SEPARATE OPINION OF JUDGE DILLARD [1]

I am in fundamental agreement with the conclusions reached by the Court and the reasons supporting them. In this separate opinion I wish, first, merely to make certain general observations in further support of the Court's Judgment and second, to indicate that the decision confirming the jurisdiction of the ICAO Council can also call on general principles of law recognized in many jurisdictions. While in no sense necessary to the Court's Judgment [2] which, of course, stands on its own footing, an allusion to these principles may be of possible interest especially as the thrust of India's main contention has implications reaching beyond this particular case.

I. Jurisdiction of the International Court of Justice

1. Preliminary Nature of Proceedings at Council Level

The contention, raised by Pakistan for the first time in the oral hearings, that no appeal lies to this Court owing to the preliminary and procedural nature of the jurisdictional issue, does not appear to me to be persuasive.

Certainly the implications flowing from it are sufficiently unattractive as to be avoided unless compelled by some reading of the relevant documents or some theory of the judicial process commanding unquestioned application. As I understand it, had the Council decided that it had *no* jurisdiction, then Pakistan's right of appeal, presumably granted in Article 84 of the Convention (which speaks of "any" disagreement), would have been forever foreclosed. On the other hand, the decision sustaining jurisdiction would compel India to be put to its proof on the merits with the right of appeal postponed until after a full exposure of the merits—the very contingency which it is the main purpose of a plea to the jurisdiction to avoid.

Although the formal scheme of the Rules for the Settlement of Differences might lend a certain aura of validity to this kind of result, I do not think it compelled.

It assumes that a *substantive* jurisdictional issue, i.e., one directed either to the person or the subject-matter in controversy, falls in the same

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[1] Passages in the oral proceedings indicated by the symbol C.R. 72/ . . . may be located through the Table of Concordance printed at the end of *I.C.J. Pleadings, Appeal relating to the Jurisdiction of the ICAO Council.*

[2] Hereafter referred to as the Judgment.

category as minor procedural requirements designed to regulate the expeditious and orderly process of adjudication. The former engages the fundamental rights of the parties and is usually non-waivable; the latter do not

In essence, a substantive jurisdictional issue (I say "substantive" only because the "jurisdiction" is sometimes loosely used) has a double focus. This is clearly revealed in the jurisprudence of federal states where jurisdictional issues are so frequently litigated and syphoned off for appeal before considering the merits [1]. Not only is the issue deemed fundamental to the rights of the individual litigant whose plea is not merely that the court or other tribunal has no power to hear the merits but also that it has no power to put the individual to the trouble, expense, potential vexation and other features which attend the need for defending on the merits. The issue is also fundamental at the level of competing power controversy between contending governmental entities (i.e., central, local or regional governments). While the latter factor may not be operative in the present case, it yet points up the importance of a jurisdictional issue directed either to power over the person or subject-matter.

On principle therefore it seems to me clear that the allegedly clean cut, but questionable, distinction between procedural and substantive issues does not for purposes of grounding an appeal embrace a plea to the jurisdiction.

The Rules for the Settlement of Differences, like other rules, are subject to varying interpretations. I see no compelling reason for so interpreting Rules 5 and 15 as to make them mutually exclusive. Furthermore the Council itself appeared to construe them together and at no time considered the issue non-appealable.

While I do not think Article 86 of the Convention was intended to create a right of appeal if none existed independent of Article 86, I yet see nothing in this Article which negatives the conclusion above.

Although the contention concerning the lack of relationship between the subject-matter of negotiations and the appeal under Article 84 raises somewhat different issues, it too seems to me insufficiently compelling to justify a denial of the appeal for reasons similar to those advanced above. It may be true that prior negotiations were not specifically directed to the jurisdictional issue itself,—an issue hardly susceptible to such negotiations [2]. A literal reading of Article 84 may then be invoked to show that any appeal on such an issue is premature. But such a reading presupposes that the drafters contemplated a consequence which

[1] See, for instance, *Bell* v. *Hood* 327 US 678, 682 (1945).

[2] It is almost self evident that, had the prior negotiations attempted to embrace this issue, they would have proved abortive. (See C.R. 72/8, pp. 12-13.)

seems out of line with the fundamental purposes inherent in the right to invoke an early and definitive decision on an issue of such importance.

The absence of any direct evidence on this point and the remoteness of any connection it may bear on the object and purpose of the Convention and Transit Agreement have impelled me to agree with the reasoning of the Judgment.

The conclusions stated above are rested on broad principles touching the nature and thrust of a jurisdictional issue. They are fortified, in the present instance, by considering the violence done to Article 62 (1) of the Rules of this Court if the opposite view were held; but I also agree with the Judgment that the decision should not be grounded on this Rule.

2. The Application of Pakistan

It does not seem to me necessary to dwell extensively on this issue. Article 36 (2) of the Statute is not involved.

The jurisdiction to entertain the appeal with respect to the Application rests on the express terms of Article 84 of the Convention and Article II, Section 2, of the Transit Agreement when both are read in conjunction with Articles 36 (1) and 37 of the Statute.

The latter Article provides for such jurisdiction "*Whenever a treaty or convention in force* provides for reference of a matter 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". (Emphasis added.)

Pakistan asserted that the Applicant's recourse to this jurisdictional power "is a clear admission of the fact that the Convention and Transit Agreement were in force between the parties at the time the cause of action arose and continued to be so" (Rejoinder, para. 37).

This amounts to saying that India cannot "blow hot and cold", i.e., that she cannot rely on the continued existence of the Convention and Transit Agreement for purposes of perfecting an appeal while denying it for purposes of attacking the jurisdiction of the Council of ICAO.

This apparently inconsistent position may, by implication, be pushed still further. Thus it may be urged that the International Court of Justice's assumption of jurisdiction would constitute, in and of itself, a denial of the main thrust of India's contention.

