INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL

(INDIA *v.* PAKISTAN)

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

APPEL CONCERNANT LA COMPETENCE DU CONSEIL DE L'OACI

(INDE *c.* PAKISTAN)

MEMORIAL SUBMITTED BY THE GOVERNMENT OF INDIA

CHAPTER I

STATEMENT OF THE CASE

On 30 August 1971, the Government of India (hereinafter sometimes referred to as "the Applicant") submitted to the International Court of Justice an Application on behalf of the Applicant appealing from the decision rendered on 29 July 1971 by the Council of the International Civil Aviation Organization ("the Council"). In accordance with the requirements of Article 67 read with paragraph 2 of Article 32 of the Rules of Court, the Application contained a precise statement of the grounds of objection to the decision complained of, stated the precise nature of the claim and gave a succinct statement of the facts and grounds on which the claim was based. In support of that Application, and as required by the Rules of Court hereinabove cited, the Applicant submits its Memorial in accordance with the decision of the Acting President of the Court rendered on 3 December 1971 and within the time-limit fixed therein.

2. The decision [1] of the Council against which this appeal has been submitted was rendered on 29 July 1971 on the Preliminary Objections dated 28 May 1971 raised by India in the Application [2] of the Government of Pakistan (hereinafter sometimes referred to as "the Respondent") dated 3 March 1971 filed under Article 2 of the Rules for the Settlement of Differences approved by the Council on 9 April 1957 ("the Council's Rules") [3], and in the Complaint [4] of the Respondent dated 3 March 1971 filed under Article 21 of the Council's Rules.

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[1] See Annex E, pp. 267-269, *infra*.

[2] See Annex A, p. 63, *infra*.

[3] For text of the Council's Rules, see Annex J, p. 330, *infra*.

[4] See Annex B, p. 92, *infra*.

CHAPTER II

SUBJECT OF THE DISPUTE

3. In the Application and the Complaint Pakistan claimed that under the Convention on International Civil Aviation, 1944[1] ("the Convention"), and the International Air Services Transit Agreement, 1944[2] ("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. 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, the Council had no jurisdiction since the disagreement between India and Pakistan related to suspension of the treaties.

4. The Council, in its said decision rendered on 29 July 1971, rejected the Applicant's Preliminary Objections. This appeal of the Applicant questions the validity of that decision both with regard to its material conclusions as well as with regard to the manner in which that decision was reached by the Council.

5. The subject of the dispute in this appeal relates to the jurisdiction of the Council to handle the matters presented by Pakistan's Application and Complaint, and raises the principal question whether a dispute relating to the termination or suspension of a treaty can be regarded as a dispute relating to its "interpretation" or "application", and whether suspension of a treaty can be regarded as "action under" the treaty.

6. A certified copy of the Council's decision complained of was attached to the Application of the Applicant. The other useful and relevant material having a bearing on the Council's decision is incorporated in or attached to this Memorial.

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[1] For text of the Convention, see Annex H, p. 299, *infra*.
[2] For text of the Transit Agreement, see Annex I, p. 327, *infra*.

CHAPTER III

JURISDICTION OF THE COURT

7. The Applicant founds the jurisdiction of the Court on the following provisions:

Article 84 of the Convention which runs as follows:

"CHAPTER XVIII

Disputes and Defaults

Article 84

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."

Article II of the Transit Agreement which runs as follows:

"*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.

Section 2

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."

Articles 36 and 37 of the Statute of the International Court of Justice which run as follows:

"*Article 36*

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.

2. 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:

(*a*) the interpretation of a treaty;
(*b*) any question of international law;
(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;
(*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

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."

CHAPTER IV

HISTORY AND BACKGROUND OF THE DISPUTE

8. The Applicant is not dealing in this Appeal with the merits of the Application and the Complaint made by Pakistan before the Council, but is strictly confining itself to its Preliminary Objections to the competence and maintainability of Pakistan's Application and Complaint, the limits of the Council's jurisdiction and the reasons why the decision passed by the Council on the question of its jurisdiction should be regarded as erroneous.

A. Material Provisions of the Convention and the Transit Agreement

9. India and Pakistan are parties to the Convention. The right of a State's aircraft, not engaged in scheduled international air services, to overfly or make non-traffic stops in the territories of other States without the necessity of obtaining prior permission, is conferred by Article 5 of the Convention in the following words:

> "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, and subject to the right of the State flown over to require landing."

10. India and Pakistan are parties to the Transit Agreement. Article I of the Transit Agreement confers similar privileges, in respect of scheduled international air services, to overfly or make non-traffic stops in the territories of other States, and its material portion runs as follows:

> "Section 1
>
> 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.
>
> . . . .
>
> Section 2
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> The exercise of the foregoing privileges shall be in accordance with the provisions of the Interim Agreement on International Civil Aviation and, when it comes into force, with the provisions of the Convention on International Civil Aviation, both drawn up at Chicago on December 7, 1944."

B. The Air Services Agreement of 1948

11. India and Pakistan entered into the Air Services Agreement [1] dated 23 June 1948. It was a bilateral treaty between the two countries, and it dealt with the right to overfly each other's territory and to make stops in each other's territory for traffic as well as non-traffic purposes.

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[1] For the text of the Air Services Agreement of 1948, see Annex C, p. 110, *infra*.

C. Military Hostilities and Suspension of the Convention and the Transit Agreement in 1965

12. Pakistan made an armed attack against India on a large scale in August/September 1965. As a result of the military hostilities, the Air Services Agreement of 1948 was suspended. The Convention and the Transit Agreement as between the two States were also suspended, wholly or in any event in relation to overflights and landings for non-traffic purposes. Consequently, no Pakistan aircraft, whether engaged or not engaged in scheduled international air services, was permitted to overfly India or make any stop for traffic or non-traffic purposes within India. The Applicant issued a Notification [1] dated 6 September 1965 under the appropriate law of India, whereby it directed 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".

D. Irrelevant to Consider whether Suspension was Total or Partial

13. The correct position in law, as submitted in a subsequent Chapter, is that for the purpose of considering the question of the Council's jurisdiction it is irrelevant to decide whether, as between India and Pakistan, the Convention and the Transit Agreement were terminated, or wholly suspended, or partially suspended, i.e., suspended in relation to overflights and landings for non-traffic purposes. The essence of Pakistan's Application and Complaint is its alleged right under the two treaties to overfly Indian territory. The crucial point is that in any view of the matter, the Convention and the Transit Agreement, as between India and Pakistan, have remained suspended since 1965, at least in relation to overflights and landings for non-traffic purposes. Even assuming the two treaties were suspended only partially, as between India and Pakistan, i.e., in relation to overflights or landings for non-traffic purposes, the Council would still have no jurisdiction, for reasons explained below, to consider the matters presented by Pakistan's Application and Complaint. Therefore, in the following pages of this Memorial, references are made only to the suspension of the two treaties, as between India and Pakistan, without raising the question whether the suspension was total or partial.

E. No Revival of Convention or Transit Agreement at any Time after 1965

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.

15. Likewise, at no time after September 1965 was the Convention or the Transit Agreement revived at all, as between India and Pakistan. The Convention and the Transit Agreement have continued to be under suspension, as between India and Pakistan, since 1965.

F. Cessation of Armed Hostilities

16. Armed hostilities ceased on 22 September 1965. On 10 January 1966 the Prime Minister of India and the President of Pakistan signed the Tashkent Declaration [2] whereby they declared "their firm resolve to restore normal and

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[1] See Annex C, p. 120, *infra*.

[2] See Annex O, p. 352, *infra*.

peaceful relations between their countries and to promote understanding between their peoples"[1]. They also agreed "to consider measures towards the restoration of economic and trade relations, communications, as well as cultural exchanges between India and Pakistan, and take measures to implement the existing agreements between India and Pakistan"[2]. They further agreed "to discuss the return of properties and assets taken over by either side in connection with the conflict"[3].

17. In response to the desire expressed by the President of Pakistan for the early resumption of overflights of Pakistan and Indian aircraft over each other's territory, Mrs. Indira Gandhi, the Prime Minister of India, wrote a letter [4] dated 3 February 1966 to the President of Pakistan, in which she expressed her willingness to agree "to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1st August 1965". The President of Pakistan, by his reply [4] dated 7 February 1966, agreed to such resumption of overflights.

G. Special Agreement of 1966

18. The general understanding of the two Governments with regard to the resumption of overflights was as follows:

(1) The overflights of Indian and Pakistan aircraft across each other's territory was to be on the same "basis" as that *prior to 1 August 1965*. This "basis" related to the fixing of routes, procedures for operating permission, etc.
(2) The resumption was limited to overflights across each other's territory. It did not include the right to land in each other's territory, for traffic or non-traffic purposes.
(3) The resumption of overflights was agreed to on a basis of reciprocity.
(4) The resumption of overflights was to be on a provisional basis.

Signals [5] were exchanged establishing the aforesaid understanding between the two countries regarding overflights.

19. In terms of the above understanding, in February 1966 a new concession *to overfly each other's territory* was granted *(a)* on a provisional basis, *(b)* on the basis of reciprocity, and *(c)* subject to the permission of the Government concerned. Under the statutory law of India the Applicant issued a Notification [6] dated 10 February 1966 amending the aforesaid earlier Notification dated 6 September 1965, so that the amended Order of the Applicant now reads as follows—

> "... 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 aforesaid agreement between the two countries relating to the newly conferred concession as regards overflying each other's territory, is hereinafter referred to as "the special Agreement of 1966".

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[1] *Ibid.*, Preamble.
[2] *Ibid.*, Article VI.
[3] *Ibid.*, Article VIII.
[4] See Annex P, p. 354, *infra*.
[5] See Annex C, p. 117, *infra*.
[6] *Ibid.*, p. 120, *infra*.

20. 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.

H. Normalcy not Restored—Pakistan's Posture of Confrontation Bordering on Hostility towards India

21. The Applicant agreed to the resumption of overflights under the Special Agreement of 1966 in the hope that the Tashkent Declaration would be scrupulously adhered to, assets and properties seized during the armed conflict would be restored, and normal relations would be established.

22. 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 Kashmir.
(9) Intensive hate-propaganda against India on the Radio and in the Press, which continues unabated to this day.

24. Pakistan's aforesaid attitude and policy, and the absence of normal relations between India and Pakistan since 1966, were responsible for the non-revival of the Convention and the Transit Agreement as between the two countries and for the non-revival of the Air Services Agreement of 1948. No air traffic between India and Pakistan on their own airlines was ever resumed: as aforesaid the air traffic between the two countries continues to be carried only by international airlines of third countries.

I. Hijacking of Indian Plane and Withdrawal of Permission to Pakistan Aircraft to Overfly India

25. The Special Agreement of 1966 continued to be in operation, both in law and in practice, till 4 February 1971. On that date, the Applicant withdrew the permission to Pakistan aircraft to overfly India, as the Applicant had the right to do under the Special Agreement of 1966. This action of the Applicant constituted the subject-matter of Pakistan's Application and Complaint before the Council.

26. The Applicant had the fullest justification for withdrawing the permission to Pakistan aircraft to overfly India. It is not necessary or relevant in this appeal to set out the factual and legal justification for the Applicant's action on 4 February 1971: the Council itself had no jurisdiction to go into this question of justification. However, it is thought desirable to set out some of the salient facts of the case which constituted the background for the dispute raised by Pakistan before the Council.

