining the Council's jurisdiction; and the question of its interpretation or application cannot possibly arise in this case. Either the treaties were suspended in 1971 or they have been under suspension since 1965.

(a) If they were suspended in 1971, Article 89 would have no application since it deals only with war and national emergency, neither of which existed in 1971 when suspension was effected by India on the ground of material breach.

(b) If the treaties have been under suspension since 1965, no question can arise of interpreting or applying Article 89 in 1971 after Pakistan has accepted and acquiesced in the suspension for six years. (See the separate opinion of Vice-President Alfaro in *Temple of Preah Vihear*, Cambodia and Thailand, *Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 39 and 40.)

Even on Pakistan's argument, Article 89 would have relevance only so far as India's Notifications dated 6 September 1965 and 10 February 1966 are concerned. But those Notifications are not even the subject-matter of the dispute raised in Pakistan's Application and Complaint before the Council.

(ii) India's action is not founded on Article 89, either in 1965 or in 1971. The suspension of the treaties was under a rule of substantive international law and the dispute in essence is as to the application of the rule of substantive international law. A Court competent to deal with substantive international law alone can deal with this dispute.

(iii) Even assuming Article 89 is relevant, it is only relevant for considering whether it leaves untouched the rights of the contracting States under substantive international law. If, on its proper construction, it does, the Council cannot claim jurisdiction to deal with the merits of the dispute relating to suspension under substantive international law on the ground that the Council was called upon to interpret Article 89. In other words, Article 89 cannot support the plea of jurisdiction regarding a dispute which centres round a rule of substantive international law. The substance of the matter is the right under substantive international law. Article 89 is alleged by Pakistan to eclipse that right. A forum competent to deal with substantive international law can consider the question whether the right of suspension under that law is eclipsed by Article 89. The Council is incompetent to deal with substantive international law, and it cannot assume *that* jurisdiction under the guise of interpreting or applying Article 89.

Suppose the Council did come to the conclusion that Article 89 merely leaves all rights under substantive international law untouched, where would it get the jurisdiction to deal with the question whether such substantive international law empowered India to suspend the treaties? In other words, if apart from Article 89, the Council has no jurisdiction to deal with the question of substantive international law, how could the absence of jurisdiction be cured by invoking Article 89? The crucial point against the Council exercising jurisdiction would still remain, namely that the operation of the treaties had been suspended, and therefore neither Article 89 nor any other article call for application or interpretation.

(iv) Article 89 being irrelevant it has not been referred to in India's Memorial at all. I place my interpretation of Article 89 before the Court only to show that on its right construction it had no bearing on the question of the Council's jurisdiction.

III

The crux of the matter is that the treaties must be in operation before any question of interpretation or application can arise. Therefore, any breach of the treaty in operation may be adjudicated upon by the Council where it involves a disagreement as to interpretation or application of the treaty. If the operation of a treaty has been suspended or terminated, the jurisdiction of the Council cannot be invoked on the ground that there has been a breach of the treaty. This would be a sound conclusion in any event in cases where the suspension or termination is in the exercise of a right under substantive international law. The jurisdiction is limited to questions of "interpretation" or "application"; and "breach" is not a jurisdictional fact at all where no question of the interpretation or application of the treaty is involved.

The field of adjudication by the Council is co-extensive with the area of the treaties, as distinct from the area of substantive international law; and the jurisdiction of the Council is co-terminous with the operation of the treaties. The competence of the Council ends where the operation of the treaties ends, since the Council has competence only within the framework of the treaties.

Further, there is a well-established distinction in law between the *power* to do a thing and the *right* to do it.

In Civil Law a licensor may have no *right* to revoke a licence but he has the *power* to revoke it, and the exercise of the power, without the right to do so, still makes the revocation effective and terminates the licence, even though the revocation may be wrongful and may give rise to a claim for damages.

In substantive international law a sovereign State has the *power* to suspend a treaty. The exercise of the power *effectively* puts an end to the operation of the treaty, leaving nothing in the treaty to interpret or apply. The Council is not the forum to decide whether the power has been rightly exercised, i.e., whether India had the right to suspend the treaties in the circumstances of the case.

In short, whereas the Council has the jurisdiction to interpret and apply the treaties so long as they are in operation in order to decide whether there has been a breach or not, it has no jurisdiction to deal with the termination or suspension of the operation of the treaties under a rule of substantive international law. This absence of jurisdiction is not cured by the Applicant alleging that the termination or suspension is in breach of the treaties.

As Judge Sir Gerald Fitzmaurice has put it, irrespective of the correctness or otherwise of India's contention that her action was justified under general principles of international law, "what Pakistan has submitted to the Council is whether . . . the Indian action is justified under the *Convention*; and *that question, so Pakistan contends, is a question which necessarily involves the* interpretation of the Convention, and must therefore be within the competence of the Council under Article 84".

My answer to the above point is that under Article 84 there must be disagreement between two contracting States before the Council can assume jurisdiction. In the present case there is no disagreement at all between India and Pakistan on the question as to whether India's action—suspension—is *justified under the Convention. In fact India and Pakistan are agreed that the* suspension is not justified under the Convention. India has never asserted that the suspension was justified under that treaty. The whole case of India throughout has been that the suspension was justified only under a rule of substantive international law. Thus non-justification of suspension under the Convention has never been the subject-matter of any disagreement, and the question of interpreting the Convention on such a point does not arise.

IV

India's Memorial and Reply make it clear that the material breaches by Pakistan are referred to only to indicate the circumstances in which India suspended the treaties, and that they have no relevance to the question of the Council's jurisdiction.

The allegations and counter-allegations of breaches made by India and Pakistan against each other have no strict relevance to the question of the Council's jurisdiction. They would have real relevance only if a question arises before an appropriate forum as to whether the suspension of the treaties by India was justified on a proper application of the rule of substantive

international law. If India's allegations against Pakistan are correct, India's action in suspending the treaties would be justified under substantive international law. If Pakistan's allegations against India are correct, India may be regarded as having committed a breach of the rule of substantive international law dealing with the right of suspension. In either event, no question of interpretation or application of the treaties would be involved, since India's action has effectively put an end to the operation of the treaties vis-à-vis Pakistan.

The last three sentences of paragraph 55 in Pakistan's Counter-Memorial run as follows:

> "In the instant case, India is claiming that the Convention and the Transit Agreement have been suspended or terminated by it. On the other hand, Pakistan maintains that the Convention and the Transit Agreement continue to be operative between the Parties and India cannot unilaterally suspend or terminate the treaties. The assertion of India and the denial by Pakistan is certainly a disagreement and raises the question of application or non-application or interpretation of the provisions of these agreements."

The first sentence contains a half-truth; in order to make it complete, it needs the addition of the words, "as a sovereign State under a rule of international law *dehors* the treaties".

The second sentence raises the question whether the treaties continued to be operative, and that, in the context of India's claim, *ex hypothesi* raises the question of the ambit of the power of a sovereign State under substantive international law to suspend a treaty.

The third sentence confuses the question of applying and interpreting a rule of substantive international law with the question of applying and interpreting the treaties. It overlooks that the rival contentions make the issue really centre round the application and interpretation of the relevant rule of substantive international law on which alone the action of India has been entirely founded.

The following is the submission of India on the question raised by Judge Jiménez de Aréchaga regarding the jurisdiction of this Court to entertain an appeal against the decision of the ICAO Council on the Complaint filed by Pakistan under Section 1 of Article II of the Transit Agreement.

A complaint may be made under Section 1 of Article II regarding "action by another contracting State under this Agreement". Section 2 of Article II provides that in the event of disagreement between two or more contracting States relating to the interpretation or application of the Transit Agreement, the provisions of Chapter XVIII of the Convention shall be applicable. Chapter XVIII of the Convention contains Article 84 which deals with adjudication by the Council and the right of appeal from the decision of the Council to this Court.

In the present case there was a disagreement between India and Pakistan regarding the interpretation of Section 1 of Article II of the Transit Agreement. The Council accepted Pakistan's interpretation of the words "action under this Agreement" and held that suspension of the Agreement, which is the very antithesis of the concept of "action under this Agreement" must nevertheless be treated as covered by those words. Since that decision is on a point of disagreement as to the correct interpretation of the phrase "action under this Agreement" an appeal lies to this Court against that decision under Section 2 of Article II of the Transit Agreement read with Article 84

of the Chicago Convention. Since there is a dispute as to the interpretation of the words "action under this Agreement" the Council would have to construe those words in the first instance, but those words are jurisdictional words. The jurisdiction of the Council to entertain complaints is restricted to cases covered by those words properly construed. The Council cannot enlarge its own jurisdiction to entertain complaints by erroneously construing the words "action under this Agreement". Such erroneous assumption of jurisdiction would have to be corrected by this Court on appeal. The submission made above is supported by the Note presented by the Secretary-General of ICAO to the Council at its seventy-fourth session in 1971, which is annexed as Annex C to India's Reply. The material portion of that Note is paragraph 5.3 at page 450, *supra*, of India's Reply. In that Note the Secretary-General of ICAO has clearly accepted the position that an appeal does lie to this Council from a decision of the Council on a complaint. It may be further noted that in this case the Complaint and the Application under Sections 1 and 2 of Article II of the Transit Agreement were filed together and were heard together. India's preliminary objections were based on two main grounds, which were common to both the Application and the Complaint.

The subject-matter of the Complaint was exactly the same as the subject-matter of the Application and the reliefs asked for in the two proceedings were also almost identical. The additional preliminary objection in the case of the Complaint was on the ground that suspension of the Transit Agreement could not possibly be construed as "action under this Agreement" and therefore the Council had no jurisdiction to entertain the Complaint.

After the Application and the Complaint were heard together a single decision dated 30 July 1971 was given by the Council, which applied both to the Application and the Complaint. Even in this Court only one appeal has been filed against a single decision of the Council covering both the Application and the Complaint. In the circumstances the Application and the Complaint virtually constitute one proceeding in substance. India submits that apart from the fact that even if Pakistan had filed the Complaint alone, this Court would have had jurisdiction to entertain an appeal, the present case is an *a fortiori* case for coming to the same conclusion.

STATEMENT OF MR. KHARAS

AGENT FOR THE GOVERNMENT OF PAKISTAN

Mr. KHARAS: Mr. President and honourable Members of the Court, I consider it both an honour and a privilege to appear as Agent for the Government of Pakistan before this distinguished Court. As a Member of the United Nations, Pakistan has always striven to maintain, strengthen and abide by the principles of the Charter. Pakistan has, therefore, always attached great value and importance to the decisions of the United Nations and the various bodies of that Organization, including this honourable Court, which is the principal judicial organ of the United Nations.

For the presentation of our case the Government of Pakistan has deputed Mr. Yahya Bakhtiar, Senior Advocate of the Supreme Court of Pakistan, and Attorney-General for Pakistan, as the Chief Counsel. He will be assisted by Mr. Zahid Said, the Deputy Legal Adviser of the Ministry for Foreign Affairs of the Government of Pakistan and by Mr. K. M. H. Darabu, Legal Adviser of the Department of Civil Aviation, Government of Pakistan.

Mr. President, I request that you may kindly call upon Mr. Yahya Bakhtiar to present Pakistan's case.

ARGUMENT OF MR. BAKHTIAR

CHIEF COUNSEL FOR THE GOVERNMENT OF PAKISTAN

Mr. BAKHTIAR: Mr. President and honourable Members of the Court, it is indeed a matter of pride for me to appear before this honourable Court to represent my country in this case.

Mr. President, I have had the honour and pleasure of watching and listening to the proceedings of this Court for the last week. I was really impressed by the courtesy shown by the Judges to counsel and the freedom which is allowed to a counsel to present his case. It was indeed perhaps due to that latitude, which you so kindly give to the counsels, that the Chief Counsel of India, who very ably and very eloquently represented India's case, had the courage to advise you not to decide the case according to your understanding of international law, but to keep the principles of expediency in mind, to think of the consequences if you decide the case—I do not know whether I have correctly interpreted his viewpoint, but he stated that if you do not decide as he interprets the law, as he suggests, the consequences will be very grave, that nations will not enter into treaties—bilateral and multilateral treaties.

I have been thinking why nations enter into treaties. We all know that India, or for that matter Pakistan, did not enter into these treaties to do a favour to mankind. It was for their own personal benefit and I do not think that when a nation enters into treaties it surrenders its sovereignty or its sovereign powers. I think that by entering into treaties we extend the scope of our sovereignty, the horizon of our sovereign power. Without these treaties India could not fly all over the world, land wherever they wanted; they would remain isolated, and the same thing would happen to Pakistan.

Mr. President, I do not want to take long over my introductory remarks. I shall try to be as brief as possible and to quote as few books as possible.

In the first place, Mr. President, the nature of the dispute, as given in the Indian Memorial is that on 3 March 1971 Pakistan presented an Application and a Complaint to the ICAO Council under Articles 2 and 21 respectively of the Council's Rules for the Settlement of Differences as approved by it on 4 April 1957. It is stated that in the Application and the Complaint, Pakistan claimed that under the Convention on International Civil Aviation, 1944, and the International Air Services Transit Agreement, 1944, Pakistani aircraft had the right to overfly India and to make stops in India for non-traffic purposes. The same substantial reliefs were claimed in both the Application and the Complaint.

India's case was, according to India's Memorial, that the Convention and the Transit Agreement were suspended, not terminated, as is stated therein, as between India and Pakistan, wholly, or in any event in relation to all flights and landings for non-traffic purposes. India raised preliminary objections and submitted, *inter alia*, that since the Council's jurisdiction was limited to disputes relating to interpretation or application of the two treaties, it had no jurisdiction since the disagreement between India and Pakistan related to suspension of the treaties.

On 29 July 1971 the Council rejected the preliminary objection both with regard to the Application and the Complaint. One appeal had been filed, I

would respectfully submit, against two decisions of the Council. The distinguished Chief Counsel for India, while discussing the question of manner and method by which the Council arrived at decisions, stated that in one case there was a majority, in another case there were only 13 votes: two distinct decisions were given, but only one appeal had been filed, and this is for the Court to determine—which appeal is competent or whether an appeal can be filed against two decisions.

The appeal of the Applicant questions the validity of orders both with regard to their material conclusions as well as with regard to the manner in which the conclusions were arrived at. India's stand has been that India and Pakistan both were parties to the Convention and the Transit Agreement until 6 September 1965 and that India and Pakistan entered into a bilateral Air Services Agreement in 1948. The latter is a treaty between the two countries and dealt with the right to overfly each other's territories and to make stops in each other's territory for traffic and non-traffic purposes. The Convention, the Transit Agreement and the Bilateral Agreement of 1948 between the two countries were suspended during the armed conflict of 1965 and were never revived, and after the Tashkent Declaration, signed on 10 January 1966, overflights were resumed under a Special Agreement of 1966. This Special Agreement of 1966 was given a legal form in the Government of India's notification of 10 February 1966 read with their previous notification of 6 September 1965. Under the Special Agreement and the notification, it was obligatory for the Pakistani aircraft, before overflying Indian territory, to take prior permission from the Government of India. The Special Agreement of 1966 was provisional and it was on the basis of reciprocity which entitled each State to revoke its permission at any time. On 4 February 1971 India withdrew the permission for Pakistani aircraft to overfly India because of the conduct of Pakistan in relation to the hijacking of an Indian aircraft. The alternative stand of the Government of India was that if it was assumed that the Convention and the Transit Agreement were in operation at the time of suspension of overflights of Pakistan aircraft, that is, on 4 February 1971, India had the right to suspend the Convention and the treaties, as against Pakistan, for material breach thereof in exercise of her right, as a sovereign State, under a rule of international law which is well established as a result of the latest pronouncement of this honourable Court. The material breach being Pakistan's conduct in relation to the hijacking incident, which constituted a threat to safety and security of international civil air transport and amounted to material breach of obligations of a contracting State under the Convention and the Transit Agreement.

India's preliminary objection before the ICAO Council was that it had no jurisdiction to handle the matter presented by Pakistan. Firstly, that the jurisdiction of the ICAO Council was limited to disagreements relating to the interpretation or application of the Convention and Transit Agreement, and did not extend to any disputes or disagreements relating to termination or suspension of the Convention or Transit Agreement by one State vis-à-vis another State. This ground was further elaborated before this honourable Court and here it was added that the Council had inherent limitations with regard to its jurisdiction. It was contended that the jurisdiction of the Council should be limited because of the incompetency of those who constituted the Council, in understanding international law.

Mr. President, I want to reserve my right to give a full reply to what my learned friend stated, but I will now make some observations. It was stated that the jurisdiction of the ICAO Council is confined to interpreting

international law to some extent—that extent is that it will not interpret substantive law. What is left by this procedure—superficial interpretations? I do not know. I will deal with this after I have read his statement in detail. In the first instance, it was stated that because the Council lacked understanding of international law, and was a purely administrative body, it is not fit to decide judicial matters. The next point was that there existed a Special Agreement between India and Pakistan which governs overflights and as the Special Agreement was inconsistent with the Convention and the Transit Agreement, the Council had no jurisdiction to handle any dispute arising from this Agreement. Then it was suggested that even if the treaties were in force as between India and Pakistan, India suspended them because of "material breach by Pakistan". Before the Council, the words "material breach" were not mentioned. It was argued that any dispute regarding termination or suspension of a treaty for material breach was outside the jurisdiction of the Council, which is only empowered to decide disagreements regarding the interpretation or application of treaties. It was also suggested in relation to the Complaint of Pakistan that even if the Transit Agreement was in force between India and Pakistan, the act of suspension of this treaty was *dehors* the treaty and not an action under the treaty as envisaged in Section 1, Article II, of the Transit Agreement. Therefore Pakistan's Complaint was not maintainable. However, in the appeal, the jurisdiction of this honourable Court is being invoked under Articles 36 and 37 of the Statute of the Court, and under Article 84 of the Convention and Section 2, Article II, of the Transit Agreement.

Pakistan's stand has been sufficiently explained, in its written pleadings, on all the points postulated by the learned Chief Counsel of India. They are reaffirmed and reiterated, therefore I will not go on repeating or reading again the pleadings.

Some of the arguments which were advanced in this court may call for some comment, but before I deal with some of them, I will seek permission from this honourable Court to make my submissions on the question of jurisdiction of this Court with regard to the present appeal of India. I think the learned Chief Counsel for India was very diplomatic in not replying to the objections which we have raised in our written pleadings as to the jurisdiction of this Court.

If I may be permitted, I will go, in detail, into the question of jurisdiction.

Mr. President, the first article on which this appeal is founded is Article 84 of the Convention. This has been reproduced in India's Memorial at page 27, *supra*. The Article appears in Chapter XVIII of the Convention under the title "Disputes and Defaults" and runs as follows:

> "*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 [I particularly draw your attention to the word 'settled'], 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 the notification of the decision of the Council." (Emphasis added.)

What I humbly want to submit is that the intention clearly was that appeal shall lie to this Court from the final order of the Council and not from interim orders or orders made disposing of any objection with regard to the jurisdiction of the Council. They are not actually called "decisions" but the word "decision" could be used in one article or the other.

Here, Mr. President and honourable Members of the Court, you will be pleased to see that only one decision is mentioned—"the decision". It does not say "any decision" of the Council. The Article read with Article 18 of the Rules for the Settlement of Differences provides for only one appeal against a decision of the Council which is given not under Article 5 but under Article 15 of the Rules. The word "settlement" ought to mean that when the matter could not be finally settled by negotiations, then it would be decided by the Council.

Before negotiations, supposing a question about proof as regard to the jurisdiction is raised, and a decision is given. This decision will not come within Article 84, because it says: first, there should be settlement by negotiations, failing which the Council will decide. The whole thing points to the final decision, and the only decision. The scheme of the Convention is such that a quick decision has to be taken on preliminary objections and no appeal lies therefrom. If appeal is allowed from every order, or any order of the Council —and we have seen the proceedings, there have been 10 to 12 orders—deferment not agreed to: go to the International Court of Justice; adjournment not allowed: go to the International Court of Justice—that will defeat the very purpose of the Convention.

One country may suffer a lot—its planes may be stopped, as in the case of Pakistan. Every month the Pakistan national airline is suffering a loss of two million dollars. It is very easy to go on raising objections, getting them decided and appeals addressed to this honourable Court. This is not the scheme of the Convention, the Transit Agreement and the Rules for the Settlement of Differences. The idea was that only one appeal will lie from the final decision, and not from interim orders, whether they are called decisions or not. And similarly, Article 18 of the Council Rules also indicates the narrow scope of appeals, and that also shows that appeal does not lie against every order.

On this point I am further strengthened by the arguments of my learned friend, the distinguished Chief Counsel of India. He stated that no reasons had been given by the Council in disposing of the preliminary objection with regard to jurisdiction, and I say yes: there was no need for it. You give reason when an appeal is provided for. If an appeal is not provided for, you are not bound to give reasons. Secondly, that decision is taken under Article 5 of the Rules for the Settlement of Differences. An appeal lies against a decision taken under Article 15 of those Rules. On page 334, *supra*, of the Memorial, one finds that only a decision given under Article 15 could be appealed against to this honourable Court. Article 15 reads as follows:

"*Decision*

(1) After hearing arguments, or after consideration of the report of the Committee, as the case may be, the Council shall render its decision [again in singular, *a* decision].

(2) The decision of the Council shall be in writing and shall contain:

(i) the date on which it is delivered;
(ii) a list of the Members of the Council participating;
(iii) the names of the parties and their agents;
(iv) a summary of the proceedings;
(v) the conclusions of the Council together with its reasons for reaching them;
(vi) its decision, if any, in regard to costs;
(vii) a statement of the voting in Council showing whether the conclusions were unanimous or by a majority vote, and if by a majority, giving the number of Members of the Council who voted in favour of the conclusions and the number of those who voted against or abstained.

(3) Any Member of the Council who voted against the majority opinion may have its views recorded in the form of a dissenting opinion which shall be attached to the decision of Council.

(4) The decision of the Council shall be rendered at a meeting of the Council called for that purpose which shall be held as soon as practicable after the close of the proceedings.

(5) No Member of the Council shall vote in the consideration by the Council of any dispute to which it is a party."

Now I will respectfully draw your attention to Article 5, which is on page 331 of the Memorial:

"*Preliminary Objection and Action Thereon*

(1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection.

(2) Such preliminary objections shall be filed in a special pleading at the latest before the expiry of the time-limit set for the delivery of the counter-memorial.

(3) Upon a preliminary objection being filed the proceedings on the merits shall be suspended and, with respect to the time-limit fixed under Article 3 (1) *(c)*, time shall cease to run from the moment the preliminary objection is filed until the objection is decided by the Council.

(4) If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question [emphasis again on *the* question] as a preliminary issue before any further steps are taken under these Rules."

This Article, that is Article 5, is a code by itself; it provides the entire procedure for disposing of preliminary objections regarding jurisdiction and a decision has to be taken under this. As I was respectfully submitting, the decision against which the Government of India has appealed to this honourable Court was taken under Article 5 and not Article 15, and that does not provide for any appeal.

Apart from our submission that the exercise of jurisdiction, other than assumption of jurisdiction by the ICAO Council, does not constitute the decision contemplated by Article 84, there is another reason for our contention that appeal against action of the Council in assuming jurisdiction in such a dispute was not provided for by the authors of the Convention. The reason is the universally established rule of international law that every international tribunal has the jurisdiction to determine its own jurisdiction. Some authorities could be cited on it. Very briefly, I will refer on the subject to

Rosenne's book *The Law and Practice of the International Court*, Volume 1, page 438, 1963 edition, wherein he says:

> "The fundamental principle of international law governing these aspects is that an international tribunal is master of its own jurisdiction. It is today an established principle of international law that every international tribunal has jurisdiction to determine its own jurisdiction . . . such determination acquiring the force of *res judicata*."

This honourable Court's decision in the *Nottebohm* case, is reported *I.C.J. Reports 1953*. The main decision is on page 111, but I shall refer to the relevant portion on page 119. This decision of the International Court of Justice rejected the contention of Guatemala that consequent upon the expiry of the declaration accepting the compulsory jurisdiction of the Court, after the filing of the Application, the Court could no longer enjoy jurisdiction to determine its own jurisdiction. The Court held that:

> "Since the *Alabama* case, it has generally been recognised, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction."

The Court will kindly mark the words "and has the power to interpret for this purpose the instruments which govern that jurisdiction".

"This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation and is, in the present case, the principal judicial organ of the United Nations."

I think that could apply to the ICAO Council what would also apply to this honourable Court. "Consequently the Court has no hesitation to adjudicate on the question of its own jurisdiction in cases in which a dispute has arisen. In this respect, the dispute went beyond the interpretation and application of paragraph 2 of Article 36."

The next provision on which India founds jurisdiction of this honourable Court is Article II of the Transit Agreement—this also appears on page 27, *supra*, of India's Memorial. India relies on this provision to found its appeal against the decision of the Council rejecting India's preliminary objection to the jurisdiction of the Council with regard to Pakistan's Complaint. Pakistan had filed the Complaint under Section 1 of Article II, which does not provide for appeal against any findings or recommendations of the Council. Would the Court please turn to Section 1:

> "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."

A Complaint was filed by Pakistan with the ICAO Council under this provision. No appeal is provided for against any of the findings or recommendations of the Council made under Section 1, Article II, of the Transit Agreement. Section 2 reads:

"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 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."

Section 2 deals with interpretation and application if there is disagreement, while Section 1 deals with the Complaint—Section 2 is not at all applicable to Pakistan's Complaint. Section 2, by reference, adopts and incorporates the provisions of Article 84 of the Convention, and all my submissions with regard to appeal against the decision of the Council under Article 84 will apply to the Complaint also, which I have just submitted. That is merely a ruling of the Council on preliminary objections, and no appeal lies, nor is any appeal provided for. And also my submission that the Council had jurisdiction to determine the question of its own jurisdiction, will apply.

Now, Mr. President, I will go to the next provision, under which India founds jurisdiction of this Court. It is Article 36 of this honourable Court's Statute, given on page 28, *supra*, of India's Memorial:

"1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

This is Section 1 of Article 36 and India has relied on this section. No case has been referred by the parties to the Court, and it is also not India's case that the appeal pertained to any matters specially provided for in the Charter of the United Nations. This Section relates to the original jurisdiction of the Court. India, however, in her Appeal relied on the last part of Section 1 which confers jurisdiction on the Court in matters ". . . provided for . . . in treaties and conventions in force". I respectfully draw the attention of the Court to paragraph 37 of India's Reply, page 419, *supra*:

"While stating that Article 36 of the Statute of the Court is irrelevant to this case, the Respondent contends that 'Article 36 (1) relates to the original jurisdiction of the Court and comprises "all cases which the parties refer to it". The Parties have not referred any case to the Court in its original jurisdiction under this provision'. The Respondent has chosen to ignore the latter part of paragraph 1 of Article 36 of the Statute which brings within the jurisdiction of the Court

'all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'."

Now what is important from my point of view is the next sentence: "The Chicago Convention and the Transit Agreement are 'treaties and Conventions in force'."

I do not know what his argument will be. That they are in force, though not between India and Pakistan? But when I am brought in appeal before this honourable Court, they have to be in force as between us. If they are not in force between India and Pakistan then no appeal lies. If it is in force, then the Council had jurisdiction—that makes all the difference. He is trying to blow hot and cold in the same breath. So, Mr. President, on this point, this admission of India may kindly be noted, because I will have to come back to it when I make my submission on other points.

May I also respectfully draw the Court's attention to various averments made in India's pleadings, because having noted down this—when they say that the Transit Agreement and the Convention are treaties in force, in India's case before the Council and this honourable Court, in the pleadings they say again and again that these treaties and conventions are *not* in force. They are suspended, they are terminated. So I respectfully draw the attention of the Court in India's Memorial, page 26, *supra*, to the following. Here India states her own case—of course this is repeated everywhere:

"Subject of the Dispute

3. In the Application and the Complaint Pakistan claimed that under the Convention on International Civil Aviation, 1944 ('the Convention'), and the International Air Services Transit Agreement, 1944 ('the Transit Agreement'), Pakistan aircraft had the right to overfly India and to make stops in India for non-traffic purposes. The same substantial reliefs were claimed in both the Application and the Complaint. India's case was that the Convention and the Transit Agreement were suspended, as between India and Pakistan, wholly or in any event in relation to overflights and landings for non-traffic purposes . . ."

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. President, when I was dealing with the appeal, I mentioned Article 15 and Article 5 of the Council's Rules for the Settlement of Differences, I should also have drawn the attention of the honourable Court on that point to Article 18 of those Rules. If I may be permitted, I shall read from the Indian Memorial, page 335, *supra*, Article 18 of the Council's Rules:

"*Notification and Appeal*

(1) The decision of the Council shall be notified forthwith to all parties concerned and shall be published. A copy of the decision shall also be communicated to all States previously notified under Article 3 (1) *(b)*.

(2) Decisions rendered on cases submitted under Article 1 (1) *(a)* and *(b)* are subject to appeal pursuant to Article 84 of the Convention. Any such appeal shall be notified to the Council through the Secretary General within sixty days of receipt of notification of the decision of the Council."

Now, the Court will be pleased to note that only decisions under Article 1 (1) *(a)* and *(b)* are appealable—not all decisions.

Now, if you will kindly refer to page 330, *supra*, which gives the sort of decision which could be appealed against:

"Scope of Rules

Article 1

(1) The Rules of Parts I and III shall govern the settlement of the following disagreements between Contracting States which may be referred to the Council:

(a) Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation (hereinafter called 'the Convention') and its Annexes (Articles 84 to 88 of the Convention);

(b) Any disagreement between two or more Contracting States relating to the interpretation or application of the International Air Services Transit Agreement and of the International Air Transport Agreement (hereinafter respectively called 'Transit Agreement' and 'Transport Agreement') (Article II, Section 2 of the Transit Agreement; Article IV, Section 3 of the Transport Agreement)."