But this argument attempts to prove too much and the contradiction is more apparent than real. This follows because the *criteria* for opposing the jurisdiction of the Council of the ICAO and those for perfecting an appeal are quite distinct. The former have to do with the basic power to entertain the application in the first place; the latter have to do with the judicial protection afforded the party against an allegedly erroneous decision. If the latter were co-extensive with the former, then the latter could be rendered completely useless.

A simple, if extreme, hypothetical instance will serve to illustrate the point. Suppose India's contention were that she had not ratified or adopted the Convention and therefore it was *not*, as between the Parties, a "treaty or convention in force", if the decision of the ICAO Council were adverse how could she avail herself of her appellate power without invoking Article 37 of the Statute?

Nor does the matter end there. There is a familiar logical weakness in attempting to charge the *maker* of a statement with a contradiction when the terms he uses must *necessarily* invite a seeming contradiction unless regard is paid to the different *types* of statements made. The matter is complicated and need not be pursued in the body of this opinion [1].

In any event it seems evident that India's position is justified and that the jurisdiction of this Court to entertain the appeal on the Application is clear.

3. The Complaint of Pakistan

If it is established that this Court has jurisdiction over the Application and if it is also established that the Council of the ICAO has jurisdiction to entertain the Application, less practical significance attaches to the issue of the appealability of the Complaint, and this is especially true in this case in light of their almost identical wording and reach.

Nevertheless, the issue was before the Court and a resolution of it may have value for the future.

The theoretical problems posed were, in my opinion, difficult and it may well be that the Council will wish to give further study to them. I propose, therefore, in the interest of exposure, to first advance an argument against the appealability of the Complaint and then a brief counter-argument in support of the position adopted in the Judgment.

(a) *The Argument against the Appeal*

This argument rests on a consideration of *(a)* the different objects

[1] Pakistan's assertion may be linked with numerous supposedly contradictory statements, analyzed by philosophers and logicians, of which the oldest is that of the Epimenides containing the famous assertion by a Cretan "that all Cretans are liars". It is obvious that such a statement appears superficially to be inherently contradictory since if it is true, it contradicts itself and likewise if it is false. (Compare similar generalized statements such as "all generalizations are false" or that of the skeptic who proclaims "he knows nothing".) The classic and perhaps still the clearest analysis designed to show that such assertions are not necessarily contradictory is that of Whitehead and Russell in the *Principia Mathematica* (2nd ed. 1950), pp. 37-39 and 47-65, which announced, for the first time, the famous "theory of logical types". See also, Eaton, *General Logic* (1931), pp. 452-462 and Copi, *Symbolic Logic* (1959), pp. 162-164.

There is no *logical* inconsistency or contradiction in India's reliance on the Convention for purposes of appeal while still contending it is not "in force" for purposes of denying the Council's jurisdiction.

of a complaint in contrast to an application and *(b)* the structure of the Rules dealing with each [1].

The Rules, of course, make a sharp distinction between applications filed under Article 84 of the Convention and Article II, Section 2, of the Transit Agreement on the one hand, and complaints under Article II, Section 1, on the other hand. This is true despite the fact that certain rules are common to both (e.g., Arts. 3 (1) *(a)* and *(c)*, 4 and 5 of Chap. III of Part I and the General Provisions of Part III).

The significant differences are:

(1) The Council is *obligated* to decide on any disagreements under an application; no such obligation obtains with respect to a complaint;

(2) the decisions of the Council with respect to an application are *binding*; no such binding quality attaches to the "findings and recommendations" under a complaint (Arts. 24 and 25 of the Rules) which envisage a consultative process;
(3) "complaints" do not deal with the interpretation or application of the treaties but with *actions* by a State, which may be legally privileged, yet are alleged "to cause injustice or hardships" to the complaining State;
(4) the decisions of the Council with respect to an application are subject to appeal pursuant to Article 84 of the Convention (Art. 18 of Rules). No similar right of appeal "appears" to apply to complaints under Section 1. (To be noted later is the *possibility* of an appeal by transferring the complaint into a type of "disagreement".)

Cast against this background, how may India justify an appeal from a decision of the Council, if its decisions under Section 1 are not subject to appeal?

From what has been said above, it seems evident that the *ultimate findings* and *recommendations* of the Council under the Complaint would *not* be subject to appeal and especially so since these findings and recommendations are not necessarily based on a legal issue resulting from an adjudication.

It would seem to follow logically that if there is no appeal from the *ultimate findings* and *recommendations* this very lack of appellate power would extend to any "preliminary" issue antecedent to those findings. (To be questioned later.)

India attempted to convert a presumably non-appealable decision under Article II, Section 1, of the Transit Agreement into an appealable one under Section 2 (Reply, paras. 39-41) by asserting there was a "dis-

[1] "Application" and "complaint" are capitalized only when reference is made to them with respect to the particular application and complaint in this case.

agreement" over whether there was or was not "action" under the Transit Agreement within the meaning of Section 1. This "disagreement" in turn, so she asserted, attracted the applicability of Section 2 which permits an appeal under Article 84 of the Convention. Support for this ingenious approach was found in the Working Paper of the Secretary General of the ICAO in Document C-WP/5433. (Reply, Annex C.)

The difficulty with this argument is two-fold.

First, the grounds India asserted to be controlling at the Council level were all grounded on the assumption that Section 1 alone was involved. India's attack on the jurisdiction of the Council raised no issue of a disagreement—a point which, while not necessarily incompatible with her major argument that there could be no "action under" a non-existent treaty, would yet have caused her difficulty.

Second, and more important, the Council's *decision* was *definitely rested on the assumption that it was dealing with a Complaint under Section 1* (see in particular Memorial of India, Annex E, *(e)*, Discussion, paras. 135-139). Indeed the explanation of the vote of the United States delegate in favour of India was expressly based on the ground that the action had been improperly brought under Section 1 and that it should have been brought under Section 2 *(ibid.)*. However this was a minority vote. There is no doubt that the decision was taken under Section 1.