27. What led the Applicant to withdraw, on 4 February 1971, the permission to Pakistan aircraft to overfly India was the conduct of the Respondent in relation to the hijacking of an Indian aircraft. The Respondent's conduct was most reprehensible and amounted to the very negation of all the aims and objectives, the scheme and provisions, of the Convention and the Transit Agreement [1]. It amounted to a flagrant violation of international obligations relating to the assurance of safety of air travel, enjoined by the Convention and the Transit Agreement and also by the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963 [2] ("the Tokyo Convention"), the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 [3] ("the Hague Convention"), and other solemn instruments and resolutions adopted by the ICAO, the United Nations General Assembly and Security Council, to which the Respondent subscribes [4].

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[1] It is expressly stated by Section 2 of Article I of the Transit Agreement that exercise of the privileges conferred by that Agreement shall be in accordance with the provisions of the Convention.

[2] For text, see Annex Q, p. 356, *infra*.

[3] For text, see Annex R, p. 363, *infra*.

[4] For texts of some relevant resolutions, see Annexes K and L, pp. 340-346, *infra*.

28. The facts regarding the hijacking incident are summarized below:

(a) An Indian Airlines Fokker Friendship aircraft on a scheduled flight from Srinagar to Jammu with 28 passengers and 4 crew on board was hijacked by two persons among the passengers and diverted at gun point to Lahore in Pakistan shortly after noon on 30 January 1971. One of the two hijackers had a grenade in his hand and threatened to use it if the plane was not diverted to Lahore, while the other pointed his revolver at the pilot.

(b) The Government of India requested the Pakistan Government the same afternoon at Islamabad and through their High Commissioner in New Delhi, for the immediate release of the passengers, crew, cargo, baggage and mail as well as the aircraft. The Pakistan Government informed the Acting High Commissioner of India in Islamabad the same afternoon of its decision to allow the plane, crew and passengers to fly back to India.

(c) The Indian Civil Aviation authorities and the Government of India informed the Government of Pakistan on the morning of 31 January about a relief plane being ready to take off for Lahore, together with spare crew, to bring back the passengers, crew, cargo, baggage and mail as well as the hijacked aircraft as soon as the Pakistan authorities gave the necessary clearance. Permission was given by the Director-General of Civil Aviation of Pakistan the same morning for the relief aircraft to leave, but this was rendered infructuous by further instructions from the Pakistan authorities that the relief plane should not take off until further specific instructions from the D.G.C.A., Pakistan. Such permission was repeatedly deferred, in spite of numerous reminders from the D.G.C.A., India. The Ministers for External Affairs and Civil Aviation of India sent messages on 1 February 1971 to the Minister of Home Affairs and the Minister-in-Charge of Civil Aviation respectively in Pakistan, requesting the immediate return of the passengers and clearance for the relief aircraft to bring back the hijacked aircraft along with the baggage, cargo and mail. The Pakistan High Commission in India consistently refused to issue visas to the crew of the relief aircraft and the spare crew.

(d) Pakistan took more than 48 hours to send the passengers and crew by road to the Indian border at Hussainiwala at 15.00 hours (IST) on 1 February 1971, though the distance from Lahore to Hussainiwala is only 36 miles. They were not allowed to bring their baggage. The Government of India had earlier made arrangements for their return to India on board a scheduled Ariana Afghan Airlines Service from Kabul to Amritsar, which landed at Lahore Airport at 23.00 hours (IST) 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 on this plane because of the alleged presence of crowds at the airport.

(e) The Government of Pakistan not only failed to return the two persons who had hijacked the aircraft but announced that they had been given asylum in Pakistan. This was done even without first disarming them and taking them into custody for their criminal acts. On the other hand, they were treated as heroes and were freely permitted to

visit, by turns, the terminal building at Lahore Airport, to put long-distance calls to their accomplices and friends in Pakistan and meet various people, besides being provided with food and other amenities which enabled them to continue their so-called occupation of the aircraft for 3½ days. This was allowed to happen on the apron of the international airport at Lahore, in full view of the authorities, troops and police there, who took no action to make them vacate the hijacked aircraft.

(f) Finally at about 20.30 hours (IST) 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. This took place in full view of the airport authorities, troops and police at the Lahore Airport, which is a protected area, and at a time when Martial Law was (as it still is) in force in Pakistan. The Lahore TV also televized the destruction of the aircraft on a special programme and it was made to appear as if the event was an occasion for celebration. The time extended for the television programme was clear proof that the Pakistan authorities knew the plans of the hijackers and connived at the destruction of the aircraft. This further criminal act of destroying the aircraft occurred only a few hours after the Pakistan High Commissioner in India had assured the Government of India that his Government were committed to, and were taking all necessary measures for, the safe return of the aircraft.

(g) The Government of India informed the President of the International Civil Aviation Organization Council on 4 February 1971 about the hijacking of the Indian Aircraft, and later about its destruction. It is understood that the President of the ICAO Council sent the following message to Pakistan:

"Regarding unlawful seizure Indian Airlines aircraft confident Pakistan acting in accordance with ICAO Assembly Resolution A-17-5 has permitted or will permit aircraft occupants and cargo continue journey immediately. Would appreciate your information regarding present situation. Am also very concerned by possibility proliferation hijackings in that part of the world unless severe measures taken. Therefore trust Pakistan will follow Assembly Declaration A-17-1 and prosecute perpetrators so as to deter repetition similar acts."

The Government of India are not aware of the response given by Pakistan to this communication. In fact, Pakistan neither permitted the aircraft, with passengers and cargo, to continue the journey immediately, nor returned the hijackers to India, nor prosecuted nor punished them in Pakistan.

(h) The Government of India had, as far back as 1 September 1970, informed the Pakistan High Commissioner in India, that certain subversive elements in Pakistan were conspiring to hijack Indian aircraft and that there was definite information about a possible attempt to hijack an Indian aircraft to Pakistan, and had requested the Government of Pakistan to take adequate steps to prevent this. There was no response from the Government of Pakistan except the strange request from their High Commissioner to disclose the source from which the Government of India had obtained this information.

In spite of their being forewarned, the Government of Pakistan do not appear to have taken any steps; on the contrary, from the statements made in Pakistan, it appears that the plan to hijack the Indian aircraft was in fact hatched in Pakistan by persons whose protestations were officially supported by the Government of Pakistan.

29. 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[1]. 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. 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 [2] to this effect to the Respondent. The Applicant forthwith suspended the overflight of its own aircraft over Pakistan territory in view of the present and imminent danger to civil aviation created by the conduct of the Respondent.

30. Even assuming it is held that the Convention and the Transit Agreement were in force in February 1971 as between India and Pakistan, the Applicant submits that it had the right to suspend them unilaterally, and it should be regarded as having suspended them unilaterally, on the principles of international law which are discussed in the next Chapter, on account of material breach of the treaties by the Respondent. Reciprocity is of the essence of the Convention and the Transit Agreement. The conduct of the Respondent made it impossible for Indian aircraft to overfly Pakistan. That country had shown no regard for the most elementary notions of safety in civil aviation, and had made it impossible for the Applicant 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 was, 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 Applicant submits that it had complete justification for suspending the Convention and the Transit Agreement vis-à-vis Pakistan. The Applicant does not set out here the full facts concerning justification, since, as stated above, the question of justification for termination or suspension of the Convention or the Transit Agreement is not within the scope of the Council's jurisdiction and does not arise as an issue in this appeal.

31. That acts of the nature committed by the Respondent constitute a threat to safety and security of international civil air transport and amount to material breach of obligations of a contracting State under the Convention as well as under bilateral agreements, has been brought out clearly by the Paper [3]

[1] The text of this note as well as of some of the other correspondence exchanged between the Applicant and the Respondent is contained in Attachment "C" to the Memorial of the Respondent dated 3 March 1971 filed before the Council. See Annex A, p. 77, *infra*.

[2] See Annex A, p. 78, *infra*.

[3] See Annex M, p. 347, *infra*.

on "Legal Rationale for Suspension of Service under Bilateral Aviation Agreements Pursuant to the United States Resolution before the ICAO Council" prepared by the Government of the United States in connection with the ICAO Council Resolution of 1 October 1970[1]. The United States Paper expresses the view that in such circumstances bilateral agreements could be suspended by the innocent party against the party in default. What applies to bilateral agreements would equally apply to multilateral agreements.

J. Conclusion

32. (i) From 1965 up to date the Convention and the Transit Agreement have remained suspended as between India and Pakistan; and the Air Services Agreement of 1948 has also remained suspended since that date.

(ii) The only agreement in force between the Applicant and the Respondent in 1971 was the Special Agreement of 1966 which related merely to overflights with the permission of the Government concerned.

(iii) The Special Agreement of 1966 was a provisional one and was on the basis of reciprocity, and entitled either State to revoke its permission at any time.

(iv) On 4 February 1971 the Applicant withdrew the permission to Pakistan aircraft to overfly India. The said withdrawal of permission was in exercise of the power expressly reserved to the Applicant under the Special Agreement of 1966 and was fully justified by the letter and spirit, the terms and provisions, of that Agreement.

(v) Even if the Convention and the Transit Agreement had been in force in February 1971, the Applicant had the right to suspend them unilaterally on principles of international law which are discussed in the next Chapter; and the suspension of the two treaties by the Applicant would have been justified, having regard to the circumstances of the case since September 1965 and the conduct of the Respondent set out above.

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[1] See Annex K, p. 344, *infra*.

CHAPTER V

INTERNATIONAL LAW RELATING TO TERMINATION OR SUSPENSION OF MULTILATERAL TREATIES

33. International law recognizes various modes of termination or suspension of treaties. Broadly, these can be classified into three categories: (1) termination or suspension in accordance with the provisions of the treaty in question, (2) termination or suspension by agreement between the parties to the treaty, and (3) termination or suspension in accordance with the rules of general international law. In the third category would be included cases like termination or suspension of a treaty upon the outbreak of hostilities; unilateral termination or suspension of a treaty on account of material breach by the other party of its obligations under the treaty provisions; termination or suspension justified by supervening impossibility of performance, fundamental change of circumstances, or conflict with an existing or new peremptory norm of international law. The substantive law on the subject has, to a large extent, been codified in Part V of the Vienna Convention on the Law of Treaties, 1969.

34. When a question relating to the termination or suspension of a treaty arises, the treaty itself may be looked at first. But on the points that the treaty does not cover, it will have to be supplemented by the rules of general international law. Thus, even if a treaty is silent on the question of its termination or suspension in certain circumstances, that would not make the treaty a perpetual treaty. The treaty can be terminated or suspended in accordance with the rules of general international law.

35. The case of India is that there was no revival of the Convention or the Transit Agreement, at any time after their suspension in September 1965 as between India and Pakistan. First, such revival could not be automatic but could only be by agreement between the two States, and there was no such agreement between India and Pakistan. Secondly, and in any view of the matter, the doctrine of automatic revival must be ruled out where the two States expressly enter into a special agreement which is materially inconsistent with the earlier treaties and which, therefore, negatives any question of revival of the earlier treaties. The Special Agreement of 1966 between India and Pakistan was such an agreement.