It becomes so obvious, in the first instance, that appeal against complaint has not been provided for because the next section to deal with complaint says:

"(2) The rules of Parts II and III shall govern the consideration of any complaint regarding an action taken by a State party to the Transit Agreement and under that Agreement, which another State party to the same Agreement deems to cause injustice or hardship to it (Article II, Section 1), or regarding a similar action under the Transport Agreement (Article IV, Section 2)."

So, the Court will see that, in the first place, only those decisions, which are made under Application, not Complaint, are appealable.

Secondly, it clearly says that only appeals on merit, with regard to decisions on the question of interpretation and application, are appealable. On the question of jurisdiction, if any decision is given, and even if we call it a decision and not an order, that is not appealable. Clearly such appeals have been ruled out, no provision has been made for them.

Now, Mr. President, with your permission I will go back to my submissions on Article 36, paragraph 1, of this Court's Statute. I was submitting that whereas India, before this honourable Court, had emphasized that the Transit Agreement and the Convention are in force and therefore they are entitled to come to this Court in appeal, they have taken a different stand before the Council, saying that these treaties are not in force, therefore, the Council had no jurisdiction. On that, I have just read out India's case from their own Memorial, and, before that, I read their Reply where they said that these treaties are in force.

This point is not controverted by India and I need not draw the Court's attention to other passages in their pleadings, wherein it has been emphasized again and again that the Convention and the Transit Agreement were suspended.

I may just refer to the pages—on page 30, *supra*, paragraph 12, of the Indian Memorial again it is stated that they were suspended; on page 33, paragraph 24, of the Indian Memorial it is again stated that they were not revived; on page 36 of the Indian Memorial, paragraph 29, it is stated that they were suspended with immediate effect, and, on the same page, paragraph 30, it is said that is was assumed that they were in force, but which they do not

admit; again, on page 37, paragraph 32 of the Indian Memorial, it is stated that they remained suspended as between India and Pakistan; on page 46, paragraph 62, it is again mentioned that these agreements were suspended.

To sum up, on page 51, paragraph 79, of the Indian Memorial, it is stated that the scheme of the aforesaid Article is simple and clear, so long as the Convention and the Transit Agreement continued to be in operation as between the two States any disagreement as to the construction of the Article or the application of the Article to the existing state of fact can be referred to the Council. Likewise, any action taken under the Transit Agreement can be referred to the Council, but, if a State has terminated or suspended the Convention or the Transit Agreement vis-à-vis another State, there cannot possibly be any question of interpretation or application of the treaty or of action under the treaty, and the Council is not the forum for deciding such disputes.

Before this Court, the only reply to Pakistan's objection on the point was as given on page 424, *supra*, paragraph 57, of India's Reply. "The Applicant denies the Respondent's contention that, even by lodging an appeal under Article 84 of the Convention or Article II of the Transit Agreement, and Article 37 of the Statute of the Court, India has acquiesced in the continued operation of the treaties"—again, they have gone back on it. "The present appeal arises from the decision of the Council and the challenge by means of an appeal to the jurisdiction of the Council to hear Pakistan's Application and Complaint and cannot be construed as acquiescence on the part of India in the continued operation of the said treaties as between India and Pakistan." So, India denies the continued operation of treaties when they come to challenge the jurisdiction of the Council but assert that the treaties were in force in order to found the jurisdiction of this honourable Court.

I will not take more time of the honourable Court on Article 36, Section 1, of the Statute.

Now, I go to Section 2, on which India has also relied in their appeal before this Court.

That section states:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning . . ." [and then details are given] (India's Memorial, p. 28, *supra*).

The Court may be pleased to note that in the *Yearbook 1970-1971* of this honourable Court it is indicated at page 65 that Pakistan had filed its declaration without any comparable reservation in respect of all legal issues and Pakistan's declaration states:

> "The Government of Pakistan recognizes as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes after 24 June 1948, arising, concerning . . . [and they give the details]."

Whereas, Pakistan submitted to the decision of this Court without any reservation concerning disputes with Commonwealth Members, India, in its declaration of 14 September 1959, which also appears in the same *Yearbook*, made reservations about submitting to the jurisdiction of this Court in the following words: ". . . disputes with the government of any State which, on

the date of this declaration, is Member of the Commonwealth of Nations." (*Ibid.*, p. 54.)

It states "on the date of this declaration, is a Member of the Commonwealth". Pakistan was a member of the Commonwealth until recently and on the date when India filed the declaration. In all disputes between India and Pakistan, Pakistan has always wanted to submit legal questions to the Court; and there were many disputes. India put in this reservation merely to stop Pakistan from coming to this honourable Court. India had no dispute with Canada, New Zealand or any other country of the Commonwealth, only Pakistan, and they did not want any dispute to be brought before this Court. This reservation was accordingly, specifically put in for that purpose.

Now I ask respectfully: supposing the Council had made a decision against me and I had come in appeal, and India had turned around and said "No, there is a reservation as far as this article is concerned, you are out. We are not subject to the jurisdiction of the Court." If this stand could be taken by India, I think Pakistan has a right to rely on the reservation of India and submit that this honourable Court has no jurisdiction under this section of the Statute to hear their pleas.

Now on that point, Mr. President, we have already cited some cases. The *Certain Norwegian Loans* case, *I.C.J. Reports 1957*, pages 23 and 24 and also the *Anglo-Iranian Oil Co.* case, *I.C.J. Reports 1952*, page 103, support me in the contention that a party can rely on the reservation made by the opposite party in matters of jurisdiction.

Now, lastly, the provision on which India has relied to found the jurisdiction of this Court is Article 37, which reads:

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice" (Indian Memorial, p. 28, *supra*).

Now this by itself does not give any right of appeal, but it has to be read with Article 84 which provides for appeal to the Permanent Court of International Justice. In my submission if appeals are not allowed under Article 84, then this Article cannot help India at all. Apart from that, may I submit that Article 37, being a transitional provision of the Statute, speaks of "as between the parties to the present Statute". The Statute was promulgated before Pakistan came into existence. Pakistan came into being on 14 August 1947 and the Statute was signed in San Francisco on 26 June 1945, so, Pakistan was not an original party to the Statute. This also ousts the jurisdiction of the Court.

Some other Judgments—the *Aerial Incident* case could be cited in support of my contention, which is in *I.C.J. Reports 1959* at pages 139, 140 and 142 and, similarly, the case between Cambodia and Thailand, *I.C.J. Reports 1961*, pages 27-32, where the *Aerial Incident* case was reconsidered by this honourable Court and that decision is also applicable. The decision and logic conveyed in these cases which deal with Article 36, paragraph 5, apply with equal force to the provisions of Article 37 also. In the case of States becoming parties to the Statute after the demise of the Permanent Court, no transformation under the provision could take place, simply because there was no transitory situation to be dealt with under Article 37 of the Statute.

Then there is also the case in *I.C.J. Reports 1952* where it is stated, in the individual opinion of Judge Levi Carneiro, at page 54: ". . . Even when the

organ which was formerly competent has been abolished, its powers cannot be regarded as automatically transferred to the new organ which replaces it."

This is also cited in the case of Ethiopia *v.* South Africa and Liberia *v.* South Africa in the *I.C.J. Reports 1962* at pages 602-603.

Mr. President, having dealt with this question, I will now make brief submissions on the oral arguments presented to this honourable Court by the learned Chief Counsel of India.

His first ground in his pleadings was that the Convention and the Transit Agreement were suspended and not in force as between India and Pakistan and, therefore, there was no disagreement with regard to interpretation and application of these treaties; overflying after 10 February 1966 was governed by a Special Agreement of 1966. Therefore, the ICAO Council had no jurisdiction under the Special Agreement to settle the dispute.

My submissions on this point are: that India has not produced a single document which clearly shows that the Transit Agreement and the Convention were suspended. The Chief Counsel of India has produced several documents[1] before the honourable Court from which he wants the Court to infer that they were suspended. No document clearly says that the Convention and the Transit Agreement were suspended, no notification says they were suspended, no order that the Government of India has produced says that they were terminated or suspended. He merely wants the Court to infer from certain documents, by putting his own interpretation on those documents, that they were suspended.

India has also, in my humble opinion, confused the right of a party under the Convention and the Transit Agreement with the exercise of that right. When a treaty or a convention is in force, then the party has a right under that treaty or convention. That right may or may not be exercised—it is a different matter. If I do not exercise my rights or the right is not exercisable at a particular moment, that will not mean that it is not in force. Now, let us take an example. Pakistani planes fly, because they cannot fly over India at the moment, around Ceylon over the Maldive Islands. Suppose that the Maldive Islands and Pakistan are both parties to the Convention; the Maldive Islands have no airline, their planes would not therefore fly over Pakistan, but Pakistani planes would fly over the Maldive Islands. Is there any difference between this situation, because the Maldive planes are not flying over Pakistan, and the situation between Pakistan and India. The right is there, but the right is not exercised.

I respectfully draw the Court's attention to this difference which they have tried to confuse: the exercise of the right and the right itself. When you suspend the operation of a treaty you do not terminate it. To suspend the operation of a treaty is one thing, suspending a treaty is another—there is no such notion or concept in international law or any other law that you suspend something and call it terminated. Suspension is different from termination. Suspension, whenever it is used, is used in the sense that its operation is suspended but the treaty remains in force. When it is terminated the treaty no longer remains in force.

I will be making my submission on this point in due course but for the present I would respectfully ask the Court to consider why India should terminate or suspend, as they call it, the treaty under a rule of international law *dehors* the Treaty.

No good reason, no cause has been shown by India, for acting under a rule

[1] See pp. 719-742, *infra*.

of general international law outside the Treaty. Article 89 of the Convention gave India the freedom of action that they wanted, all that they wanted to achieve is given under that Article. I would respectfully draw the Court's attention to that Article again.

Article 89 deals with war and emergency conditions:

> "In case of war, the provisions of this Convention shall not affect the freedom of action of any other contracting State 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" (Indian Memorial, p. 323, *supra*).

It is not denied by India that because of war these were suspended. They say that during the hostilities of 1965, when Pakistan attacked India, this step was taken. It is also not denied by India that they declared a national emergency.

Now the point is, Mr. President, do nations act in accordance with law if they can help it or not? Sovereign power is exercised only when the law creates an obstacle, or when a treaty creates an obstacle, and then, in their own interests, they say well, we will do away with the treaty, we will terminate it. But if the law itself gives the power and the freedom for all that you want to do, India's freedom of action to carry out war efforts and defence plans could be carried out fully, under Article 89. This Article gave them all the freedom of action, so, in the first place, how can it be presumed that this action of India was under international law and not under Article 89.

This has been admitted by the learned Chief Counsel for India—that Article 89 gives them all the freedom. I draw the attention of the Court to the verbatim transcript (pp. 572-573, *supra*), where the Chief Counsel of India states:

> "In short, Article 89 permits all the freedoms available to a State under State practice and international law, and one of those rights is the right of suspension. Therefore, I submit, India has clearly the right *dehors* treaties to suspend them and Pakistan's contention that India had no such right—and its right was only under Article 89—is misconceived."

Having considered, and having admitted, that what they wanted to achieve under international law could also be achieved under Article 89, has he given us any good reason why, when Article 89 was there, he should resort to the rule of international law?

I humbly submit that nations do not act in a perverse manner. They want to have the goodwill of the world and if they can achieve something in accordance with a treaty in their own international commitment, they will not resort to any rule of international law outside the Treaty or give expression to their sovereign powers for a purpose which they can achieve under the agreement. Again, Mr. President, you will kindly note that, while referring to the rules of international law, the learned Chief Counsel dealt with at length the various conditions imposed on the exercise of that right under international law. He referred to various provisions of the Vienna Convention, saying that India is not a party to it, but that it is international law codified and he had the right to rely on that. Those conditions, if I remember correctly, related to material breach and to the question of good faith and also notice to the other State of several months—to rely or to take a step under international law those conditions had to be fulfilled, whereas, under Article 89, there were no such conditions, there were no such restrictions. It merely said

that if there is war you can declare a national emergency, your freedom of action is guaranteed to you—all that you have to do is inform the fact of the emergency to the ICAO Council. Even the question of good faith is not involved, so why should India, with this weapon in her hand, resort to a rule of international law "*dehors* the Treaty" and say that we suspended it under that?

I respectfully ask the Court: does Article 89 not permit India to suspend operation of the treaty? That suspension would be in accordance with Article 89 itself, but it would be suspension of the operation of a part of the treaty —the treaty would remain in force.

My next submission on this point is that there is a general rule of law, which is also a rule of international law, that if the law requires that a thing is to be done in a particular manner, then that thing can be done only in that manner or not at all. The treaty is binding on India, it gives India freedom, allows it to exercise its freedom. India says: No, I will not exercise that freedom in accordance with the law but in another manner. I have the choice, I am the sovereign Power, I can choose one remedy or the other. The law says "no"—if the law itself has provided that it should be done in a particular manner, then it shall be done in that manner or not at all.

If I may, I will draw the Court's attention to a judgment of the Privy Council of England (*A.I.R.*, 1936, p. 253) where an observation appears:

> "The rule which applies in a different and not less well-recognized rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." (*Ibid.*, p. 257.)

India is a party to a Convention—she is committed to the Convention. The Convention gives much the same freedom and the same remedy which India thinks she has under general international law. If the rule says you must perform your duty and exercise your right in the manner provided by the Convention, it has no scope and no choice to go outside the Convention and rely on a rule of general international law.

Again India has emphasized that because of this war and this attack on India by Pakistan they suspended the treaty. Oppenheim, in his book *International Law*, Volume II, Seventh Edition, on page 305 says: "Multilateral treaties are not referred to in the Peace Treaties, and it must be assumed that their continued existence was not deemed to be affected by the outbreak of war." This is also a rule of international law which we have to keep in mind.

Now without going into the merits of the case, but to illustrate a principle of international law, I will also draw your kind attention to what the learned counsel said before the Court: India says that Pakistan attacked her in 1965. Pakistan says that India attacked, but that that is immaterial for the consideration of the Court. I say that it is material. Whatever India or Pakistan say, the Court may not accept, but what the newspapers reported and what was the true position has now been mentioned in Lord McNair's book, *The Legal Effects of War*, 1966, Fourth Edition. In the Appendix, Lord McNair states: "The fighting on both sides of the cease-fire line in Kashmir was not accompanied by any declaration of war, nor was there any such declaration by India when India attacked into Pakistan territory on 6 September [1965]." Now having attacked into my territory on 6 September 1965, this honourable Court will also take into consideration, under a rule of international law, that an aggressor cannot be allowed to take advantage of his own act of aggression. If you attack me and at the same time say you have the right, under international law, to suspend treaties and take advantage of getting

out of treaty obligations, that surely will not be permitted by international law. This rule is also mentioned by Oppenheim in *International Law*, Volume II, at page 219:

> "It has been rightly suggested, with regard to the abrogation of treaties as the result of war, that it may be improper for courts to recognise, in a way benefiting the aggressor State, the automatic termination of treaties in consequence of a war launched by him."

So, I submit—all these problems, all these conditions to fulfil—India will not resort to the rule of international law to suspend the operation of the treaty, it will resort to, as a sensible person and as a reasonable man does to the law itself, which gives the same freedom, that is Article 89, and declares an emergency under this Article, to archieve the freedom wanted. When they could achieve the same purpose under this Article, they would not, I respectfully submit, resort to international law.

I submit, Mr. President, that not only has India not produced a single document which clearly states that the said treaties were suspended, but the learned Counsel for India wanted the Court to infer from these two notifications and some of the documents that this was an act of suspension under a general rule of international law.

I will respectfully ask the honourable Court to read the notifications of 6 September, in which all overflights of Pakistan planes are banned. In the next they say that, with the permission of the Government of India, they will be allowed. Then all those signals which they referred to, which they call "permission was sought", "prior permission was sought", "*ad hoc* permission was sought", or "express permission was sought",—different terms have been used by India in different places—are they not all consistent with an action under Article 89? If India has declared an emergency under Article 89, and if India, after declaring this emergency, notified the ICAO Council that they have declared such an emergency, and all these actions are taken, and these notifications are issued, will they not be consistent with Article 89? Will this amount to termination or suspension of the treaty under international law? My humble submission is that India had taken action under Article 89, it achieved its freedom under this Article, and when it issued this notification banning overflights of Pakistani planes, it was consistent and justified under Article 89; I could not complain. I had no justification to say that India has stopped performing her obligations because this is my treaty with India —that in case of war or national emergency, they can impose restrictions on my overflights and landings. So both the notifications, all the signals, all the documents which have been produced before the pleadings came to a close, and after that, Mr. President, each one of them could be consistent with Article 89.

The only thing that could be stated by the learned Counsel for India is that there was a condition, under Article 89 also, that the ICAO Council should be notified of the fact of emergency or action taken. Such a document showing that India had in fact taken this step, under Article 89, and had in fact notified the ICAO Council of a national emergency does exist on the record of the Government of India but perhaps the learned Counsel forgot to produce it before the Court. So I will respectfully draw the Court's attention to the letter of the Government of India dated 9 September 1965 which the ICAO Council received. This letter states:

> "I have the honour to refer to the Government of India's cable of 28 November 1962 [in 1962 there were disputes with China, war with

China—at that time India had declared a national emergency and had informed the ICAO Council, so this is reference to that] and letter No. 21A/7 62 dated November 29th, 1962 whereby intimation was given that the President of the Republic of India has declared by proclamation under the Indian constitution that a grave emergency exists whereby the security of India is threatened and that, under these circumstances, the Government of India may not find it possible to comply with any or all provisions of the Convention on International Civil Aviation and the International Air Services Transit Agreement.

2. Despite this notification, as you are aware, the Government of India has consistently adhered to its obligations under the Convention on International Civil Aviation and the International Air Services Transit Agreement. However, the recent aggression on India by the armed forces of Pakistan places on the Government of India heavy burdens with regard to their own security and the safety of aircraft through the country's airspace. Therefore, the present danger coupled with the continued threat of extended aggression on Indian territory by the People's Republic of China again entails the possibility that the Government of India may not be able to comply with any or all provisions of the Convention on International Civil Aviation and the International Air Services Transit Agreement. It will be the continued endeavour of the Government of India to adhere as far as possible to the provisions of the Convention on International Civil Aviation and International Air Services Transit Agreement, but to the extent they are unable to do so it will be directly as a result of the emergency referred to above, created by the continued threat of aggression by the People's Republic of China, and now extended and heightened by the Pakistan aggression."

Mr. President, this letter was circulated by the ICAO Council to all the contracting States and was sent to Pakistan also. I have the original with me and this letter from the International Civil Aviation Organization, Montreal says:

"L1/8-65/192—Subject: Article 89 of the Chicago Convention. Action required: None. For information. 17 September.

I have the honour to inform you that a letter dated 9 September 1965 of which a copy is attached was received from the Government of India. The cable referred to in the first paragraph was notified to you in my communication E1/8-62/232 of 20 December 1962. The statement made in the letter with reference to the Convention on International Civil Aviation presumably relates to the provision of Article 89 thereof. As regards the International Air Services Transit Agreement there is no provision corresponding to Article 89 of the Chicago Convention. The President of the Council acting under this delegation of authority conferred on him when the Council is not in session decided to transmit a copy of the letter from India to all contracting States. The Government of India has been requested that upon termination of the emergency, notice of the fact be sent to the Council."

With these documents before this honourable Court, can it still be said that India acted under a rule of international law by suspending or terminating the treaty when they had in fact taken action under Article 89, and informed the ICAO Council accordingly as required under Article 89. The ICAO

Council treated that action under Article 89, and sent a copy of their covering letter to India, and they never protested or objected that, as far as Pakistan is concerned, they had suspended or terminated the treaties. As far as the rest of the world is concerned, it is Article 89; we are treated on the same footing. First, action was taken against Pakistan because Pakistan had, according to India, attacked her. Pakistani planes were banned—no other action was taken on 6 September against planes of any other country—and, thinking that Pakistan might rush to the ICAO Council, this letter was sent.

Mr. President, I hope I have been able to show that India had suspended the operation of some provisions of the treaty under Article 89. The question of suspension of treaties under international law will not, I think, arise and I do not have to go into all those arguments. Sufficient details were given in our pleadings, Rejoinder and Counter-Memorial, therefore I will not waste the time of the Court by going into any further discussion on the point of whether the treaty was suspended or not. The facts are before the Court and it would be very difficult for the Court, faced with all the overwhelming evidence that this action India had taken under Article 89, and all those documents they have produced, could be interpreted as if they were documents under Article 89, consistent with Article 89, where there are notifications, regulations, and signals.

To support my argument further, I would also like to draw the Court's attention to the Tashkent Declaration—India has relied on it, and Pakistan also. Article VI of the Tashkent Declaration of 10 January 1966 appears on page 353, *supra*, of India's Memorial:

> "The Prime Minister of India and the President of Pakistan have agreed to consider measures towards the restoration of economic and trade relations, communications, as well as cultural exchanges between India and Pakistan, and to take measures to implement the existing agreements between India and Pakistan."

The Court will please note that reference is made to "existing agreements between India and Pakistan". This Declaration was signed on 10 January 1966. India's claim is that, in any case on 6 September 1965 at the outbreak of hostilities, this was suspended by India and they draw attention to the notification of 6 September 1965 when Pakistan overflights were banned. Yet here, four months later in Tashkent, India signed the Declaration where reference is made to communications treaties as "existing treaties", and they will implement those. This is also one of the grounds which I would respectfully draw your attention to in order to show that these treaties were not terminated or suspended in the sense that India says, but they were in existence, and steps were taken to implement them. Otherwise, the person who drafted this Declaration would have said that the suspended treaty shall be revived—not that the existing Agreements shall be implemented.

Then, the Court may be pleased to turn to page 354, *supra*, of India's Memorial—letters from the two heads of Governments, first, the letter from the Prime Minister of India, and then the letter from the President of Pakistan:

> "Our Foreign Minister and Defence Minister, on their return from Tashkent, informed us of your desire for the early resumption of overflights of Pakistani and Indian aircraft across each other's territory. We had thought that this matter would be settled at a meeting between the Ministers of both countries within a few days along with other problems

connected with the restoration of communications. As it appears that such a meeting might take some time, we would be agreeable to an immediate resumption of over-flights across each other's territory on the same basis as that prior to 1st August 1965."

"Resumption", and "on the same basis". India admits that these treaties were in existence, and the Prime Minister suggests that these be implemented ". . . on the same basis as that prior to 1 August 1965". So this is not a special agreement that India refers to—it means an implementation of the Tashkent Declaration, the existing treaties.

Similarly, the President of Pakistan in his letter to the Prime Minister of India says:

"Your High Commissioner, Mr. Kewal Singh, has delivered your message to me in Larkana this afternoon. I am glad to learn of your constructive decision in a matter which is of high benefit to India and Pakistan. I am also issuing immediate instructions to our Civil and Military authorities to permit the resumption of air flights of Indian and Pakistani planes across each other's territories on the same basis as that prior to the First of August 1965."

Both have agreed; now if it had been a special agreement, then the terms would have been drafted, and under law, it would have to be registered with the United Nations. There was no special agreement at all—this was a step taken by them only to implement the existing treaties, which existed before the war and after the war. The Tashkent Declaration says that they were existing treaties.

They have been at pains to say that "the same basis" referred to a matter of routes or other details but that was not so, "the same basis" referred to the treaty itself, the routes did not remain the same. Whenever we wanted to go on a particular route there were objections before we were allowed. I do not want to go into detail, but I could show, you see, that they had nothing to do with routes—for routes you had to get permission anyway under Article 68 of the Convention. That is a different provision altogether. If they say they have this permission under international law, that, I will humbly submit, is wrong.

With regard to the designation of routes and airports, see page 318, *supra*, of the Memorial. Article 68 of the Convention reads as follows:

"Each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use."

So Pakistan International Airlines had to submit their schedules and their routes, they had to examine them, ask their permission, and they say yes, approved, not approved, go by another route; we say we go by Delhi, as we want to stop there from Lahore. They say no, go from Karachi, don't stop at Delhi. So this has been going on since 1968, it is nothing to do with "the same basis"—"the same basis" only referred to the Convention and the treaty itself.

Another point or argument in support of my submission that the treaties existed and were in force all along is an arbitration[1] which was referred to Professor Pierre A. Lalive of Geneva University. This is a case involving the

[1] See pp. 748-765, *infra*.

Indian Company Dalmia Cement Co. Ltd., which filed a claim against the National Bank of Pakistan. The parties agreed and it was referred to, as I mentioned, Professor Lalive of Geneva University, who was the sole arbitrator. The arbitrator went into this question—it was after the wars of 1965 and 1967—and both the parties brought all sorts of evidence before the arbitrator and in his Award, paragraphs 48 and 49, it states:

Mr. PALKHIVALA: I do not know what the procedure is, but can my learned friend refer to new documents, of which I have no notice—which are not on the record?

Mr. BAKHTIAR: This is a judgment of an international tribunal. You filed hundreds of documents, and I did not object. If you object, I leave it to the Court—if, after I have read it, the Court thinks that this is something which may not be on the record, I have no objection, they can rule it out. But this deals with a specific issue, whether the treaties were in existence or not and is an opinion just like an opinion of any other author could be. Professor Lalive is an expert on international law and he says the second factor which remains to be examined is the continued existence of treaties between the two countries.

Then, in paragraph 49 . . .

Le VICE-PRÉSIDENT: M. Bakhtiar, voulez-vous nous indiquer dans quelles conditions le texte dont vous faites état a été publié, pour éviter toute confusion ou tout désaccord?

Mr. BAKHTIAR: It is just an international commercial award; it is a precedent of a tribunal or an arbitrator to which I am referring. I do not exactly know whether it has been published, but I have got the original copy, photostat copy signed by Professor Lalive himself, before me, and it must be in the library of this Court. But we have got other copies prepared.

Le VICE-PRÉSIDENT: Dans ces conditions, M. Bakhtiar, peut-être serait-il utile ou judicieux de renvoyer la discussion sur la base de ce document jusqu'à ce que la question ait été éclaircie, soit qu'une publication ait eu lieu, soit que la Partie adverse accepte que ce document soit discuté après qu'il lui ait été communiqué.

Mr. BAKHTIAR: As it may please the Court; I will not refer to it any more.

Mr. President, I was just submitting a little while ago that India has referred to many documents—some documents were produced before the close of pleadings, some after that—and I submitted that if you will kindly consider them in the light of my submissions that India had, in fact, taken action under Article 89, had accordingly informed the ICAO Council, then all their actions being consistent with the Convention and Article 89 thereof will not show that the treaty was suspended or terminated but will be action under the treaty itself, under the Convention itself, justified by the Convention itself, so long as the emergency lasted. Our grievance was that after the emergency, India had taken this step to ban our planes in 1971.

I have already drawn the attention of the Court to Article 68. In the Reply, paragraph 18, on page 409, *supra*, certain instances are given:

> "Case 1. Year 1966
>
> On 7 June 1966, the D.G.C.A., Pakistan, sent to the D.G.C.A., India, a signal requesting permission for landing at Delhi (Palam) International Airport for non-traffic purposes by Pakistan aircraft AP-AMC which

was to fly from Karachi to Dacca. On 8 June 1966, the D.G.C.A., Pakistan, was informed that the request was under consideration.

Subsequently, the D.G.C.A., Pakistan, was informed that permission for landing at Delhi could not be granted."

Now, in my humble opinion, this case of 7 June 1966 clearly comes, not only under India's action taken under Article 89, but also under Article 68; this request was for the plane to go on a particular route, to land at Delhi, Palam airport—perhaps from a security point of view—and they did not want it—it is an afternoon flight. To say that because this happened therefore the treaty was not in existence, the treaty had been suspended, in my humble opinion, is not a correct stand to be taken.

Under Article 68, other instances would also be covered. They have given instances of June 1966, September 1966, June 1967, February 1968 and March 1969. Now, all of them are covered either under Article 68 or Article 89. And India *could* do it and Pakistan could not object to these restrictions. They do not show that the treaty or the Convention was suspended.

Again, India referred to the regulation of 1968 with great emphasis. When in our pleading it was stated that because of that regulation for the plane's clearance we had asked for permission, India turned round and said the regulation had come into force in 1968—these permissions relate to 1966 and 1967. That may be true. The regulation came into force after the emergency ended. Before that, Article 89, and the emergency under that was there; those cases were caused by the emergency—the case of 1969 is covered by the regulation. Why did India promulgate that regulation? To stop. And why the defence clearance? That was also because the emergency in Pakistan had not ended in 1969. It ended toward the beginning of 1969, but because India knew that Pakistan was continuing the emergency in 1968, and that they had to put an end to the emergency, they brought in the Defence Clearance Regulation. So that point, in my humble opinion, is not valid.

Actually, what is important to meet the Indian argument on the basis of their contention is to refer to the first signals which are given in Pakistan's Rejoinder. They appear on page 495, *supra*, Annexure V. It simply says: "Request confirm no objection to the resumption of normal operations by PIAC to and across India." This is sent from Pakistan. India replies: "Ref yr Sig 3-65 AT-1 *writing to you*".

The text is:

"Our Government has agreed to restoration of overflights of scheduled services between India and Pakistan. We would suggest meeting soonest possible to determine details including earliest date of resumption and routes over which overflying could be resumed. We would be grateful for immediate reply regarding date and venue."

Now, if the basis meant routes and procedure for permission, then the Director-Generals would not be asking each other "let's meet and determine the procedure and the routes".

Again,

"We have received instructions from our government that the government of India has agreed on reciprocal basis to the resumption of overflights over each others territory by our respective airlines in accordance with the procedure existing before 1 August 1965. Accordingly we propose to resume overflights of Indian territory as per following schedule."

Then the entire schedule is given of the Pakistan International Airline planes which were to overfly.