An additional argument can be advanced, keyed to the concept that the appellate jurisdiction of the Court is a limited one, and that it is incompatible with that concept for the Court to review on appeal an issue neither argued before the lower tribunal nor decided by it [1].

If the analysis above is correct, the entire argument concerning the Complaint, including the voting on Section 1, may be dismissed as beyond the competence of the International Court of Justice.

(b) *The Argument Sustaining the Appeal*

There can be little doubt that, viewed in the abstract, the theoretical arguments above are not without weight. When, however, more detailed consideration is given to the particular character of the Application and

[1] As stated by one commentator:

"Whether new issues—that is questions of law or fact not argued before the ICAO Council—may be considered by the appellate tribunal is more doubtful. Unless all the parties involved consent thereto, these issues would seem to be *ultra vires* the jurisdiction of the appellate tribunal. This is not because of any formalistic notion of estoppel, but because the consent to the jurisdiction of the appellate tribunal is limited to the review of those issues that were submitted to the ICAO Council for adjudication." (Buergenthal, *Law Making in the International Civil Aviation Organization* (1969), pp. 145-146.)

Complaint in this case, including their striking similarity, the arguments are weakened. The Judgment has, in my view, adequately provided the justification for assimilating, for purposes of appeal, the Complaint to the Application and it would be an exercise in needless repetition to rehearse the reasons, with which I agree, sustaining its position.

I am moved, however, to make the following additional observations.

The argument that because the ultimate findings and recommendations of the Council, in considering a complaint are non-appealable, therefore a preliminary jurisdictional challenge is likewise non-appealable is, in my view, subject to doubt. They fall into different categories.

It may be true that the former may turn on considerations of equity and expediency which do not readily furnish suitable material for appeal to a court of law (a proposition which may need some qualification), but surely a jurisdictional issue, which turns on basic questions of institutional power, furnishes the very paradigm of a legal issue.

Nor does it logically follow that because the former are not "legally" binding, the latter is non-appealable. The institution of a complaint sets in motion a whole series of chain reactions. It is a two-stage process in which the respondent State is put to his proof with potential sanctions of a severe character. The very purpose of a challenge to jurisdiction is to arrest this process, with its potentially vexatious requirements and implications, *in limine*. Its purpose is to deny that the Council can subject the challenging party to any enquiry whatever concerning alleged "injustice or hardship" especially when an adverse finding or recommendation may well generate the sanction of suspension from rights and privileges under the Agreement, provided (at the second stage of the process) that the Council considers that the allegedly offending State has "unreasonably" failed to take suitable corrective action.

It is hardly necessary to add that the legally oriented observations above carry no implication whatever that the Council would assume an unwarranted jurisdictional power or that to allow an appeal on this issue would in any way impede the non-appealable character of its ultimate findings and recommendations. Assuming it has power, its highly desirable flexible procedures are in no way impaired. At the policy level it may also be suggested that considerations of the kind noted above are more likely to stimulate than retard the number of States willing to adhere to the Transit Agreement.

4. The Voting Issue

The issue of possible irregularity in the manner and method of voting becomes irrelevant if, as indicated earlier, the Complaint is not appeal-

able. It is also irrelevant in so far as the Application is concerned since, under any view, a statutory majority favoured the appeal.

Is it relevant on the assumption that the Complaint, viewed in isolation from the Application, is appealable?

It is possible to assert that the manner in which the Council behaves is not central to the issue of whether it can behave at all, i.e., the jurisdictional issue. I take this to be the thrust of a question put to counsel (C.R. 72/7, p. 40). Thus, if the jurisdictional issue is in favour of India's contention, i.e., that, *objectively viewed*, there is no jurisdiction, then clearly the issue becomes irrelevant and likewise if the issue favours, on an objective assessment, the position of Pakistan.

The force of this argument may be somewhat dented by the counter-assertion which India was quick to make that the decision by the Council was itself on the jurisdictional issue (C.R. 72/8, p. 10).

Fundamentally, however, the voting problem does not go to the jurisdictional issue itself since this issue is clearly focussed on the reach of the Council's competence to deal with the *subject-matter* of the disagreement.

Considerations of a different kind also fortify the view that the Court should not treat the voting issue as critically significant.

As to the "manner" of putting the vote, there is little validity in India's claim that it was framed in the wrong way [1]. While the Council's being "seised" of the case is not to be confused with its jurisdictional power to handle it, nevertheless it is clear that, as with any other body endowed with adjudicating authority, it may legitimately assume (in the absence of a claim that is patently frivolous or groundless) that, in the first instance, it is possessed of jurisdiction pending a challenge to its power. In keeping with general principles of adjudication it was incumbent on India to prove the contrary.

Turning to the problem of the "statutory majority" the proposal put to vote was stated by the President of the Council to be whether "those who think that the Council of ICAO has no jurisdiction to consider Pakistan's Complaint to so indicate by saying 'yes' and those who disagree with that to say 'no' . . .".

The result of the voting was 1 yes, 13 no, 3 abstentions (Memorial of India, Annex E, *(e)*, Discussion, para. 136). The President therefore ruled that the Council had jurisdiction. In light of this result, it would appear that even if there were error, it was harmless error, since, in my view, the manner of putting the voting in this particular case was permissible and only one vote was negative.

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[1] See *infra* under II, 1.

That there was some confusion on the meaning of a majority was revealed in the subsequent discussion and was relied on by Pakistan to show that the whole issue of a statutory majority has by no means been resolved (Rejoinder, para. 78; Counter-Memorial, para. 59).

The point made by India was that, had the issue been put in such a manner that a statutory majority were needed to *establish* jurisdiction, then only 13 States so voted and the decision would not be sufficiently supported [1].

Pakistan's point was that the majority needed was *not* that of the total membership of the Council but only the majority of those on the Council who are also parties to the Transit Agreement and thus entitled to vote or who are not otherwise disqualified as a party in interest.