36. If for any reason the Court were to hold that the Convention and the Transit Agreement were in force as between the Applicant and the Respondent on 4 February 1971, the Applicant submits that in that event the suspension by the Applicant of the treaties and of overflights of Pakistan aircraft over Indian territory was lawful and justified on the principle that an innocent party has the right to suspend unilaterally a multilateral treaty on account of its material breach by the other party.

37. As to unilateral termination or suspension of a multilateral treaty due to material breach, it is not necessary for the Applicant to deal extensively with this legal principle in view of the fact that the validity of this principle has been recognized by the International Court of Justice in its Advisory Opinion given in the *Namibia* case on 21 June 1971. The Court held:

> "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' (Article 60, para. 3).

. . . .

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 [1]."

38. Further the Court observed that to contend that the revocation of the Mandate could only take place with the concurrence of the Mandatory (which in the present case would imply that the suspension of a multilateral treaty could take place only with the concurrence of the other party concerned)—

". . . 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 [2]".

39. It might be added that Mr. Sharifuddin Pirzada, Counsel for Pakistan, appearing in the *Namibia* case, also referred to Article 60 of the Vienna Convention on the Law of Treaties, 1969, which, he said, "to a large extent codifies the customary law [3]".

40. Article 60 of the Vienna Convention on the Law of Treaties, 1969, reads as follows:

"*Termination or suspension of the operation of a treaty as a consequence of its breach*

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 in whole or in part 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;

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[1] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 47.

[2] *Ibid.*, p. 16 at p. 49.

[3] *I.C.J. Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Vol. II, p. 138.

(*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*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.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

41. A State's right to terminate or suspend a treaty unilaterally in an appropriate case is adequately supported by doctrine, State practice, judicial decisions and arbitral awards, recommendations of learned societies and of other competent institutions dealing with the study and dissemination of international law. The position in this regard has been summed up adequately by Lord McNair [1] as follows:

"(*a*) that, in general terms, such a right exists when the stipulation broken is such that the breach of it can properly be described as a fundamental breach of the treaty;
(*b*) that the exercise of this right is optional at the discretion of the party wronged;
(*c*) that it must be exercised within a reasonable time after the breach; . . ."

42. A comprehensive study of the subject was attempted by an Indian scholar, Mr. B. P. Sinha, which has been published by Martinus Nijhoff, The Hague, in 1966. The study was completed early in 1964 and, therefore, reviews the literature on the subject up to the end of 1963. The title of the study is *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*. After reviewing the relevant principles of international law, 14 cases decided by international and national forums, relevant literature and State practice of over 150 years, the author reached the following conclusion:

"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 obligations either of the innocent party or of the defaulting party. It merely endows an innocent party with certain alternatives or rights of actions. 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 viola-

[1] McNair, *Law of Treaties*, 1961, p. 571. See also Whiteman, *Digest of International Law*, Vol. 14, pp. 468-478.

tions, 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. . . .

There being no protest note during the last one hundred and fifty years specifically challenging or questioning the validity of the doctrine of unilateral denunciations, there being no general international agreement forbidding it, there being a substantial agreement among the jurists and the judges regarding the equity and binding force of this doctrine, there being a general principle of law essentially analogous to this doctrine, there being the general practice of States, encompassing Africa, Asia, Europe and the Americas, including States of major importance in international relations, upholding or confirming this doctrine as a rule of international law, this just and equitable doctrine is a principle of international law and ought to be so regarded.

It is maintained that the rule of unilateral denunciation exists under the following conditions:

(1) That an innocent party may denounce all of its obligations arising under a treaty the provisions of which form an indivisible whole on the ground of prior substantial breach or breaches;
(2) That an innocent party to a treaty containing different types of obligations may unilaterally denounce its obligations only under those provisions seriously affected by violation or violations and those reasonably related to the seriously violated ones, and not under those unaffected;
(3) That the right of unilateral denunciation must be exercised within a reasonable period of time [1]."

43. Judge Sir Gerald Fitzmaurice raised this very question and enquired from the Counsel of the United States Government in the *Namibia* case cited above as to how, in his view, the principle of unilateral termination of contracts or agreements would work in practice. He said:

"... 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 [2]".

He enquired,

"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?[2]"

44. The Counsel for the United States filed his reply on 18 March 1971 and, *inter alia*, stated as follows:

"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

[1] B. P. Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*, 1966, pp. 206, 214-215.

[2] First Question of Judge Sir Gerald Fitzmaurice at the Hearing of 9 March 1971 (*I.C.J. Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Vol. II, p. 506).

other party in 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 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. 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 the interpretation, application and termination of international agreements [1]."

45. It would thus be clear that both parties have to accept the compulsory jurisdiction of an international tribunal to handle a controversy or dispute about the termination or suspension of a treaty; no forum can have automatic and compulsory jurisdiction in such matters at the request of one party. The reply of the United States indicates the present state of international law on the point.

46. On the question of the likely effect of the absence of a forum with compulsory jurisdiction on the efficacy of the principle of the unilateral termination of a treaty for material breach, Mr. B. P. Sinha observes:

"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 divergencies 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.

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 authorisation or approval from an international judicial authority.

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[1] Reply given by United States Representative on 18 March 1971 to Question put at the Hearing of 9 March 1971 (*I.C.J. Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Vol. II, p. 623).

The fear of the abuse of the right of unilateral denunciation appears to be exaggerated [1]."

47. That the right of unilateral termination or suspension of an international treaty exists independently of the provisions providing for withdrawal therefrom, was also recently asserted by the United States Secretary of State, supported by the advice rendered by his Legal Adviser. The reference was to Article IV of the Nuclear Test Ban Treaty 1963, which provides as follows:

"The Treaty shall be of unlimited duration. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject-matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance."

48. During the course of the hearings on this Treaty, before the Committee on Foreign Relations of the United States Senate, on 12 August 1963, and in the course of the testimony of Secretary of State Rusk, 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's say in the atmosphere or under water and we know 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? [2]"

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.

Now, I would be very glad to make available to the committee a legal brief on this point, because where the gut of the treaty collapses we are not limited just by the withdrawal clause [2] . . ."

49. The "legal brief" referred to by Secretary Rusk, *supra*, was an Opinion dated 12 August, 1963, of the Legal Adviser (Chayes) of the Department of State, which was entitled "Right of the United States to withdraw from the nuclear test ban treaty in the event of violation by another party". After quoting Article IV of the Treaty, set forth *supra*, the memorandum continued:

"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. The three

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[1] B. P. Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*, 1966, pp. 209-210.

[2] Whiteman, *Digest of International Law*, Vol. 14, pp. 473-474.

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.

I. THE GENERAL RULE

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 ed. 1955); see also *Restatement*, Foreign Relations, sec. 162 (proposed official draft 1962). 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. The right to void the treaty must be exercised within a reasonable time after the violation has become known, I. Lauterpacht, 948.

The right of unilateral abrogation for cause has apparently never been adjudicated in an international court. [It has, however, been alluded to in at least two cases before the Permanent Court of International Justice, *Diversion of Water From the River Meuse, P.C.I.J., Ser. A/B, No. 70,* 50 (1937); *Case Concerning the Factory at Chorzów, P.C.I.J., Ser. A, No. 9,* 31 (1927).] It has however been confirmed by publicists generally, and by United States, British, and Soviet authorities, among others [1]."

50. The opinion given by the United States Legal Adviser, cited immediately above, fully endorses the view expressed before the Council by the Chief Counsel of India, Mr. Palkhivala, in making a distinction between the right of denunciation under Article 95 of the Convention and the right to terminate or suspend unilaterally a treaty for material breach by the other party, pursuant to the rule of general international law [2]. He stressed the point that Article 95 did not foreclose the remedy open to an innocent party to suspend the treaty against the defaulting State. The requirement of notice of one year under Article 95 would create an absurd situation and the innocent party will have to wait and suffer the obligation vis-à-vis the State in default during the period of notice, whether or not in the meanwhile the Council was able to remedy the situation.

51. To sum up, no authority and no State practice supports the proposition of Pakistan that a question relating to the termination or suspension of an international treaty is a question relating to its interpretation or application. On the other hand, there is a sharp and clear distinction in law and practice between questions regarding interpretation and application on the one hand and questions regarding termination and suspension. The legal concepts of termination and suspension are clear-cut and distinct and cannot possibly be confused with the concepts of interpretation and application.

[1] Whiteman, *Digest of International Law*, Vol. 14, pp. 474-475.

[2] Council, Seventy-fourth Session, Minutes of the Fourth Meeting, Doc. 8956-C/1001, C-Min. LXXIV/4, pp. 124-126. See Annex E, pp. 222-223, *infra*.

CHAPTER VI

PROCEEDINGS BEFORE THE COUNCIL AND LIMITS OF THE COUNCIL'S JURISDICTION

52. On 3 March 1971 the Respondent submitted as aforesaid the Application and the Complaint to the Council. In the Application the Respondent alleged that the refusal of the Applicant to let Pakistan aircraft overfly India amounted to a disagreement between the Applicant and the Respondent relating to the "application" of the Convention and the Transit Agreement; and in the Complaint the Respondent alleged that the Applicant's conduct amounted to "action under the Transit Agreement".

53. The Secretary General of the International Civil Aviation Organization, vide his letter No. LE 6/1 dated 8 April 1971 and his letter No. LE 6/2 dated 8 April 1971, invited the Applicant to present its Counter-Memorials to the Respondent's Application and Complaint.

54. Since the Applicant was advised that the Council had no jurisdiction to handle the matters presented by the Respondent's Application and Complaint, the Applicant filed on 28 May 1971 a single set of Preliminary Objections to the jurisdiction of the Council, under Article 5 of the Council's Rules, to both the Application and the Complaint.

55. The Council's jurisdiction is limited to disagreement relating to the interpretation or application of the Convention or the Transit Agreement, and does not extend to any dispute or disagreement relating to the termination or suspension of the Convention or the Transit Agreement by one State vis-à-vis another State. This is clear from Article 84 of the Convention, Section 2 of Article II of the Transit Agreement, and paragraph (1) of Article 1 of the Council's Rules.

56. Article 84 of the Convention runs as follows:

> "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." (Italics added.)

57. Section 2 of Article II of the Transit Agreement 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." (Italics added.)

58. Paragraph (1) of Article 1 of the Council's Rules runs as follows:

"(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)." (Italics added.)

59. The Council's jurisdiction to deal with a complaint is limited to cases where action is taken by a State under the Transit Agreement. This is clear from Section 1 of Article II of the Transit Agreement and paragraph (2) of Article 1 of the Council's Rules.

60. Section 1 of Article II of the Transit Agreement runs 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." (Italics added.)

61. Paragraph (2) of Article 1 of the Council's Rules runs as follows:

"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)." (Italics added.)

62. In the Preliminary Objections the Applicant submitted that the Council should dismiss both the Application and the Complaint on the grounds that they were incompetent and not maintainable, and that the Council had no jurisdiction to hear them or handle the matters contained therein, because—

(a) there was no disagreement between the Applicant and the Respondent relating to the interpretation or application of the Convention or the Transit Agreement;

(b) no action had been taken by the Applicant under the Transit Agreement;

(c) the question of Indian aircraft overflying Pakistan and Pakistan aircraft

overflying India was governed by a Special Régime and not by the Convention or the Transit Agreement; and

(d) the Council had no jurisdiction to handle any dispute under a Special Régime or a Bilateral Agreement.