Then there is a further signal:

> "We agree to resumption of overflights by scheduled services effective 10 February 1966. We note the details of overflights of scheduled services that PIAC propose to resume."

This is clear, Mr. President, normal permission is asked, information is conveyed and this information is noted. They had no objection to the schedules which were submitted, though under Article 68 they could have objected. But to say that we asked for permission in each and every case and prior permission was required is not gathered from the record, although on this point the learned counsel changed his position by saying that they had *ad hoc* permission, and sometimes saying that permission was taken for six months, but the record only showed, all that we know is, that after the Tashkent declaration they were resumed. Schedules were sent, they were approved, there were no objections, and in non-scheduled cases, we know, the route had to be approved, though the transcripts show that sometimes they accepted the route, sometimes they did not.

But, all the same, if any permission was necessary, that could be covered under Article 89, would be consistent with the provisions of Article 89 or any action taken under Article 89. It could not be said that because permission was sought, therefore this was an action under international law or that the treaty was suspended.

I have already made my submissions on the areas of this regulation, Mr. President, and my next point will be to deal with the ground of material breach. If you will permit me I will make my submission on that tomorrow.

The Court rose at 1 p.m.

SEVENTH PUBLIC SITTING (28 VI 72, 10 a.m.)

Present: [See sitting of 19 VI 72.]

Mr. BAKHTIAR: Mr. President and Members of the honourable Court: yesterday I concluded my submissions on the main point advanced by India, that the treaties were not in existence, that they were suspended and that action taken by India was under the rule of international law and not under Article 89.

I referred, Mr. President, to a document which India sent to the ICAO Council, who took action on it, treating it as action under Article 89. Now since there was an objection as to whether it was published or not, I respectfully draw your attention to the *United Nations Juridical Yearbook 1965*, where on page 282 reference is made to this communication of the Government of India to the ICAO Council—a similar communication was also sent by the Government of Pakistan—and it says:

> "Assembly, fifteenth session, Minutes of the plenary meetings . . .
>
> (6) *Communications from the Governments of India and Pakistan regarding compliance with the Convention on International Civil Aviation and with the International Air Services Transit Agreement*
>
> [On 30 September 1965, the Council noted the communications received from the Governments of India and Pakistan indicating that an emergency had been declared and that they might therefore be unable to comply with any or all of the provisions of the Convention and the International Air Services Transit Agreement. Copies of these communications were sent to all Contracting States and the Governments of India and Pakistan were requested to notify the Council when the emergency terminated.]"

The Court will be pleased to note how the ICAO Council treated this. They called it "Communications from the Governments of India and Pakistan regarding compliance with the Convention on International Civil Aviation and with the International Air Services Transit Agreement". They had complied with it—they cannot say that we did not comply with it and we took action under a general rule of international law.

Again, Mr. President, as the Council had asked them to communicate when the emergency was revoked, India duly informed and notified the Council that it had revoked the emergency. This appears on page 259 of the *United Nations Yearbook 1968*.

Now, if you will permit me, I will proceed with my submissions on the second ground: the ground of material breach, which, actually, the learned Chief Counsel for India argued first, and very elaborately, for almost three days. This ground was that even if treaties were in existence, they were suspended because Pakistan was guilty of a material breach. This action of India was under a rule of international law and the suspension was thus *dehors* the treaties. On this, as I submitted, we put forward many arguments. My answer, I am afraid, is going to be brief on this point also.

My averments in the Counter-Memorial and Rejoinder are reiterated —and I humbly submit that those objections raised on this ground have not

been answered satisfactorily by the learned counsel—apart from that, if my submissions, which I made yesterday, on Article 89 are accepted by this honourable Court, then the question of going into the point of material breach does not arise. I will even go a step further and submit that if the Court is of the view that action was taken under Article 89, or if the Court is left with a doubt in its mind whether it was taken under Article 89 or under international law—even then the jurisdiction of the Council will be attracted—then this Court will not go into the question.

Therefore I submit that, whether the action of India—with all those notifications, all those documents they relied on—is consistent with Article 89—and they say no, they are under international law, some rule, real or imaginary—this by itself, Mr. President, will attract the jurisdiction of the ICAO Council to interpret Article 89 and apply it.

I will respectfully draw the attention of the Court to Mr. Palkhivala's speech, made on 22 June 1972 (p. 577, *supra*). He says:

> "Against this background, you will kindly consider the question of the continued suspension. Here again, Pakistan asserts that there was no suspension, or continuation of suspension, after 1965. I assert to the contrary. Let the Court look at the basic facts and then decide for itself, because a mere assertion by one Party would help nobody—we could keep on asserting until the end of time what our particular stand is."

Now this I accept—I also say the same thing. It was action under Article 89 and not suspension under international law. Now will this not attract the jurisdiction of the ICAO Council—that is the point. Will they not interpret Article 89 to see whether it permits action of the kind India has taken and whether the action comes within the scope of the application of Article 89? As I submitted before, in my argument yesterday, they (India) are not permitted, they have no choice, when they are committed under an international treaty they cannot go outside the treaty, *dehors* the treaty, and take action. So this point will also be considered by the Counsel—the jurisdiction is directly attracted.

Now this, Mr. President, was my first submission, but you may kindly note that, before the ICAO Council, this objection was not specifically taken by India in their pleadings. This is an afterthought. Vaguely this ground was taken in the submissions before the Council by India, but India's written pleadings did not mention that this action had been taken because of a material breach on the part of Pakistan which entitled India, under some rule of international law, to suspend the treaty or its operation.

I respectfully draw the attention of the Court to page 77, *supra*, of India's Memorial—this is their case before the Council:

> "The High Commission of India in Pakistan presents its compliments to the Ministry of Foreign Affairs of the Government of Pakistan and has the honour to state as follows: [this is the first letter that they wrote after the hijacking]
>
> The encouragement and support given by the Government of Pakistan to the two persons who hijacked the Indian Airlines Fokker Friendship aircraft to Lahore on January 30, 1971 is in violation of all norms of international behaviour and of International Law. The attitude of the Pakistan authorities in this entire matter has been extremely objectionable from the time the aircraft was hijacked to Lahore. No attempt was made to condemn the incident and, in fact, by agreeing to grant political

asylum to these two criminals, the Government of Pakistan have made clear their direct involvement in it.

The encouragement and support given to the two persons by the Government of Pakistan directly led to the blowing up of the aircraft on the 2nd February. The Pakistan authorities neither made any effort to restrain them from blowing up the aircraft, nor did they, according to reports, make even an attempt to save the aircraft despite the fact that under the established international law and practice it was the responsibility of Pakistan to return immediately the hijacked aircraft with the baggage, cargo and mail.

The High Commission of India strongly protests against the action of the Government of Pakistan in extending assistance and support to, and even encouraging, these two criminals and for their failure to protect the aircraft and the cargo, baggage and mail.

The Government of India claim damages [this is important—what they claimed, what their protest was] in respect of the destroyed aircraft as well as for the cargo, baggage and mail and the loss resulting from the detention of the aircraft in Pakistan.

The Government of India hold the Government of Pakistan wholly responsible for any consequences that may follow from this deplorable incident and hope that the Government of Pakistan will refrain in future from assisting, inciting or encouraging such incidents in the interest of peace and harmony between the two countries.

The High Commission of India avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Government of Pakistan the assurances of its highest consideration."

Mr. President, you have kindly noted that India only wanted to be compensated and warned Pakistan that in future they should not do such a thing. There was no mention, no warning, no hint in this letter that they proposed to take action in the nature of suspending or terminating the treaty. The breach is not mentioned, nor have they mentioned that because of Pakistan's objectionable behaviour they were going to suspend the treaties.

Then, after this note, Mr. President, I would like to draw your attention to the Indian Memorial again, page 36, *supra*, paragraph 29. I am saying this because I do not want to go into the incident of hijacking. I am not going into the merits of the case, but on the point of material breach, my learned friend was appealing to convince the Court that his good faith is to be presumed. Good faith is an essential part of this doctrine. Whether it is to be presumed, whether it is just a mere allegation that I am guilty of this incident or not guilty, or my conduct was such that it invited this action on the part of India, it is sufficient if I repudiate it. After that the question will be open again to the Court to consider so that on that point alone, to show that the question of good faith is relevant, I am respectfully drawing your attention to paragraph 29 of the Indian Memorial, on page 36:

"The Applicant was greatly perturbed over the hijacking of their aircraft in Pakistan and the unwillingness of the Respondent to come to the assistance of the innocent passengers and crew, to restore the possession of the aircraft to its commander, to allow the passengers and the crew to continue their journey promptly to India, to investigate into the act of hijacking and to take the hijackers into custody, and to save the aircraft, cargo, mail and property from being destroyed at the hands of the hijackers. The plane was blown up on the evening of 2 February 1971.

> The Applicant addressed a note to the Respondent on 3 February 1971. The Applicant strongly protested against the conduct of the Respondent in relation to the hijacking incident, claimed damages for the destroyed aircraft, cargo, baggage and mail, and for the loss resulting from the detention of the aircraft in Pakistan. [Now kindly mark the words after this.] When no positive and satisfactory response was made by the Respondent, the Applicant decided on 4 February 1971 'to suspend, with immediate effect, the overflight of all Pakistani aircraft, civil or military, over the territory of India'; and sent a note to this effect to the Respondent."

Mr. President, India's case is that they claimed damages—the plane was blown up, they protested, they sent a Note claiming damages on 3 February 1971, but "when no positive and satisfactory response was made by the Respondent"—within how many days, we expect not even a few hours, this Note was received by the Government of Pakistan on 3 February 1971 in the evening—this is our case, though they have no evidence that we received it on that day at all—on 3 February in the evening we received the Note and on 4 February in the morning they take action suspending all our flights. Taking all this, they submit that our action, our conduct, was not in accordance with the norms of international behaviour. How is their action, we ask, consistent with the norms of international behaviour or civilized decencies? You do not even give a State a few hours when you claim damages to pay you, straightaway you suspend the planes, straightaway you put an end to their flights. This was the case before the Council. They claimed damages, they gave a warning, they protested, we were willing to meet them, to negotiate with them, to compensate them, if we were guilty or not, so on this point of good faith—you may kindly note that, when they rely on international law, they have to show good faith and the provisions of the Vienna Convention make it obligatory for them, and I will be coming to that point, to show that when they take action, before that, they give a warning to the other party, they send a note that this is the action they are going to take. They have not mentioned that they were going to suspend the treaty or terminate it.

Now, even after that, Pakistan was willing, as I pointed out just now, to come to some understanding with India, to resume all flights. Mr. President, I do not want to go into the details of the incident, it is not my intention to say that I was right and they were wrong, but as the case has come before the Court in the pleadings, the plane is hijacked from Kashmir—I say Kashmir is a disputed territory, the United Nations says it is a disputed territory, India says "No, it is an integral part of India". Very well, it is an integral part of India, so its people belong to India. They are Indian nationals, then, who hijacked the plane from Indian territory and brought it to my country. They bring it, I try to rescue all the passengers—to rescue them I offer the hijackers asylum—I try to save their baggage and the plane for two days and make great efforts. This is all on the record, an enquiry is being held and people have been prosecuted. Still I am blamed for arranging all this hijacking. Under ordinary law or international law, for acts of private individuals, a State cannot be held responsible anyway, but we believe these individuals belonged to their State, according to their understanding. So this case, as has now been proved, was actually engineered by India, because these two persons have now been tried by a very high-powered special court presided over by the senior judge of the Supreme Court of Pakistan. These persons belonged to the Indian security force, and were actually employed to hijack the plane in Srinagar

Airport. They hijacked the plane and said that Pakistan had conspired. Anyway, without going into that, the real motive was that some sort of agitation or dissatisfaction, whether it was a mistake of the Pakistan Central Government or not, was going on in East Pakistan. They thought we were creating a movement, an agitation in Kashmir or in other areas, and we thought that they were creating dissatisfaction against the Central Government in East Pakistan, which is called Bangla-Desh. Indian motive was to break the only vital link of communication between East and West Pakistan. As the Court is aware, Pakistan is a country divided into two regions, two areas, with India's 1,200 miles' area intervening; they wanted to break this vital link of air service and they were looking for some excuse, some pretext to put an end to it. This hijacking incident was just a pretext.

I am not going into the details, I am not making bald assertions, I am coming back to the pleadings. I said that when I wanted to come to some understanding on this incident, to pay them compensation, to apologize for my misconduct, if I have been guilty of any misconduct, I said, "let's settle the issue" and they said "No". I respectfully draw the attention of the Court to the Indian Memorial, page 102, *supra*, paragraph 9. Mr. President, before I read this, you will kindly recall that their case was that the flying of Indian aircraft over Pakistan brought them danger—the security of international air transport, that was one of the reasons why they stopped. Now that reason has disappeared; here they say:

> "In any view of the matter, resumption of overflights for Pakistan aircraft over Indian territory would now be inconceivable in view of the massacre and genocide of unarmed civilians in East Bengal."

Well, Mr. President, is this a material breach or is this the expression of Indian sympathy and support, which impelled India to stop the overflying of my planes? I am willing to compensate them, I am willing to apologize if I have misconducted myself, whatever demands of theirs are put before me I am willing to accept; I am willing to negotiate, as already submitted, to the ICAO Council by a resolution of 8 April which called upon the parties to negotiate. We expressed our willingness, India expressed their willingness, but then India went back on it. Because of this resolution their parliament passed a resolution that we must support East Bengal. East Bengal had some resentment against the Central Government or the central authority of Pakistan, to see that no essential supplies, after the cyclone appeared, after the communal rioting there, the Central Government should not be in a position to rush essential supplies to East Pakistan, that was the main aim, so that the resentment against the Central Government is enhanced or increased in Bangla-Desh or East Pakistan.

So here is a clear motive. How do they say that this is a breach due to misconduct on the part of Pakistan when they clearly give out the motive which was at the back of their mind, and that was to see that Pakistan was split into two pieces, somehow, and that East Pakistan is separated. So I submit, Mr. President, that this point of a material breach is an afterthought and the Court may be pleased to look through the preliminary objections, as filed before the Council. They appear on pages 98-109, *supra*, of the Indian Memorial. All the pleadings do not mention material breach at all, this is taken for the first time; whether they can take it for the first time is for this honourable Court to judge. The Council were not bound when the point was not taken in their pleading—they had been vaguely argued before that—

to give any verdict or any finding on that, or to take it into consideration at all.

As I just submitted, Mr. President, a State cannot be held liable for the actions of private individuals, particularly when the individual belongs to the State which claims to be aggrieved, and if the State in which this incident takes place makes every effort, which a normal person or a normal State would do, then this State cannot be held liable. Pakistan, in their Counter-Memorial, page 376, *supra*, paragraphs 18 and 19, give their version of the incident. We made every possible effort to save the plane—we actually succeeded in rescuing all the passengers, we put them up in a first-class hotel, and two days later they were sent across the Indian border to India. The airport was crowded with people and we rushed there—people openly had their sympathies with the Kashmir Liberation Movement in Pakistan. We not only had people who had sympathized with the Kashmir Liberation Movement, but there were thousands and thousands of Kashmiri refugees living there—they were taken in, they were deceived, they got enthusiastic about this hijacking, they rushed to the airport. The Government of Pakistan made every effort, took every step to see that the plane was not destroyed, but in spite of all their efforts, the plane was destroyed by them, we could not help it—the hijacking incident and the destruction of the plane—but nowhere did we hear of an action in such circumstances as taken by India.

On that point, Mr. President—the action of private individuals—a government or a State cannot be held liable if the State makes every effort to see that damage is not caused. Briggs, in his book *The Law of Nations*, Second Edition, pages 711 and 712, supports me on this point.

Now, Mr. President, the point emphasized by the distinguished Chief Counsel for India was that the provisions of the Vienna Convention embodied and codified the general rules of international law, and that under those rules of international law, *dehors* the treaty, Pakistan was responsible—how can he say that—it was not consistent with the rules of international law, of international behaviour. According to India, I had committed a breach of international law—not of a treaty, not of any provision of the treaty—I had misconducted myself by not conforming to the provisions and rules of international law, and therefore that entitled India to suspend or terminate the treaty. But the doctrine of material breach cannot be invoked by India, because this doctrine depends on the breach of a provision of the treaty. They have not pointed out that *this* provision of the Convention or *that* provision of the treaty was violated by Pakistan, and therefore this entitles India to suspend the treaty. They say that I have misconducted myself, my conduct was highly objectionable under the general rules of international law. So the Vienna Convention does not help India on this score; Article 60, paragraph 3, clause *(b)* states: [defining breach] "the violation of a provision essential to the accomplishment of the object or purpose of the treaty". They did not point out any provision of the treaty which I have violated, and it is not surprising that India has either failed to point out any provision or deliberately did not want to, but if India does point out a provision of the treaty which I am supposed to have violated, then the jurisdiction of the ICAO Council, under Article 84, will be attacked straightaway, because the question of interpretation and application of the provisions which I am supposed to have violated would arise and this would have to be considered by the Council. That was one of the main reasons why they deliberately either did not say that I had violated any provision of the Convention, or have not been in a position to point one out. But even if they show that any

rule of international law is violated by me, the case will not be justified under the codified international law as given in the Vienna Convention, because that clearly says that the breach must be of a provision of the treaty or convention.

My next submission on this material breach point, Mr. President, is based on Article 54 of the Convention. I particularly draw the attention of the Court to clauses *(j)* and *(k)* of the Convention, which are given on page 315, *supra*, of India's Memorial:

> "*Mandatory Functions of Council*
>
> The Council shall: [I will go straight to *(j)* on page 315]
>
> *(j)* Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council;
>
> *(k)* Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of this infraction."

Violation of a provision of a treaty, in my humble submission, is the same thing as infraction of a treaty. If I were guilty of violating any provision of the treaty under the rule of international law as codified in the Vienna Convention, then my case was covered by Article 54. In other words, India has remedy, under Article 54, to report to the Council. The Council would have asked me, asked Pakistan, to take this action under *(j)*; if I had failed, the Council would have reported the matter to the Assembly under *(k)*. So infraction or breach is covered by the treaty itself—there is a remedy provided for that; a remedy is provided for that breach, for my misconduct—for whatever fault I may have been guilty there is a remedy in this Convention itself; India is committed to this Convention, I am committed to this Convention. In view of this, India has no scope or choice or alternative to go *dehors* this treaty, as they say, and claim some remedy under the general rules of international law. Neither India nor Pakistan are parties to the Vienna Convention, but we accept the general rules of international law, if they are codified, they are binding on me. I am not going to repudiate and say, well this part I accept—this is part of international law, and the other part I reject because I am not a party to the Vienna Convention. When it comes to the matter of notice, 3 months' notice has to be given, India says this is a superimposition—this is not part of international law—and says she is not a party to the Convention, it is not binding on her. But the other part is international law—I am the judge as to what is and is not international law—that is international law, that is codified, that is binding on Pakistan; whatever you say is correct, but here you come under Article 54 of the Convention itself. My argument is the main argument, did you or did you not have a remedy under Article 54 to report the matter to the Assembly, to the Council? After that the Council would have taken action against me.

On this point, Sir, I would respectfully draw your attention to paragraph 4 of Article 60 of the Convention; this also supports my contention. Article 60 has been relied upon by the learned counsel for India. The first three paragraphs were mentioned, but then we come to paragraph 4, which states: "The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach." There is a provision in the treaty in the event of breach which could be resorted to; that is Article 54, so these general rules of international law as codified in the Vienna Convention are subject to

the treaty itself, to the Convention itself. They could not say: "we are going to take action under international law because we are bound by international law"; but should they say that they are bound by their own treaty commitments, that their action is subject to any provision with regard to breach in that Convention itself.

Again I would just like to draw the attention of the Court to Article 26 of the Vienna Convention. This also creates some difficulty for India. Article 27 states the maxim *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Therefore, Mr. President, if the Convention is binding on India, then Article 54 and Article 89 are both binding on India, and India cannot get out of that position.

My last submission, on this point, is also with regard to Article 60 of the Vienna Convention. Paragraph 1 of Article 60 states:

> "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."

The words which I humbly want to emphasise are "entitles the other to invoke the breach as a ground for terminating", *ipso facto* the treaty does not come to an end. This gives only the right to invoke the breach as a ground for terminating—you only invoke, the right is of invoking, the right is not of terminating, and this right has to be invoked before that appropriate forum, and, for this, I would also rely on the interpretation of this provision by the United Nations Conference on the Law of Treaties, First and Second Sessions, pages 74 and 75. They are also of the same view—that the right is of invoking only, not of terminating or suspending and this right is to be invoked before the appropriate forum. Now, it was emphasised by the learned Chief Counsel of India that he can prove his case before the appropriate forum, he can justify it, but this is not the place for it. The ICAO Council is not the place for it. Where is the forum? He will not point out, but he says he can justify it if there is an appropriate forum. My humble submission is that if there is no forum, if there is no remedy, then there is no wrong, then there is no right; they have no right, I have not done any wrong, if it cannot be redressed before an appropriate forum. This is a very well-known maxim—where there is no remedy, there is no wrong. So India cannot say that a forum is not known, a forum is not available, you have committed a breach, I have the right to invoke this breach as a right for terminating it, but I do not know where to invoke it, I do not bother about it—no, that cannot be done.

Then, lastly, Mr. President, you may kindly note paragraph 4 of Article 65 of the Vienna Convention:

> "Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes."

Again, India finds herself in difficulties, they cannot get out of this provision. The Convention and the Transport Agreement contain such provisons, as have been pointed out in my submissions, through which the disputes could be settled.

Mr. President, I will not say any more on this point, subject to what my learned friend may say, and, if necessary, I may make some submission in my rejoinder.

Now, I go to the next point, the last point taken up by India, that is, the

manner and method of making the decision vitiating it. Five grounds, five objections on this point were raised before the honourable Court.

The first objection was that the Council was a purely administrative body composed of incompetent persons in so far as their knowledge of international law was concerned.

The second objection was that the voting which took place in the Council on the proposal for the deferment of the decision was lost due to the manner in which voting took place.

Before I go to the third, fourth and fifth objections, I would like to deal with these two objections first, that is, that the body was purely administrative and the members of the Council were incompetent because of lack of knowledge on their part of international law, or of any law at all, and secondly, that the voting which took place in the Council on the proposal of Czechoslovakia, for deferment of the decision, was lost due to the manner in which the voting took place.

Mr. President, if we seriously consider this point, is he attacking the manner, the method, or the Convention itself, the treaty itself, the law, the regulations? Those he is attacking. His quarrel is with the law, the treaty which he has signed. He is hurt by that, that he has signed something with open eyes. Now he finds that that Council could have people who could be incompetent, according to him, who would not be qualified in law. The Security Council does not have lawyers and they take far more important decisions, and decisions of a judicial nature also sometimes. The same applies to the General Assembly. The same applies to every other body. Is he quarreling with the law, or is he quarreling with the procedure that was adopted? He has not pointed out a single provision or any rule which the Chairman or the Committee or the Council violated. He said they are not qualified. I do not want to go into detail on this point, but is it necessary for a judge to be a lawyer? These we have, there is no doubt, particularly in all the higher courts we have lawyers and jurists who preside over benches, but, originally, it was not necessary. The qualification of the judge was his impartiality, his character, his integrity, his commonsense, then it was the duty of counsel to assist him, to help him, so that he could apply his open mind and interpret law with the help of counsel. This is how originally the *judge came into existence, and even today we have honorary magistrates.* We have, all over the world, executive administrative bodies performing judicial functions. I know the jurists have been protesting against it, but, for the past 30, 40, 50 years, this has been going on. This may not be desirable, but, in this modern age with the planned economy, these powers have to be delegated to experts in different fields, who, while performing their expert duties, may also perform some little judicial function. They have no other alternative to that. We are trying to find one. Everybody is trying to find an alternative but cannot find it. So his quarrel is basically with the scheme of the Convention. That these people could be appointed because their qualification is not that they should be lawyers, or that they were not lawyers, that is not his ground; his ground is that these people are incompetent, but did he not know when he signed the Covention that incompetent people, according to his notion of competency, would be sitting here to decide these questions? Did he not know that Article 84 conferred judicial powers and functions on the Council, when he signed the Convention? Was he not aware of that fact? If he was, then he cannot quarrel, he cannot complain now at this stage, before this Court—nor there. Of course you were afraid, you would not tell them they were incompetent: you would be telling the Council that they

were incompetent; but is this a valid ground? I would humbly submit that this is no ground at all because their action, their qualifications, were in accordance with the provisions of the Convention—the Convention never required that these people should be lawyers, or learned in law or in international law.

Similarly, the next point was that the manner in which the deferment vote was taken was highly objectionable. What happened in the Council meeting was that one of the members, perhaps Czechoslovakia, moved that the decision should be postponed, deferred—it was not. Eight members voted for it. The rest did not, they abstained. Now, the rules of procedure of the Council are that no motion can be carried unless it is supported by the majority of the members. In an international organization we find that many countries do not want to annoy another country so, instead of voting against, when they want to defeat a motion, they abstain. India has done this on hundreds of occasions in international organizations—they abstained just to defeat the motion. You cannot quarrel with this procedure, that when certain members abstain you fail to get the deferment by getting 14 votes. This was the procedure. The Chairman did not do anything, eight voted, none voted against it. Those who wanted to vote against it abstained in order not to annoy India. This is the normal procedure in international organizations. You cannot quarrel with this proposition because the law allows it, the rules allow it and this was strictly in accordance with their own procedure—the motion had to be supported by the majority of the members; if the motion was not supported by the majority of the members it fell through.

The emphasis that this was a purely administrative body, I would humbly submit, is not correct. India knows that any person who reads this Convention and has a little knowledge of law will know that the judicial function was entrusted to the Council—Chapter 18, which means Articles 84-88, relates clearly to judicial functions, and, on that, I will respectfully draw the attention of the Court to Bin Cheng's book *The Law of International Air Transport*, 1962 edition, page 52. He says that this function is a purely judicial function. He wrote that book in 1962, so I suppose that in ten years India should have learned that this was purely a judicial function.

Again, there is a book by Buergenthal which is called *The Law-making in the International Civil Aviation Organization*, 1969, page 8. He has said the same thing—that these are judicial functions which the Council performs.

So India was aware of this position—that the Council performed judicial functions. This cannot be their grievance—that they were not aware that judicial functions would be performed by them, or that these people would not be acquainted with the rules of international law, and that therefore India has suffered our miscarriage of justice.

The next ground which our objections will take, upon the manner and method of arriving at the decision, is that the questions were formulated in a manner which, when put to vote, prejudiced the Applicant.

Mr. President, on this point, some of the submissions which I made yesterday are relevant. The questions were not formulated in a manner which, when put to vote, prejudiced the Applicant. The manner in which they were put was: the Council has no jurisdiction. India says they should have been put: the Council *has* jurisdiction, because, under international law, when a party goes before an organization it first proves that that Organization has jurisdiction and, after that, the other party may make objection whether it has jurisdiction or not. But in this case India say the Council formulated the questions and found that it has no jurisdiction. They should

not have put it in this form. Those members of the Council may have been ignorant of international law but they were men of commonsense, intelligent people, highly qualified technicians and experts in their own field. They were not imbeciles who did not know what was happening or what they were doing or which way they were voting. If it is the case of India that these people made a mistake—by no they meant yes, and by yes they meant no—that is different. Otherwise what difference does it make whether this question was put in one form or the other to intelligent people, to experts, and, if the honourable Court will see the proceedings, it will find that they knew what they were doing.

But apart from that, the point is that the scheme of the Convention is a bit different. This is the law, under that, anyway, the jurisdiction of the Council is presumed, so that when an Application is made the Council will proceed, but if anybody has any objection to the jurisdiction, that party shall file an objection under Article 5 of the Rules for the Settlement of Differences. On page 331, *supra*, of India's Memorial:

> "*Preliminary Objection and Action Thereon*
>
> (1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection."

Now he has set out the basis of his objection; it is his objection that forms a question or a motion; it is his objection that has to be put before the House, and it is for him to muster up the majority of the House to succeed. Otherwise, like the President said, they will proceed with the case as if they have the jurisdiction, if India had not made this Application they would have proceeded, but India did make this Application and their Application was that *the Council has no jurisdiction, so that had to be put before the Council:* India said that there is no jurisdiction; what do you say? That was the question.

They voted, India only got 1 vote—it fell through. It is immaterial whether I got 20 votes or I got 18 votes, but India got 1 vote on that point, none on the other, on both the motions, and they fell through, but I will come to voting later.

My humble submission, Mr. President, was that the manner of arriving at a decision, or the manner in which the question was formulated, was strictly in accordance with the Rules themselves, which govern the formulation of such questions. On this point I could also refer to the background of this case: that when the Application and the Complaint were filed before the Council, the Indian Agent was called, a meeting was held in Vienna on 8 April, and a resolution was passed calling on the Parties to negotiate. India accepted that, Pakistan accepted that. Does that not amount to a submission to the jurisdiction of the Council? Later, India filed a preliminary objection —much later, so when the President of the Council says: that we have proceeded on the assumption that we had jurisdiction, he was perfectly right. You have submitted to the jurisdiction. He said negotiate. You said: yes, we are willing to negotiate. And the speech of the Indian Agent which is part of the record—I do not know whether it is available here or not but I have got a copy I can supply. He said that the time is short, we will file our counter-memorial, we will file our objection—the time is short: they did not object to the resolution as such, they did not object to the jurisdiction as such. He says; six weeks or eight weeks will not be enough, give us more time. But as the Council had decided, we submit, we accept, we honour. Those were

averments, those were statements made before the Council—and then they agreed to negotiate. Under these circumstances to condemn the Council or the Chairman by saying that he did not follow the procedure, he assumed jurisdiction, is unfair.