Article 52 of the Convention specifies that decisions of the Council shall require "approval by a majority of its members". It does not, however, specify how the majority is to be determined. Article 66 *(b)* specifically strips a member of the Council who is not a member of the Transit Agreement from voting on any question under the provisions of the Agreement. And parties in interest are also excluded (1957 Rules, Arts. 15 and 26 (3)).

It had been assumed by the Secretary General of the ICAO that despite the provisions of Article 66 *(b)*, a statutory majority of 14 was needed for *all* decisions of the Council. That this interpretation may be subject to doubt was indicated by Pakistan and may well await renewed study by the Council, especially since the requirement might, under readily conceivable circumstances, paralyse the decision-making powers of the Council. It may be noted, in passing, that the general Rules of Procedure for the Council (as opposed to the Rules for the Settlement of Differences) are not so restricted and speak of the majority of votes cast (Rules 42, 49)[2].

It is, of course, not impossible to contemplate a situation of gross abuse of procedural requirements leading to a miscarriage of justice. In such a situation the validity of the decision adopted by a subordinate adjudicating body may be legitimately challenged on appeal. As previously noted, a challenge of this kind is quite distinct from one directed to the issue of jurisdiction.

It seems to me abundantly clear that no such abuse was evident in

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[1] The Council is composed of 27 States but the number qualified to vote on the Complaint was limited to 18 owing to the fact that India was a party in interest and 8 other States represented on the Council were not parties to the Transit Agreement. Only 17 votes were cast because the representative of one State was absent.

[2] One commentator favours the view that a dispute should be decided by a simple majority of those Council members who are qualified to vote in deciding the particular case (Buergenthal, *op. cit.*, *supra*, p. 191).

the present case either with respect to the "voting" issue or other alleged procedural irregularities.

The observations above are merely supplied in further support of the conclusions of the Court in paragraphs 44 and 45.

II. Jurisdiction of the ICAO Council

1. Preliminary

The following broad principles seem to me applicable to the present controversy:

(1) As a general rule any organ endowed with jurisdictional power has the right *in the first place* to determine the extent of its jurisdiction. This clearly applies in the absence of a clause *contraire* and it is particularly applicable to a pre-established international institution. As stated in the *Nottebohm* case (Prel. Obj.), *I.C.J. Reports 1953*, page 111 at page 119 (emphasis added):

> "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 constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, *but is an institution which has been pre-established by an international instrument* ..."

Statements from numerous cases can be marshalled in support of the general principle, noted above. See, e.g., *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, *P.C.I.J.*, *Series B*, *No. 16*, at page 20 (1928) [1].

(2) Assuming that the principles announced in Section 3 of the Vienna Convention give expression to general principles of international law antedating the Convention, it is clear that Article 60 (1) must be read in conjunction with Article 65 (4). In keeping with the broad principle announced above, this Article provides:

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[1] Were it necessary to have recourse to general canons of construction, I would wish to associate myself with the concluding statement on this point by Judge Read in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1952*, at pp. 143, 144) in which he emphasized that within certain limits both the Permanent Court of International Justice and the International Court of Justice have "given liberal interpretations to *jurisdictional clauses*, designed to give full effect to the intentions of the parties concerned". (Emphasis added.)

And, also, with the view expressed by Lauterpacht that the Court "has applied boldly the view that effect must be given to the ostensible purposes of the jurisdictional clause" (*The Development of International Law by the International Court of Justice*, 1958, p. 341).

"Nothing in the foregoing paragraphs shall affect the right or obligation of the parties under any provisions in force binding the parties with regard to the settlement of disputes."

Furthermore it should be noted that under Article 60 (2) *(b)*, an alleged material breach of a multilateral treaty by one of the parties does *not* give a party "specially affected" the privilege of terminating the treaty but only provides grounds for "*suspending*" the *operation* of the treaty in whole or in part in the relations between itself and the defaulting State" (emphasis added). The concept of "suspension" which is clearly keyed to a temporary condition, *pre-supposes the continued existence of the treaty.*

Even if certain *operations* governing air rights were deemed suspended it would not logically follow that such suspended *operations* embraced the compromissory clause of the treaty which falls conceptually and functionally in a separate category and may thus become operative since the treaty remains in force.

2. Formulation of the Question

In its Application of 3 March 1971 before the Council of the ICAO Pakistan invoked the power of the Council to decide and declare, *inter alia*, that the decision of the Government of India suspending the overflights of Pakistan aircraft over the territory of India "is illegal and void and in violation of India's international obligations under the Convention and Transit Agreement".

It also requested that the Council decide and declare that the decision of the Government of India suspending flights of Pakistan aircraft over the Indian territory is causing injustice, hardship, loss and injury to Pakistan.

Thus it sought a directive that the Government of India should restore the "two freedoms" and adequately compensate 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".

As previously noted, the Complaint filed the same day was similar in terms except for the omission of the paragraph seeking compensation (Memorial of India, Annex A, item 3, *(f)*, (7), and Annex B, item 3, *(f)*). For purposes of this analysis the two may be treated together.

The Council has no general power to adjudicate disagreements among contracting States. Its powers are strictly derivative and thus depend on the terms of the Convention and Transit Agreement.

Article 84 of the Convention and Article II, Section 2, of the Transit Agreement (by reference to Article 84) confer the power to decide ". . . *any* disagreement between two or more contracting States *relating to the interpretation or application*" of the Convention and its Annexes.

In its Application instituting proceedings before this Court, India's submissions were:

(1) that the Council has no jurisdiction to handle the Application and Complaint of Pakistan as the Convention and Transit Agreement "have been terminated or suspended between the two States";
(2) that the Council has no jurisdiction over the Complaint since no action has been taken "under" the Transit Agreement . . . since that Agreement has been terminated or suspended as between the two States;
(3) that the question of overflights is governed by a special régime of 1966 and not by the Convention or the Transit Agreement.