63. The Respondent's reply to the Applicant's Preliminary Objections,—both the written reply as well as the reply at the oral hearing on the Preliminary Objections before the Council—was that any dispute between two States relating to the termination or suspension of the Convention or the Transit Agreement should be regarded as a disagreement relating to the interpretation or application of the Convention or the Transit Agreement and was consequently within the jurisdiction of the Council. As regards the Complaint, the Respondent further submitted that termination or suspension of the Transit Agreement amounted to action under that Agreement.

64. The Council heard both the Applicant and the Respondent on 27 and 28 July 1971. After the conclusion of the hearing of the case, at a meeting of the Council on 29 July 1971, the President of the Council expressed his intention of putting to vote the following propositions based on the Applicant's Preliminary Objections:

"*Case 1 (Application of Pakistan under Article 84 of the Convention and Article II, Section 2, of the International Air Services Transit Agreement)*

(i) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation.

(ii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the International Air Services Transit Agreement.

(iii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the bilateral agreement between India and Pakistan.

Case 2 (Complaint of Pakistan under Article II, Section 1, of the International Air Services Transit Agreement)

(iv) The Council has no jurisdiction to consider the Complaint of Pakistan [1]."

65. The Indian Delegation immediately pointed out that the formulation of the questions in the manner indicated above was improper, prejudicial to India and contrary to the Council's Rules[2]. The propositions before the Council should have been formulated in a positive way, viz., that the Council had jurisdiction to deal with the Respondent's Application and Complaint. Despite this valid objection by the Indian Delegation, the President of the Council took votes on the propositions as he had formulated them earlier, though he did not put to vote the third proposition under Case 1 in view of the Respondent's statement[3] made after the hearing and at the time of voting, that it did not seek relief from the Council under the Bilateral Agreement. While the majority of the members of the Council voted against propositions (i) and (ii), only 13 out

[1] Council—Seventy-fourth Session, Minutes of the Sixth Meeting, Doc. 8956-C/1001, C-Min. LXXIV/6, p. 176. See Annex E, p. 267, *infra*.

[2] Council, *op. cit.*, pp. 177, 192, 194, 195, 204. See Annex E, pp. 267, 279-280, 281, 282, 288-289, *infra*.

[3] Council, *op. cit.*, pp. 177, 200. See Annex E, pp. 268, 285, *infra*.

of 27 members voted against proposition (iv). The Minutes of the Sixth Meeting of the Council maintained that the Council's decision as the result of the votes was the rejection of the propositions (i), (ii) and (iv) and hence the affirmation of the Council's competence to consider the Respondent's Application and Complaint[1].

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[1] Council—Seventy-fourth Session, Minutes of the Sixth Meeting, Doc. 8956-C/1001, C-Min. LXXIV/6, p. 178. See also Annex E, p. 269, *infra*.

CHAPTER VII

GROUNDS OF OBJECTION TO THE COUNCIL'S DECISION

66. The Applicant has exercised, within the time-limit permitted under Article 84 of the Convention (which also applies under the Transit Agreement) the right of appeal from the above-mentioned decision of the Council [1].

A. The Council's Decision Is Erroneous on the Preliminary Objections Filed by the Applicant

67. The Applicant submits that the decision of the Council is erroneous and the Council should have upheld the Preliminary Objections filed by the Applicant against the Respondent's Application and Complaint. The Council should have held, on the following three grounds, that the Application and the Complaint were incompetent and not maintainable and that the Council had no jurisdiction to hear them or to handle the matters contained therein.

1. There Is no Disagreement relating to the "Interpretation" or "Application" of the Convention or the Transit Agreement

68. This ground is without prejudice to Ground 3 below, and proceeds on the assumption that the Convention and the Transit Agreement did not remain suspended since 1965 and that the Special Agreement of 1966 did not govern overflights between India and Pakistan in February 1971.

69. The Application of Pakistan proceeds on the untenable basis that there is a disagreement between the two countries relating to the application of the Convention and the Transit Agreement. Pakistan's Application is incompetent and the Council has no jurisdiction to deal with it, because no question arises of applying the Convention or the Transit Agreement as between India and Pakistan.

70. There is no disagreement between the Applicant and the Respondent relating to the interpretation or application of the Convention or the Transit Agreement. The words "interpretation" and "application" postulate and presuppose 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. In other words, so long as two contracting States accept the existence, operation and efficacy of the Convention or the Transit Agreement as between them, all points of disagreement as to the interpretation or application of the treaties would be within the jurisdiction of the Council. But any question of termination or suspension of the treaties as between two States cannot be referred to the Council under the aforesaid Articles.

71. The aforesaid construction of Article 84 of the Convention, Article II (2) of the Transit Agreement, and Article 1 (1) of the Council's Rules, harmonizes with Article II (1) of the Transit Agreement and Article 1 (2) of the Council's

[1] For the text of the final Minutes of the decision of the Council, see Council, *op. cit.*, p. 175. See also Annex E, p. 266, *infra*.

Rules which deal with complaints regarding an action taken by a State *under* the Transit Agreement, and not regarding termination or suspension of the Transit Agreement which would be *de hors* that Agreement.

72. Disagreement between States pertaining to the Convention or the Transit Agreement may arise in one of four ways:

First, it may be a disagreement as to interpretation of the Convention or the Transit Agreement;
Second, it may be a disagreement as to application of the Convention or the Transit Agreement;
Third, it may be disagreement arising from action taken under the Transit Agreement;
Fourth, it may be a disagreement pertaining to termination or suspension of the Convention or the Transit Agreement by one State as against another.

73. For the sake of brevity, these may be called cases of (i) interpretation, (ii) application, (iii) action and (iv) termination or suspension. These four cases cover the normal gamut of disagreements between contracting States. Under the terms of the Convention, only the first two types of disagreement can be considered by the Council. As far as the Transit Agreement is concerned, the first three types of disagreement can be considered by the council. The Council is not competent to consider the fourth type of disagreement which is concerned with termination or suspension of the Convention or the Transit Agreement.

74. The question may arise whether the State which purports to exercise the right to terminate or suspend the treaty has done so on good grounds and in good faith. The important point is that this question can only be determined by the forum which has the right to decide the disputes pertaining to termination or suspension of treaties. The Council is not the proper forum to decide that question. The competence of the Council extends only to the interpretation or application of the Convention and the Transit Agreement and action taken under the Transit Agreement.

75. The termination or suspension of an international treaty represents the exercise by a State of its right under international law and that right is *de hors* the treaty, as was held by this Honourable Court in the Advisory Opinion of 21 June 1971 *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970))*. The legal concept of termination or suspension of a treaty is wholly distinct and different from the concept of interpretation or application of the treaty; and the Council's jurisdiction does not embrace the former but is strictly limited to the latter.

76. That the concepts of "interpretation" and "application" of a treaty are different from the concept of its termination or suspension, and that a State could unilaterally terminate or suspend a treaty as a result of a material breach by the other party is well illustrated in the question put by Sir Gerald Fitzmaurice to the representative of the United States in connection with the oral proceedings in the *Namibia* case and the reply given to it by the latter. This question and the reply, as well as the law on the subject, have already been dealt with in Chapter V.

77. The clear and deliberate choice of the words "interpretation" and "application" as denoting only two types of dispute which fall within the Council's jurisdiction, may be noted. The words should not be stretched to cover "termination" or "suspension", for such a construction would run counter to the well-settled principles of interpretation laid down by the Permanent

Court of International Justice in the case concerning the *Polish Postal Service in Danzig*[1] and by the International Court of Justice in its Opinion[2] on *Competence of the General Assembly for the Admission of a State to the United Nations.*

78. The composition of the Council and its powers and functions are, again, in keeping with the limited jurisdiction which has been conferred upon it by Article 84 of the Convention, Article II of the Transit Agreement, and Article 1 of the Council's Rules, to hear international disputes. The sovereign power of a State to suspend, or to abrogate or otherwise terminate an international treaty—not seldom involving vastly complicated questions of fact and international law—are outside the scope of the Council's jurisdiction under the aforesaid Articles.

79. To sum up, the scheme of the aforesaid Articles is simple and clear. So long as the Convention or the Transit Agreement continues to be in operation as between two States, any disagreement as to the *construction* of its Articles or the *application* of the Articles to the existing state of facts, can be referred to the Council; and 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. These disputes are usually in the realm of political confrontation between two States, often involving military hostilities not amounting to war, and these matters of political confrontation or military hostilities are outside the ambit of the Council's competence. The question of overflying raised by Pakistan, is directly connected with military hostilities in the past and continues to be inextricably tied up with the posture of political confrontation bordering on hostility adopted by Pakistan.

80. There may be no forum which is entrusted with the jurisdiction to deal with the question of termination or suspension of a treaty in the absence of an express agreement between the parties. The contracting States have not agreed to any forum under the Convention or the Transit Agreement to go into the merits of questions relating to termination or suspension of the said treaties. The fact that there is no international tribunal before which the party contesting the termination or suspension could bring a case is, to recall the words of Mr. Stevenson, "the problem relating to the efficacy of international law and institutions generally and not especially to the problem of the material breach doctrine" which justifies unilateral termination or suspension of a treaty.

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. 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

[1] *P.C.I.J., Ser. B, No. 11*, p. 39.
[2] *I.C.J. Reports 1950*, p. 4 at p. 8.

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

(2) That the Council, on such occasions, be authorized to render an advisory report, or a decision binding upon the parties, if the parties expressly decide to obligate themselves in advance to accept the decision of the Council as binding; and

(3) That the procedure to govern the arbitral procedures shall be determined in agreement between the Council and all the interested parties".

82. The importance of this resolution is that the Assembly recognized that the original concept of submitting all differences to the Council had been abandoned and that the competence of the Council was limited to disagreements relating to interpretation or application. Thus, the ICAO itself has recognized from the very inception the severe limits on its Council's jurisdiction.

83. The Counsel for Pakistan in the course of his oral pleadings before the Council cited the case of *Heyman* v. *Darwins* [1] in support of the proposition that an arbitration clause survives the rescission of a contract. Viscount Simon, Lord Chancellor, ruled on this point as follows:

"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 [2] 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. If the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have

[1] [1942] All England Reports 337.

[2] *The arbitration clause reads as follows:*

"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." *Ibid.*, at p. 339.

happened—e.g., as to whether the agreement has been broken by either of them; or as to the damage resulting from such breach; or as to whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance; or as to whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further—in all such cases it seems to me that the difference is within such an arbitration clause as this [1]."

84. This case has been followed in a large number of American decisions [2]. It really supports India's case inasmuch as it shows how broad the jurisdiction clause should be in order to cover disputes regarding matters other than application or interpretation.

85. In the circumstances aforesaid, it is irrelevant to decide on the facts (i) whether the case is one of termination or of suspension, and (ii) whether the termination or suspension took place in September 1965 or in February 1971. However, the correct view of the matter according to the Applicant is that the Convention and the Transit Agreement were suspended as between the Applicant and the Respondant by both the States in September 1965, and they have never been revived as between the two countries; and the Applicant and the Respondent have accepted and acted on the basis of this position since September 1965; and that if the material parts of the two treaties are at all to be regarded as being in operation between the two countries at the beginning of 1971, they were suspended by the Applicant on 4 February 1971 since there were material breaches of the two treaties by the Respondent, which specially affected the Applicant. A dispute relating to such suspension could not fall within the jurisdiction of the Council.