Then, Mr. President, another objection that was raised was: that the motion was moved by the President of the Council and that it was not supported by another Member. This also is not a valid objection. First of all, I again respectfully draw the attention of the Court to Article 5 of the Rules for the Settlement of Differences, which is a procedure for disposing of an urgent objection of that kind, an objection pertaining to jurisdiction. This decision or this action, as I have already submitted, was taken under Article 5. Article 5 does not require that a motion in the form of a resolution is to be moved and in turn be supported. Article 5 says that:

> "(1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection.
>
> (2) Such preliminary objection shall be filed in a special pleading at the latest before the expiry of the time-limit set for the delivery of the counter-memorial.
>
> (3) Upon a preliminary objection being filed, the proceedings on the merits shall be suspended and, with respect to the time-limit fixed under Article 3 (1) *(c)*, time shall cease to run from the moment the preliminary objection is filed until the objection is decided by the Council.
>
> (4) If a preliminary objection has been filed, the Council after hearing the parties, [that is all they had to do] shall decide that question [not the motion—that question] as a preliminary issue before any further steps are taken under these Rules."

Decide the question: now may I respectfully draw the Court's attention to the Rules of Procedure of the ICAO Council. Rule 24 requires "a majority of the Members of the Council shall constitute a quorum for the conduct of the business of the Council." Then Rule 25 says:

> "The President shall convene meetings of the Council, he shall preside at and declare the opening and closing of each meeting, direct the discussion, accord the right to speak, put questions and announce the decision."

He has to put the question and announce the decision. That is exactly what he did. He put the question—there is no question of moving a resolution or a motion, to be supported by another member and then put to the vote.

I will again read Rule 25, clause *(a)*:

> "The President shall convene meetings of the Council, he shall preside at and declare the opening and closing of each meeting, direct the discussion, accord the right to speak, put questions and [there is no 'or' with it; it is said together, put questions and] announce the decision."

So, strictly in accordance with this Rule, the President has acted. When the question was brought before the Council, he afforded the parties a hearing, written pleadings were also filed and so were objections, and after that he put the question and the Council decided.

The last ground was, Mr. President, that the decision was not in accordance with Article 15 of the Rules for the Settlement of Differences. I have already dealt with this point so I will not take a lot of your time, except to see whether

this was a decision under Article 15 or Article 5. These Rules, and the way they are arranged, should be considered and noted. Chapter I deals with the scope of rules; Chapter II is on disagreements and deals with Applications and the form in which they have to be filed before the Council; Chapter III covers action upon the receipt of Applications—under this Chapter comes Article 5. At this stage you make an objection with regard to jurisdiction and you file an Application. After that is disposed of, under that Article, the question has to be decided. Then the proceedings start under Chapter IV and the decision is given under this chapter.

I will therefore respectfully submit that the decision, under Article 15, had nothing to do with the disposal of a preliminary objection with regard to jurisdiction. That is a final decision for which reasons have to be given, and, under Article 5, in disposing of the preliminary objection with regard to jurisdiction, the question shall be put, by the President or the Chairman of the Council and member to vote. He did that and throughout my case has been that no appeal lies against that, and I am supported and fortified on this point also—that if appeal had been provided, they would have said: give reasons for it. By not providing for reasons in one article and providing for them in another shows that there is appeal under one and not under the other.

Now, Mr. President, I have some brief submissions to make on the complaint to the Application. It is stated that only 13 votes were in favour of Pakistan, and Article 52 of the Convention required a majority of members of the Council to support a motion. I will first submit that Article 52 (Memorial, p. 314, *supra*) deals with application under the Convention. It says:

> "Decisions by the Council shall require approval by a majority of its members. The Council may delegate authority with respect to any particular matter to a committee of its members. Decisions of any Committee of the Council may be appealed to the Council by any interested contracting State."

The main thing is: "Decisions by the Council shall require approval by a majority of its members."

Now with that the Court may be pleased to read Article 66, which deals with the functions relating to other agreements:

> "*(a)* The Organization shall also carry out the functions placed upon it by the International Air Services Transit Agreement and by the International Air Transport Agreement drawn up at Chicago on December 7, 1944, in accordance with the terms and conditions therein set forth.
>
> *(b)* Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement or the International Air Transport Agreement drawn up at Chicago on December 7, 1944, shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreement."

Now it is not disputed that out of 27 members of the Council, 7 had not signed the Transit Agreement—they were not entitled to vote. 19 were entitled to vote; were 20 entitled to vote? So the spirit of Article 52 is that a majority should vote—only those who are competent to vote—that majority will be less than even 13. If in this case it is accepted—I am not accepting it, my ground is different also, but supposing, as he suggests, that a majority should have voted, the total number is 19, is 20, although 13 voted. Certainly the Court may be pleased to consider that supposing only 13 members of that

number have signed this agreement, then would the Court place an absurd interpretation on it and say that no decision could ever be carried out because, of those 12 members who signed, supposing only 10 voted in favour of a mention and this majority meant the entire Council of 27, that means, under the Transit Agreement, no decision could ever be carried out. It so happens that 20 are members, but supposing that 12 or 13 had been members? Neither the Council nor this honourable Court has so far interpreted this provision. The Secretariat of the ICAO Council gave the view that the majority means of the entire Council, but I think that is on the face of it wrong and the Court will not make any absurd interpretation on a provision of this nature. When the provision of one law is incorporated in another law, that provision becomes part of the other and when it says majority, it means the majority of the signatories of the Transit Agreement. It is very simple. I do not know how they could possibly advance this argument, but, all the same, I would further like to draw the attention of the Court to my submission that the Council had put the question of India's objection—the Council has no jurisdiction—to vote; it was India's duty, India's good fortune or bad fortune or misfortune to have obtained a majority. They got only 1 vote—it fell through. I do not have to get majority there. It was his motion that Council had no jurisdiction that fell through. He cannot say that Pakistan got 13 votes. He failed to get 14 votes, if his argument is accepted. He should have got 14 votes for his motion, according to the procedure, and then he would have been successful. To say that 14 votes were not cast in favour of Pakistan is the wrong approach to the problem. The objection was from India, that the Council had no jurisdiction; that was the question which was put to the house, that was the question on which votes were asked for and only 1 vote was given that it has no jurisdiction, whereas he had to get 14 votes according to his reading of Article 52.

The Court adjourned from 11.20 to 11.50 a.m.

QUESTIONS BY JUDGES ONYEAMA, PETRÉN, JIMÉNEZ DE ARÉCHAGA, DILLARD AND SIR GERALD FITZMAURICE

Le VICE-PRÉSIDENT faisant fonction de Président: Monsieur le conseil principal, je voudrais vous demander de retarder votre plaidoirie pour donner le temps à un certain nombre de juges de poser des questions. Je vais donc commencer par donner la parole aux juges qui ont des questions à poser, soit à vous-même soit aux deux Parties.

Judge ONYEAMA: These questions are directed to the Chief Counsel of India. In view of the point made by the Chief Counsel of Pakistan regarding the competence of the appeal now before the Court, I would like the Chief Counsel of India, if he would be so good, to express his views on the significance of the words ". . . if any disagreement cannot be settled by negotiation . . ." in Article 84 of the Convention.

What interpretation would he give to those words as applied to the disagreement which the Council is empowered to decide, and from which an appeal can be brought to this Court as provided in Article 84?

Would such a disagreement, in his view, include a conflict of views on a preliminary objection to the jurisdiction of the Council?

Judge PETRÉN: My question is directed to both Parties. It is the following one: under Article 84 of the Chicago Convention, the decisions of the ICAO Council, against which appeals may be brought, are decisions relating to the interpretation or application of the Convention. Article 86 then provides that: "Unless the Council decides otherwise any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal", but *that "On any other matter, decisions of the Council shall, if appealed from, be* suspended until the appeal is decided". Do the Parties in the present case consider that the expression "any other matter" in Article 86 is to be read literally, and regarded as including, for example, decisions by which the Council, in the course of proceedings before it, admits or rejects an application to file evidence, or do the Parties consider that Article 86 cannot refer to any decisions of the Council other than those defined in Article 84, i.e., decisions relating to the interpretation or application of the Convention? This ends my question. It has in a way been indirectly touched upon during the pleadings, but I should be grateful to counsel if they would be good enough to address themselves in their replies directly to the point I have now raised.

Judge JIMÉNEZ DE ARÉCHAGA: Mr. Bakhtiar, in Part II of its Counter-Memorial, under the heading "Jurisdiction of the International Court of Justice" the Government of Pakistan made the following remarks:

(1) In paragraph 23 it stated:

> "The Appeal of the Government of India against the decision of the Council in respect of the Application of Pakistan could be founded, if at all, on *the following provisions:*
>
> *(a)* Article 37 of the Statute;
> *(b)* Article 84 of the Convention;
> *(c)* Article II, Section 2, of the Transit Agreement."

(2) In paragraph 24 of the Counter-Memorial the invocation by India of Article 36 of the Statute of the Court was declared to be irrelevant and misconceived.

(3) In paragraph 25 it was said:

> "It is submitted that the Appeal of the Government of India in respect of the decision of the Council in Pakistan's Complaint is incompetent and not maintainable . . ."

on various grounds which I omit.

From these statements it would appear that:

(1) Pakistan did not raise formally an objection against the jurisdiction of the Court to entertain the appeal with respect to the Application and it enumerated the legal titles providing for such jurisdiction.

(2) Pakistan disputed the relevance in the case of Article 36 of the Statute and recalled India's reservation to its own declaration of acceptance of the compulsory jurisdiction of the Court. This observation, however, did not appear to be in the nature of an objection to the jurisdiction, because India had not relied upon nor invoked as the basis of the Court's jurisdiction in this case the declaration made by Pakistan accepting the compulsory jurisdiction of the Court under Article 36 (2) of the Statute.

(3) Finally, Pakistan raised a partial objection to the jurisdiction of the Court: it opposed the Court's jurisdiction to entertain the appeal against the decision of the ICAO Council with regard to the Complaint, as distinct from the Application.

In the statement you made yesterday, Mr. Bakhtiar, you advanced two observations which go against the Court's jurisdiction in the present case:

(1) You disputed the applicability of Article 37 of the Statute to Pakistan, because your country became a party to the Statute after the demise of the Permanent Court of International Justice. This argument coincides with the second preliminary objection which was raised by the Government of Spain in the *Barcelona Traction* case, a preliminary objection which was dealt with in a Judgment of this Court on 24 July 1964.

(2) You asserted that none of the decisions which were adopted by the ICAO Council on 29 July 1971 are subject to appeal and therefore it would appear now that the Court would not possess, according to you, any jurisdiction to exercise in the present case, not only with regard to the Complaint but also with respect to the Application. It would appear that you are raising new points concerning the jurisdiction of the Court. Therefore, my questions are as follows:

(1) Is the Government of Pakistan now raising, at the oral proceedings, formal objections against the jurisdiction of the Court or were you simply suggesting certain questions which in your view the Court ought to take into account when examining, *motu proprio*, its own jurisdiction.

If the answer to this question is in the sense of the first alternative, that is to say, if you are raising formal objections against the jurisdiction of the Court, then my second question follows.

(2) Are there any reasons why such formal objections to the jurisdiction of the Court were not raised within the time-limit established for that purpose in Article 62, paragraph 1, of the Rules of Procedure of the Court, so as to allow the preliminary procedure provided for in that Article to be implemented?

Judge DILLARD: My questions are directed to the Chief Counsel of India. Mr. Palkhivala, in order to be sure that I have thoroughly understood the theoretical implications flowing from your basic approach, I would like to put the following four questions, which I believe can be answered quite simply:

(1) Does it not follow from your theory that *in so far as the jurisdiction of the Council of the ICAO is concerned* it is completely irrelevant whether India's asserted suspension of the Convention and Transit Agreement was or was not in conformity with the priciples of international law.

(2) Does it not also follow from your theory that the mere *factum* of suspension—I use your term at page 611, *supra*,—once officially proclaimed by India should suffice in and of itself, according to you, to preclude the Council of the ICAO from entertaining the Application and Complaint of Pakistan. In other words, is it not immaterial whether Pakistan agreed or disagreed with the "fact" of suspension since, if the Council were to consider that disagreement it would necessarily be endowed with jurisdiction, according to your position.

(3) Are not the composition and characteristics of the Council also irrelevant inasmuch as the Council itself, no matter how constituted would, according to you, be without any power to entertain the Application and Complaint. Put more concretely, even if the Council were composed of 27 of the most eminent jurists of the world it would still, as a composite body, be without jurisdictional power.

(4) I shall preface this last question with a brief comment inspired by my own researches into the records of the Chicago Convention which, on this point, have proved abortive. If I understood you correctly the matter of the composition and characteristics of the Council was elaborated upon in order to justify the inference that it was unreasonable to supose that the nations of the world would confer on the Council the power to decide any disagreement relating to termination and suspension, or even questions of substantive international law.

The great diligence you have displayed in the preparation of your case prompts me to ask whether we may not assume that you have discovered no *positive* evidence fortifying the inference you have sought to draw, namely that the nations, including in particular India, in ratifying or adopting the Convention and Transit Agreement did so with the understanding that the jurisdiction of the ICAO Council was limited in a manner which excluded any disagreement relating to termination or suspension.

Judge Sir Gerald FITZMAURICE: My questions are also addressed to Chief Counsel for India arising out of the latter part of his statement. I wish first to put two points to you regarding that part of you argument in which you have alleged irregularities in the procedure of the Council of ICAO. You have laid much stress on the fact that the delegates in the Council were not given sufficient time to obtain instructions. But equally you have stressed that the members of the Council were not the individual delegates but their governments.

This being so, is not the real question this,—namely *not* whether the *delegates*, once they got to the meeting, had time to consider the matter, but whether the *governments* had time to consider it and instruct their delegates *before* the Council's meeting opened? Looking at it from that point of view I notice that Pakistan's Complaint to the Council was presented on 3 March 1971, and that India's Objection to this Complaint was submitted to the

Council on 28 May 1971, and was not heard by the Council until nearly the end of July—two months later. The governments, therefore, had an overall period of practically five months in which to consider the matter and give the necessary instructions to their delegates,—and quite two months they had even after the filing of India's Objection. They must have realized that legal issues would be involved, and could, if need be, have attached legal advisers to their delegations. In consequence, a telegram or telephone call from their delegations should have been enough to enable the latter to be told how to vote. In these circumstances, and this is my question, is it really possible to attribute responsibility to the Council as such rather than to the individual governments?

Second question: You have argued that various irregularities in the Council's procedure vitiated the voting, and therefore the Council's decision to assume jurisdiction.

The point I want to put to you is this: the matter having now been brought to this Court, would these irregularities, assuming them to have occurred, any longer matter? For if the Court thinks that, in law, the Council had *no* jurisdiction to entertain Pakistan's claim, then the fact that the Council reached an opposite conclusion by irregular methods clearly becomes irrelevant. But is this not equally the case if the Court considers that there *was* jurisdiction, whether or not the Council's own decision to that effect was irregularly come to? In short, if the existence or non-existence of jurisdiction is an *objective question of law* which it is now for this Court to determine, can the outcome before the Court be affected or altered by irregularities in the way the *Council* dealt with it? Even if the decision in the Council had gone in favour of India, it would still have been open to appeal on the part of Pakistan.

And my final point is this: arising out of the answer you gave the other day to one of my previous points, I should like to put this further question to you. In making the distinction you seemed to make between substantive and non-substantive international law, and in placing treaty interpretation in the latter category, is it your contention that treaty interpretation—on which the whole of the rights and obligations of the parties in a given case may depend—is a sort of subsidiary or lower-level international law, not on a par qualitatively with some kind of higher international law—and if so, can you cite any authority, judicial or other, in which such a distinction is made?

Le VICE-PRÉSIDENT: Telles sont les questions qui devaient être posées par MM. les juges. Maintenant puis-je demander d'abord à M. le conseil principal du Pakistan — je m'adresserai ensuite à M. le conseil principal de l'Inde — quand il peut répondre aux questions qui le concernent. Pourra-t-il le faire avant de terminer sa plaidoirie ou bien, le cas échéant, au second tour de plaidoiries?

Mr. BAKHTIAR: I should prefer to reply to the question directed to me in my second reply or the rejoinder, after I have heard the counsel for India. Whether that comes tomorrow or the day after depends on his reply. At the moment, I will not be in a position to reply, but after he has made his submission, I shall make an effort to reply to the questions which are directed to me.

Mr. PALKHIVALA: Mr. President, may I request the Court to permit me to deal with these questions the day after tomorrow, that is, Friday when, again with your permission, I would like to give my reply to the various points raised by my learned friend yesterday and today. The reason why I

am asking for one day's break is a three-fold reason. First: the verbatim notes reach us at 9 p.m., therefore I shall get the verbatim notes of my learned friend's arguments today only late tonight. Secondly: my learned friend has given us a compilation of new documents[1] which he wants to go on record, and that compilation came to us this morning at 10 o'clock. I have not even looked at the compilation of the new documents. Thirdly, some very significant and important questions have been raised, if I may say so, by the honourable Members of this Court, and I would like to give them a carefully considered reply. And if I am to do all these—reply to my learned friend, deal with his new documents and, most important, deal with the questions framed by the honourable Judges, one day's grace would be about the minimum that I would require in order to manage to cope with this work.

Le VICE-PRÉSIDENT: Donc M. le conseil principal de l'Inde, si je comprends bien, vous désirez répondre aux questions qui vous sont adressées au cours de ce premier tour de plaidoiries, avant le second tour. C'est bien cela que vous demandez? Vous serez informé après que la Cour se sera réunie et aura délibéré de la question.

Mr. PALKHIVALA: Mr. President, if I may clarify the point, it is not as if I am making a distinction between the first round of arguments and the second. All that I am requesting the learned Judges to permit me to do is to deal with these questions on Friday morning, then, if the Court puts it that way, in the second round of arguments and before I begin replying to my learned friend, I shall first reply to the questions framed by this honourable Court and, having dealt with these questions framed by the learned Judges, I shall then reply to my learned friend straightaway, without any further delay.

---

[1] See pp. 743-765, *infra*.

ARGUMENT OF MR. BAKHTIAR (cont.)

CHIEF COUNSEL FOR THE GOVERNMENT OF PAKISTAN

Mr. BAKHTIAR: Mr. President, Members of the honourable Court, before I sum up my submissions this morning, as my learned friend has mentioned certain documents[1] now filed in this Court, I would respectfully draw the attention of the Court to some of them. These are the documents, which have been filed in reply to India's documents, which were filed after the close of the proceedings and they requested the Court to give us time to get these documents from Pakistan.

India's case, in the documents they filed after the close of the proceedings, was that permission was sought by the Director-General of Civil Aviation in Pakistan or by the Pakistan International Airlines from the Government of India to land, or to overfly. And these documents which we have filed, and our case, has been that what they called permission was something which was done even before the outbreak of armed hostilities, even before September 1965, when the emergency was proclaimed by India—even before that, such permission was given to airlines. If that is called permission, as the request was submitted under Article 68, it was required, it was necessary. So for that purpose we have filed some documents. The Court may be pleased to see them. I will just draw the attention of the Court to one or two documents—there are others of course. There is a document which was filed this morning—it is the request from the Government of India to the Director-General of Civil Aviation, Government of Pakistan. The learned counsel says that these documents are not admitted. He filed certain documents; in spite of our objection only to the extent that until we get documents of rebuttal they should not be allowed on the record, they were allowed and he stated that the Pakistan counsel had no objection. Now he says that he has to consider whether he objects to them or not. The Court had already allowed us to file documents in rebuttal of these documents and I only refer to these documents. Of course, if the Court comes to the conclusion that his objection is maintainable, which he is going to put forward on Friday, well these documents could be ruled out. But subject to whatever his objection may be, because I do not want this sitting to be prolonged—I do not want to come back to the Court and say that my first round of argument is still to be concluded, I want to conclude that—therefore, I am submitting that the document of 4 September 1965, subject to his objection, may be considered by the Court.

This letter is signed by the Manager of Air India, the Indian national airline, to the Director-General of Civil Aviation, Government of Pakistan. It says:

> "Flight AI. 512 of 12.9.1962 and Flight AI. 505 of 5.10.1965: We have your standing permission for our Flights AI. 512 and AI. 505, amongst others, to overfly Pakistan territory.
>
> We would like to inform you, however, of a slight change in schedule of the above flights. The revised schedule will be as under [then it gives the schedule]."

[1] See pp. 743-765 and p. 788, *infra*.

Mr. President, the word "permission" is used here and this is a letter dated 4 September 1965, two days before the emergency was declared and proclaimed by India. Similarly the Court will find in other documents that what they called permission was actually complying with the provisions of the Convention itself, whether it is under Article 68, or sometimes Article 9, which is also relevant, and to which, while I am dealing with this point, I may respectfully draw the attention of the Court. It is in the Indian Memorial at page 301, *supra*:

> "*(a)* Each contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization.
>
> *(b)* Each contracting State reserves also the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distriction of nationality to aircraft of all other States."

Mr. President, these documents in which either my country has sought permission, or India has sought permission, could very well be under Article 9, could be under Article 68, or, during an emergency, under Article 89.

As I submitted yesterday, nothing has been shown to show that these documents were inconsistent with an emergency declared by India, or inconsistent, some of them, with Article 68 or Article 9. I will not take up any more of the Court's time on this point of documents. I am also not mentioning anything about that Dalmia arbitration case because my learned friend assured me yesterday that his objection was only because he did not have notice of that document. I thought because he had appeared in that case and had argued there that the treaties did exist; he should have known that document.

Mr. President, summing up my argument, I will very briefly re-state my case.

My first submission before the Court was—and I am aware of the question that was directed to me; I will leave that, I will not go into that point now—that India's appeal is not competent before this honourable Court under any provisions on which India founds the jurisdiction of this Court.

With regard to Article 84 of the Convention, on which India mainly relied, I submitted that that Article provides for appeal only against the final decision of the ICAO Council about the disagreement relating to interpretation or application of the Convention and not about every ruling, interim order or decision made by the Council—for example the decision with regard to the question of jurisdiction.

I have submitted that appeal under Article 84 of the Convention, lies only where a decision is taken under Article 15 of the Council's Rules for the

Settlement of Differences and here, I am informed, the word "decision", as translated in the French text in Article 84 means "adjudication" and I think that also means final decision. If the draft was first prepared in English and then translated, I would say the translator got the sense of the meaning of decision as to in which context it was put or, if the first draft was prepared in French, then in English perhaps the word "adjudication" should have been used.

I submitted that no appeal had been provided for against a decision made under Article 5 of the Council's Rules for the Settlement of Differences, and I mentioned that Article 5 does not require that any reasons should be given for their decision, whereas Article 15, where the final decision is made, makes it obligatory on the part of the Council to give reasons for their decision.

I may further add, and I have already explained this morning—the scheme of the Rules; that a decision, which is a final decision, which is headed as "decision" under Article 15, comes after the proceedings commence, whereas this decision—when the question is put about the jurisdiction—is dealt with in a different chapter, before the proceedings start. That is not a decision in the sense that Article 15 contemplates.

I have also submitted, Mr. President, that, under Article 18 of the Council's Rules for the Settlement of Differences, not only is no appeal about a decision with regard to a Complaint provided for, but also that appeal with regard to a decision about the Application is confined to disagreement relating to the interpretation or application of the Convention. Article 18 does not contemplate an appeal with regard to a decision on the question of the Council's jurisdiction.

I also submitted my reasons why appeal under Articles 36 and 37 of the Statute of the Court and under Article II, Section 2, of the Transit Agreement, was not competent. Apart from that, I also submitted that under general rules of international law, an organization like the ICAO had the jurisdiction to determine its own jurisdiction and that such determination, according to authorities, acquires the force of *res judicata*. On this I have, respectfully, pointed the attention of the Court to the Judgment in the *Nottebohm* case.

Finally, I also submitted that India was hot and cold in the same breath. To the ICAO Council it said: you have no jurisdiction because the Convention and the Transit Agreement have been suspended and are no longer in force and there is nothing for you to interpret or apply. To this honourable Court India has come in appeal and said: you exercise jurisdiction because the Convention and the Transit Agreement are in force. On the point that the treaties were suspended and not in force, and therefore the Council had nothing to interpret and apply, I submitted that India wanted the Court to infer the fact of suspension as an act of a sovereign State under the general rule of international law. From various documents produced before the Court, no document clearly showed that India had suspended the operation of the treaty under international law. On the contrary, I submitted, India has, as the documents show, suspended the operation of the treaty under Article 89 itself, and this Article permits, in an emergency or in war, the suspension of the operation of the entire Convention or part of it. And India's case—taken at the highest—has been that overflying and landing for non-traffic purposes were stopped, that is, the obligations placed on India by Article 5 of the Convention. Those two rights, those two freedoms—with regard to the operation of the Convention—were suspended. The operation of the Convention with regard to Article 84, or other provisions, even according to India's own case, were not suspended.

I have submitted, Mr. President, and may I add here, that according to India's case they have suspended the Convention or the Transit Agreement under a rule of international law as codified in the Vienna Convention. This also requires consideration from another point of view: that the Vienna Convention does not speak of suspension of any treaty whatsoever. It only speaks of the operation of suspension—to suspend only the operation of the treaty. In other words, there is a distinction between termination and suspending the operation of a treaty. In termination the treaty comes to an end, but when you suspend the operation of a treaty, then it means it is still in force, only the rights are not exercised or the obligations are not performed. If that is so, then the ICAO Council's jurisdiction is attracted towards other provisions. So even under the rule of international law, on which India has relied, and her case, as stated in the Memorial, page 26, *supra*, was that the treaties were suspended wholly or in part—they have not put forward their case before the Court as termination. Loosely the term has been used with suspension, but, as I submit, there is no question of suspending a treaty, you can only suspend its operation. You can say that you have terminated it, put an end to it, but there is no question of terminating a treaty in part. It is *total* termination, but suspension could be of a provision of it. India's case has been that there has been a suspension of certain provisions and, as allowed under Article 89, they have suspended the freedoms given to me, under Article 5, to overfly and land for non-traffic purposes. They have suspended that—their documents show that, their notification shows that—and in view of this, the rest of the treaty remains in operation, including Article 84, and the jurisdiction of the Council remained intact to deal with the Application and the Complaint.

India has tried to argue that the question of suspension could not be covered by the word "interpretation" or "application" in the two jurisdictional clauses, that is, Article 84 of the Convention and Article II, Section 2, of the Transit Agreement. But this involves a question of interpretation of the words "interpretation" and "application" in the above-mentioned Articles. India's contention that the armed conflict of 1965 suspended the Convention and Transit Agreement clearly calls for the interpretation of Article 89 of the Convention and Article I, Section 1, of the Transit Agreement. India asserts that the Convention and Transit Agreement are silent about the right of suspension for material breach, and hence a rule *dehors* the treaty applies. Pakistan maintains that the Convention and Transit Agreement are not silent about this. Consequently this involves a question of interpretation of the Convention and Transit Agreement. In any case a question of suspension is covered by the word "interpretation" or "application" in Article 84 of the Convention. The meaning of these words has to be arrived at in the context of Article 54 of the Convention which provides that the Council's mandatory function is to consider any matter relating to the Convention which any contracting party refers to it.

I have submitted in detail that, from all the documents produced by India, it seemed apparent that action was taken under Article 89 and none of the documents which India has relied upon and produced is inconsistent if India has taken action under Article 89.

I have also submitted that India has, actually, under Article 89, informed the ICAO Council that India had declared a national emergency. I also pointed out to the honourable Court that the ICAO Council had treated that notification of India as notifying the fact as an action under Article 89. My grievance was that India in 1968 informed the Council that it had put an end

to the emergency, that the emergency proclamation had been revoked by the President of India. That communication was sent on 10 January. After that, when the operation of the treaty or Convention, with regard to the obligation that was placed on India, was no longer in suspension—on 4 February 1971—there was no emergency, India could not deprive me of my right and could not fail to perform her obligation. There was no reason for it, there was no justification for her not to perform her obligation under the treaty. On 4 February 1971 the Convention and the Transit Agreement were fully in operation.

This fact is also supported by the fact that when the hostilities broke out in 1971 India and Pakistan again informed the Council of their emergencies under Article 89. These are all contained in the publication of the ICAO Council, in a letter dated 9 December from the ICAO Council. It says:

"*Subject: Article 89 of the Chicago Convention*

I have the honour to send herewith copies of two cables from Pakistan dated 3 and 6 December 1971 and a cable dated 3 December 1971 from India."

These cables were placed before the Council with the comment by the Secretary-General that the reference to the Convention related, presumably, to Article 89 of the Convention on International Civil Aviation and that there was no corresponding provision in the International Air Services Transit Agreement. The Council decided to draw up copies of the said cable for contracting States. The Governments of Pakistan and India had been requested that upon termination of the emergency notice of that fact be sent to the Council. The cables are . . .

Mr. PALKHIVALA: *I am sorry to interrupt my learned friend, but would* he be kind enough to indicate where this documentation is to be found because I do not find it anywhere in the record. I am not objecting to it—I only want to read it for myself, it is nowhere on the record.

Mr. BAKHTIAR: Copies have already been supplied to my learned friend here and copies have been supplied by the ICAO Council to the Government of India and to all contracting parties, but, if he objects, I will not refer to any document and I will not object to any document that he brings hereafter.

Mr. President, I have submitted that, as India had withdrawn the emergency on 10 January 1968, and, whereas in Pakistan the emergency continued until February 1969, India considered it necessary to promulgate the regulation in 1968 so that some restrictions would be placed on Pakistani planes; I have shown to the Court that some instances which are quoted by India could be covered either under Article 89 or under this regulation as a permission where routes are concerned or a permission where overflying was concerned.

I have submitted to the honourable Court that the Tashkent Declaration and letter exchanged between the Prime Minister of India and the President of Pakistan also confirm that the treaties existed in January 1966. India's claim that on the outbreak of hostilities, on 6 September 1965, the Convention and the treaty were suspended seems incorrect in view of the Tashkent Declaration, signed by the Prime Minister of India and the President of Pakistan, who considered these treaties to be existing treaties which have to be implemented.