From the above it appeared that the principal issue before the Court could be stated as follows:

"*Did Pakistan's Application (and Complaint), considered in light of India's objections, reveal any disagreement between the two Parties relating to the interpretation or application of the Convention and its Annexes?*"

3. India's Principal Contention

In denying that the Council had jurisdiction India's principal contention (presented with great thoroughness, force and ingenuity) was that any disagreement relating to the termination or suspension of a treaty lies *completely dehors* the treaty. (*Dehors*-the-treaty theory.) Inasmuch as it lies *dehors* the treaty it *cannot* relate to any disagreement over the interpretation or application *of* the treaty. Supplementing the *dehors*-the-treaty theory was a logically distinct yet related theory viz., the "non-existing" treaty theory. This was revealed in the repeated assertion that "to interpret or apply" presupposes the continued existence of something to interpret or apply—an assertion which reverberated throughout the Memorial, Reply and oral argument [1].

India recognized, of course, that international law does not sanction the *arbitrary* termination or suspension of either a bilateral or multilateral treaty. The privilege is not absolute but qualified by various requirements of which the most significant is that the breach justifying the termination or suspension must be material.

But all this is quite irrelevant, so she asserted, when the issue centres on the power of the ICAO Council to handle the disagreement. Since the source of this power is the Convention it cannot embrace matters lying beyond it.

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[1] Application, paras. 1, 27 *(a)*; Memorial, paras. 55, 68, 70, 72, 85; Reply, para. 8; C.R. 72/6, p. 13.

Her chain of reasoning appeared to be:

(1) *All* questions of termination or suspension lie *dehors* the treaty;

(2) the jurisdiction of the ICAO Council lies *within* the treaty; therefore

(3) the Council of the ICAO has no jurisdiction to handle the disagreement.

Had her premise been soundly grounded, the conclusion would follow that, *in so far as the jurisdiction of the ICAO Council is concerned*, any contracting State may, vis-à-vis any other contracting State, arbitrarily suspend the treaty and do so by her mere *ipse dixit*. This conclusion India cheerfully conceded (C.R. 72/8, p. 14) [1].

In my view the argument contains the hidden assumption that all questions of termination or suspension lie "dehors" the treaty *irrespective of any terms of the treaty*.

Because this assumption is questionable, India's premise was too sweeping and, in the context of the present case, it therefore begged the central question.

In fairness it should be said that she attempted to avoid question-begging and circularity by indulging another assumption. This was exposed by a question put to her by a Member of the Court. Her further assumption was that "inherent limitations" on the Council's jurisdiction inhibit it from considering questions of "substantive" international law under which the suspension was effected. Under this assumption any challenge to her right to suspend the treaties could be aired only by a court competent to handle such matters.

Putting aside the validity of the asserted distinction between substantive and non-substantive international law (to be alluded to later) India nevertheless reaffirmed her basic premise.

This was especially revealed in the following passage in response to another question put by the same Member of the Court. The question dealt with the potential application or relevance of Article 89 of the Convention. After discussing this critically significant Article, counsel stated:

> ". . . 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,*

[1] To avoid any misunderstanding it should be pointed out that India at no time contended that she could arbitrarily suspend treaties. Her contention was that such an issue could only be determined by a court competent to enter into the matter and that the ICAO Council was not competent to do so. See Judgment, paras. 32 and 34.

namely that the operation of the treaties has been suspended, and therefore neither Article 89 nor any other article call for application or interpretation." (Emphasis added.)

This recourse to the "non-existing treaty" theory is made even more explicit in the next passage where he stated:

"*The crux of the matter* is *that the treaties must be in operation before any question of interpretation or application can arise* . . . 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." (C.R. 72/6, p. 13.) (Emphasis added.)

It can be suggested that India, by her combined theories, was in effect challenging the applicability of the entire Convention as opposed to the mere application of any particular article in it. But this point need not be pressed since ultimately the Council must, as a matter of the merits, decide whether the disagreement relates to the interpretation or application of one or more articles of the Convention. This point is mentioned *infra*, under 5.

4. Subsidiary Arguments

India's attempt to fortify her case through a number of subsidiary arguments needs only passing reference.

(1) In discussing the inherent limitations on the Council's jurisdiction, she drew the inference that the nations of the world could not have intended to endow it with the power to determine issues of a sophisticated legal nature especially when the dispute may be highly charged with political implications and inspired by military considerations.

It is true, of course, that the Council is endowed with a mix of mediating, conciliating and adjudicating functions. In so far as the last is brought into play, its composition may seem ill-suited to its function as numerous commentators have suggested [1].

Grant this and the argument is yet incomplete. This is so because it ignores the safeguard provided by the right of appeal to either an arbitral tribunal or this Court, bodies presumably capable of handling sophisticated legal issues.

It also ignores the fundamental distinction between the *power* of the international community to establish an organ with adjudicative powers and the policy considerations prompting it to do so. There is no question but that this power was exercised with the consent of all contracting States.

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[1] See, for example, Goedhuis, "Questions of Public International Air Law", 81 *Recueil des cours*, pp. 203 ff., at pp. 222-224.

Finally, it is significant to note that the powers of the Council are part of a functioning "system" or régime in which some supervisory authority over its adjudicating powers is integral to the operation of the entire system. This point, alluded to in the Judgment (para. 26) is, in my view, important.

It is important not because third-party judgment is always preferable to more flexible procedures of settlement but because it provides a method for ultimately settling legally relevant issues and can, by so doing (especially when the process is located within a functioning system), facilitate rather than impede the processes of negotiation, mediation and conciliation.

(2) It is, of course, axiomatic that questions of international law inhere in the interpretation or application of treaties. The attempt by India to segregate those legal issues which might fall within the proper province of the ICAO Council and those beyond its reach, while ingeniously argued, was not persuasive in light of the unsupported and novel distinction between substantive and non-substantive international law. The matter needs no elaboration.