2. Pakistan's Complaint Is Incompetent because India Has Taken no Action Whatever under The Transit Agreement

86. Pakistan filed its Complaint under Article 21 of the Council's Rules for the Settlement of Differences. The Council's jurisdiction to deal with a Complaint is limited to cases where action is taken by a State under the Transit Agreement. This is clear from Article II (1) of the Transit Agreement and Article 1 (2) of the Council's Rules [3].

87. Two cumulative conditions have to be satisfied before the Council can exercise its jurisdiction in respect of a Complaint which causes injustice or hardship:

(i) the Transit Agreement must be in operation between two States, one of which takes action which causes injustice or hardship to the other; and
(ii) the action must be under the Transit Agreement.

Unless both the conditions are satisfied, the Complaint would be incompetent and not maintainable and the Council would have no jurisdiction to deal with it.

88. In the present case, neither of the aforesaid two conditions is satisfied. The Transit Agreement has been suspended as between India and Pakistan since 1965; and, further, in any view of the matter, no action whatever has

[1] [1942] All England Reports 337, at pp. 339-340.
[2] *American Jurisprudence*, 2nd. ed., Vol. 5, § 19, pp. 534-535.
[3] The text of the Transit Agreement is in Annex I, p. 327, *infra* and of the Council's Rules in Annex J, p. 330, *infra*.

been 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.

89. Secondly, it is submitted that even if the Transit Agreement had been in force between the two countries after 1965, Pakistan's Complaint would still be outside the ambit of Article II (1) of the Transit Agreement and Article 1 (2) of the Council's Rules, since the action complained of amounts to suspension of the Transit Agreement and is not under the Agreement.

90. Thirdly, without prejudice to the above, it is further submitted that in any case, even assuming India had committed a breach of the Transit Agreement, such a breach cannot be the subject-matter of a Complaint under Article II (1) of the Transit Agreement. A Complaint under that Article can only relate to the action of a State discharging its obligations under the Transit Agreement but in such a way as to cause injustice or hardship to another State, e.g., by prescribing conditions for overflying or landing which are unduly onerous.

91. The Council should have held that the Complaint was incompetent and not maintainable and that the Council had no jurisdiction to deal with it, since suspension of the Transit Agreement by the Applicant, whether in 1965 or in 1971, was *de hors* the treaty and represented the exercise of a right under a well-settled rule of international law, and could not possibly be regarded as *action under the Transit Agreement*.

3. The Question of Overflying Was Governed Only by the Special Agreement of 1966 regarding which the Council Had no Jurisdiction

92. The question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed, not by the Convention or the Transit Agreement, but by the Special Agreement of 1966. This Special Régime was accepted by both the Applicant and the Respondent from February 1966 onwards as constituting a Bilateral Agreement after the suspension (as between the two States) of the Convention and the Transit Agreement in September 1965. 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. But the Council overlooked that where such a Special Régime exists, as it does in the present case, no question of interpretation or application of the Convention or the Transit Agreement can possibly arise. The Council should have held that the dispute raised by Pakistan amounted only to an allegation that the permission to Pakistan aircraft to overfly Indian territory was wrongly or improperly withdrawn by India under the Special Agreement of 1966, and that such a dispute was outside the jurisdiction of the Council.

B. The Council's Decision Is Vitiated by the Manner and Method Employed in Reaching the Decision

93. Apart from the fact that the decision of the Council amounts to erroneous assumption of jurisdiction to deal with Pakistan's Application and Complaint where no such jurisdiction exists, India submits that the manner and method employed by the Council in reaching its decision rendered the decision improper, unfair and prejudicial to India and bad in law, for the following reasons:

(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 . . .".

(2) 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 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.

(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.

94. In the circumstances set out above, the decision of the Council cannot stand and must be regarded as having no validity or effect. The facts which have a bearing on the points indicated above are set out below.

95. For the first time in the history of the International Civil Aviation Organization, the Council was called upon to decide the question of its own jurisdiction. For the purposes of Article 84 of the Convention, the Council transforms itself into a tribunal and functions like a court from whose decision an appeal lies to the International Court of Justice. The importance of the questions involved in the proceedings was impressed upon the Council.

96. Reasonable time was not given to the members of the Council for a full and adequate consideration of the arguments put forward by both sides at the oral hearing held on 27 and 28 July 1971. Verbatim records were not made available to the members of the Council for their deliberations before the propositions were put to the vote. A suggestion to put the entire argument presented by India in a written memorandum was made by Mr. Palkhivala, Chief Counsel for India, on 28 July 1971 in the following words:

> "Frankly, the idea was not to inflict upon the Council any further piece of written work; the idea was merely to assist the Council. . . .
>
> . . . .
>
> . . . my desire here is not to gain time. I am not interested in that at all. I am only interested in seeing that a just, fair decision is reached after full consideration. For that purpose I suggested a memorandum. The alternative, if you don't want a memorandum, is to have the verbatim notes made available to every member before a decision is reached . . . [1]"

Some members wanted to consult their Governments on the technical and legal validity of the arguments put forth during the oral hearing. To cite some examples:

Air Vice Marshal Russell, the representative of the United Kingdom, stated:

[1] Council—Seventy-fourth Session, Minutes of the Fifth Meeting, Doc. 8956-C/1001, C-Min. LXXIV/5, p. 162. See Annex E, p. 255, *infra*.

"On this question of going now to a decision, Mr. President, we have heard lengthy discussions and expositions, although they may be brief in legal terms, and not being a lawyer, 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 . . .
. . . 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 . . . [1]"

The representative of Czechoslovakia, Mr. Svoboda, said:

"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[2]."

The *representative of the Soviet Union, Mr. Borisov, said:*

". . . 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 ten days would be necessary for this. Failing this, I shall not be able to make a decision on this question . . . [3]"

The representative of Uganda said in the Council on 28 July 1971 as follows:

". . . 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. 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 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 didn't know this could be done and I was prepared

[1] Council, *op. cit.*, p. 166. See Annex E, pp. 257, 258-259, *infra.*
[2] Council, *op. cit.*, p. 166. See also Annex E, p. 258, *infra.*
[3] Council—Seventy-fourth Session, Minutes of the Sixth Meeting, Doc. 8956-C/1001, C-Min. LXXIV/6, p. 181. See Annex E, p. 271, *infra.*

to deal with the matter recognizing that I am ignorant of anything outside the Convention . . . [1]"

98. None of the suggestions mentioned above to enable members to consult their governments was accepted. The Council proceeded to vote on the propositions without waiting for the verbatim records of the full arguments, or even a summary thereof. This made the oral hearing an idle ceremony and indicated that the members of the Council had not in fact applied their minds to the important issue raised before them. The decisions reached in these circumstances cannot be regarded as decisions reached in accordance with law.

99. It may also be pointed out that some of the members of the Council who voted at the time of the final decision were not present throughout the oral hearing, i.e., from the beginning to the end. It is a well-known principle of law that in all jurisdictions, judges must sit throughout the proceedings. Judge M. Eugene Dreyfus said as follows:

"It has always appeared necessary in all jurisdictions—it is a principle of general application with which they may in no circumstances dispense—that within the limit of the legal or regulation quorum, judges who are called upon to give a final decision shall have sat in the case from the beginning of the oral proceedings down to the pronouncement of that decision [2]."

C. There Is no Presumption as to Jurisdiction

100. The Council's jurisdiction to entertain Pakistan's Application or Complaint cannot be presumed. As has been well pointed out by Judges Sir Percy Spender and Sir Gerald Fitzmaurice:

". . . a duty lies upon the Court, before it may assume jurisdiction, to be conclusively satisfied—satisfied beyond a reasonable doubt—that jurisdiction does exist [3]".

101. Jurisdiction of an international forum, whether established by a bilateral treaty or a multilateral treaty, is based on the consent of the contracting States and it has been held repeatedly that this consent has to be strictly interpreted. Thus, Sir Gerald Fitzmaurice while dwelling on the question of consent in relation to the jurisdictional obligation of States, stated as follows:

"Just because consent is the basis, and the sole basis of it, the jurisdiction simply does not exist outside the scope of the consent given. 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. This is putting it less high than it can be put: strictly, 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 Tribunal. . . . It is only too easy in this matter for international tribunals to pay lip-service to the principle of consent and to profess only to assume jurisdiction by the consent, express or implied, of the parties, while adopting an interpretation of what is involved by consent, and more particularly

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[1] Council—Seventy-fourth Session, Minutes of the Fifth Meeting, Doc. 8956-C/1001, C-Min. LXXIV/5, pp. 171-172. See Annex E, pp. 262-263, *infra*.

[2] See his dissenting opinion in the case of *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Ser. A/B, No. 46*, p. 202.

[3] See *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 473.

of what matters are covered by a particular consent, such that, in practice, a jurisdiction is assumed going well beyond what was intended to be conferred—or which was not intended to be conferred at all. 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[1]."

102. Sir Gerald added the following with regard to consent by inference:

"If inference is piled on inference, and reference on reference, then the connection 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*... The type of consent necessary to found international jurisdiction is, or should be, a positive one. It may arise by inference, but must, as so inferred, be seen to be something positive and definite, not open to reasonable doubt or question [2]."

103. Judge Moore in his dissenting opinion in the *Mavrommatis Palestine Concessions* case, stated the following with regard to jurisdiction of international tribunals:

"Ever mindful of the fact that their judgments, if rendered in excess of power, may be treated as null, international tribunals have universally regarded the question of jurisdiction as fundamental. It would be superfluous to cite from the records of international tribunals particular decisions to this effect. An international tribunal with general jurisdiction, compulsory or non-compulsory, over independent States does not as yet exist. The international judicial tribunals so far created have been tribunals of limited powers. Therefore no presumption in favour of their jurisdiction may be indulged. Their jurisdiction must always affirmatively appear on the face of the record [3]."

D. No Acquiescence by India in the Council's Jurisdiction

104. By informing the President of the Council about the hijacking incident and the conduct of Pakistan relating thereto early in February 1971[4], the Applicant apprised him of the situation developing in this part of the world and the circumstances in which the Applicant was forced to take measures of self-protection. This was done because the International Civil Aviation Organization is the principal international organization concerned with the safety of civil aviation. The Applicant did not apply to the Council for settling any disagreement or dispute about the suspension of the treaties in question, because no such disagreement had arisen, nor was the Council competent to entertain such an application or complaint. There was, therefore, no submission to the

[1] "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure", *British Year Book of International Law*, Vol. XXXIV, 1958, p. 88.

[2] *Ibid.*, pp. 89-90.

[3] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Ser. A, No. 2*, p. 60.

[4] See Annex G, p. 295, *infra*.

Council's jurisdiction in the matter, as was erroneously alleged by Pakistan in the oral proceedings before the Council.

105. The Applicant did not submit at any stage to the Council's jurisdiction *in the present case. The very purpose of raising the* Preliminary Objections was to assert at the outset that the Application and the Complaint of the Respondent were incompetent and that the Council had no jurisdiction to deal with them.