About the special Agreement which was emphasized by India to have been an arrangement under which overflying was taking place after what they

called the suspension of the Convention and the Agreement, I submit that if India had in fact entered into an agreement with Pakistan then it should have been registered with the United Nations Organization. I should have pointed out, and drawn the attention of the Court to Article 102, paragraph 1, of the Charter of the United Nations, which lays down:

> "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

Then paragraph 2, of Article 102, of the Charter lays down:

> "No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.",

—and particularly the principal judicial organ of the United Nations, as this Court is.

The Chief Counsel for India cannot invoke that there was a special agreement on which he relies. It had to be registered before he could rely on it.

In any case, as I have submitted, it is a question for the Council to determine whether this is a special agreement or action under Article 89 of the Convention and calls for interpretation and application.

About material breach, I submitted this morning that this point has been specifically taken before this honourable Court and not in the pleading before the ICAO Council. I also submitted an assertion that material breach must, under international law, be made in good faith; so, good faith becomes a relevant part of international law for the exercise of this right, and I have drawn the attention of the Court to the various provisions of the Vienna Convention on the point.

I have also pointed out to the Court what the real motive was, on the point of good faith, in putting restrictions on Pakistani flights to go from one wing of the country to the other.

I submitted and drew the attention of the Court to the fact that material breach was something covered by Article 54 of the Convention which uses the term "infraction of the Convention" and, for that, I have drawn to the attention of the Court that international law, as codified in the Vienna Convention in Article 60, was subject to the terms of the Treaty itself.

Again I draw the attention of the Court to Article 26 of the Convention, which makes it binding on the parties to perform their obligations under the treaty in good faith. Then I submitted that the right was not to suspend the treaty but to invoke it, the breach, as a ground for suspending it, and that has to be done only before an appropriate forum, and if there is no appropriate forum, there is no right, there can be no grievance. For the manner and matter, I have made my submission briefly, I need not go into them again. And now Mr. President, there were one or two points which I mentioned yesterday; I mentioned the Maldive Islands, and I have been informed that perhaps the Maldive Islands is not a contracting Party; however I was making my submissions on the point that a right is something different from exercise of that right. It is not reciprocal. I submitted that the Maldive Islands had no necessity to fly over Pakistan but that Pakistani planes go there, but I will forget about that, and maybe take another contracting State; I can take the example of Australia. Planes of Australia's Quantas fly over Pakistan bu'

our planes do not fly there. It does not mean that we have no right to fly over Australia just that we are not exercising that right at the moment. Similarly, our planes fly over Greece, land at Athens, but their planes do not come to Pakistan—that does not mean that Greece does not have the right to send a plane to fly over Pakistan. The right is there, it may not be exercised, but the fact that the right is not exercised does not mean that the treaty has come to an end or that it is not in force.

I am grateful to the honourable Court for the patience with which it has heard me and I conclude my submissions on the arguments submitted by India.

The Court rose at 12.45 p.m.

EIGHTH PUBLIC SITTING (30 VI 72, 9.30 a.m.)

Present: [See sitting of 19 VI 72.]

REPLY OF MR. PALKHIVALA

CHIEF COUNSEL FOR THE GOVERNMENT OF INDIA

Mr. PALKHIVALA: Before replying to my learned friend, may I, Mr. President, first give my answers or make my submissions on the questions or the points put to me, by the honourable Judges of this Court.

First, my submissions on the further points put to me by Judge Sir Gerald Fitzmaurice:

I. Method and manner adopted by the ICAO Council in arriving at its decision. The honourable Judge Sir Gerald Fitzmaurice has been pleased to put to me two points on this question.

I

It is true that India's Preliminary Objections to Pakistan's Application and Complaint were filed on 28 May 1971 and they were heard at the end of July 1971. However, although in the Preliminary Objections, India had specifically raised the point that it had suspended the treaties in the exercise of its right as a sovereign State under a rule of international law *dehors* the treaties, the Advisory Opinion of this honourable Court in the *Namibia* case was not available at that time; that Advisory Opinion was handed down on 21 June 1971. Consequently, the governments who read India's written Preliminary Objections did not have the opportunity of applying their minds to the Advisory Opinion which is an authority directly in point and which supported India's plea in the Preliminary Objections. Hence the oral arguments in which the *Namibia* case was discussed and applied were very material. It is respectfully suggested that a telegram or telephone call from the delegates to their governments after the oral arguments could not have been a satisfactory way of dealing with the far-reaching question arising in the case. The Council had the responsibility of ensuring that the Preliminary Objections were adequately weighed and considered in the light of the *Namibia* case and the oral arguments, and this responsibility it failed to discharge. In the events that happened, the oral hearing before the Council became an idle ceremony.

Further, Article 15 (4) of the Council's Rules provides that "the decision of the Council shall be rendered at a meeting of the Council *called for that purpose* which shall be held as soon as practicable after the close of the proceedings" (Memorial, p. 335, *supra*). When the earlier meeting of the Council was held in Vienna, it was merely agreed that the Council would meet on 27 July 1971 to hear the Parties on the Preliminary Objections, and the point whether a decision would be reached was not specifically discussed. No meeting was called for the purpose of arriving at a decision. As the President of the Council himself said in the Council on 28 July 1971, after the hearing of the oral arguments was concluded:

> "That point [i.e., whether a decision would be reached] was not specifically discussed. It was simply agreed that the Council would meet

on 27 July to hear the parties on the Preliminary Objection. We didn't say more than that. So perhaps some people thought that we were going to take a decision and others did not." (Memorial, p. 264, *supra*, para. 129.)

Thus some governments were not even aware that a decision would be taken by the Council on the Preliminary Objections. This fact is relevant to the question raised—whether it is possible to attribute responsibility to the Council as such rather than to the individual governments.

II

Subject to what is stated herein below, the existence or non-existence of jurisdiction is an objective question in law, which it is now for this Court to determine. If this Court thinks that, in law, the Council had no jurisdiction to entertain Pakistan's Application and Complaint, then the fact that the Council reached an opposite conclusion by irregular methods clearly becomes irrelevant.

But if this Court is not prepared to hold that the Council had no jurisdiction, the desirability, if not the necessity, of sending the case back to the Council for reaching a decision on the point of its own jurisdiction by the right manner and method is indicated by the following consideration. Article 84 of the Convention confers on the Council not only the right but the duty to decide in the first instance the question of the limits of its own jurisdiction. A proper decision of the Council supported by reasons, reflecting the views of the nations which are parties to the Convention, is contemplated by the Convention and the Council's Rules as a necessary prelude to a decision by this Court. If therefore this Court is at all inclined to the view that jurisdiction may exist, the doctrine of "strict proof of consent" can be more safely applied by following the scheme of the Convention and the Council's Rules and directing that the various nations represented on the Council, which are parties to the treaties and the limits of whose consent is in issue, should have the opportunity of considering fully the entire case and then giving a reasoned decision.

II. I come now to the second section of Judge Sir Gerald Fitzmaurice's points put to me. "Substantive international law" is a compendious term which I have used in the submissions made on 23 June 1972 to denote international law which is the source of titles, powers and rights of sovereign States *dehors* the Convention and the Transit Agreement. The only object of using this compendious term was to designate, clearly and without circumlocution, the vast field of international law which is unconnected with any question of interpreting or applying the two treaties.

I do not contend, and it is not necessary for the purpose of my argument to contend, that treaty interpretation is, to quote the words of the learned Judge Sir Gerald Fitzmaurice, "a sort of subsidiary or lower-level international law not on a par qualitatively with some kind of higher international law". While I would not be prepared to deny a superior status to substantive international law, I do not propose to assert any such superior status since it is not relevant to my argument.

The distinction which I am respectfully submitting for the Court's acceptance is the distinction between the field of substantive international law on the one hand and treaty interpretation or application on the other. I submit that the two fields are separate and distinct, even if one regards them as being on a par qualitatively.

While the representatives on the Council may be equipped by experience and training to deal with the general run of questions of interpretation and application of the treaties, they are not qualified to deal with questions of substantive international law.

I now come to the questions put by Judge Petrén:

Judge Petrén has stated: "under Article 84 of the Chicago Convention the decisions of the ICAO Council, against which appeals may be brought, are decisions relating to the interpretation or application of the Convention."

India's submission is as follows: under Article 84 of the Convention, an appeal lies to this Court from a decision of the Council on an application filed under Article 84. The decision is not any the less appealable if the application is asserted, or found, not to relate to interpretation or application of the Convention. In other words, the maintainability of the application under Article 84 depends on its dealing with disagreement relating to the interpretation or application of the Convention; but the maintainability of an appeal under Article 84 depends merely on a decision being given by the Council on the application, regardless of whether the application itself related to the interpretation or application of the Convention or whether it did not and was therefore misconceived.

Article 86 of the Convention, which deals with stay of the Council's decision pending an appeal, has no bearing on the question whether a decision is appealable or not. That question would have to be decided by reference to Article 84 only. In cases where the decision of the Council is appealable under Article 84, the decision, if appealed from, has to be suspended until the appeal is decided, except in the one case dealt with by the first sentence of Article 86. The words "any other matter" in Article 86 do refer literally to any other matter which is the subject of a decision of the Council when that decision has been taken in appeal under Article 84.

The decision of the Council on a preliminary objection as to jurisdiction is appealable under Article 84, and, therefore, that decision would be suspended under Article 86 until the appeal is decided—see paragraphs 4 *(b)* and *(c)* of the Working Paper presented by the Secretary-General of ICAO, in India's Reply, page 449, *supra*. A decision of the Council merely admitting or rejecting an application to file evidence may not be an appealable decision under Article 84, and in that case the question of stay under Article 86 would not arise.

May I now come to the questions put to me by Judge Onyeama:

In Article 84 of the Convention, the material words are the following:

> "If any disagreement . . . relating to the interpretation or application of this Convention . . . cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council . . . Any contracting State may . . . appeal from the decision of the Council . . . to the Permanent Court of International Justice."

In the context of the point made by the Chief Counsel of Pakistan regarding the competence of the appeal now before the Court, my submissions on the above-quoted words are as follows:

(1) The disagreement must relate to interpretation or application of the Convention and it must be such that it cannot be settled by negotiation.
(2) Such a disagreement, when it is made the subject-matter of an Application, *shall* be decided by the Council.
(3) Once an Application is made by a State to the Council on the ground that there is disagreement relating to interpretation or application, a prelimi-

nary objection to the Council's jurisdiction may disclose a disagreement as to the interpretation of the jurisdictional words "interpretation or application".

(4) Article 84 does not require that a dispute as to the Council's jurisdiction should itself be the subject-matter of attempts at settlement by negotiations. However, if this were to be read as a requirement of Article 84, the written and oral pleadings of India and Pakistan before the Council left no doubt that any attempt to settle the dispute as to jurisdiction by negotiation was foredoomed to failure.

(5) An appeal is provided to this Court from a decision of the Council on an Application of any State concerned in the disagreement. It is not a further condition of the maintainability of an appeal to this Court that the decision should deal with the merits of a disagreement which cannot be settled by negotiation. If the opposite view were upheld, the unacceptable consequence would be that if the Council rejected an Application on the ground that it had no jurisdiction to deal with it, no appeal would lie to this Court, however erroneous the Council's decision may be.

May I add, with respect to the honourable Judge that if the opposite view were upheld, the other unacceptable consequence would be that no appeal would lie at all on a decision of the Council as to its own jurisdiction, which would clothe the Council with the same power to make a final decision as to its own jurisdiction as is conferred on this honourable Court by Article 36, paragraph 6, of the Statute of the Court.

The following are my answers to the questions put by Judge Dillard:

(1) Yes. It does follow from my theory that in so far as the jurisdiction of the ICAO Council is concerned, it is completely irrelevant whether India's asserted suspension of the Convention and Transit Agreement was or was not in conformity with the principles of international law.

(2) Yes. It does follow from my theory that the mere factum of suspension, once officially proclaimed by India, should suffice in and of itself to preclude the ICAO Council from entertaining the Application and Complaint of Pakistan; and that it is immaterial whether Pakistan agreed or disagreed with the fact of suspension.

It may, however, be noted that in the present case the fact of suspension in 1971 is admitted by Pakistan.

(3) Yes. The composition and characteristics of the Council are irrelevant inasmuch as the Council, no matter how constituted, would be without any power to entertain the Application and Complaint. Even if the Council were composed of 27 of the most eminent jurists of the world, it would still, as a composite body, be without jurisdictional power.

(4) As you rightly state, Judge Dillard, the matter of the composition and characteristics of the Council was elaborated upon by me in order to justify the "inference" (if I may use the learned Judge's word) that it is unreasonable to suppose that the nations of the world would confer on the Council the power to decide any disagreement relating to termination and suspension, or even questions of substantive international law.

I have been unable to find any *positive, specific* evidence that the nations, including in particular India, in ratifying or adopting the Convention and Transit Agreement, did so with the understanding that the jurisdictional power of the ICAO Council was limited in a manner which excluded any disagreement relating to termination or suspension.

However, may I add the following points which, in my respectful sub-

mission, are relevant to the question of evidence regarding the limits of the Council's jurisdiction:

(a) The exclusion of the Council's jurisdiction in cases of suspension or termination is not a matter of inference but is explicit on a proper construction of the jurisdictional words "interpretation" and "application", and on the well-settled distinction between those words on the one hand and termination or suspension on the other.

(b) The burden of proof is on Pakistan, since the Party invoking the Council's jurisdiction has to give strict proof of consent.

(c) There is overwhelming evidence of the reluctance of nations to submit to the compulsory jurisdiction of this Court, or any other tribunal, disputes as to the exercise of their right under international law as sovereign States to suspend or terminate treaties.

(d) The very first session of the ICAO Assembly expressly recognized that the original concept of submitting all disputes to the Council had been abandoned and a limited jurisdiction was given to the Council under the Convention (Memorial, para. 81, pp. 51, 52, *supra*).

I have finished, Mr. President, with the answers to the questions put by this honourable Court.

May I now come to my learned friend's argument, which he advanced with great skill and commendable brevity. At the outset my learned friend has been kind enough to credit me with "courage to advise" this honourable Court to reject the principles of international law and "keep the principles of expediency in mind". I must be a singularly inarticulate person if I have failed to make clear my basic point that this Court will be pleased to apply well-settled principles of international law to the point in issue, and with that object I thought that I had given a fairly reasoned argument for acceptance at the hands of this Court.

My learned friend has stated also, at the commencement of his argument: "Before the Council, the words 'material breach' were not mentioned" (p. 625, *supra*).

Now, this is incorrect. I will not multiply references to what was stated before the Council, but just to satisfy the Court that the point of material breach was specifically argued in terms on behalf of India, I would draw attention to India's Memorial, page 147, *supra*, paragraph 21. This paragraph deals with India having exercised its right under international law to suspend the treaties on the ground of material breach and what is argued before the Council is that this right of India is supported by the decision of this Court. The words of paragraph 21 are as follows:

> "The second proposition laid down by the World Court is that if one State which is a party to an international treaty commits a material breach of the treaty, the other party is not bound to sit idle, wring its hands and say 'Will you kindly be good enough to observe your obligations'."

Then on page 149 in India's Memorial the very first line, in paragraph 25, on page 149:

> "In other words, the World Court says [I should have said the International Court of Justice says] that even apart from the Vienna Convention of 1969, every State has an inherent right, as a matter of customary international law, to terminate an agreement if another State has committed a breach of it. 'In the light of these rules, only a material breach of a treaty justifies termination . . .' "

At page 151, on behalf of India, we cite the argument of the United States counsel in his oral pleadings. The United States counsel is giving an answer to the question put to him by Judge Sir Gerald Fitzmaurice, and on page 151 India quotes before the Council the written answer of the United States counsel which starts with the words "The doctrine of material breach as a basis of terminating a contract . . .".

And, finally, on page 153 India places before the Council the very Article of the Vienna Convention which deals with termination or suspension on account of material breach, and that is Article 60 of the Vienna Convention. It is in paragraph 37 on page 153.

The fact that Pakistan's conduct amounted to material breach of the Convention and the Transit Agreement is stated, no doubt in a dignified manner, but also in a manner which leaves no doubt that India regarded the conduct of Pakistan as sufficiently reprehensible to justify suspension of the treaties. That is on page 102, *supra*, of India's Memorial, the last sentence of paragraph 8:

> "The Government of India also forthwith suspended the overflight of its own aircraft over Pakistan's territory in view of the present and imminent danger to civil aviation created by the conduct of Pakistan."

And then on page 105, paragraph 24, third line, referring to Pakistan:

> "That country has shown no regard for the most elementary notions of safety in civil aviation, and has made it impossible for India to enjoy its rights under the Convention, and its privileges under the Transit Agreement, over Pakistan territory. Pakistan's theoretically permitting Indian aircraft to overfly Pakistan is, in the context of the facts stated above, a mockery of the principles underlying, and the provisions embodied in, the Convention and the Transit Agreement. In the circumstances, the Government of India submit that they had complete justification for terminating or suspending the Convention as regards overflying and the Transit Agreement vis-à-vis Pakistan."

If this is not alleging material breach, I do not know what words India should have used to convey that idea.

Now, my learned friend has spent considerable time in attempting to satisfy the Court that the appeal is incompetent and the Court should dismiss the appeal on the ground that the appeal is not maintainable. I have three preliminary objections to my learned friend raising the point at all. I did not want to interrupt him when he was arguing and that is why I thought I would deal with the matter when it came to my turn to reply.

The first ground on which I object to this argument being at all urged before the Court is that it is in violation of Rule 62 of the Rules of Court.

The second ground of my objection is that this point is not taken, so far as the Application before the Council is concerned as distinct from the Complaint, in the Counter-Memorial or in the Rejoinder of Pakistan.

And my third ground of objection is that no respondent can be allowed to take up such a ground, even on ordinary principles of natural justice and fair play, after the entire argument of the appellant on the merits of the appeal is finished.

I shall deal with these three points in order.

First, the Rules of Court: the relevant Article in the Rules of Court is Article 62:

> "1. A preliminary objection must be filed [Mr. President, I am sure

you will be good enough to note the word 'must'] by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading.

2. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; these documents shall be attached; it shall mention any evidence which the party may desire to produce.

3. Upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time-limit within which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence it is proposed to produce shall be mentioned.

4. Unless otherwise decided by the Court, the further proceedings shall be oral.

5. After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings."

Four points emerge from Article 62. First, it is mandatory for a party objecting to the jurisdiction of the Court to file the preliminary objections at the latest before the expiry of the time-limit fixed for the delivery of its first pleading. Second, there have to be written submissions and facts and law should be properly set out in the pleading, which may be called a special pleading, which has to be placed before the Court and given to the other side before the preliminary objection can at all be heard. Third, the proceedings on the merits shall be suspended; in other words, the concept of the Court hearing the argument on merits first and then a party raising the point as to jurisdiction, is directly contrary to Article 61 which requires that the proceedings on the merits of the appeal shall be suspended. Fourth, the Court has to give its decision on the objection, or decide that the objection to the Court's jurisdiction shall be joined to the merits of the appeal. This procedure has not been complied with at all.

My second objection is that neither in the Counter-Memorial nor in the Reply did my learned friend object to the jurisdiction of this Court so far as his Application before the Council is concerned. Without reading what he has set out in his Counter-Memorial, may I give references to the relevant passages there. Pakistan's Counter-Memorial, page 379, *supra*, paragraphs 23, 24 and 25 deal with the question of the jurisdiction of this Court. Pakistan has there argued that Article 36 (2) of the Statute of the Court is not applicable here. I have never suggested that Article 36 (2) is applicable. In paragraph 25, it is stated that the appeal against the Complaint is incompetent and not maintainable. There is nothing said about the appeal being incompetent or not maintainable so far as Pakistan's Application before the Council is concerned.

In Pakistan's Rejoinder, page 472, *supra*, the relevant paragraphs are 36 and 37. Even when India, in its Reply, specifically pointed out that the Court has jurisdiction to deal with the appeal under Article 36 (1) of the Statute of the Court, which extends the Court's jurisdiction to "all matters specially provided for . . . in treaties and conventions in force" and India categorically says that the Convention and the Transit Agreement are in force, in the Rejoinder Pakistan does not suggest that this argument is misconceived and

that an appeal does not lie under Article 36 (1) of the Statute of the Court.

There are various assertions in Pakistan's Rejoinder, e.g., paragraphs 36 and 37, where Pakistan chooses to say: India now contends, India now concedes. I do not know how the use of the word "now" is justified. The stand of India has been exactly the same all along, and the word "now" is misleading in the context where it is used. It erroneously suggests that India is saying something now, which it has never said before, whereas the truth is exactly the contrary.

My third point is self-explanatory. On rules of natural justice, as a matter of elementary norms of fairness in procedure, no party can be allowed to let a whole argument go on on merits, and when that argument is over, decide for itself whether it wants to object to the jurisdiction of the Court or not.

I now come to the other aspect of this matter. If the Court is pleased to rule out this objection as to the maintainability of the appeal, I have nothing more to say; but in case the Court wants to go into the question of the maintainability of the appeal, I shall deal with the three points which my learned friend has raised on the merits of this particular issue.

His first point has been that the Convention and the Transit Agreement, having regard to India's pleadings and oral arguments, should be treated as treaties not in force for the purpose of Article 36 of the Statute of the Court.

Pakistan's second point is that no decision purely on the issue of jurisdiction is appealable under Article 84 of the Convention, and it is only the one and final decision on an application which is appealable under that Article of the Convention.

My learned friend's third point is that the Council has the competence to decide the limits of its own jurisdiction, and the Council's decision is final on the point.

I shall deal with these three points in order.

First, my learned friend says that the correct construction of Article 36 of the Statute of the Court is that, if India asserts that the Treaty has been suspended it must be regarded as a treaty not in force and therefore an appeal does not lie under Article 36, paragraph 1.

There are four answers to this point of my learned friend. *(a)* A multilateral treaty is in force, even if it is suspended or terminated as between some of the parties to the treaty. *(b)* Assuming the treaty has to be in force as between the parties to the dispute, the true test is whether it is in force according to the party which sought the decision appealed from. *(c)* Where the appeal is from a decision of an authority constituted under the treaty the real test is, would the decision appealed from be in force unless reversed in appeal? *(d)* The words "in force" cannot be invoked to defeat a point regarding termination or suspension arising on the merits of the appeal or to render the appeal incompetent in such a case. I think each of these four points needs a little explanation.

(a) When there is a multilateral treaty, the existence of the treaty, its continuation in force, must be recognised, regardless of the question whether it is in force as between two or more parties out of the several parties to the treaty. In short, the existence of a multilateral treaty or the fact of the multilateral treaty being in force, is not dependent upon whether it is in force as between the two Parties to the Appeal before the Court.

(b) Assuming against myself that the words "in force" are to be applied as between the two parties who are the Parties to the Appeal before the Court, then the real test is whether the treaty is in force according to the party who sought the decision appealed from, because otherwise it makes nonsense of

the right of appeal. Just consider how it will work out in practice: my learned friend goes to a tribunal; I tell the tribunal: you cannot deal with it because the treaty has been suspended; then my learned friend puts me on the horns of a dilemma—he tells me: "either you accept the position that the treaty is in force, in which event your whole argument before the Council, and in this appeal, goes by the board, or you say the treaty is not in force, in which event your appeal becomes incompetent." If this was the idea of drafting Article 36, paragraph 1, it was perhaps more in jest rather than as a matter of the earnest desire of the nations to have adjudication at the hands of this Court; and I take it that the nations were not trying merely to enliven international proceedings by putting something in the Article which would negative the right of appeal where the right is most needed.

(c) The real test in this appeal is: would the decision of the Council remain in force unless it was reversed in appeal? Now this is a good test of deciding whether the requirement of Article 36 (1) is satisfied. Suppose I did not succeed in this Appeal: would or would not the decision of the Council remain in force? It would. The confusion arises because the fourth point, to which I come directly, is not borne in mind in applying the words "in force" in Article 36, paragraph 1.

(d) The words "in force" cannot be invoked to defeat a point regarding termination or suspension arising on the merits of the appeal or to defeat the appeal itself on the ground that it is incompetent. What my learned friend says is that the words "in force" must either defeat me on merits or defeat me on the preliminary point as to the maintainability of the appeal. I say that it makes no sense of Article 36, paragraph 1. Just let me give one simple example to illustrate what I am saying. Two nations—nation A and nation B—have a bilateral treaty, and the treaty provides that *any* dispute pertaining to the treaty (including disputes as to termination, etc., either expressly stated or implied) shall be decided by this Court. Nation A terminates the bilateral treaty. Nation B is aggrieved and comes before the Court and says: this treaty has been terminated wrongly. I accept that the treaty has been terminated, I accept the fact of termination, I accept it is not in force, but I say it has been wrongly done. Will this Court have jurisdiction, or will the wrong-doing State put the other State on the horns of a dilemma: either admit that the treaty is in force or let your appeal be dismissed? How will it work in practice? This Court has considered a number of cases of termination, where the issue of termination has been within the competence of the Court. Thus the point is that the words "in force" cannot be used to defeat a point on the merits of the appeal. In the hypothetical case of the bilateral treaty which I took, the issue of termination was on the merits of the appeal. In our present case, the issue of suspension is on the merits of the appeal. A treaty may have been terminated or suspended, and the factum of termination or suspension, the legality or justification for termination or suspension, may be on the merits of the appeal. Now, when it is on the merits of the appeal, it is impossible to shut out the merits by saying that since you have come in appeal, and you say that the treaty is in force, you cannot argue that it has been terminated or suspended; and it is equally impossible to have the appeal dismissed on the preliminary ground that the treaty is not in force. I submit this is the only way in which this particular paragraph of Article 36 can be reasonably construed. Otherwise, in a number of cases where this Court is given the power to deal with disputes as to termination, it can never deal with the dispute.

That finishes the first point of my learned friend on the maintainability of

the appeal. This point, of course, as I have already said, is nowhere in the Counter-Memorial or Rejoinder; there are no written submissions; but I have still dealt with it in reply to my learned friend's oral arguments—contrary to the Rules as I have already pointed out.

I come to the second point of my learned friend on the question of non-maintainability of the appeal. He says that, under Article 84 of the Convention, it is only one decision which can be the subject-matter of an appeal. This point, again, is nowhere in the pleadings, but I shall nevertheless deal with it.

Article 84 has no such limitation at all. Suppose an application deals with three distinct disputes as to interpretation or application, and the Council chooses to decide each dispute at separate sessions, and give separate decisions; will there be three appeals or not? Or should a party wait until the decision on the third issue is given, which is unconnected with the first issue? Can the aggrieved party come or not come each time a decision is given? Where does one get the concept of the oneness of the decision which is applicable. What is there in Article 84 which suggests that you cannot have more than one appealable decision on the same application? There are no such restrictive words restricting the right of appeal to only one decision on an application.

Now let me deal with the second point which my learned friend hinted at in his oral arguments, and which I find Judge Onyeama has specifically referred to in the questions put to me. That point is this: in order that a decision under Article 84 may be maintainable, is it necessary that the decision must be on that disagreement which has been the subject-matter of negotiations for settlement? I have given a reply to this in the answer to the honourable Judge, and therefore I shall not repeat the precise argument in detail again.

It is sufficient to say that the two parts of Article 84—the first part which says in what cases an application will lie, and the second part which says in what cases an appeal will lie to this Court—are not interconnected in this manner, so as to bring the concept of negotiations for a settlement into the question of the maintainability of the appeal. The two are quite distinct; if I may read Article 84:

> "If [there is] any disagreement . . . relating to the interpretation or application of this Convention . . . [and that disagreement] . . . cannot be settled by negotiation, it shall . . . be decided by the Council . . . [on an application]."

The matter is finished. Then:

> "Any contracting State may, . . . appeal from the decision of the Council [that is, on the application. What is appealable is the decision of the Council on the application, and there is no further requirement]."

But assume the other view, which I respectfully submit is erroneous, were to be held against me, and assume someone were to say that, in order that the appeal may be maintainable, the decision appealed from must deal with a disagreement as to interpretation or application of the Convention which cannot be settled by negotiation. Even then I am right, because here is a clear dispute between India and Pakistan as to the interpretation of the jurisdictional words, "interpretation or application"; and there is no doubt that it cannot be settled by negotiation. If it could have been settled by negotiation, the Court would not have been troubled with this case. That it cannot be

settled by negotiation is almost axiomatic in the light of the allegations you have seen and heard. That it is a disagreement as to interpretation or application is self-evident, because Pakistan puts one interpretation on the words "interpretation or application", and I put another. The reason why this Court will interfere is that these words "interpretation or application" are jurisdictional words, and by a wrong interpretation the Council cannot enlarge the field of its own jurisdiction. So this honourable Court will step in and prevent a wrongful exercise of jurisdiction on an erroneous construction of the words "interpretation or application".

Now what is suggested against me is this: is it therefore the position under Article 84 that *any* decision of the Council is appealable? If the decision is to grant or refuse an adjournment, to admit or reject evidence, if a decision is given that the case will begin tomorrow at ten o'clock; are these decisions appealable? Or a decision is given, let the parties try to negotiate, which is Article 6 of the Rules of the Council (Memorial, p. 332, *supra*):

> "(1) Upon the filing of the counter-memorial by the respondent, the Council shall decide whether at this stage the parties should be invited to enter into direct negotiations as provided in Article 14."