(3) India's attempt narrowly to restrict the concept of "application", while also ingenious, was also unpersuasive. The distinction she drew was between the "operation" (of the treaty) and the "application" of its provisions to "an existing state of affairs". By way of illustration she invoked the kinds of applications which she claimed might legitimately arise under Articles 5, 9 and 11 of the Convention. (C.R. 72/1, pp. 18-24; 72/5, p. 53.)

Her invocation of Article 9, in particular, deserves a digressive comment. It is difficult to discern how the legal issues arising from the application of this Article, involving as they do, considerations of "reasons of military necessity and public safety", are not, under India's view, so highly charged with political and military factors as to make them beyond the reach of the Council. Yet India herself invoked the jurisdiction of the Council in its dispute with Pakistan in 1952 and relied specifically on Article 9 (as well as Articles 5 and 6) [1].

The articles of the Convention are, of course, not "applied" in a vacuum. They must relate to a dispute involving, to some extent, an existing state of affairs. If that "state of affairs" is generated by a suspension of the treaty, it is difficult to see how the distinction between "application" and "operation" is helpful or why the former is automatically excluded.

Judicial pronouncements do not give to the term "application" a

[1] The controversy was ultimately settled by negotiations. For an interesting analysis, see *1953 United States and Canadian Aviation Reports*, pp. 110-133.

restricted meaning as statements in the *Mavrommatis case*, *P.C.I.J.*, *Series A*, *No. 5*, page 48, and the *Peace Treaties* case, *I.C.J. Reports 1950*, page 74, attest. I refrain from extending this opinion with quotations.

5. Specification of Relevant Articles

It seemed to me desirable to go through the laboured exercise above because the major contention of India was rested rather more on logical than empirical grounds. If its basic assumption had been correct then (as in the domestic arena when a contract is deemed void) the compromissory clause (Art. 84) could have no effect. It seems clear, however, that her assumption was not sufficiently supported.

It remains to determine, therefore, whether the disagreement between India and Pakistan relates to the "interpretation or application" of *any* article of the Convention and Transit Agreement.

On this positive point it will be observed that the Judgment carefully avoids trespassing on matters which are the proper province of the Council to determine. Whether India was or was not justified in suspending the treaties obviously goes to the merits and is irrelevant to the jurisdictional issue. It suffices therefore to point to a number of articles of the Convention and Transit Agreement the interpretation and application of which appears to be involved in the disagreement between the Parties. I have little to add to the analysis in the Judgment which has called attention to the disputes over the interpretation and application of Articles 5, 82, 83, 89 and 95. The specification of these Articles does not necessarily imply that others might not also be relevant, i.e., Articles 25 and 37. Furthermore, if regard is had to the Preamble of the Chicago Convention and Article 44, it is arguable that their interpretation and application are also implicated especially in light of Article 31 (1) and (2) of the Vienna Convention. But all this falls within the province of the ICAO Council to decide [1].

Since in my view Article 89 was particularly relevant, and since I have

[1] The "jurisprudential" point might be mentioned, even at the risk of appearing over-academic, that multilateral treaties establishing functioning institutions frequently contain articles that represent ideals and aspirations which, being hortatory, are not considered to be legally binding except by those who seek to apply them to the other fellow. On the other hand there are other articles which are generally recognized as imposing definite legal obligations. The point at which the former merge into the latter constitutes one of the most delicate and difficult problems of law and especially so in the international arena where generally accepted *objective* criteria for determining the meaning of language in light of aroused expectations are more difficult to ascertain and apply than in domestic jurisdictions. Nevertheless the problem of determining, within the context of a specific controversy, which articles are and which are not, legally binding cannot be altogether avoided without indulging the twin assumptions that law is a "brooding omnipresence in the sky" (an extreme natural law tenet) or that the language of law is at once self revealing and self contained, a proposition which all modern scholars concerned with linguistic analysis and communication theory reject. Happily, considerations of this kind are not required in the present controversy since it is unnecessary to invoke the vaguer norms of the Convention and Transit Agreement in order to de-

alluded to it earlier, I shall attempt to characterize the nature of the disagreement over that Article.

Article 89

India's consistently maintained position, to repeat, was that in suspending the Convention and Transit Agreement vis-à-vis Pakistan she was acting in accordance with privileges accorded her under international law. Whether she was right or wrong in doing so is an issue going to the merits which, she asserted, can only be determined by a court of competent jurisdiction. It has nothing to do with the jurisdiction of the ICAO Council.

Article 89 of the Convention specifically provides:

> "In case of war, the provisions of this Covenant 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."

India's suspension was occasioned by the hostilities in 1965. She claimed the suspension was never lifted.

Pakistan contended that as a party to the Convention India was obligated to observe its requirements. Article 89 specifically provides for the very contingency which occasioned the suspension and is thus binding, so she contends, on India. She fortified this by alluding to India's own conduct in sending a notification to the Council of the ICAO. She asserted that India was, in fact, operating under Article 89 and that her subsequent actions were consistent with this view. From all this it followed that the Convention and Transit Agreement were not suspended even if the operation of certain rights accorded Pakistan under Article 5 and Article I, Section 1, of the Transit Agreement were temporarily suspended. Furthermore, so asserted Pakistan, India revoked the emergency.

At the legal level Pakistan insisted that Article 89 confers freedom of action regarding the rights and obligations of contracting States regarding emergencies, including notification and the lifting of the emergency. It gives States all the needed protection afforded by international law and has, in effect, supplemented international law by the consent manifested in adopting the Convention.

India's reply was, in effect, three-pronged. At the factual level she disputed both the facts and inferences drawn from them by Pakistan. At the legal level she contended that Article 89 is completely irrelevant

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monstrate that the jurisdiction of the ICAO Council is keyed to very specific provisions involving legal obligations of one kind or another, which it may be the duty of the Council to consider.

to the jurisdictional issue and leaves untouched the correctness of her basic rights under international law. This follows, she asserted, because Article 89 is merely declaratory of international law. Its purpose was merely to assure States that their rights of suspension remained unaffected by the Convention. Therefore it neither confers new rights nor disturbs those already existing. She analogized the thrust of the Article to Article 73 of the Vienna Convention which, she asserted, has a similarly innocuous, if cautionary, function.