CHAPTER VIII

STATEMENT OF CLAIM

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

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

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

108. The Applicant reserves the right to request the Court to declare and adjudge with respect to such further and other matters as the Applicant may deem appropriate to present to the Court.

(Signed) Lt. General His Highness YADAVINDRA SINGH,
Maharaja of Patiala,

Ambassador of India at The Hague,
Agent of the Government of India.

The Hague,
22 December 1971.

BOOKS AND ARTICLES

A. BOOKS

1. McNair, *The Law of Treaties*, 1961.
2. B. P. Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*, 1966.
3. Marjorie M. Whiteman, *Digest of International Law*, Volume 14, 1970.
4. *American Jurisprudence*, 2nd ed., Volume 5.

B. ARTICLES

Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure", in *British Year Book of International Law*, Volume XXXIV, 1958.

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1. *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4.
2. *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports* 1962, p. 319.
3. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

B. PERMANENT COURT OF INTERNATIONAL JUSTICE

1. *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.*
2. *Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J., Series B, No. 11.*
3. *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9.*
4. *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96.
5. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J, Series A/B, No. 70*, p. 4.

C. OTHER

Heyman and another v. *Darwins, Ltd.* [1942] All England Reports 337.

ANNEXES TO THE MEMORIAL SUBMITTED BY THE GOVERNMENT OF INDIA

Annex A

APPLICATION OF THE GOVERNMENT OF PAKISTAN, DATED 3 MARCH 1971, FILED UNDER ARTICLE 2 OF THE RULES FOR THE SETTLEMENT OF DIFFERENCES APPROVED BY THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION ON 9 APRIL 1957

Government of Pakistan — Applicant

versus

Government of India — Respondent

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No. AV-(A)11(10)/70
Government of Pakistan
Ministry of Defence
the 3rd March, 1971.

From: Air Vice Marshal A. Qadir,
Joint Secretary to the
Government of Pakistan.
Ministry of Defence (Aviation Division),
Islamabad (Pakistan).

To: The President of the Council of
the International Civil Aviation Organization,
International Aviation Building,
1080 University Street,
Montreal (Canada).

Subject: Suspension by Government of India of the flights of Pakistan aircraft over the territory of India

Sir,

I am directed by the President of Pakistan to notify that His Excellency, Mr. M. S. Shaikh, High Commissioner for Pakistan, in Canada, Ottawa, Ontario, Canada, is the Chief Agent of Pakistan in the above matter.

This is also to notify that Mr. Syed Sharifuddin Pirzada, S.Pk., Attorney General for Pakistan is the Chief Counsel in the matter.

Accept, Sir, the assurances of our highest consideration.

(Signed) A. QADIR,

Air Vice Marshal,
Joint Secretary to the Government of Pakistan.

No. AV-(A)11(10)/71
Government of Pakistan
Ministry of Defence
the 3rd March 1971.

From: Air Vice Marshal A. Qadir,
Joint Secretary to the
Government of Pakistan,
Ministry of Defence (Aviation Division),
Islamabad (Pakistan).

To: The President of the Council of the
International Civil Aviation Organization,
International Aviation Building,
1080 University Street,
Montreal (Canada).

Subject: Suspension by Government of India of the flights of Pakistan aircraft over the territory of India

Sir,

I am directed by the President of Pakistan to make this application on behalf of the Government of Pakistan to the Council of the International Civil Aviation Organization in accordance with the Rules of Procedure approved by the Council on 9th April, 1957. The Memorial as required under Article 2 of the Rules, is attached.

2. The illegal and onjust action by the Government of India of suspending Pakistan aircraft flights over its territory from the 4th February, 1971, in breach of its international obligations, has caused and is causing great injustice, hardship, loss and injury to Pakistan which requires immediate attention and action of the Council.

3. In view of the disagreement between the two contracting States of Pakistan and India relating to the application of the Convention on International Civil Aviation, 1944, the International Air Services Transit Agreement, 1944 and the Bilateral Air Services Agreement 1948 between the two countries which could not be settled by negotiation, it is requested that the application may be taken up urgently and the matter be decided by the Council and reliefs may be granted as stated in the attached Memorial.

4. The Applicant requests for early action, oral hearing and the opportunity to place relevant material including case law before the Council at an early date.

Accept, Sir, the assurances of our highest consideration.

(Signed) A. QADIR,

Air Vice Marshal,
Joint Secretary to the Government of Pakistan.

Note: This Application and the Memorial are being filed without prejudice to the Complaint under Article 21 of the Rules of Procedure of 9th April, 1957, which is also being filed separately in compliance therewith.

MEMORIAL OF THE GOVERNMENT OF PAKISTAN UNDER ARTICLE 2 OF THE RULES OF PROCEDURE APPROVED BY THE *COUNCIL ON 9TH APRIL, 1957*

(a) Government of Pakistan — Applicant

versus

Government of India — Respondent

(b) His Excellency M. S. Shaikh, High Commissioner for Pakistan in Canada — Agent of the Applicant

Names of the Counsel:

1. Syed Sharifuddin Pirzada, S.Pk., Attorney General of Pakistan. — Chief Counsel
2. Mr. Harunur Rashid, Deputy Legal Adviser, Ministry of Foreign Affairs, Government of Pakistan. — Counsel
3. Mr. Zahid Said, Deputy Legal Adviser, Ministry of Foreign Affairs, Government of Pakistan. — Counsel
4. Khawaja M. H. Darabu, Legal Adviser, Department of Civil Aviation, Government of Pakistan. — Counsel
5. Mr. Mumtaz A. Khan, Legal Adviser, Pakistan International Airlines Corporation. — Counsel

Address:

c/o The Pakistan High Commission,
Ottawa, Ontario, Canada.

(c) Statement of relevant facts:

(1) In a note dated 4th February 1971 handed over to the Government of Pakistan, the Government of India conveyed its decision "to suspend, with immediate effect, the overflight of all Pakistani aircraft, civil or military, over the territory of India".

(2) In a Note dated 5th February, 1971, the Government of Pakistan protested to the Government of India that its decision to suspend flights of Pakistan aircraft over India was arbitrary and unilateral and a serious breach of multi-

lateral and bilatereral agreements. Immediately after receipt thereof, following cable was sent to ICAO:

> "ICAO Montreal
> 8-4/71/AT.11. Attention Binaghi. India banned PIA scheduled services between East and West Pakistan overflying Indian territory. This action causing injustice and hardship to Pakistan. Request intervene in accordance with Article two of the Transit Agreement. Regards.
> Civilair Karachi."

(3) Pakistan comprises of two wings which are situated more than 1,000 miles apart with Indian Territory in between. Air services between the two wings are thus a vital link between the two wings of Pakistan. As a result of the decision of the Government of India to suspend overflights of Pakistan aircraft over its territory, Pakistan International Airlines, the national airline of Pakistan has been compelled to re-route its flights between the two wings of Pakistan and other international scheduled flights by circumventing the Indian territory. This has more than doubled the flight time between the two wings, considerably increased the flight time of other international flights and reduced frequency of flights on all sectors. These factors have resulted in considerable increase in the cost of operation of services of Pakistan International Airlines, loss of business and other losses to the airline, inconvenience to passengers, immense loss and injury to Pakistan and have adversely affected the economic situation of the country. Supporting data related to these facts are given under item *(d)*.

(4) The Government of Pakistan conveyed to the Government of India that the flights of Pakistan International Airlines which connected two wings of Pakistan carry, apart from passengers, essential supplies to East Pakistan. The suspension of these flights has also adversely affected the relief operations in East Pakistan currently going on in view of the recent devastations caused by the cyclone and tidal bore. In the same note the Government of India was called upon to rescind its decision to suspend overflights of Pakistan aircraft.

(5) The Government of India sought to link the recent hijacking incident in which two nationals of the State of Jammu and Kashmir hijacked an Indian aircraft from Indian occupied Kashmir to Lahore in Pakistan, with the arbitrary suspension of flights of Pakistan aircraft over Indian territory. It is stated that the State of Jammu and Kashmir is a disputed territory in respect whereof various resolutions have been passed by the United Nations Commission for India and Pakistan and the Security Council and an Agreement was entered into between India and Pakistan. The facts of this incident have duly been communicated by the Government of Pakistan to the Secretary General of the International Civil Aviation Organization by a letter, dated 19th February, 1971 (copy attached—"Attachment A"). It is submitted that reference by India to the hijacking incident is irrelevant and has no relation whatsoever with the suspension of flights of Pakistan aircraft over Indian territory. Such flights are governed by multilateral and bilateral agreements and there is no legal basis or justification whatsoever for their suspension.

(6) The decision of the Government of India to suspend the overflights of Pakistan aircraft over its territory contravenes the provisions of the Convention on International Civil Aviation, 1944, the International Air Services Transit Agreement, 1944 and the Bilateral Air Services Agreement, 1948 and thus India is in breach of its obligations thereunder.

(7) In spite of the arbitrary, unilateral and illegal decision of the Government of India to suspend overflights of Pakistan aircraft, the Government of

Pakistan has not banned Indian aircraft which are free to overfly Pakistan territory.

(8) A disagreement has arisen between the Government of Pakistan and the Government of India relating to the application of the provisions of the Convention on International Civil Aviation, 1944, the International Air Services Transit Agreement, 1944 and the Bilateral Air Services Transit Agreement, 1948.

(9) On 18th February, 1971, an Aide Mémoire was presented on behalf of Pakistan to the Secretary General of International Civil Aviation Organization. By a letter dated 20th February, 1971, Pakistan approached the International Civil Aviation Organization Council for necessary action (copies attached—Attachment B).

(d) Copies of Notes exchanged between the two Governments are annexed hereto (Attachment C), statement of data referred to in para. 3 of item *(c)* is attached (Attachment D).

(e) Statement of Law:

(1) Pakistan and India are parties to the Convention on International Civil Aviation, 1944, the International Air Services Transit Agreement, 1944 and the Bilateral Air Services Agreement, 1948.

(2) By virtue of Article 5 of the Convention on International Civil Aviation, 1944, each Contracting State agreed that all aircraft of the other contracting States not engaged in scheduled international air services shall have the right 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 subject to the right of that State to require landing. By denying this right to Pakistan aircraft engaged in other than scheduled international air services to overfly its territory or make a technical stop, India has unilaterally and arbitrarily violated the provisions of the Convention without any valid reason and is in breach of its obligations thereunder.

(3) Under Article 1 of the International Air Services Transit Agreement, India has granted to Pakistan 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.

Pakistan has been enjoying these freedoms of the air till 3rd February 1971, when all of a sudden India, by a Note dated 4th February, 1971, informed Pakistan of its decision to suspend with immediate effect the overflights of all Pakistan aircraft over the territory of India and thereby denying these freedoms to Pakistan. In suspending the overflights of Pakistan aircraft over its territory India has thus committed a serious breach of its obligations under the Agreement and created a situation which has caused great hardship, injustice, injury and loss to Pakistan.

(4) By virtue of the Bilateral Air Services Agreement with India of 1948, Pakistan International Airlines, the designated airline of Pakistan, has the right, *inter alia*, to transit across the territory of India without landing on its scheduled international air services. The decision of the Government of India to stop such overflights of Pakistan's designated airline contravenes the provisions of the Agreement and is in breach of its obligations thereunder.