Now what is put to me is, and that is my learned friend's argument in his oral pleadings—am I suggesting that all these decisions are appealable? Well, my answer is very simple—the Court knows where to draw the line, and it is clear where the line has to be drawn. I submit, in order that a decision may be appealable under Article 84, the decision must be on an issue arising in the application. The issue before the Court is, and before the Council was,—What is the construction of the words "interpretation or application"? Only one issue arose on Pakistan's application, so far as the preliminary objections are concerned: did the Council have jurisdiction? This was an issue in the application. It is an issue on which the Rules of the Council provide for special pleadings; it is an issue on which the Rules of the Council provide for a separate special hearing. Can you equate this issue with adjournment or other such matters? It is an issue on which the Rules provide for a decision restricted to this particular issue. All this is provided for as a matter of the adjudication process; this is a matter on which there has been an adjudication. When you decide to grant adjournment or not to grant it, permit evidence to be led or not, you are not adjudicating on an issue in the case. Here there is an adjudication on an issue which arose directly between the Parties. The Rules put this beyond doubt. Article 5 of the Rules for the Settlement of Differences of the Council, in India's Memorial, page 331, *supra*, which my learned friend also referred to:

> "*Preliminary Objection and Action Thereon*
>
> (1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection.

[So there is a regular pleading.]

> (2) Such preliminary objection shall be filed in a special pleading at the latest before the expiry of the time-limit set for delivery of the counter-memorial.
>
> (3) Upon a preliminary objection being filed, the proceedings on the merits shall be suspended and . . .
>
> (4) If a preliminary objection has been filed, the Council, after hearing

> the parties, shall *decide* the question [mark the words] *as a preliminary issue* before any further steps are taken under these Rules."

It is an issue arising on the application, so the decision is on an issue. There can be three issues in an application, and those three issues may be decided by three different, separate orders—each order is appealable. This issue is not only one arising in the application itself, but it is an issue which goes to the root of the whole matter. Imagine a Gilbertian situation, where an issue which does not go to the root of the matter is appealable, but if it goes to the root of the matter, I have no right of appeal. Jurisdiction goes to the root of the matter as no other issue will.

My learned friend said in his oral pleadings (*supra*, p. 626) that if the parties are allowed to come to this Court, it would waste time. It will not waste any time. Suppose I have to wait until the merits are decided by the Council, and then I come to this Court challenging the decision on both jurisdiction and merits, how will it save time? The point is that, on the contrary, the time would be wasted by going into merits before a Council which may ultimately be found to have no jurisdiction at all. You never save time by permitting a Council to go on with a matter where its jurisdiction is in doubt—the way to save time is to have a preliminary objection to its jurisdiction. That is why Rules of all courts provide for a preliminary hearing on the issue as to its jurisdiction, because that is the way to save time. Why did this Court provide in its own Rules that the question of the Court's jurisdiction will be decided as a preliminary issue? To save time.

Suppose on this very Application of my learned friend and on my preliminary objections, the Council had dismissed the Application on the ground that it had no jurisdiction; according to my learned friend could he not appeal against it because it did not deal with the merits? What would happen in that case? If an order upholding the challenge to jurisdiction is appealable, is it conceivable that an order not upholding the challenge to jurisdiction is non-appealable?

My learned friend next says that Article 5 deals with preliminary objections and the decision on the preliminary objection as to the Council's jurisdiction is under Article 5, not under Article 15, of the Rules of the Council. The answer is that Articles 5 and 15 are *not* mutually exclusive. If the Council gives its decision under Article 5 on the preliminary objection as to its own jurisdiction, it has got to comply with the requirements of Article 15. I have only to read Article 15 to show that it could not be any other way. May I read Article 15, which is in India's Memorial, page 334, *supra*: "*Decision:* After hearing arguments, or after consideration of the report of the Committee, as the case may be, the Council shall render its decision."

The Court will have marked the words in Article 5, clause 4, that "the Council has to decide the question as a preliminary issue"—the word "decide" is specifically used in Article 5. Various requirements for a decision are set out in Article 15.

If to a decision on the issue of jurisdiction, Article 15 does not apply, look at the consequences.

First, the decision on jurisdiction need not be in writing. Secondly, the date on which it is delivered need not be mentioned. The list of Members of the Council participating, names of the parties and of their Agents, summary of the proceedings, all these need not be there. The conclusion of the Council, together with its reasons, my learned friend says, need not be there. The decision, if any, in regard to costs, need not be there. A statement of the

voting in Council showing whether the conclusions were unanimous or by a majority vote, and, if by a majority, giving the number of Members of the Council who voted in favour of the conclusion and the number of those who voted against or abstained—all these need not be there.

Can this Court read Rule 15 as not applicable to a decision on a preliminary objection as to jurisdiction? Can the Council function without complying with Article 15?

The provision of Article 15, which, according to my learned friend, does not apply to the decision on jurisdiction, is: "Any Member of the Council who voted against the majority opinion may have its views recorded in the form of a dissenting opinion which shall be attached to the decision of the Council." Is it suggested that on the most important point, namely jurisdiction, a Member cannot write a dissenting opinion?

Then the next one: "The decision of the Council shall be rendered at a meeting of the Council called for that purpose." Can the point of jurisdiction be decided at a meeting which is *not* called for that purpose?

And the final one: "No Member of the Council shall vote in the consideration by the Council of any dispute to which it is a party." There was no voting by India on the preliminary objection. If Article 15 did not apply, India could have voted on the preliminary objection which is its own objection.

Now, if it is clear that every single one of these requirements of Article 15 does apply, why not the requirement about the giving of reasons for the decision? Every one of these requirements must apply, on any reasonable reading of Article 15, to a decision which is given on a preliminary objection under Article 5. In other words, the preliminary objection is under Article 5, and under Article 5 that decision will have to be given; but whether a decision is on merits or whether it is on the preliminary objection under Article 5, the procedure and the requirements are the same, and they are in Article 15.

Then, my learned friend says the word used in Article 84 of the Convention is "decision" and not "decisions"—it is not in the plural. I think it would be impertinent on my part even to mention to this Court that singular includes the plural. I cannot recall a right of appeal being given against decisions in the plural.

My learned friend says Article 5 is a self-contained code. I have pointed out that it could not possibly be a self-contained code because, otherwise, it can be an oral decision without any formalities whatever, which are all required under Article 15.

In short, the decision has to be under Article 5, read with Article 15, and that decision is as much appealable as any other decision on an issue arising in the application.

Then my learned friend says the Council did not give reasons because they knew that the decision is not appealable. The truth is exactly the contrary—the tribunal knew and realized that the decision *was* appealable, and that is on the record. In fact nobody thought it non-appealable until the oral argument of Pakistan began.

In India's Memorial, page 273, *supra*, on the preliminary point as to jurisdiction the learned President of the Council himself says in the last sentence of paragraph 19, "I imagine also that if the decision of the Council on this question was contested, there is always a superior body to which India could apply".

There is no doubt as to which the "superior body" is.

Please turn to India's Reply, page 454, *supra*. The President of the Council says in June 1971:

> "When we started this case in Montreal two months ago, I think I said that the legal opinion was that as it was a case that might eventually go to an authority outside ICAO—for instance, the International Court of Justice—it was necessary throughout the proceedings to take decisions by the majority required under the Convention . . ."

The Council had a working paper prepared on the question as to whether an appeal would lie from a preliminary decision on jurisdiction. The working paper prepared by the Secretary-General of ICAO unreservedly says that the right of appeal does exist, and that is also in India's Reply; the relevant passage is at page 449, *supra*:

> "*(b)* 'decisions of the Council' [from which appeals lie]: There are no qualifying words which would exclude any particular class of decision. The legislative history of Article 86 reveals no such distinction."

Then there is a footnote: "For example, the decision may be one affirming or negating the jurisdiction of the Council in a particular matter."

So, far from my learned friend's conjecture being right—that the Council gave no reasons because it thought the decision is not appealable—the positive evidence is that the Council knew that the decision is appealable; the President has said it in so many words before the final decision, as I have already pointed out.

In the working paper, on page 449 of India's Reply, after the statement that a decision on the issue of jurisdiction will be appealable, clause *(c)* is also relevant, regarding Article 86 of the Convention:

> " 'Shall, if appealed from, be suspended until the appeal is decided': The words 'if appealed from' denote a fact, namely whether or not an appeal has been filed. The words 'shall . . . be suspended' are imperative, so that the Council's decision is *ipso facto* suspended during the pendency of the appeal. The decision appealed from would confer no right on any of the parties to the dispute and would not be given effect, during the pendency of the appeal, namely 'until the appeal is decided'."

Now the point is that none of these various Articles—Articles 84 and 86 of the Convention, or Articles 5 and 15 of the Rules—help my learned friend in his argument that the ICAO Council's decision is not appealable. The ICAO Council itself regards it as appealable.

Finally, my learned friend says a decision on jurisdiction is not a decision. Consider the decision of this honourable Court in the *South West Africa* case of 1962 purely on jurisdiction. Would anyone say it was not a decision? If that decision had been given by a lower authority, could it be said that it was not a decision on the Applications filed? To say that a decision on a point which goes to the root of the matter is not appealable is really to negative virtually the right of appeal.

The Court adjourned from 11 to 11.25 a.m.

I come now, Mr. President, to the third and last ground advanced by my learned friend in support of his proposition that the appeal is not maintainable. His point is that the Council has the right to decide its own jurisdiction and decide it finally.

On that proposition, my learned friend has cited certain cases and textbooks. May I request the Court to be good enough to make a distinction between three propositions, because otherwise one tends to confuse the real issue. The first is—which is a proposition I accept—that the Council has the right in the first instance to decide whether it has jurisdiction. The second proposition, which I deny, is that the Council has the right to decide the question of its own jurisdiction finally. And the third proposition is that the Council's decision as to jurisdiction can be corrected on appeal: it is linked up with the second proposition.

My submission is that no case and no textbook has ever suggested that when the decision of an authority or a tribunal is subject to appeal, the authority or the tribunal still has the right to decide the question of its own jurisdiction finally. My learned friend does suggest it in his oral pleadings.

I submit that the proposition is untenable.

Pakistan cited from Rosenne's book *The Law and Practice of the International Court*, Volume I, pages 438 to 441. Without reading the relevant passages there, if I may just summarize what the learned author says, because the position is fairly clear. First, the learned author is dealing with the jurisdiction of this honourable Court. The Court has held that, even apart from Article 36, paragraph 6, of the Statute of the Court, any decision given by the Court as to its own jurisdiction is final. I accept that proposition. The principle that this Court has the jurisdiction to decide for itself finally what the limits of its own jurisdiction are, has been given statutory form in Article 36, paragraph 6, of the Statute, but that is only a statutory recognition of a principle which would, even apart from the Statute, prevail.

Now it is a far cry from that proposition, which applies to this Court, to the jurisdiction of an authority or tribunal which is subordinate to the Court and whose decisions are subject to appeal to the Court.

The case which my learned friend cited, the *Nottebohm* case, *I.C.J. Reports 1953*, page 119, does not deal with a tribunal like the Council, whose decisions are subject to appeal.

In short, without elaborating this point, may I just place before the Court three points. First, that the Council is not in the position of an arbitrator, whose award is not subject to appeal. I mention this because my learned friend has cited cases which deal with arbitrators appointed to determine international disputes where their decisions are not subject to appeal. Those decisions, and the principles laid down there, have no application here. Secondly, the Council, if I may say so with respect to the Court, is not the International Court of Justice. To try to apply to it the principles which apply to this Court is, perhaps, fair to neither institution. Thirdly, the Council is, as I have already submitted, essentially an administrative body invested with certain judicial or quasi-judicial functions.

I think the position regarding the Council's decision as to its own jurisdiction being subject to reversal by this Court on appeal is so clear that I would be content with citing only one authority, if even one authority is needed in support of that proposition—Shihata's book on *The Power of the International Court to Determine its own Jurisdiction*, page 68, last paragraph:

> "*The Power is Relative—Effect of the Excessive Exercise of the Power*
>
> The power of international tribunals to determine their own jurisdiction has, since it was first alleged to exist, been conceived as subject to limitations that stem from the judicial nature of the tribunal and from

> the instruments that enable it to handle the dispute. The rule of the *compétence de la compétence* has, therefore, been always subject, in theory, to another rule according to which a tribunal's decision becomes null if reached as a result of an excessive exercise of jurisdiction."

If the law were otherwise, the words limiting the jurisdiction of the Council would be meaningless and the Council can decide for itself whether it will abide by the limits on its own jurisdiction or ignore them. This cannot possibly be the construction of the Convention.

Now my learned friend has made a separate point, which is an additional point regarding the maintainability of my appeal pertaining to the Complaint as distinct from the Application before the Council. On that point I have given an answer to the question put to me by Judge Jiménez de Aréchaga, and I would request the Court to regard my answer given there as a part of my reply to Pakistan on this point.

But may I state, in addition to what I have already said in reply to the learned Judge on this particular point, something which strikes me as very relevant. If the subject-matter of the Complaint is one which involves nothing but a question of interpretation or application of the Transit Agreement on the complainant's own case, the right of appeal cannot be defeated or negatived by the form of the proceedings adopted.

This, I submit, is an important point which directly arises for consideration in the light of the great emphasis put by my learned friend on this issue of the decision on the Complaint being one which cannot be the subject-matter of appeal. Let me give a concrete example to illustrate what I am trying to say. The Complaint can only be under the Transit Agreement, it cannot be under the Convention. Now according to the party itself, that is, Pakistan, the question—I am presenting their case, I do not accept it but it is their case—the question involves a disagreement as to the interpretation or application of the Transit Agreement. They make it the subject-matter of an Application under the Transit Agreement; almost word for word it is made the subject-matter of a separate Complaint.

Now the point at issue is this: is it the form of the proceedings which determines the right of appeal, or is it the substance of the dispute? If it is the form of the proceedings, it would be so easy to defeat the right of appeal to this Court. All that you would have to do is, even when on your own assertion the question is one of application or interpretation of the Transit Agreement, not file an application, put it in the form of a complaint, and any decision given is then not subject to appeal.

The subject-matter is word for word the same, the facts are the same, the submissions, contentions, arguments are the same—everything is the same; the relief sought practically word for word the same. But the party says—I have put it in the form of a complaint. Now my point is that what determines the right of appeal is not the label which is attached to the proceedings. A very important right, like the right of appeal to this Court cannot be defeated by putting the label "complaint".

I am taking a case where the real dispute is asserted to be only about interpretation or application of the Transit Agreement, because that is the whole case of Pakistan. Now three possibilities arise: the party may file only an application; the party may file only a complaint, or the party may file both an application and a complaint.

If my learned friend is right, the consequences are that if he files an application only, I have a right of appeal; if he files an application and a complaint,

virtually a duplication word for word, I have a right of appeal as regards the application, none as regards the complaint; and if he files only a complaint, I have no right of appeal at all. Can that be the right reading of a Charter under which a party has a right to come to this Court?

My point is, that the right of appeal is a substantive right, it cannot be defeated by the label attached to a particular proceeding. Pakistan, which has filed what it calls a complaint, has, in reality, filed an application: it is a duplication of the application. Again consider what the position would be otherwise. Suppose this Court gives a decision on the Application and assuming for a moment, in case I am not unduly optimistic, that the decision is in my favour, the Application will stand dismissed, but the Complaint will go on the same cause of action. Can the Court conceive of an international treaty which is drafted on those lines?

If the question is one of interpretation or application of the Transit Agreement, the party has to file an Application, and if he chooses to file a Complaint, the Council should tell him that the Application is the only correct procedure.

But if the Council is lenient enough to hear even the complaint as a separate proceeding, for the purposes of appeal it must be taken on the same footing as a disagreement relating to interpretation or application.

In short, my submission is that a substantive invaluable right of appeal—I call it "invaluable" as the facts in this very case show—cannot depend on the label attached to the proceedings. In India's Memorial, page 322, *supra*, you will find Article 84 of Chapter XVIII of the Convention set out, which says in terms that a disagreement relating to interpretation or application shall be decided by the Council with a right of appeal to the Court.

Article II, Section 2, of the Transit Agreement, is on page 328, *supra*:

> "If any disagreement between two or more constracting States relating to the interpretation or application of this Agreement cannot be settled by negotiations, the provisions of Chapter XVIII of the above-mentioned Convention 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."

The right to raise a dispute as to interpretation or application is only in the form of an application and not a complaint; and, correctly speaking, therefore, the Council should have rejected the Complaint and gone on with the Application. If it has chosen to carry on with the Complaint as a separate case, I submit it still falls within Article II, Section 2, of the Transit Agreement, because for all purposes, of substance as well as of form, form of the pleading, form of the submissions, form of the reliefs claimed, Pakistan is asking for interpretation or application of the Transit Agreement, according to its own case. That means that the case falls under Article II, Section 2, and all the provisions of Chapter XVIII of the Convention apply, the right of appeal to this Court being one of them. This is my first submission, and I submit that this is the only correct approach by which the right of appeal to this Court cannot be defeated by the simple process of putting one label instead of another.

In short, a State can write out the whole pleading, raising a dispute as to interpretation or application of the Transit Agreement, and it can, at the top, say: Complaint under Article II, Section 1, or it can say: Application under Article II, Section 2, of the Transit Agreement. For the purposes of

appeal it cannot make a difference. It is only what the dispute is about in reality which decides the right of appeal.

Learned authors have pointed out that Article II, Section 1, applies to cases *not* of interpretation or application, but when the Transit Agreement is adhered to and some measures are adopted by a State which do not call for any interpretation or application but which cause injustice or hardship; then alone can you file a complaint. Now here there is no question of my adhering to the Transit Agreement—the whole question is as to interpretation or application according to Pakistan. This is my first point.

My second point: if the honourable Court does not accept the first point, then the second point is that if you can have a complaint properly filed, I shall assume against myself, which involves a question as to interpretation or application of the Transit Agreement, for the purposes of appeal that complaint would have to be dealt with as one which involves disagreement as to interpretation or application. In such a case, the right of appeal under Article II, Section 2, is available. It has been so held by the ICAO Council itself in the Working Paper which I have referred to in my answer given the day before yesterday to Judge Jiménez de Aréchaga. On page 450, *supra*, of India's Reply, paragraph 5.3 of the Working Paper submitted to the ICAO Council by the Secretary-General:

> "5.3 Each of the foregoing acts of the territorial State would constitute, under Section 1 of Article II of the Transit Agreement, an 'action . . . under this Agreement'. However, it cannot be denied that a complaint in respect of any of the foregoing matters is essentially a complaint of misapplication of the Agreement and consequently is a case of 'disagreement . . . relating to the interpretation of application' of the Agreement and would, in any event, fall under Section 2 of Article II of the Transit Agreement. The case may also raise a question of interpretation or application of that provision itself, namely, Section 1 of that Article II [i.e., whether any action has been taken under the Transit Agreement]. It follows that, as specified in that Section 2, the provisions of Chapter XVIII of the Chicago Convention shall be applicable even in a case brought solely under Section 1 of Article II of the Transit Agreement. . . . This means that the second sentence of Article 86 which is in that Chapter will govern the case if an appeal is made against a decision of the Council."

In short, the Working Paper says, and that is the view the Council has accepted, that an appeal will lie against a decision on a complaint where the complaint is asserted by the complainant to involve questions of interpretation or application of the Transit Agreement.

My learned friend's last point is that the Council's Rules do not provide for an appeal against a decision on a complaint. For that purpose, my learned friend has referred to Article 18 of the Council's Rules at page 335, *supra*, of India's Memorial, and he points out that, under clause (2) of Article 18, it is only decisions rendered on cases submitted under Article 1 (1) *(a)* and *(b)* which are subject to appeal. Article 1 (1) *(a)* and *(b)* will be found on page 330, *supra*. These clauses deal with disagreement between two or more contracting States relating to interpretation or application of the Convention under *(a)*, and the Transit Agreement under *(b)*. My answer is a two-fold answer to this based on Article 18 of the Council's Rules.

First: if the right of appeal is conferred by the Charter itself, i.e., the Transit Agreement, nothing in the Rules can possibly defeat that right. In other

words, the Rules cannot control the right of appeal given by the Transit Agreement itself. Secondly: my learned friend's construction of Article 18 of the Rules is incorrect. This Article says that decisions are appealable "on cases sumitted under Article 1 (1) *(a)* and *(b)*", and those cases are cases of disagreement as to interpretation or application; but as the ICAO Council's Secretary-General has pointed out to the members of the Council in the Working Paper, the complaint may itself involve a disagreement as to interpretation or application of the Transit Agreement. In that case, the case is covered by Article 1 (1) *(b)* of the Council's Rules at page 330, *supra*, and although you may use the label "complaint" since disagreement is asserted as to interpretation or application, the right of appeal can be exercised by the party which loses.

Finally, my learned friend has said that under Article 36 (2) of the Statute of the Court I had filed a declaration agreeing to the compulsory jurisdiction of this Court, but with the reservation that the dispute should not be with any other nation in the Commonwealth, and my learned friend says that I deliberately did it with a view to preventing Pakistan from coming to this Court. This allegation is unfair. Its unfairness is heightened by the fact that, apart from being irrelevant to the issues arising here, it has not even been provoked by anything I have said in my opening address. It would suffice to point out to the Court that this reservation India has made about disputes with other Commonwealth countries, is a reservation made by most other countries of the Commonwealth which have filed declarations under Article 36 (2) of the Statute. In the same *Yearbook 1970-1971* of this Court which my learned friend referred to, you will find identical reservations made by the following countries. I shall give the pages where the reservations are to be found: United Kingdom, page 72; Australia, page 45; Canada, page 49; Gambia, page 53; Malta, page 60; Mauritius, page 61; New Zealand, page 64.

Apparently anything India does in the international sphere is misconstrued to mean some animus against Pakistan, some desire to hurt that country. India cannot do what other Commonwealth countries do, without this charge being levelled against it.

The final point made by my learned friend about the Appeal not being competent was that, under Article 37 of the Statute, this Court's jurisdiction cannot be invoked because Pakistan was not a party to the Statute of the Court at the time when it was brought into effect. Now the answer to that is obvious. There is Article 93 of the Charter of the United Nations which expressly provides that all Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice, and Pakistan is a Member of the United Nations. Secondly, this very argument of Pakistan has been noticed and rejected in the *Barcelona Traction* case. This is reported in *I.C.J. Reports 1964*, and the relevant passages rejecting such an argument are at pages 28, 29, 30 and 32. That finishes the point about maintainability of the Appeal.

My learned friend then referred to the special régime, and his point was, first, that there is not a single document evidencing suspension of the Treaties in 1965. The Court will be pleased to draw a clear distinction between the events of 1965 where the suspension is disputed, and the events of 1971 where the fact of suspension is not disputed.

In 1965, my learned friend says, there is not a single document. Well, my answer is, are not these documents evidence of suspension—the notifications of September 1965 and February 1966 expressly prohibiting over-flights by

Pakistan over Indian territory? If they do not suspend, in whole or in part, the Convention and the Transit Agreement, it is difficult to see what does. Does any rule of international law require that you must use the word "suspend", or does the law require that your action must amount to suspension? I submit that the documents, namely the two notifications, the signals, the various documents already placed before the Court showing how Pakistan applied for our permission, time and again, to overfly or to land, and we applied for Pakistan's permission and Pakistan gave that permission or refused it; we on our part gave the permission to Pakistan or refused it—all these documents are clear documentary evidence, both contemporaneous and for six years thereafter, proving the factum of suspension.

Secondly, my learned friend made a distinction between the right to overfly and the exercise of the right. Frankly, I am unable to see the point of that argument. Pakistan, on a number of specific occasions, tried to exercise the so-called right: it applied for permission to overfly and the permission was refused. Where is the room for invoking the argument about the right to do a thing and the exercise of the right? What are all these examples which are already on the record, if not examples of an attempt to exercise the so-called "right" of overflying? There was no such right and that is why they had to ask for permission. If they overflew with our permission, it means there was no such right. As I have pointed out earlier, not a single instance has been brought to the notice of the Court where, without India's permission, Pakistan has either overflown India or landed in India, between September 1965 and February 1971.

The third point made by my learned friend was that there was no good reason why India should suspend the Treaties in 1965. It had the freedom of action under Article 89, and it merely exercised its right under Article 89. This is the case of Pakistan.

May I point out that my learned friend has not even attempted to meet my argument as to the right construction of Article 89 of the Convention. My argument has been that that particular Article does not confer any right—it only declares that existing rights shall remain untouched; and in the submissions I made last Tuesday on the points put to me by Judge Sir Gerald Fitzmaurice, I have dealt in detail with the question as to how Article 89 is not here relevant at all.

Pakistan's real complaint is that in 1971 I suspended the overflights, and the fact that they were suspended is not in dispute. I am completely at a loss to see what is the relevance of Article 89, because so far as Article 89 is concerned, it deals with something which happened in 1965-1966. There was suspension right from 1965 onwards. But, assume there was no suspension, and assume the right exercised by India in 1965 was the alleged right under Article 89, how does it help my learned friend when he admits that there was suspension of the Treaties in 1971.

As to the point made by my learned friend: why should India exercise the right under international law, the answer is, on a proper construction of Article 89, that is the only right India can possibly exercise. Article 89 does not confer a right, it leaves existing rights untouched; so to say that India had no good reason for exercising a right under international law is to misread Article 89.

Then my learned friend's point that India communicated to ICAO a declaration of emergency: why should it suspend the Treaty if there was already the declaration of emergency? The answer is that the declaration of emergency referred to in Article 89, is for the whole world, for belligerents, for neutrals,

for everybody. By declaring an emergency, India had a certain freedom of action according to rights under existing international law, which freedom is different from the right to suspend the Treaty vis-à-vis Pakistan. In short, the notification of emergency is of help to India vis-à-vis the whole world.

Thus as regards Article 89, the declaration of emergency enabled India to impose certain restrictions on various countries; but, so far as Pakistan is concerned, and so far as Pakistan alone is concerned, India prohibited overflights altogether. So that one sees the sharp contrast between India's exercising its rights against the rest of the world by declaring an emergency and India's suspending the Treaties with Pakistan. The notifications prohibiting the overflights of Pakistan applied only to Pakistan, and that amounted to suspension, whereas the emergency declaration was to enable India to impose restrictions on the aircraft of other countries of the world. The very existence of the notifications, directed against Pakistan alone, shows that vis-à-vis Pakistan India suspended the Treaty; vis-à-vis the other countries India did not suspend them but claimed rights under international law, which are left undisturbed by Article 89, to take such measures as were necessary in order to protect the integrity and security of India.

Then my learned friend read out a passage from Oppenheim's *International Law* (at p. 636, *supra*): "Multilateral treaties are not referred to in the Peace Treaties, and it must be assumed that their continued existence was not deemed to be affected by the outbreak of war."

Now this principle applies in a case where there is no action taken by a belligerent State. But if positive action is taken by the belligerent State and definite notifications, specifically directed against Pakistan, are issued, saying in so many words that overflights are prohibited, is it possible to argue that the two treaties were not suspended? In short, the assumption may apply where there is no positive action taken by the State, but where the State takes positive action in times of military hostilities and that positive action is contrary to a treaty and amounts to suspension of the treaty, it is unarguable that the existence of the treaty is left unaffected by military hostilities.

Then my learned friend cited a passage from McNair's book. I would have preferred to avoid disputes about Kashmir which somehow always crop up wherever the two countries face each other, whether it is in an international court or in the United Nations. Again, it is a completely gratuitous statement that India attacked Pakistan. I had myself, as you will recall, said in my opening address that these are irrelevant contentions of the Parties, and I shall say nothing about them. But my learned friend has chosen to say affirmatively that it was India which attacked Pakistan, and I cannot let the record of this Court remain incomplete on that point.

I would like to have it made a part of the record of this case that whereas Pakistan starts with September 1965, the correct approach is to start with August 1965 when the military aggression against India took place at the hands of Pakistan. Without submitting my own arguments, may I refer to the United Nations Security Council report, the document is S/6651 dated 3 September 1965. It is a public document of the United Nations where, in paragraph 6, on page 4, this is what was reported to the United Nations:

> "General Nimmo has indicated to me that the series of violations which began on 5 August were to a considerable extent in subsequent days in the form of armed men, generally not in uniform, crossing the cease-fire line from the Pakistan side for the purpose of armed action on the Indian side. This is a conclusion reached by General Nimmo on the

basis of investigations by the United Nations observers, in the light of the extensiveness and character of the raiding activities and their proximity to the CFL [cease-fire line] . . ."

And then, in the same document, page 6, paragraph 9, under the heading "Efforts of the Secretary-General":

"On the morning of 9 August 1965, a telegram was received from General Nimmo warning that the situation was deteriorating along the the CFL. On the basis of this report, I saw the representative of Pakistan at 1230 hours on that day, and asked him to convey to his Government my very serious concern about the situation that was developing in Kashmir, involving the crossing of the CFL from the Pakistan side by numbers of armed men and their attacks on Indian military positions on the Indian side of the line, and also my strong appeal that the CFL be observed. That same afternoon I saw the representative of India, told him of the information I had received from General Nimmo and of the *démarche* I had made to the Government of Pakistan, and asked him to convey to his Government my urgent appeal for restraint as regards any retaliatory action from their side. In subsequent days, I repeated these appeals orally for transmission to the two Governments, asking also that all personnel of either party still remaining on the wrong side of the line be withdrawn to its own side. [Now follows the important passage.] I have not obtained from the Government of Pakistan any assurance that the cease-fire and the CFL will be respected henceforth or that efforts would be exerted to restore conditions to normal along that line. I did receive assurance from the Government of India, conveyed orally by its representative to the United Nations, that India would act with restraint with regard to any retaliatory acts and will respect the cease-fire agreement and the CFL if Pakistan does likewise."

Now this shows that the allegations of Pakistan that India was the wrong-doer; that as the wrong-doer, it cannot take advantage of its own wrong; that having started the war itself, it cannot purport to suspend the Treaties; —these proceed on a total misconception as to the true facts, as they existed in August 1965, which ultimately led to the military hostilities of the next month, that is, September 1965. It is precisely because the hostilities began on 5 August 1965 by armed men crossing from Pakistan into India that the resolution was adopted by the Security Council of the United Nations, on 6 September 1965, which is UN document S/RES/210:

". . . *Calls upon* the parties to cease hostilities in the entire area of conflict immediately, and promptly withdraw all armed personnel back to the positions held by them before 5 August 1965."