India's third contention was that the controversy over Article 89 was irrelevant or better, perhaps, that it was rendered moot by virtue of the suspension in February 1971 at which time there was neither a war nor a national emergency.

It is true that Pakistan's Application before the ICAO Council was precipitated by the hijacking incident and the compensation sought in its prayer for relief appeared to be limited to losses consequent upon that incident. On the other hand, her letter to the President of the ICAO Council invoked Article 89, and it was relied upon in the Counter-Memorial (para. 29). Counsel, of course, vigorously argued its applicability, as witness C.R. 72/4, at pages 19-22; 72/6, at pages 10-11 and 42-50; 72/7, at pages 8-10; 72/8, at page 48 and 72/9 at page 22.

A more fundamental answer to India's third point lies however, elsewhere. Clearly if the suspension in February 1971 is found to be illegal as Pakistan contended then it can hardly render moot the controversy over the application of Article 89. Equally clearly, this is for the Council to determine as one of the issues on the merits.

From the above it becomes apparent that we have in these contrasting views a disagreement relating to the interpretation and application of the Convention and Transit Agreement sufficient to bring the disagreement within the reach of Article 84 and thus to justify the assumption of jurisdiction by the Council. Once this is determined the Court has exhausted its appellate function at this stage of the proceedings.

III. The Municipal Law Analogy

1. Relevance

In what follows I do not mean to suggest that the Judgment need be fortified by reference to Article 38 *(c)* and *(d)* of the Statute. The case for sustaining the jurisdiction of the ICAO Council is, in my view, sufficiently compelling that further support from "general principles of law" in domestic fora or "judicial decision" of the highest authority in those jurisdictions, may appear superfluous.

At the risk of appearing over academic, I append this analysis because:

(1) It may shed additional light on the theoretical aspects of the case.

(2) Both Pakistan and India have alluded to *Heyman* v. *Darwins Ltd.* (Memorial of India, paras. 83, 84; Counter-Memorial, para. 52; Reply, paras. 70, 71; Rejoinder, paras. 70-72; and C.R. 72/3, pp. 23-25).

(3) I agree with the view of Judge Moore, expressed in the *Mavrommatis Palestine Concessions* case (*P.C.I.J., Series A, No. 2 (1924)*, pp. 57-59), and that of many commentators that recourse to general principles can enlighten issues before the Court and enrich its jurisprudence.

(4) Finally, in this instance, in particular, the analogy to domestic fora is not (as is frequently the case) either irrelevant or misleading.

While this is true generally of contracts which have a provision that disputes "relating to the interpretation and application of the contract" should be first submitted to arbitration, it seems particularly true in the field of labour controversy where contending power blocs (management and unions), each jealous of its own prerogatives, are reluctant to concede more power to the arbitral tribunal than the terms of the collective bargaining agreement warrant. The analogy here is all the more suggestive since in this area, as in the international area, the purpose of the agreement is to establish a "system" designed to absorb conflict through procedural techniques in the interest of industrial peace. The purpose of establishing the ICAO was, in the large, to establish a system or régime of civil air peace. Chapter XVIII of the Convention was designed to facilitate the functioning of the entire system.

It is customary to dismiss the domestic analogy on two connected grounds:

(1) The over-riding need in the international field for strict proof of *consent* to submit to the jurisdiction of any tribunal; and

(2) the absence of a total system of compulsory third-party settlement in the event of a breakdown in the arbitral process.

In the context of the present controversy, neither of these grounds is persuasive. The cases in the domestic arena also stress the fact that the consent of the parties is at the root of their obligation to submit a particular dispute to arbitration.

The second ground does not apply in this instance because under India's theory of the case, it is irrelevant to the jurisdictional issue whether the parties were or were not bound to submit the controversy to this

Court or any other. In other words, the existence *vel non* of compulsory jurisdiction outside the Council had no bearing on the meaning and scope of the compromissory clause. This is precisely the assumption which is indulged in the municipal sphere. The issue centres on exactly the same problem, i.e., the impact of a repudiation of the contract by one party on the meaning and scope of a compromissory clause framed in terms of interpretation or application of the contract.

It should be added that the question whether the repudiation was *justified* by an alleged prior breach (the usual assertion) or for any other reason, goes to the merits; hence the issue is whether the arbitral tribunal has the power to enter into the merits—a narrow, jurisdictional issue precisely as in the India/Pakistan case.

Furthermore, it is now firmly established, at least in common law jurisdictions, that the jurisdictional issue remains to be decided whether the repudiating party (as in the *Heyman* case) invokes the dispute settlement clause or, as is more usual, the aggrieved party does so.

2. Some Distinctions

A critical distinction exists when the contract is shown to be void *ab initio* as opposed to a showing that is it *voidable* [1].

In the former instance it is clear that if the entire contract fails, all subordinate clauses collapse including the arbitration clause. This is comparable to India's reliance on a kind of "non-existing" treaty contention. But this presupposes a showing that the party opposing arbitration never consented to the contract in the first place or that this consent was vitiated by fraud in the factum or other factors destroying the entire contract. Clearly this is not the situation in the India/Pakistan case, although India's reliance on a "non-existing" treaty approach would seem to require it. India freely consented to the Convention and Transit Agreement.

When the repudiating party resists the jurisdiction of the arbitral tribunal on the ground that he has legitimately repudiated the contract because of prior material breach, then the contract is not rendered void but only voidable. This is comparable to the situation in international law. All the authorities agree that the treaty is not *ipso facto* rendered void and especially so in a multilateral convention, even if the repudiation is

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[1] This distinction is so well established as hardly to need a recitation to authority. However an interesting discussion is contained in the opinion of Judge Frank in *Kulukindis Shipping Co. S.A.* v. *Amtorg Trading Corp.* (C.A. 2, 1942) 126 F. 2d 978.

related to only one other party[1]. The issue then arises as to the operation and scope of the compromissory clause. To what extent does this depend on the actual wording of the clause?