(5) The decision of the Government of India to suspend the over-flights of Pakistan aircraft over its territory is *per se* discriminatory in that aircraft of other States continue to make flights over Indian territory.

(6) It is further submitted that the Government of India has violated the principle of *pacta sunt servanda* in respect of its treaty obligations and has not acted in good faith.

(7) It is also submitted that the intention of the Government of India was to prevent easy and direct communication between the two wings of Pakistan by suspending flights of Pakistan aircraft by direct route over Indian territory.

(8) The decision of the Government of India is arbitrary, unilateral and illegal and is in violation of the Conventions and Agreements aforesaid and is contrary and repugnant to International Law.

(f) Reliefs Desired

The Government of Pakistan seeks among others, the following reliefs by action of the ICAO Council:

(1) To decide and declare that the decision of the Government of India suspending the overflights of Pakistan aircraft over the territory of India, is illegal and in violation of India's international obligations under the Convention and Agreements aforesaid.

(2) To find and declare that Pakistan has the following freedoms of the air in respect of scheduled international air services:

(a) the privilege to fly its aircraft across the Indian territory without landing;
(b) the privilege to land its aircraft in Indian territory for non-traffic purposes.

(3) To find and declare that Pakistan aircraft have the right, subject to observance of the terms of the Convention on International Civil Aviation, 1944 to make flights into or in transit non-stop across Indian territory and to make stops for non-traffic purposes in that territory without the necessity of obtaining prior permission, and subject to the right of India to require landing of non-scheduled flights.

(4) To find and declare that Pakistan aircraft are entitled to operate flights between the two wings of Pakistan and beyond by direct route over its territory.

(5) To direct the Government of India to immediately rescind their illegal decision aforesaid and not to impede in any manner the overflights of Pakistan aircraft over the territory of India.

(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) 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.

(g) Efforts were made by Pakistan to negotiate with India but were not successful.

ATTACHMENTS A TO D

Attachment A

GOVERNMENT OF PAKISTAN
DEPARTMENT OF CIVIL AVIATION

No. 8-4/71/AT-11.
Dated the 19th Feb., 1971.

To
The Secretary General,
International Civil Aviation Organization,
International Aviation Bldg.,
Montreal (Canada).

Subject: Hijacking of Indian Aircraft F-27(VT-DMA) Flight IC422-A to Lahore on January 30, 1971

Sir,

I have the honour to refer to our cable dated 5th February, 1971 and to forward a report on the incident mentioned above.

2. On January 30, 1971, at 12.35 hours Indian Airlines F-27 (Reg. VT-DMA) Service-ICC-422-A en route from Srinager to Jammu, contacted Lahore Air Traffic Control Radio Telephone and informed that the aircraft was being hijacked to Lahore and would be landing in 10 minutes time. Immediately on receipt of this information, fire and security services were alerted by the Airport Manager.

3. The aircraft landed at Lahore Airport at 12.54 hours local time. It was parked away from other aircraft with security and fire services standing by.

4. Immediately on landing, the hijackers were requested to allow the passengers and the crew to disembark. This was not agreed to by the hijackers at first but after a lot of persuasion they agreed to let the crew and the passengers out at 14.32 hours local time.

5. The passengers and the crew were immediately taken to the passenger lounge and subsequently transported to a hotel where arrangements for their accommodation, etc., had been made.

6. The Director General, Civil Aviation of India was informed of the safe landing of the aircraft.

7. The Capt. of the aircraft (Capt. G. H. Ubroi) was given clearance in writing by the Regional Controller of Civil Aviation, Lahore, that he could take off at any time he wished. The receipt of this communication was acknowledged in writing by the Captain.

8. The Director General of Civil Aviation, India, requested permission for operation of a relief flight to Lahore to transport the crew and the passengers of the hijacked aircraft back to India. The permission was immediately granted. However, before the proposed aircraft could take off from Delhi, law and order situation had deteriorated due to a large crowd having gathered at the Lahore Airport. The Indian Director General of Civil Aviation was informed accordingly and advised that the relief flight should not take off for Lahore until further advice.

9. Throughout this period one or both the hijackers remained on board the aircraft. Attempts by the Pakistan authorities to persuade them to release the plane made no headway as they refused to negotiate directly with the Government Authorities. Consequently, the hijackers were allowed to contact some non-officials in the hope that they could persuade the hijackers to agree to release the aircraft. At no time, both the hijackers came out of the plane at the same time. One of them invariably remained on board. Any attempt to disarm or arrest one would have surely blown up the aircraft as the two had threatened to do.

10. It may be emphasized that at no time both the hijackers came off the aircraft at the same time.

11. Throughout 30th and 31st January, 1971, negotiations continued with the hijackers in an effort to get the plane released.

12. On February 1, 1971, the Director General, Civil Aviation, India, was advised by telephone that the law and order situation at Lahore Airport was still unsatisfactory but was likely to improve by afternoon. Accordingly, the Director General was requested to keep the relief aircraft in readiness to fly to Lahore at short notice. However, by midday the situation worsened and in the interest of safety, it was thought inadvisable to ask the Indian Aircraft to leave for Lahore. Meanwhile, because of the tension prevailing in the area around Lahore Airport the Pakistan authorities arranged to send the passengers and the crew to India by road under proper escort at 13.00 hours on February 1, 1971.

13. On February 2, 1971, the Government of India announced that the demand for the release of 27 political prisoners in Indian Occupied Kashmir made earlier by the hijackers as a pre-condition for the surrender of the plane, was not acceptable to India. At 20.00 hours on February 2, 1971, the hijackers blew up the aircraft. The hijackers received injuries in the process, and were taken to a hospital.

14. Though Pakistan is not a signatory to the Tokyo Convention of 1963 and to the Convention for the suppression of Unlawful Seizure of Aircraft of December 16, 1970 signed at Hague, it condemns hijacking and is a party to the UN Resolution 2645 (XXV) of 25 November, 1970, on aerial hijacking and to the Resolutions adopted by the 17th Session (Extraordinary) of the ICAO Assembly at Montreal in June, 1970. In pursuance of the aforesaid Resolutions, the Pakistan authorities not only arranged to return the passengers and the crew to India within 48 hours, but also tried all possible means to get the plane released from the hijackers for its return to India.

15. The Government of Pakistan had deplored the act of blowing up of the aircraft.

Accept, Sir, the assurance of our highest consideration.

(Signed) SALAHUDDIN,

Director General of Civil Aviation.

Attachment B

Office of the High Commissioner
for Pakistan,
499 Wilbrod Street,
Ottawa 2 - Canada.

AIDE MÉMOIRE

On the 4th of February, 1971, the Government of India unilaterally and arbitrarily banned all Pakistani civilian flights over her territory thus dislocating vital links between East and West Pakistan. Government of India's action is illegal and a clear violation of international conventions and India's bilateral agreement with Pakistan.

2. Under the International Air Services Transit Agreement of 1944, each contracting State grants to other contracting States "two freedoms" of air in respect of scheduled international services: (1) to fly across its territory without landing; (2) to land for non-traffic purposes. The Chicago Convention on International Civil Aviation to which both India and Pakistan are parties, permits operation of international scheduled air services over the territory of a contracting State in accordance with special agreements.

3. India and Pakistan signed a special bilateral Air Agreement in 1948, (revived in 1966) according to which the operation of PIA's scheduled air services serving vital communication between the two wings of Pakistan, were permitted to over-fly India and Indian planes were allowed to over-fly Pakistan's territory on a reciprocal basis.

4. Although India has unilaterally banned Pakistan's over-flights, Pakistan has not imposed any restrictions on India's flights over Pakistan's territory. Even after India's unilateral and illegal action, Indian planes continue to fly over Pakistan on the following routes, although reciprocity is an important condition of Indo-Pakistan Air Agreements:

(1) Calcutta-Agartala
(2) Calcutta-Bagdogra
(3) New Delhi-Moscow
(4) New Delhi-Kabul
(5) Amritsar-Kabul
(6) New Delhi-Tehran
(7) New Delhi-Kuwait (From Feb. 6)

5. India claims that ban on Pakistan's over-flights is a consequence of the blowing up of Indian Airlines' Fokker Friendship plane by two Kashmiri young men who hijacked the plane to Pakistan on January 30. Actually, India's illegal ban on Pakistan's over-flights and the hijacking are two distinct issues. Instead of using normal diplomatic procedures, India has resorted to the illegal use of pressure and threats against Pakistan. India has warned that the ban on Pakistan's flights over Indian territory will not be lifted unless Pakistan accepts the Indian demand for compensation for the Indian plane. Indian leaders, including the Prime Minister, have threatened to take "further steps" against Pakistan and warned of a "conflict."

6. Violent demonstrations and attacks have been organized against Pa-

kistan's High Commission at New Delhi. In total disregard of well-established diplomatic practice, demonstrators broke into the Pakistan Chancery building, set fire to the guard house and a room of the staff inside the Pakistan Chancery. Some members of the staff were also injured and an official car of the High Commission was burnt.

7. Pakistan had made it clear that she had nothing to do with the hijacking incident, which is a desperate act of two Kashmiri young men aged 20 and 21 who claimed to be members of the Kashmir Liberation Front and have apparently resorted to this desperate act to highlight the present situation of brutal repression in Indian-held Kashmir.

8. Pakistan does not view hijacking with favour. When the plane landed at Lahore on January 30, Pakistan promptly deprecated hijacking of the Indian plane and offered full co-operation and all facilities and to fulfil her obligations under international conventions. The hijackers were persuaded to allow the crew members and passengers to leave the plane and prompt action was taken to offer them food and shelter. They were given full protection and were safely repatriated to India within 48 hours.

9. Pakistan authorities made all possible efforts to persuade the hijackers to leave the plane so that it could be returned to India but they continued to insist on acceptance of their demands which included the demand for the release of 36 political workers by India. Pakistan authotities could not even use force to eject the hijackers from the plane because they had threatened to blow up the plane in such a case. Moreover, there was strong public feeling at Lahore which was controlled with great difficulty through lathicharge and tear gas. Use of force against the hijackers would not have saved the plane, but it could have created a serious law and order situation in the country.

10. The hijackers blew up the plane when the Government of India rejected their demand to release the political workers. The Government of Pakistan immediately deplored the blowing up of the Indian plane which was done in complete disregard of pleas and persuasion by Pakistani authorities.

11. Pakistan does not condone this act by the hijackers and is in no way responsible either for the hijacking of the plane from Kashmir, which is under India's military occupation, or of the blowing up of the plane by desperate Kashmiri young men. India's charge of Pakistan's complicity in the hijacking of the plane or its subsequent blowing up is, therefore, completely baseless.

12. India's violent over-reaction is obviously premeditated and politically motivated. Almost simultaneously with the demand for compensation India unilaterally banned over-flights of Pakistan's aircraft over its territory in violation of its bilateral and international commitments. India made no effort to seek a settlement of this issue through established diplomatic channels and procedures and tried to pressurize Pakistan to submit to her unilateral and unreasonable demands for compensation which was drafted with a view to put the blame of hijacking and destruction of the plane on Pakistan. Apart from India's charges against Pakistan being baseless, no self-respecting sovereign country could be expected to submit to illegal demands under duress.