The date is material, "5 August 1965". Now the passage in McNair's book does not deal with the events of August 1965 at all; it deals with what happened in September 1965. In international conflicts it is always possible to start with the wrong date and then brand the defender as the aggressor.

The real issue which the Court will have to decide is not whether the suspension of the treaties was under a rule of international law or under Article 89 of the Convention. The real question is, did a special régime come into force in February 1966? Assume against me that the suspension was under Article 89; if the special régime came into force in February 1966 as a result of suspension under Article 89, as Pakistan contends,—is it still a

special régime which was in operation from February 1966 onwards? And how will the jurisdiction of the Council be affected thereby? If there was a special régime from February 1966 onwards, the Council had no jurisdiction to deal with disputes pertaining to that special régime, irrespective of the question whether the special régime came into force as a result of suspension under international law or as a result of action under Article 89 of the Convention.

My learned friend has then emphasized the emergency and my communication to the ICAO Council about the emergency. I have already pointed out that the emergency was declared not vis-à-vis Pakistan, because vis-à-vis Pakistan the Treaties were suspended and that was enough, but the emergency was to give India the right to impose restrictions under general international law vis-à-vis States other than Pakistan.

The Tashkent Declaration my learned friend has referred to. I have already dealt with it in detail and pointed out how it did not revive any treaty at all, it merely said measures would be taken in future, and the measures were never taken in future to revive the Convention and the Transit Agreement. On the contrary, after the Tashkent Declaration of January 1966 came the notification of February 1966, which continued the prohibition against Pakistan overflying India except with India's permission.

Then my learned friend says the special régime was not registered with the United Nations. Well, it need not be registered. If a special régime is established by notifications, signals, letters, then such special régimes are not registered by India with the United Nations. Assume an agreement could be registered, and was not registered, that does not detract from its validity. In *The British Year Book of International Law 1952*, Volume XXIX, at page 203 is the sentence in an article on the Validity of Non-registered Treaties by Michael Brandon, who is of the Legal Department of the United Nations Secretariat and he says: "A non-registered treaty is valid under general international law and is binding upon the States parties thereto."

Then my learned friend has referred to Article 68 of the Convention. That Article is to be found in India's Memorial, page 318, *supra*. Now that Article has nothing to do with permission for overflying. One should not confuse two concepts which are separate and distinct: one, permission to overfly, and the other, a country designating routes which all other nations of the world would have to follow if they overfly that country. For example, India would designate certain routes which BOAC, KLM, Alitalia, Air France, all would have to follow if they want to overfly India. Now these routes are designated generally for all airlines of the world and that is what is dealt with by Article 68:

> "Each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use."

Now, when Pakistan asked for permission to overfly India and that permission was refused, it had nothing to do with Article 68 or the route to be designated. At p. 642, *supra*, that is my learned friend's argument of Tuesday, he refers to a particular incident where Pakistan asks for permission to overfly and we refuse the permission, and my learned friend says:

> "Now, in my humble opinion, this case of 7 June 1966 clearly comes, not only under India's action taken under Article 89, but also under Article 68; this request was for the plane to go on a particular route,

to land at Delhi, Palam airport—perhaps from a security point of view—and they did not want it—it is an afternoon flight."

But incredible as it may seem to some people, planes do overfly Delhi in the afternoon and they do land at Delhi in the afternoon—there is no problem. And what has the afternoon got to do with this? What has the designation of the route got to do with this? The simple point is that Pakistan was asking for a permission, which the other parties to the two treaties do not have to ask for, and the route had nothing to do with it, nor the time of the day. It is simply refusal of permission. All airlines of the countries which are parties to the treaties are entitled to overfly or land for non-traffic purposes, as of right and they do. The designation of the route, which my learned friend has strongly emphasized, has nothing to do with permission for overflying. He repeats the same argument on page 642, *supra*, of Tuesday's arguments. Then my learned friend refers to the Defence Regulations at page 642. If I may just refer to what he says there: "Again, India referred to the Regulation of 1968 with great emphasis." The Court will be pleased to recall that so far from my referring to the Regulations with any emphasis, I said they are completely irrelevant. They are the Defence Regulations which apply to all aircraft, Indian and non-Indian, and which apply to limited areas which are necessary for defence, and they have nothing to do with permission for overflying. That is the point I made in reply to Pakistan which wrongly referred to the Defence Regulations as the law under which it had asked for permission.

My learned friend goes on to say: "Why did India promulgate that regulation? and why the defence clearance? That was because the emergency in Pakistan had not ended in 1969 [I think he means 1968]. It ended toward the beginning of 1969, but because India knew that Pakistan was continuing the emergency in 1968, and that they had to put an end to the emergency, they brought in the Defence Clearance Regulations. So that point, in my humble opinion, is not valid." (*Supra*, p. 642.) Now that could not possibly be right; the emergency was lifted or de-notified by India on 10 January 1968. The Air Defence Regulations came on 26 November 1968. They came 11 months later and they have nothing to do with the notification or de-notification of the emergency. Between January 1968 and November 1968, when there were neither the Defence Regulations nor any emergency in operation so far as India is concerned, there were a large number of instances, which are given both in India's Reply and in the new documents, groups A to D, which I filed the other day, where Pakistan had still to ask for our permission for overflying or landing. I do not have to refer to those instances again, where the dates speak for themselves.

Then my learned friend referred to the suspension of the two Treaties following upon the hijacking incident, the next argument, where again my learned friend has gone into facts. I would prefer to use such time as is available to me to argue points which have a direct bearing on the issues really arising in the case.

I shall only point out that the facts as they are stated in India's Memorial, pages 34 to 36, *supra*, paragraph 28, are fairly eloquent facts. I will not read those facts, but you will find that when the plane is hijacked to Pakistan and we are asking for permission for the relief aircraft to leave from India to go to Pakistan, the permission is suspended—it is not given. Pakistan takes more than 48 hours to send the passengers and crew by road to the Indian border. They are not allowed to bring their baggage with them. There was another plane which was taking off, as we point out in clause *(d)*, but Pakistan would

not allow the Indian passengers to board that plane of another country's airline. And we point out how the Government of India had earlier made arrangements for the return of passengers to India on board a scheduled Ariana Afghan Airlines Service from Kabul to Amritsar, which landed at Lahore Airport on 31 January 1971; "but though a large number of passengers disembarked and 30 passengers were boarded on that aircraft at Lahore, the authorities in Pakistan said that they could not make arrangements to board the passengers and crew of the hijacked Indian aircraft . . . because of the . . . presence of crowds at the airport"—this is during military régime, when the airport is under military control.

The Government of Pakistan not only failed to return the two criminals who had hijacked the aircraft but announced that they had been given asylum in Pakistan. And then,

> "Finally at about 20.30 hours . . . on 2 February 1971 these two criminals were allowed to blow up the hijacked Indian aircraft and even to prevent the fire brigade from putting out the fire until the aircraft had been totally destroyed." (*Ibid.*, p. 35, *supra*, para. *(f)*.)

LE VICE-PRÉSIDENT faisant fonction de Président: Monsieur Palkhivala, estimez-vous que ces développements sont indispensables? Vous avez dit vous-même que seuls les faits pertinents seraient traités par vous. Peut-être estimerez-vous que cela n'est pas indispensable et que vous pouvez passer à un autre développement sur le fond de la question qui est posée devant la Cour.

Mr. PALKHIVALA: Since you, Mr. President, put it this way, and you suggest an approach to the problem which, frankly, I have to agree with, because it is reasonable, I cannot say that these facts are indispensable. I thought I would deal with them because Pakistan had gone into some of the circumstances concerning the hijacking incident and my learned friend had stated things which reminded one of the line of the poet, "Willing to wound, yet afraid to strike", and I thought that perhaps, in fairness to my country, I could deal with a few facts. But, in the light of what you, Mr. President, have been pleased to put to me, I will stop this argument straight away.

May I refer to page 645, *supra*, where my learned friend says: "before the ICAO Council, this objection was not specifically taken by India in their pleadings. This is an afterthought." Now the objection is regarding India exercising its right under international law to suspend the treaties in 1971, assuming they had not continued under suspension since 1965. I do not know why my learned friend says that the objection was not specifically taken in the pleadings: we have put it in so many words, in the written preliminary objections filed before the Council and in the oral arguments before the Council. There are paragraphs and paragraphs dealing with this particular point and for my learned friend to say that it is an afterthought is hardly a right reading of the record.

Then my learned friend, in support of his plea that the allegation of breach against Pakistan is an afterthought, refers to the note which India sent to Pakistan, which is reproduced on page 77, *supra*, of India's Memorial, and my learned friend says it shows that India merely wanted money out of Pakistan and nothing else. One has only to look at that note to see that this particular contention is completely unfounded; the allegation of breach by Pakistan is specifically referred to in this very note—I will read just one sentence of the second paragraph:

"The encouragement and support given by the Government of Pakistan to the two persons who hijacked the Indian Airlines Fokker Friendship aircraft to Lahore on January 30, 1971 is in violation of all norms of international behaviour and of International Law."

This is what I said as early as 3 February 1971, before the overflights were suspended, and yet my learned friend says that breach of international law on Pakistan's part is an afterthought.

India further asked not merely for reparation. It is true that India did say that Pakistan should make good the loss arising from the loss of the aircraft, cargo, baggage, mail, etc., but it also said in the same letter that it wanted an assurance from Pakistan that: "The Government of Pakistan will refrain in future from assisting, inciting or encouraging such incidents in the interests of peace and harmony between the two countries." So to say that India merely asked for money is to omit the most relevant parts of this particular Note, which is on page 77, *supra*, of India's Memorial.

Then my learned friend says that India has referred, in the preliminary objections filed before the Council, to the fact that the resumption of overflights for Pakistan aircraft over Indian territory would be inconceivable in view of the massacre and genocide of unarmed civilians in East Bengal. Now, chronology again has to be borne in mind here. The overflights were suspended in February 1971; while the preliminary objections were filed in May 1971. It is in May 1971 that India tells the Council that, at the time when it suspended the overflights, it was because of breach of international law and international treaties on the part of Pakistan. If in May 1971 India is asked to resume the flights, it would be faced with a further difficulty—that in view of the massacre and genocide of unarmed civilians in East Bengal, it was not possible to permit such overflights to take place. This, therefore, refers not to the motive for suspension in February 1971; it refers to the subsequent developments which took place between February 1971 and May 1971 when the preliminary objections were filed.

On page 648, *supra*, my learned friend refers to the plea of material breach as an afterthought. May I just give the pages, without reading them, of India's Memorial, where this material breach issue was specifically referred to before the Council: pages 105, 147, 149, 150, 151, 153 and 223, *supra*.

It is further said that India should have reported to the Council any material breach by Pakistan instead of suspending the Treaties. Surely it has no bearing on the point which this honourable Court has to consider. If, under international law, India had the right to suspend the Treaties, is it to the point to say that India should have merely reported the incident to the ICAO Council instead? India thought, and rightly so, that the matter was so serious that, in the interests of the country, the Government had to take immediate action, and reporting was not enough.

My learned friend's next point is that the ICAO Council must be treated as qualified to deal with this matter, because after all in judges you do not need men of the law—laymen can be judges—in fact, executive, administrative bodies do perform judicial functions all over the world. In this connection, I submit my learned friend has not met the real point in the case. The real point in the case is that there are express delimiting words as regards jurisdiction, and the delimiting words are "interpretation" and "application" of the Treaties. These delimiting words, if properly construed, confer such jurisdiction on the Council as the Council is capable of shouldering. But if you put any wider interpretation on these two words, the Council would not be

qualified or equipped to deal with other questions. Now to say in answer to that, that judges can be laymen, is really to say that when you consider the inherent limitations of a Council, ignore the composition, ignore the functions, ignore the duties and the powers, and you only bear in mind that any layman can deal with any field of international law. I submit, this is not the way that international treaties are construed. They are construed in a way which insist upon strict proof of consent. I am asking the Court to look at the cumulative effect of all the various considerations I have placed before them. The cumulative effect is irresistible, that these laymen, extremely useful as they are in their own sphere, and excellent as they are in discharging their very onerous duties as the Council of ICAO, are not qualified to bear this type of new burden which my learned friend wants to put on them. This burden has never been put on the Council before. I submit here the question does arise of their equipment, their qualifications, and the inherent limitations on their jurisdiction.

This finishes my learned friend's argument about the right of the Council to deal with questions of termination or suspension. I will not list the various points I had made, both on special régime and on the interpretation of the words "interpretation or application"—which points remain completely unanswered. On these two grounds I had advanced detailed arguments point by point, which remain unanswered.

My learned friend then says that the manner and matter adopted by the Council in reaching its decision was the right manner and matter. He refers to Bin Cheng's book—I will not cite the other passages from the book—but if one turns to that book, one comes across the distressing conclusion which the author has reached. He says that the Council is not the best equipped body to discharge even those judicial functions which are conferred on it under Article 84. (*Law of International Air Transport* by Bin Cheng, pp. 104, 455, n. 4, and 460.)

My learned friend has dealt with the question of manner and matter in this way. He says that the provisions of Article 15 of the Rules for the Settlement of Differences, requiring reasons to be given do not apply to a decision on the preliminary point of jurisdiction. If the Court is satisfied that a decision on the preliminary point as to jurisdiction has to comply with the requirements of Article 15 of the Council's Rules, then this argument of my learned friend cannot be sustained.

As regards the point that the proposal was put to vote by the President, instead of being put by a Member, my learned friend has referred to the Rules of Procedure, where questions can be put by the President. Well, those questions put by the President are quite different from the propositions put to the vote. Questions put by the President are questions which, for example, are like questions the Court will put to counsel here. These questions are quite different from a proposition put to the vote as to the Council's jurisdiction.

Then my learned friend says that though the Council decided the question as to jurisdiction regarding the complaint by 13 votes, those 13 votes were enough, because 13 is a majority of the votes of the nations which are parties to the Transit Agreement. It is true that what my learned friend says would be a preferable way of re-writing the Convention, the Transit Agreement and the Rules binding on the Council. But until they are re-written the Convention and the Rules have to be abided by. Under the present provisions you may have a anomalous situation where the parties to the Transit Agreement may be less than 14, and so no decisions can be reached. That is all true, but

those are the Rules today in force. On that point may I request you to turn briefly to India's Memorial, page 314, *supra*. You will find there Article 52 of the Convention, which says: "Decisions by the Council shall require approval by a majority of its members." This is important. Then if you go back to Article 50, on page 313, the first sentence is: "The Council shall be a permanent body responsible to the Assembly. It shall be composed of twenty-seven contracting States . . ." In other words reading Article 50 with Article 52, a majority of 14 is required for any decision of the Council.

Article 66 of the Convention, at page 318, says:

> "Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement or the International Air Transport Agreement drawn up at Chicago on December 7, 1944 shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreement."

It is quite clear that whereas in the case of the Council the decision has to be made by a majority of the total number of members of the Council, in arriving at that decision those who are not members of the Transit Agreement cannot vote. The whole object of this apparently was to induce nations which were parties to the Convention to become parties to the Transit Agreement. And that is why they are told that if they are a party only to the Convention but not to the Transit Agreement, they will have no right to vote.

At the same time the Council has to function for the purposes of the Transit Agreement exactly the same way as it has to function for the purposes of the Convention, namely that every decision of the Council must be supported by a majority of the votes of the total strength of the Council.

Please contrast this with Article 48 *(c)*, of the Convention. At page 312, *supra*, is found Article 48, clause *(c)*, of the Convention, which deals with the Assembly. One sees the contrast between the voting required to carry a proposal in the Assembly and the voting required to carry a proposal in the Council. Article 48, clause *(c)*, says:

> "A majority of the contracting States is required to constitute a quorum for the meetings of the Assembly. Unless otherwise provided in this Convention, decisions of the Assembly shall be taken by a majority of the votes cast."

In other words, in the Assembly you completely ignore its total strength; you only have regard to the States which are represented at the meeting, and the majority of the votes cast at the meeting will decide whether the resolution is carried or not. By contrast, all decisions of the Council have to be, not by a majority of the members present and voting, but a majority of the total strength of the Council.

Now let me take one example to show how this construction is the only right one, although it may result in an anomaly. Take a case where there is a meeting of the Council and less than 14 representatives are present. No decision can be made at all, because you must have at least 14 votes. Or you may have a case where nations may abstain from voting and you have only 8 votes—well, the resolution is not carried.

For good reason or bad, it is expressly provided that all decisions of the Council are to be by a majority of the total members of the Council—that means 14 today. And there is no escape from it, although it may cause anomalies or injustice in various cases.

This is the ICAO Council's own view, which they have acted upon all

along from 1944 onwards. Up to now, all proceedings of the ICAO Council have been on the basis which I have submitted, and the Council has had legal advice on this point, which has supported the above position. (See India's Reply, pages 451 and 452, *supra*, to which I have already referred.)

Then my learned friend says that, on the manner and method part of my argument, surely the governments must have realized that legal issues would be involved.

Now my answer is that, as you see from the observations of the President of the Council in the Council meeting itself, some governments were not even aware that a decision was going to be reached, because under the Rules of the Council a meeting has to be called for the purpose of arriving at a decision and such a meeting was never specifically called. A meeting was called to hear the parties and, as the President says, some governments might have thought that no decision would be reached.

Then, finally, my learned friend has produced certain new documents[1]—I do not object to their production.

The first document he has referred to is the letter of ICAO, dated 17 September 1965, which says: "*Subject:* Article 89 of the Chicago Convention." It refers to the letter received from the Government of India. Now the letter received from the Government of India is annexed to this document of 17 September 1965 and it deals with the continuation of the emergency.

I have already pointed out that these documents were intended to safeguard India's position as a law-abiding and a treaty-abiding nation vis-à-vis States other than Pakistan, because by declaring the emergency India could impose restrictions on countries other than Pakistan. But there was no question of suspension of the treaties vis-à-vis other countries. That question arose only vis-à-vis Pakistan, and that is why the two notifications of 1965 and 1966 imposing prohibition of overflying are directed only against Pakistan.

I am sorry for detaining the Court, Mr. President, but I thought it would be more convenient for the Court if I finished the argument today and my learned friend could then start on his final reply on Monday.

The second document is of 9 December 1971 which, again, deals with this question. This document is from the ICAO Council to Pakistan where it says: "I have . . . to send herewith copies of two cables . . . These cables were placed before the Council . . . The Council decided to transmit [the] copies." These cables only referred to the military hostilities in December 1971. India informs the Council of what has happened. Again, I would be reluctant to go into this particular point because it raises controversial issues between the two countries. But there is nothing in the documents of December 1971 which can possibly support my learned friend, because he himself has not disputed at any stage that there was suspension of the treaties in February 1971. What relevance these documents of December 1971 have one fails to see.

These documents are for the purpose of keeping the ICAO Council informed of the developments which take place in India and which affect international aviation.

The third document is Air-India's letter of 12 September 1964, where we give the route which we propose to follow on a scheduled flight. In fact, if anything, this document supports me, because it indicates the contrast between the designation of the route by a country and permission for overflying.

The designation of a route, as I have already pointed out, under Article 68 of the Convention, has nothing to do with permission for overflying. In this

[1] See pp. 743-765 and p. 788, *infra*.

document of 12 September 1968 India is merely designating the route and not asking for any permission.

Again, the next document—India indicates what routes have been discontinued.

In the letter of 4 September 1965, Air-India says: "We have your standing permission for our Flights . . ., amongst others, to overfly Pakistan . . . We would like to inform you . . . of a slight change." It is not asking for permission but it says we already have your permission.

Now, when this is said on 4 September 1965, it can only mean that, under the treaties which were in existence up to that date, the permission or right was available to the contracting States, and India had that permission or right under the Treaties. India is not asking for any permission by the letter of 4 September 1965.

The next document of 29 January 1965 is from India to Pakistan. Again we say: ". . . there is no objection to the introduction of PIA Schedules effective 1st April, 1965." This document again supports me, because this is a document of January 1965 when no permission is necessary. Pakistan is not asking for India's permission, nor is India giving the permission; India is only saying that it has no objection to the routes that Pakistan proposed. Those routes must conform with the routes which India had designated; they did conform with such routes and so India says there is no objection.

In other words, these documents deal with the designation of the routes as distinct from permission for overflying.

Finally comes the Award of Professor Lalive in the Dalmia Cement case against the National Bank of Pakistan. I am rather surprised that Pakistan should have produced this document.

This was a case where Pakistan took the cement factories of India and agreed to pay a price. Having taken the cement factories, Pakistan defaulted and would not pay the price, and it would not pay the price even at the time when there were no military hostilities between the two States. And we argued that here are normal times, will you not pay the price . . .

Mr. BAKHTIAR: Mr. President, the Court has not read this document.

Mr. PALKHIVALA: Well, would you like to withdraw this document?

Mr. BAKHTIAR: No, I will not withdraw it.

Le VICE-PRÉSIDENT: S'il vous plaît, si vous voulez vous adresser à la Cour. Je n'ai pas entendu l'objection de M. Bakhtiar.

Mr. PALKHIVALA: I am asking my learned friend whether he wants to withdraw it; if he withdraws it, I have no objection . . . but he says he was not allowed to address the Court on this document. I had only told my learned friend that after I have looked at the document, he could refer to it; that is what I had told him, which is in conformity with the Rules of this Court. If my learned friend says he will not refer to it, then I will not. If my learned friend does not refer to it in his closing address on Monday, because otherwise . . .

Mr. BAKHTIAR: No, I will.

Mr. PALKHIVALA: You will? Then I propose to go on with the document.

In this particular case, Pakistan refused to pay the price in normal peace

time; and their argument was war had broken out between India and Pakistan in 1965 and, therefore, thereafter, even after the Tashkent Declaration was signed, they were not bound to pay the price. Professor Lalive says that this is wrong. He made an Award against Pakistan, asking Pakistan to pay the full price with full interest and the costs of the arbitration.

Now, the paragraph my learned friend relies upon is a paragraph where the learned arbitrator comes to the conclusion that there were military hostilities between the two countries in August and September 1965, but military hostilities not amounting to war; he comes to the conclusion that there were military hostilities not amounting to war, on several grounds. One of the grounds is that various treaties continued to be in operation between the two countries. I have never disputed that. I have never disputed in this case that various treaties did continue to be in operation between the two countries even during August and September 1965 and afterwards. All that I have contended is that the Convention and the Transit Agreement were suspended. Now, Professor Lalive does not refer to the Convention or the Transit Agreement at all. In fact—I appeared in that case myself—neither party said a word about the Convention or the Transit Agreement. We referred to various other treaties—treaties which are unconnected with aviation, treaties which have no bearing on the questions arising in this case. Those other treaties continued in operation, and the learned arbitrator says that this is one of the reasons why he comes to the conclusion that there was no war but there were military hostilities not amounting to war.

In short, this Award had no bearing whatever on the question as to whether these two particular treaties were suspended or not, because the arbitrator was not even asked to deal with the treaties, and no reference was made to these two treaties at all.

This finishes my reply to my learned friend, Mr. President, and may I, once again, thank this honourable Court for the great courtesy and the great patience with which I have been heard.

Le VICE-PRÉSIDENT: Monsieur Palkhivala, vous avez précédemment présenté vos conclusions. N'avez-vous rien à ajouter à cette précision?

Mr. PALKHIVALA: No, Mr. President, I have no other clarifications to make, but if any of the honourable Judges would need any clarification I am at their service and I would be more than happy to resolve any doubt which may strike any of the learned Judges.

The Court rose at 1.15 p.m.

NINTH PUBLIC SITTING (3 VII 72, 3 p.m.)

Present. [See sitting of 19 VI 72.]

REJOINDER OF MR. BAKHTIAR

CHIEF COUNSEL OF THE GOVERNMENT OF PAKISTAN

Mr. BAKHTIAR: Mr. President and Members of the Court: I will first reply to the question addressed to me by Judge Jiménez de Aréchaga and the question that Judge Petrén addressed to both Parties.

Our reply to the question asked by Judge Jiménez de Aréchaga is: Paragraphs 22 and 23 of Pakistan's Counter-Memorial imply the invalidity of the grounds relied upon by India to support her right of appeal against the decision of the Council of ICAO. These grounds include Article 84 of the Convention and Article II, Sections 1 and 2, of the Transit Agreement. It is correct, however, that while paragraph 25 of the Counter-Memorial specifically raises the question of the competency of India's appeal in respect of the decision of the Council on Pakistan's Complaint, the objection taken to the competence of India's appeal, in respect of the decision of the Council on Pakistan's Application, is not expressed in similarly emphatic terms. In view of this, the objection of Pakistan to the competence of India's appeal against the decision of the Council in respect of Pakistan's Application, raised specifically during the oral proceedings, may be interpreted as an invitation to the Court to consider the competence of that appeal *proprio motu.*

Our reply to the other question posed by Judge Petrén to both the Parties is: in Pakistan's view, that the expression "any other matter", appearing in Article 86 of the Convention, refers to only those decisions of the Council taken under Article 84 of the Convention—that is decisions of the Council on any disagreement relating to the interpretation or application of the Convention which cannot be settled by negotiation. The decision of the Council under Article 84 of the Convention cannot refer to any decision which is not a decision relating to the interpretation or application of the Convention.

Article 86 of the Convention provides that the decision of the Council under Article 84 of the Convention, other than decisions on whether an international airline is operating in conformity with the provisions of the Convention, shall, if appealed from, be suspended until the appeal is decided. It may be pointed out that the decision of the ICAO Council of 29 July 1971, rejecting the preliminary objection of India challenging the jurisdiction of the ICAO Council, has not been suspended by the Council, which shows that the Council did not consider the decision as a decision taken under Article 84 of the Convention. It therefore follows that the expression "any other matter" in Article 86 cannot refer to any decisions of the Council other than those which relate to the interpretation or application of the Convention.

Mr. President, turning now to our second and final oral submissions before the Court, I would like to state that the oral submissions of the Parties have revealed that there are three aspects to be considered in this case:

(i) competence of the appeal;
(ii) whether the assertions and counter-assertions made by India and Pakis-

tan in the circumstances of the case constitute one or more disagreements relating to the interpretation or application of the Convention and Transit Agreement within the meaning of these terms in Article 84 of the Convention and Article II, Section 2, of the Transit Agreement;

(iii) whether or not the manner and method employed by the Council in giving its decision as to its jurisdiction vitiates the decision.

While dealing with these matters, however, I shall largely concentrate on the assertion made by the learned Chief Counsel of India, on Friday last, in his second oral submissions before the Court.

First I turn to the question of competence of the appeal. The learned Chief Counsel for India has argued that, in respect of the appeal against the Council's decision on Pakistan's Application, we had not raised an objection to the competence of the appeal. In respect of the appeal against the decision of the Council on Pakistan's Complaint, we had categorically stated that the appeal was not maintainable in paragraph 25 of our Counter-Memorial. In respect of the appeal against the Council's decision on Pakistan's Application, we have already indicated, in our reply to the question of Judge Jiménez de Aréchaga, that the objection taken was not in similarly emphatic terms. However, we have raised the issue categorically in the oral proceedings and have invited the Court to consider the competence of the appeal *proprio motu*. We respectfully submit that it is incumbent on the Court to satisfy itself of its own jurisdiction. We rely on the doctrine invoked by India regarding strict proof of consent. On the question of competence of the appeal our submissions are as follows:

(a) The appeal in respect of the Council's decision on Pakistan's Complaint could not lie as no procedure has been provided for this under Article I, Section 1, of the Transit Agreement;

(b) Article 84 of the Convention provides only for an appeal against the decision of the Council on merits, that is in respect of the decision relating to interpretation or application of the Convention or Transit Agreement;

(c) Article 36, paragraph 1, of the Statute of the Court cannot be relied on by India, and even if it is relied on, this provision is inapplicable;

(d) Article 37 of the Statute of the Court cannot confer jurisdiction on the Court in the circumstances of the case.

It is pertinent to point out that ground *(a)* relates exclusively to the appeal in respect of the Council's decision on Pakistan's Complaint, whereas grounds *(b)* *(c)* and *(d)* relate to both the decisions of the Council.

My first submission is that appeal in respect of the Council's decision on Pakistan's Complaint cannot lie to the International Court of Justice since no procedure has been provided for this under Article II, Section 1, of the Transit Agreement. Article II, Section 1, of the Transit Agreement 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."

It is apparent from reading this Section that, unlike Section 2 of Article II, which specifically provides that if any disagreement arises relating to the interpretation or application of the treaty which cannot be settled by negotiations the provisions of Chapter XVIII of the Convention shall apply, no similar provision has been made in Section 1. Consequently there is no reference to Article 84 of the Convention in Section 1, whereas there is such reference in Section 2.

That there is no appeal against a Complaint is also confirmed in the Rules for the Settlement of Differences. Article 1, Section 2, of the Rules provides that in the case of a Complaint, Parts II and III of the Rules for the Settlement of Differences will be applicable. It is to be noted that the only Article in the Rules providing for appeal is Article 18, which is in Part I of the Rules for the Settlement of Differences.

Now the learned Counsel for India has argued that, while considering Pakistan's Complaint, a question of interpretation had arisen regarding the word "action" in Article II, Section 1, of the Transit Agreement. Therefore Article II, Section 2, of the Agreement automatically became applicable, which in turn attracts Article 84 of the Convention. In support of this he has quoted a Note of the Secretary-General of ICAO on Article 86 of the Convention.

First, I may state that the Note of the Secretary-General is of no consequence—it is the Council's practice and decisions which alone can be relevant in interpreting the Transit Agreement. In any case, even if a question of interpretation of Article II, Section 1, of the Transit Agreement were to exist, the operation of Article II, Section 2, would only be attracted had there been an Application made under Article 1, Section 1, of the Rules for the Settlement of Differences incorporating this disagreement. The procedure under Article 1, Section 2, of the Rules for the Settlement of Differences, which has been invoked in the case of Pakistan's Complaint, is entirely different and does not attract Article II, Section 2, of the Transit Agreement or Article 84 of the Convention, or, for that matter, Part I of the Rules for the Settlement of Differences.