In the first place it is clear than when the contract is *void*, the wording of the clause is irrelevant. When it is voidable, it becomes significant chiefly when *the broad language* of the clause is qualified by more specific *exclusions*, as for instance, in collective bargaining agreements when "management prerogative" clauses qualify the obligation to submit to arbitration. The issue can then arise as to whether the arbitral tribunal's jurisdiction extends to the determination of the *scope* of the exclusion. See, *U.S. Steel Workers of America* v. *Warrior and Gulf Navigation Co.* 363 US 574 (1960) (holding that it did) [2].

The big point is that the wording of a clause confined to "interpretation or application" of the contract or similar language, is customary in the municipal as in the international field. It will be recalled that Article 84 also speaks of "any" disagreement without any exclusionary provision either with respect to a class of disagreements or a particular disagreement.

Counsel for India sought to distinguish the *Heyman* case because of certain *dicta* indulged by Lord Simon calling attention to the breadth of the compromissory clause. But a reading of that case will show that it did *not* turn at all on this point, and indeed this is true of practically all the cases in which a general clause is not coupled with expressly stated exclusions.

3. The Cases

Heyman and Another v. *Darwins Ltd.*, 1942, A.C. 356, 1 All Eng. Rep. 337 (H.L.) is, perhaps, the most frequently cited and quoted case on the subject in the common-law world. It may be well, therefore, to quote two passages from the opinions of the Law Lords. (References are to All England Law Reports.)

Lord MacMillan, after making the distinction between void and voidable contracts, continued:

> ". . . an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such

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[1] For an interesting analysis see, Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*, 1966, especially at pp. 35-58. So far as I can ascertain the literature of international law is sparse in the analysis of the *relationship* between repudiation and a compromissory clause in the repudiated treaty.

[2] It is true but not relevant to the present analysis to observe that national policies in many States favour the arbitral process in contrast to the attitude prevalent in the nineteenth century.

reason come to an end, I can see no reason why the arbitrator should not decide that question." (P. 346.)

Viscount Simon sounds the same note in expressly approving a statement by Viscount Finlay in a previous case:

"The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause is unreasonable in itself, and there is no authority to support it." (P. 341.)

Sometimes the argument is advanced as India did in the present case that it is unreasonable to suppose that critical issues of material breach should be left to a tribunal not exclusively composed of lawyers. In a leading and much-cited case in the United States dealing with a labour controversy in which management claimed that the union's violation of a "no-strike" clause was such a material breach as to terminate the contract, including the arbitration clause, the court stated:

"If the union did strike in violation of the contract, the company is entitled to its damages; by staying this action, pending arbitration, we have no intention of depriving it of those damages. We simply remit the company to the forum it agreed to use for processing its strike damage claim. That forum, it is true, may be very different from a courtroom, but we are not persuaded that the remedy there will be inadequate."

This case, incidentally, followed the reasoning in the *Heyman* case and cited it. While the compromissory clause was broader than Article 84, it was still keyed to "disputes or grievances . . . involving questions of *interpretation or application* of any clauses or matter covered by this contract . . ." (*Drake Bakeries Incorporated* v. *Local 50, American Bakery and Confectionary Workers International, AFL-CIO, et al.* 370 US 254, 266 (1962)).

The *Heyman* case is only one of many others in numerous jurisdictions which concur in the conclusions above.

Attention is invited, in particular, to the following: *Woolf* v. *Collis Removal Service* (1947) 2 All Eng. Rep. 260; *The Tradesman* (1961) All Eng. Rep. 661; *Mackinder* v. *Feldia A.C.* (1966) 3 All Eng. Rep. 847; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* 388 US 395 (1967).

For a comprehensive analysis and citations to cases not only in the United States, but in England, Canada, South Africa, Australia and

Ireland, see *Breach or Repudiation of Contract as Affecting Right to Enforce Arbitration Clause Therein* 32 A.L.R. 3d 377-419 [1].

A leading United States case, *Swift Chaplin Products* v. *Love* 219 Cal. App. 2d 110, 32 Cal. Rep. 758, 5 A.L. 12. 1001, which cited many Supreme Court cases, is particularly instructive. In that case the compromissory clause was similar to that in Article 84. The contract had been so modified as to generate a dispute. On this basis the lower court had held (as India contended in the present case) that "no right to enforce arbitration now exists, there being no contract then or now existing between the parties" (p. 1004).

In reversing this holding, the appellate court, after stating that the function of the court is a very limited one when the parties have agreed to submit disputes to arbitration, continued:

> "It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the *moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.*" (Emphasis added.)

* * *

When India ratified the Convention, she freely consented to the right of all other parties to invoke Chapter XVIII of the Convention. She cannot unilaterally derogate from that right without demonstrating that her consent was void *ab initio or* that the disagreement was of such a character as to fall entirely outside the category of disagreements embraced in Article 84. She did not address herself to the former and her attempt to justify the latter was, of course, disputed by Pakistan.

IV. Conclusion

For all the reasons above, supplementing and reinforcing the Judgment, it seems clear that the Court had jurisdiction to entertain the

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[1] I regret that the references above are confined to common law jurisdictions. The analysis of comparable problems in other legal systems was beyond my reach especially as I do not conceive that they can be adequately understood abstracted from the total legal environment in which they are located. I would assume, however, that the principles announced above are so fundamental as not to be parochially oriented. For a discussion of French law, see Robert, *Arbitrage civil et commercial* (Dalloz, 1967).

Appeal by India and that the Council of the ICAO was invested under the Convention and Transit Agreement with the competence to entertain Pakistan's Application and Complaint.

(Signed) Hardy C. DILLARD.