I now come to another submission of the learned Counsel for India made during the second oral submission on the point that an appeal lies in the case of a decision by the Council in respect of a complaint. At page 685, *supra*, he is quoted as having stated as follows:

"Now the point at issue is this: is it the form of the proceedings which determines the right of appeal, or is it the substance of the dispute? If it is the form of the proceedings, it would be so easy to defeat the right of appeal to this Court. All that you would have to do is, even when on your own assertion the question is one of application or interpretation of the Transit Agreement, not file an application, put it in the form of a complaint, and any decision given is then not subject to appeal.

The subject-matter is word for word the same, the facts are the same, the submissions, contentions, arguments, are the same—everything is the same; the relief sought practically word for word the same. But the

party says—I have put it in the form of a complaint. Now my point is that what determines the right of appeal is not the label which is attached to the proceedings. A very important right, like the right of appeal to this Court cannot be defeated by putting the label 'complaint'."

These assertions, made by the learned counsel for India, do not reflect the true position. First of all, they take for granted that a party which labels it as a complaint knows what the result is going to be—that it is going to win—which is not terrible, on the face of it, since the relief claimed and the remedy sought under Section 1 of Article II are always different from that under Section 2 of Article II. Section 1 merely empowered the Council to give findings and make recommendations for necessary action, whereas Section 2 empowered the Council to determine whether or not a treaty had been applied and hence, by implication, the power to determine the breach of the Convention and Transit Agreement, and to assess compensation of such breaches. Keeping this fact in view, Pakistan claimed compensation in its Application, and in her Complaint requested the Council to determine that Indian action was causing injustice and hardship to it and should be discontinued. The Court may be pleased to refer to the Indian Memorial, at page 69, *supra*, where the reliefs sought by Pakistan in her Application are stated. Reliefs indicated in paragraphs 7 and 8 are relevant and state:

"(7) To direct that the Government of India should adequately compensate and indemnify Pakistan for the losses and injury suffered by it as a result of the arbitrary, unilateral and illegal decision of the Government of India in breach of its international obligations. The amount of losses suffered so far are indicated in attachment to this Memorial (Attachment D).

(8) The Council may assess and award costs to Pakistan and direct Government of India to bear it and pay the same to Pakistan."

The Court may also be pleased to refer to the Memorial, page 97, *supra*, for the relevant reliefs sought in Pakistan's Complaint. Paragraphs 6 and 7 state as follows:

"(6) To decide and declare that the decision of the Government of India of suspending flights of Pakistan aircraft over the Indian territory is causing injustice, hardship, loss and injury to Pakistan.

(7) The Council may assess and award costs to Pakistan and direct Government of India to bear it and pay the same to Pakistan."

Thus Pakistan deliberately sought an expeditious remedy under Article II, Section 1, by making a Complaint. That procedure could give Pakistan only a limited remedy and no compensation for breach of the Agreements. It could not have been the intention of the high contracting parties in such circumstances to defeat this shorter procedure, resulting in a limited remedy, by making Section 2 of Article II automatically applicable where any question of interpretation of Section 1 were to arise.

May I respectfully point out that in every case of a Complaint under Section 1 of Article II, the Council would have to determine whether any action under the agreement is causing hardship to a party which calls for immediate relief, and consequently in almost every case a question of interpretation of the Transit Agreement would be involved. Does this mean that the speedy remedy under Section 1 will always be frustrated and that Section 2 of that

Article will be automatically applicable? Mr. President, our submission is that such could not have been the intention of the contracting States.

My second submission on the competence of the Appeal is that Article 84 of the Convention provides only for an appeal against the decision of the Council on merits, i.e., in respect of the decision relating to the interpretation or application of the agreement, and not a decision on a preliminary objection pertaining to jurisdiction.

Article 84 of the Convention provides that the Council shall decide only that disagreement relating to the interpretation or application of the Convention which cannot be settled by negotiation. Such a decision is appealable. It is respectfully submitted that only those decisions of the Council taken under Article 84 of the Convention are appealable which pertain to disagreements relating to the interpretation or application of the Convention, to the exclusion of all other decisions which the Council may have to take during the course of arriving at the decision which is appealable. The decision of the Council on the question of a preliminary objection challenging its jurisdiction is not a decision within the meaning of Article 84.

The Rules for the Settlement of Differences approved by the Council make a clear distinction between the decision of the Council on a preliminary objection and decision under Article 15 thereof which is related to Article 84 of the Convention. Article 5 of the Rules has a self-contained procedure for handling a preliminary objection. Under this Article, the Council had to decide the question or objection in contradistinction to a disagreement before any further steps are taken under the Rules. After the disposal of the preliminary objection, the Council proceeds on the merits of the case, and under Article 15 renders its decision. It is only this decision under Article 15 of the Rules which is appealable. Article 18 of the Rules clearly states that only the decisions with regard to disagreement relating to interpretation or application of the Convention and the Transit Agreement are appealable, which is in consonance with Article 84 of the Convention.

It is submitted that the decision of the Council on a preliminary objection under Article 5 of the Rules for the Settlement of Differences, is not a decision as envisaged in Article 84 of the Convention. Under Article 86 of the Convention, the decision of the Council taken under Article 84 of the Convention has to be suspended, if appealed from. The Council has not suspended its decision of 29 July 1971, against which India has submitted appeal to this honourable Court which indicates that the Council does not consider its decision rejecting the preliminary objection of India as a decision under Article 84. The reference made by the Chief Counsel for India to the observations of the President of the ICAO Council in this regard and to the note of the Secretariat to the Council, has no bearing and is irrelevant, as it is the Council only which has to decide whether its decision of 29 July 1971 was a decision under Article 84 or was required to be suspended under Article 86 of the Convention. Mere formal mention of the date of the decision or name of the party does not mean that the decision is under Article 15 or that Article 5 is to be read with Article 15. The fact remains that the decision of the Council of 29 July 1971 did not contain, and should not have contained, all those matters which are required to be included in the decision of the Council under Article 15 of the Rules for the Settlement of Differences. The decision of the Council was conveyed to the parties by the Secretary-General in his letters No. LE 6/1 and LE 6/2 dated 30 July 1971, in the following words: "On 29 July 1971 the Council decided not to accept the preliminary objection aforesaid." (Please see p. 398, *supra*, of Pakistan's Counter-Memorial.) It

therefore follows that the Council did not consider its decision of 29 July 1971 as a decision under Article 15 of the Rules and, consequently a decision within the meaning of Article 18 of the Rules which can be appealed from.

In view of the foregoing submission, the appeal of India to this honourable Court cannot be based on the provisions of Article 84 of the Convention and is, therefore, misconceived and not maintainable.

My third submission on the question of competence of the appeal is that India cannot rely on Article 36, paragraph 1, of the Statute of this Court for founding the jurisdiction of the Court, but even if she can rely on this Article, it does not confer jurisdiction on the Court in the instant case.

For this Article to be applicable, India must not only show but accept the fact that the Convention and Transit Agreement are "treaties and conventions in force", as between India and Pakistan. I emphasize the words "as between India and Pakistan", because the basis of the Court's jurisdiction is the consent of the parties before the Court, and not the consent of other contracting States not parties to this appeal. But India cannot assert this position before this Court, in appeal, simply because she has taken the position before the ICAO Council that the Convention and the Transit Agreement are not in force as between India and Pakistan. Can India deny the continuance in force of the Convention and Transit Agreement, as between India and Pakistan, for the purpose of ousting the jurisdiction of the Council, and then take exactly the opposite position for the purpose of founding this Court's jurisdiction? My learned friend argued on Friday that Pakistan was not being fair in putting India in such a dilemma. With great respect to the learned counsel for India, I would submit that the dilemma is of their own making. I would merely like to quote the words of Justice Honyman in *Smith* v. *Baker* (1873) L.R. 8 C.P., at page 357. He states:

> "A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he would only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."

Mr. President, I have submitted that even if India can rely on Article 36, paragraph 1, of the Statute, and is permitted to blow hot and cold on this issue, that provision does not confer jurisdiction on the International Court of Justice. The reason for this is that the reference to Article 84 of the Chicago Convention is to the Permanent Court of International Justice, and not to this honourable Court, whereas in Article 36, paragraph 1, of the Statute the term "Court" refers to the International Court of Justice. It is well known that the present Court is a new Court, and a reference to the Permanent Court cannot mean an automatic reference to the present Court. In such circumstances the International Court of Justice can only have jurisdiction if such reference to the Permanent Court has been saved for the International Court by virtue of Article 37 of the Statute of the Court.

My fourth and last submission on the competence of the appeal is that Article 37 of the Statute could not have conferred jurisdiction on the International Court of Justice in the circumstances of the case. The learned counsel for India drew attention to the decision of this Court in the *Barcelona Traction* case, *I.C.J. Reports 1964*, in which the preliminary objection of the Government of Spain was similar to our submissions on Article 37. No doubt in that case the preliminary objection of Spain was rejected by the Court. However, in the instant case there are certain distinguishing features which

need special consideration. It is clear that Article 37 of the Statute saves a jurisdiction which already existed in the Permanent Court and is not a source of jurisdiction in itself. In the *Barcelona Traction* case it could be demonstrated that, at some point in time, the Permanent Court of International Justice did have jurisdiction. The treaty conferring jurisdiction in that case came into force in 1927 when the Permanent Court was very much in existence. On the other hand the Chicago Convention came into force, as between India and Pakistan on 6 November 1947, when Pakistan notified its adherence. On that date the Permanent Court had already suffered a demise, and consequently that Court, at no point in time, had any jurisdiction under Article 84 of the Convention, as between India and Pakistan.

I now come to the second aspect of the case which the Court has only to consider if it finds that the Appeal is competent. If the Court does exercise jurisdiction it would have to go into the question whether the assertions and denials made by the Parties constitute one or more disagreements regarding the interpretation or application of the Convention and the Transit Agreement, within the meaning of these terms in Article 84 of the Convention and Article II, Section 2, of the Transit Agreement.

Now the assertions made in the circumstances of the case, which have been denied by the opposite Party, are the following: Pakistan's assertion that India is denying Pakistan her rights and privileges under Article 5 of the Convention and Article I, Section 1, of the Transit Agreement; India's assertion that the Convention and Transit Agreement were suspended as a result of the armed conflict of 1965 and were never revived; India's assertion that Pakistan's conduct in 1971, relating to the hijacking incident, amounted to a material breach of the Convention, and further, that India is entitled to suspend the Convention and the Transit Agreement vis-à-vis Pakistan.

Each of these assertions have been denied by the opposite Party. We were astonished to hear the learned Chief Counsel for India, on Friday last, repeatedly stating that Pakistan did not deny the factum of suspension in 1971. This is a complete travesty of the facts.

The Court may be pleased to turn to the Indian Memorial, at page 66, *supra*, where Pakistan's Application before the ICAO Council is reproduced. On page 68, paragraphs 1, 2 and 3, regarding the statement of law made by Pakistan, may kindly be examined by the Court. It is immediately apparent from these paragraphs that Pakistan asserted that its rights and privileges pertaining to overflying and landing for non-traffic purposes, under the Convention and Transit Agreement, were being illegally denied by India. We never stated this, or suspended the Convention; they were illegally denied by India.

There was, therefore, no question of acceptance of the so-called factum of suspension as India claims.

This is also confirmed by the reliefs desired by Pakistan, in her Application before the ICAO Council—kindly see paragraphs 1, 2 and 3 under the heading "Reliefs desired" in the Indian Memorial, at page 69, *supra*.

We are, therefore, amazed at this fresh turn in India's arguments that Pakistan has accepted the so-called factum of suspension of the Convention and Transit Agreement by India in 1971. On the contrary, it has been correctly asserted by us that India never claimed the suspension of the Convention in her Note of 4 February 1971, but merely banned overflights, that is, she denied Pakistan her rights and privileges under the Convention and Transit Agreement.

It is therefore clear that each of the assertions made were denied by the other Party. Now what turns on this? May I refer here to the decisions men-

tioned in Pakistan's Counter-Memorial, at page 387, *supra*, which the learned Counsel for India has so conveniently dismissed as being irrelevant. I would specially refer to the *Mavrommatis Jerusalem Concessions* case (1924), *P.C.I.J. Series A, No. 2*, at page 11, where it has held that: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interestst between two persons."

The point is, each assertion of a legal view or interest and denial by the other party would constitute a separate disagreement or dispute. Therefore, in the instant case, we respectfully submit that there are three disagreements between the Parties.

I shall now proceed to show that each of these disagreements involves a question of interpretation or application of the Convention or the Transit Agreement, attracting the jurisdiction of the Council.

The first disagreement between the Parties arises from the assertion of Pakistan that India is denying Pakistan her rights and privileges under Article 5 of the Convention and Article I, Section 1, of the Transit Agreement. India's denial of this position creates a disagreement regarding the application of Article 5 of the Convention and Article I, Section 1, of the Transit Agreement.

The second disagreement between the Parties arises from India's assertion that the Convention and Transit Agreement were suspended in 1965 and were never revived. Pakistan does not accept this and takes the position that, consequent upon the armed hostilities in September 1965, India acted under a provision of the Convention, that is, Article 89. She notified the Council on 9 September 1965 that she would not be able to comply with any or all the provisions of the Convention and the Transit Agreement.

This means that the Convention was not suspended, but only the operation of the rights and privileges with regard to Pakistan contained in Article 5 of the Convention and Article I, Section 1, of the Transit Agreement, were suspended under Article 89.

Indeed, Pakistan's position is that under Article 89 a State has only freedom of action in relation to its rights and obligations as a belligerent or neutral, or in relation to an emergency, but this does not mean that the Convention is suspended. India's position, on the other hand, is that Article 89 is merely declarative of a right under general international law to suspend treaties in the case of armed conflict: whatever the merits of the positions taken by each Party, it is very clear that a question of interpretation of Article 89 of the Convention arises, and consequently the Council's jurisdiction is attracted under Article II, Section 2, of the Transit Agreement and Article 84 of the Convention.

The third disagreement between the Parties arises out of India's assertion that Pakistan has committed a material breach of the Convention because of its conduct in relation to the hijacking incident and, consequent upon this breach, India has a right to suspend the Convention and the Transit Agreement. Pakistan rejects the contention that it committed a breach of any provision of the Convention and, further, that the Convention provides a specific procedure to be followed in the case of a breach, which ousts any right of unilateral suspension.

The assertion of India that there has been a material breach, and Pakistan's rejection of this allegation, would clearly call for an interpretation of the relevant provision of the Convention.

India has also asserted that she has a right *dehors* the treaty to unilaterally suspend the Convention on the basis of a material breach alleged by her against Pakistan. Pakistan, on the other hand, has maintained that there is

no such right because the Convention and Transit Agreement are not silent with respect to what happens when one party commits a breach of the agreement.

We have stated that the party feeling aggrieved would have to follow the procedure laid down in Article II, Section 2, of the Transit Agreement and Article 84 of the Convention. We have also drawn attention to Article 54, paragraphs *(j)* and *(k)* of the Convention, which make it a mandatory function of the Council to determine infractions of the Convention. It is to be noted that even in the *Namibia* case the right of unilateral suspension on grounds of material breach was said to exist only if the treaty was silent. Thus, in paragraph 96 of the Judgment, it is stated:

> "The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside . . . the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded." (*I.C.J. Reports 1971*, para. 96, p. 47.)

We, however, take the position that the Convention is not silent about what is to happen in the event of an assertion regarding the breach of the Convention. In such circumstances, the provisions of the Convention should apply. Our position is also supported by Article 60 of the Vienna Convention on the Law of Treaties of 1969. As mentioned earlier by us, paragraph 4 of that Article states: "The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach."

Whatever be the merits or demerits of the stand taken by the Parties on this issue, one thing is clear: that is, that Pakistan maintains that the Treaty is not silent with respect to what happens in the case of a breach. India, on the other hand, asserts that the Treaty is silent. This clearly involves a disagreement regarding the interpretation of the relevant provisions of the Treaty. Consequently, the jurisdiction of the Council is attracted.

A lot has been built up by the learned Chief Counsel of India on the supposed existence of a right *dehors* the Treaty to unilaterally suspend the Treaty on the grounds of material breach. I cannot, therefore, leave this subject without pointing out that the doctrine whereby one party can free itself of a contract because of material breach of the contract by another party is based on an implied condition in the contract. Therefore, *ex hypothesi*, it would involve a question of interpretation of the contract. That this is so, is also clear from the Judgment in the *Namibia* case. Thus the Court states as follows in paragraph 98 of the Judgment:

> "That this special right of appeal was not inserted in the Covenant cannot be interpreted as excluding the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement." (*I.C.J. Reports 1971*, para. 98, p. 48.)

Thus the power of termination or suspension on account of breach is presumed to exist as inherent in any agreement, that is, it is implied in the agreement itself. That being so, *ex hypothesi*, a question of interpretation of the agreement arises especially if one party asserts that this implied condition has been ousted by the express intention of the parties.

I have now finished with the three disagreements existing between the Parties in the circumstances of the case, and I have tried to show how each

of these disagreements involves a question of interpretation and application of the Convention and the Transit Agreement. I will now give two more independent reasons why the Council's jurisdiction is attracted.

The first is that when India states that the words "interpretation" and "application" in Article II, Section 2, of the Transit Agreement and Article 84 of the Convention do not cover a question relating to the suspension of the Treaty, they are in fact seeking an interpretation of the words "interpretation" and "application" in the jurisdictional clauses and, consequently, a question of interpretation does arise.

The second point is that the Council is competent to determine its own jurisdiction. Consequently, no one party can assert the suspension of the Treaty and claim that the Council has no jurisdiction to determine whether the Treaty continues or not. If this were permitted, India would become the judge of the Council's jurisdiction, and not the Council itself.

Here, Mr. President, I may add that it was stated by the learned Counsel for India that a body like ICAO is not to determine its own jurisdiction; it is not the final authority on the point, because an appeal against a decision lies to this Court.

I had made a certain submission on the point. I do not say that appeal does not lie to this Court, and I do not say that appeal on this point will not lie to this Court. My only submission was that on a decision under Article 5 on a preliminary objection, no appeal is provided at all. But if the case is finally decided on merits under Article 84, along with that, the question of jurisdiction could also be taken up in appeal, but at this stage when it is decided as a preliminary issue no appeal lies. Because the authority that I have quoted says that the matter becomes *res judicata—res judicata* at that stage, no further appeal is provided against that. But when the final decision is appealed against, the question of jurisdiction could be taken up at that stage also.

The learned Chief Counsel for India has not, in my humble submission, stated anything new in respect of the manner and method employed by the Council in reaching its decision which calls for further comments. I shall, therefore, leave the third aspect of this case and confine myself to certain other matters raised by the learned Chief Counsel of India during his second oral submissions on last Friday.

The submissions of the learned Chief Counsel for India in respect of the existence of a special agreement of 1966 related essentially to the merits of the case and it is not necessary for us to controvert these assertions to establish that the Convention and the Transit Agreement were in force in order to establish the jurisdiction of the Council. All we needed to show is that the assertions and denials of the parties constituted disagreement relating to the interpretation and application of the two treaties. We have already made our submissions in this regard. However, it is submitted that the effect of Article VI of the Tashkent Declaration and the letters exchanged between the President of Pakistan and the Prime Minister of India in February 1966 was that the existing treaties, which included the Convention and the Transit Agreement, were implemented.

The signals exchanged between the DGCA, Pakistan and DGCA, India, pursuant to the aforesaid letters, were merely the steps for the implementation of the Convention and the Transit Agreement. The learned Chief Counsel for India has frequently referred to these signals. That these signals did not constitute a new agreement replacing the Convention and the Transit Agreement is manifest from the first few signals which were exchanged between the aviation authorities and are reproduced on pages 495 to 498, *supra*, of Pakis-

tan's Rejoinder. The first signal sent by DGCA, Pakistan, to DGCA, India, on 15 January 1966, reads as follows: "Request confirm no objection to the resumption of normal operation by PIAC to and across India." This does not show that somebody was asking for permission: "Request confirm no objection to the resumption of normal operation."

In reply, DGCA, India, in his signal of 4 February 1966, stated: "Our Government has agreed to restoration of over-flights of scheduled services between India and Pakistan."

It was stated and asserted before this honourable Court that the signals amounted to agreement and here the signal said that our Government has agreed. Where is that agreement? In the letters exchanged and the Tashkent Declaration which said "on the same basis" and which talked about these two treaties? So it says "our governments have agreed to the restoration of overflights of scheduled services between India and Pakistan".

The signal from DGCA, Pakistan to DGCA, India, of 7 February 1966 reads as follows:

> "We have received instructions from our Government that the Government of India has agreed on reciprocal basis *to the resumption* of overflights [the Court may be pleased to note my emphasis on the words 'to the resumption'] over each other's territory by our respective airlines in accordance with the procedures existing before 1st August 1965. Accordingly we propose to resume overflights of Indian territory as per following schedule."

Then the schedule is joined unto that.

In this signal the schedule of overflights of PIA was intimated to DGCA, India, and he was requested to acknowledge the schedule. In reply DGCA, India, in his signal of 8 February 1966, stated:

> "We agree to resumption [again the word 'resumption'] of overflights by schedule services effective 0001 LT 10 February 1966. We note the details of overflights of schedule services that PIAC propose to resume."

"We note"—again, there is no question of: we permit you, allow you, nothing of the sort.

It is clear from these signals that the overflights were resumed in accordance with the agreement reached between the two Governments wherein it was agreed to resume overflights on the same basis which existed prior to 1 August, 1965, i.e., on the basis of the Convention and the Transit Agreement. By no stretch of interpretation could these signals constitute a special agreement replacing the Convention and the Transit Agreement which, to state India's stand, were only suspended and not terminated. Kindly see paragraph 38, page 419, *supra*, of Reply of India.

Thus keeping in view the provisions of the Tashkent Declaration, the letters exchanged between the President of Pakistan and the Prime Minister of India, and the signals exchanged between the aviation authorities of the two countries, it is manifestly clear that overflights were resumed on the basis of the Convention and the Transit Agreement.

While trying to justify that Pakistan has been obtaining prior permission for its scheduled flights to overfly Indian territory, the learned Chief Counsel of India has tried to lay wholly incorrect interpretation on certain letters sent by Pakistan International Airlines to DGCA, India, in which schedules of overflights were filed by the Airline. These letters did not request prior permission for operating the overflights. It may be stated, without any apprehen-

sion of being contradicted, that it is an international practice that every airline submits its schedules to the aviation authorities of the countries in whose territory they land or overfly.

From the documents we have filed during the course of the oral pleadings before this honourable Court, we have shown that similar practice was being followed in respect of filing schedules even before the armed conflict of 1965, when, by India's own admission, the Convention and the Transit Agreement were in force. The letter dated 4 September 1965 from the Manager, Air India International, to the DGCA, Pakistan, clearly states that the latter had given standing permission for the overflights of Air India International. That the same procedure was being followed before September 1965, in respect of filing the schedules, as was followed after the armed conflict of 1965, lends support to our submission that the filing of schedules was not inconsistent with the Convention and the Transit Agreement.

The learned Chief Counsel for India referring to my address at page 625, *supra*, stated, in his address—his address being at page 674, *supra*:

> "My learned friend has stated also, at the commencement of his argument: 'Before the Council, the words "material breach" were not mentioned' (*supra*, p. 625).
>
> Now this is incorrect. I will not multiply references to what was stated before the Council, but just to satisfy the Court that the point of material breach was specifically argued in terms on behalf of India, I would draw attention to India's Memorial, page 147, *supra*, paragraph 21. This paragraph deals with India having exercised its right under international law to suspend the treaties on the ground of material breach and what is argued before the Council is that this right of India is supported by the decision of this Court."

My learned friend has, by this statement, tried to give the impression to this honourable Court that perhaps I tried to mislead the Court or mis-state facts. My learned friend should have read the elaboration of my said submission, which was in his possession when he made that statement. This appears on pages 645 and 648, *supra*, and reads as follows:

> ". . . this, Mr. President, was my first submission, but you may kindly note that, before the ICAO Council, this objection was not specifically taken by India in their pleadings. This is an afterthought. Vaguely this ground was taken in the submissions before the Council by India, but India's written pleadings did not mention that this action had been taken because of a material breach on the part of Pakistan which entitled India, under some rule of international law, to suspend the treaty or its operation."

Then I further submitted (p. 648):

> "So I submit, Mr. President, that this point of a material breach is an afterthought and the Court may be pleased to look through the preliminary objections, as filed before the Council. They appear on pages 98-109, *supra*, of the Indian Memorial. All the pleadings do not mention material breach at all, this is taken for the first time; whether they can take it for the first time is for this honourable Court to judge. The Council was not bound when the point was not taken in their pleadings—they had been vaguely argued before that—to give any verdict or any finding on that, or to take it into consideration at all."

I had made it plain that in their preliminary objection, appearing on page 98, *supra*, of the Indian Memorial, India had not mentioned material breach at all or based their right on general international law on it. I had stated in my submission that before the ICAO Council, the Chief Counsel for India may have made submissions on the point of material breach but the Council was not bound to take any notice of it because these were not specifically taken before the Council in their pleadings, i.e., their preliminary objection. It is now for the honourable Court to judge whether there has been any misstatement of facts, and by whom.

The Court will be pleased to remember that when I was making submission on a certain Award, given by the Arbitrator Professor Pierre Lalive in an International Commercial Arbitration case, the learned Chief Counsel of India interrupted me and objected to the Court that he had no notice of that award and therefore, it should not be referred to. I knew it was embarrassing for him to mention that Award and therefore, I did not make any further submission on the intervention of the President of the Court. I was, therefore, amazed that the learned Chief Counsel of India made elaborate submissions with regard to this Award in his reply. The Award, among other things, also interpreted Article VI of the Tashkent Declaration and, in paragraph 49, states as follows:

> "It is, therefore, interesting to note that not one of the treaties concluded by India and Pakistan before September 1965 seems to have been considered on either side as cancelled . . . On the contrary, evidence may be found to show that both countries have viewed these treaties as still in force . . . Moreover, this view finds a confirmation in Article VI of the Tashkent Declaration, whereby the Prime Minister of India and the President of Pakistan agreed 'to take measures to implement the existing agreements between India and Pakistan'—and not, for instance, to 'revive' former agreements cancelled by a 'war'."

When I submitted earlier that it was perhaps embarrassing for the learned Chief Counsel for India that I referred to this Award, my reason simply was that it was his able argument that helped the Arbitrator to come to this conclusion. He appeared for Dalmia in that case.

On the subject of documents which have been filed by India during the oral pleadings before this honourable Court, the Chief Counsel for India has attributed certain false statements to Pakistan. The Chief Counsel for India has stated at page 592, *supra*:

> ". . . Pakistan itself has prohibited the overflights of the aircraft of certain countries and it has [published this notification containing the prohibition in the Aeronautical Information Circular—exactly like India: it is[1]] not published the notification in the Aeronautical Information Publication."

This statement is incorrect. He called our statement false but I would say his statement is incorrect. Pakistan has not issued any Aeronautical Information Circular on the subject and has in fact included this information in its Aeronautical Information Publication on page GEN 1-4, para. 8.1.3 which reads as follows:

> "No Rhodesian and Israeli registered aircraft are permitted to operate to or overfly Pakistan. No flight of International air line, scheduled or

[1] Deleted from final corrected text of Indian Counsel's oral argument.

non-scheduled operating to or from Rhodesia or Israel is permitted to operate or overfly Pakistan."

I do not need to go any further into such statements made by the Chief Counsel for India. The Court may kindly examine and judge them for themselves.

In conclusion, once again, Mr. President and Members of the Court, I thank you for the courtesy and accommodation shown to me in making my submissions and the patience with which you have heard me. Thank you very much.

CLOSING OF THE ORAL PROCEEDINGS

Le VICE-PRÉSIDENT faisant fonction de Président: Je m'adresse aux deux Parties. La Cour a écouté avec intérêt les exposés qui ont été faits et je tiens à remercier en son nom les agents et les conseils des deux Parties. Les débats sont clos et vous serez informés de la date à laquelle l'arrêt sera prononcé.

The Court rose at 4.5 p.m.

TENTH PUBLIC SITTING (18 VIII 72, 10 a.m.)

Present: [See sitting of 19 VI 72.]

READING OF THE JUDGMENT

The VICE-PRESIDENT, acting President in the case: The sitting is open.

The Court meets today to deliver its Judgment in the *Appeal relating to the Jurisdiction of the ICAO Council*, brought before it on 30 August 1971 by an Application of India against Pakistan.

I shall now read the French text of the Judgment:

[The President reads paragraphs 9 to 46[1].]

I call upon the Registrar to read the operative part of the Judgment in English.

[The Registrar reads the operative part of the Judgment in English[2].]

President Sir Muhammad Zafrulla Khan and Judge Lachs append declarations to the Judgment. Judges Petrén, Onyeama, Dillard, de Castro and Jiménez de Aréchaga, append Separate Opinions to the Judgment. Judge Morozov and Judge *ad hoc* Nagendra Singh append Dissenting Opinions to the Judgment.

In order that the Court's decision might be made known as soon as possible, and by reason of the delays which would have occurred if it had been necessary to postpone the delivery of the Judgment until printing of the Judgment and the separate and dissenting opinions had been completed, it was decided to read the Judgment today from a duplicated text. The usual printed edition will appear in approximately three weeks.

The sitting is closed.

(Signed) F. AMMOUN,
Vice-President.

(Signed) S. AQUARONE,
Registrar.

---

[1] *I.C.J. Report 1972*, pp. 50-70.
[2] *Ibid.*, p. 70