13. India has deliberately over-reacted in accordance with her policy of confrontation with Pakistan; specially at this time, the Indian Government is taking a hard line against Pakistan, with an eye on the impending general elections. Mrs. Indira Gandhi, in an election speech at Calcutta on February 6, threatened to take "further steps" against Pakistan on her return to New Delhi. She made a similar provocative statement in Maharashtra on February 10. The tough anti-Pakistan stand is also designed to cover up all the recent

repressive measures in the occupied state of Jammu and Kashmir where they have banned the Kashmir Plebiscite Front, externed Kashmiri leaders, including Sheikh Abdullah and Mirza Afzal Baig and arrested several hundred political workers. Subsequently, they expelled Mr. Zafar Iqbal Rathor, Pakistan High Commission's First Secretary from New Delhi, on the fake charges of organizing an underground movement called "Al Fatah." Mr. Rathor, who was accused or organizing "Al Fatah" had been in India barely three months, while according to India's own declaration, this organization had started working more than two years ago.

14. On 9th February the Government of India delivered a note to Pakistan, the tone of which is extraordinarily provocative and belligerent. India has not accepted Pakistan's invitation to settle mutual issues in a spirit of understanding, through established diplomatic procedures. India has reiterated her unreasonable stand to continue the ban on over-flights and has threatened to take further retaliatory steps unless her demands were met. India has objected to our reference to the disputed territory of Kashmir and asked Pakistan to vacate Azad Kashmir and threatened consequences. This naturally increases Pakistan's apprehensions of India taking provocative military action across the ceasefire line.

15. Expulsion of Pakistan's First Secretary on false charges, arbitrary ban on Pakistan's civilian over-flights, demand of compensation under duress, attack on Pakistan's High Commission in New Delhi, threats to take "further steps" against Pakistan are a series of illegal acts which are part of India's policy of hostility and confrontation towards Pakistan. The plane incident, for which the Government of Pakistan has no responsibility whatsoever, has been used as an excuse to heighten tensions on the eve of India's general elections.

16. India's illegal and unilateral action in banning Pakistan's over-flights is causing great financial losses to Pakistan due to re-routing of flights via Ceylon and India's use of threats and intimidation against Pakistan is heightening tensions in the sub-continent, and the responsibility for further deterioration of the situation would entirely rest with India.

17. Pakistan continues to allow Indian over-flights, India must lift her illegal ban and honour her legal commitment under the International Air Services Transit Agreement of 1944, Chicago International Civil Aviation Convention of 1944 and the Indo-Pakistan Air Services Agreement of 1948, as revived in 1966.

Director General of Civil Aviation,
19, Napier Barracks,
Karachi.
No. 8-4/71/AT-11/
Dated the 20th Feb., 1971.

To
The President of the ICAO Council,
International Civil Aviation Organization,
Montreal (Canada).

Subject: Violation by India of the Chicago Convention on International Civil Aviation and International Air Services Transit Agreement of 1944, and the Agreement between the Government of Pakistan and the Government of India relating to Air Services of June, 1948.

Sir,

I have the honour to refer to our cable dated 5th February, 1971 and to forward the following for action by the ICAO Council.

2. Being parties to the International Air Services Transit Agreement, both Pakistan and India have granted to each other the privilege, on the basis of reciprocity, to fly across each others territory without landing, scheduled international air services (Article I, Section 1).

3. Under Article 89 of the Chicago Convention this privilege can be withdrawn only in case of war or on declaration of state of national emergency to be notified by the Council of ICAO.

4. Again under a bilateral agreement concluded in 1948 between the two countries, Pakistan has a right to operate the air services over-flying Indian territory, connecting the two wings of Pakistan. The provisions of this agreement were temporarily suspended in 1965 on account of the out-break of hostilities between the two countries. However, the over-flights were resumed in February, 1966, on a reciprocal basis, after exchange of signals between the Directors General, Civil Aviation of India and Pakistan.

5. In a Note handed to the Ministry of Foreign Affairs, Government of Pakistan, on February 4, 1971, the Government of India conveyed its decision banning the over-flights of Pakistan Airlines over Indian territory. It blamed the Government of Pakistan for hijacking and complicity in the subsequent blowing up of the plane by the hijackers (relevant extracts of the Indian Note enclosed). The Government of Pakistan, on February 5, 1971, in reply, gave the factual position to the Government of India and categorically denied any responsibility either for the hijacking of the plane or its subsequent destruction (relevant extracts enclosed at Annexure II). In another Note dated the 9th February, 1971, the Government of India sought to justify its ban on over-flights of Pakistan Airlines repeating its earlier assertion that the Pakistan authorities were responsible for the hijacking of the Indian aircraft and its subsequent destruction (relevant extract enclosed at Annexure III). In reply the Government of Pakistan on February 13, 1971, refuted the Indian contention that there was any relation between the hijacking of the Indian plane by two Kashmiri youths from a territory that is under India's military occupation and the ban on over-flights by Pakistani Airlines. In spite of Indian action the Government of Pakistan has stood by its bilateral and international commit-

ments under the Chicago Convention on International Civil Aviation, the International Air Services Transit Agreement and the Bilateral Agreement of 1948 with India. Pakistan has not banned flight of Indian aircraft over Pakistan territory.

6. As a result of India's arbitrary and unilateral action Pakistan Airlines flights have been re-routed through Colombo. It increased the flight time by 3 hours and the operational cost by Rs 1,000,000 per week. Further, because of the extra time taken to fly the circuitous route between the two wings, the Pakistan Airlines had to reduce its frequency on other routes, thereby sustaining further losses.

7. Pakistan had no responsibility in the hijacking of the Indian aircraft or in its subsequent blowing up by the hijackers. The co-relation sought to be established by India between hijacking of its aircraft and the ban on flight of Pakistani aircraft over its territory is, to say the least, unwarranted and unjustified. If a country which is a party to the Chicago Convention is allowed to flout its obligations unilaterally the very object of the Convention would be defeated.

8. The civil aviation authorities of Pakistan, therefore, urge the President of ICAO Council to proceed against India for the injustice and hardship caused to Pakistan under Article 2 of the Transit Agreement.

Accept, Sir, the assurance of our highest consideration.

(Signed) SALAHUDDIN,

Director General of Civil Aviation.

Attachment C

Most Immediate

High Commission of India,
Islamabad.

No. ISL/POL/D/10/71

February 3, 1971.

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:

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 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.

The Ministry of Foreign Affairs,
Government of Pakistan,
Islamabad.

High Commission of India,
Islamabad.

No. ISL/POL/103/6/71 February 4, 1971.

The High Commission of India in Pakistan presents its compliments to the Ministry of Foreign Affairs, Government of Pakistan, and has the honour to state as follows:

The Government of India are deeply disturbed by the instigation, abetment and encouragement given on Pakistan territory to unlawful and subversive activities in India. This has resulted in the recent hijacking of an I.A.C. plane which was, in spite of repeated requests from the Government of India, not only not returned to us but was deliberately allowed to be blown up by two criminals under the very nose of the West Pakistan authorities. The Government of India have exercised restraint and tried throughout not to escalate the incident.

The Government of India have demanded compensation for the loss of the aircraft, baggage, cargo and mail and the damage caused by the detention of the hijacked plane in Lahore. The protest and the demand for compensation was conveyed to the Pakistan Government yesterday. Until this matter is satisfactorily resolved, 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. This decision is not made to inconvenience the people of India or Pakistan but is taken in the hope that the Government of Pakistan will settle this matter amicably and peacefully without delay.

The High Commission avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.

The Ministry of Foreign Affairs,
Government of Pakistan,
Islamabad.

Most Immediate

High Commission of India,
Islamabad.

No. ISL(POL)/103/6/71

February 5, 1971.

The High Commission of India in Pakistan presents its compliments to the Ministry of Foreign Affairs, Government of Pakistan, and has the honour to state as follows:

The two persons Mohd. Hashim Qureshi and Mohd. Ashraf, who hijacked an Indian Airlines aircraft to Lahore on the 30th January are guilty of serious criminal offences under Indian Laws by their act for which they are required to stand their trial in India. It is requested that they may be returned immediately under escort to the Indian authorities at a place and time to be mutually agreed, the details of which may be communicated at an early date.

The High Commission avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.

The Ministry of Foreign Affairs,
Government of Pakistan,
Islamabad.

Aide Mémoire

The Government of Pakistan cannot accept the demand of the Government of India for the return of Messrs. Mohd. Hashim Qureshi and Mohd. Ashraf to India as requested in the High Commission of India, Islamabad, Note No. ISL(POL)/103/6/71 dated February 5, 1971. The said Kashmiri young men are not the nationals of India. Therefore the question of handing them over to India simply does not arise.

Ministry of Foreign Affairs,
Islamabad.

No. IN(III)-14/1/71. February 5, 1971.

The Ministry of Foreign Affairs presents its compliments to the High Commission for India in Islamabad and has the honour to acknowledge the receipt of the High Commission's Note No. ISL/POL/103/6/71 dated 4 February 1971, conveying the decision of the Indian Government to suspend, with immediate effect, the overflight of all Pakistani aircraft over its territory.

2. The Government of Pakistan categorically rejects the contention of the Government of India that the Pakistan authorities are responsible for the hijacking and had deliberately allowed the Indian Airlines Corporation plane to be blown up. The High Commission is fully aware that the plane was throughout in the possession of hijackers and any attempt at dislodging them by force by the Pakistan authorities could only have been counter-productive. The Government of Pakistan took all reasonable measures within its means to obtain the release of the plane. It has since officially deplored the blowing up of the plane.

3. The logic of the demand by the Government of India for compensation is not understood. The IAC aeroplane was hijacked by two nationals of Kashmir, a territory which is under the military occupation of India. It is beyond comprehension how the Government of India could consider the Government of Pakistan, in any manner, responsible for the act of hijacking. The Government of Pakistan subscribes to international conventions which are designed to discourage hijacking and fully stands by its commitments. It cannot, however, have control over and be responsible for hijacking of planes by persons outside its territorial jurisdiction.

4. The High Commission's Note regarding compensation for the IAC aircraft was received late in the evening of 3 February 1971. The Government of Pakistan regrets that within a short period of the delivery of the said Note, the Government of India should unilaterally decide to suspend the overflights of all Pakistani aircraft, including civilian aircraft, over the Indian territory. These overflights have been operating, on reciprocal basis, under agreed arrangements between the two Governments. Their suspension in this arbitrary and unilateral manner cannot but be interpreted as a serious breach of international and bilateral commitments.

5. The Government of Pakistan is surprised at the Government of India's claim that the said measure was taken not to inconvenience the people of Pakistan. The Government of India is well aware that the commercial PIA flights, apart from passengers carry essential supplies to East Pakistan and the suspension of these flights cannot but adversely affect the present relief operations in East Pakistan.

6. The hijacking incident is the direct result of repressive measures taken by the Government of India in occupied Kashmir. The Government of Pakistan regrets that instead of employing normal diplomatic procedures for resolving it, the Government of India has used this incident to heighten tension between the two countries. In addition to the suspension of overflights of all Pakistani aircraft over Indian territory, the Pakistani diplomatic mission and its personnel in New Delhi have been subjected to unceasing demonstrations

for the last few days which culminated yesterday in the burning of High Commission property and injuries to its personnel. The Government of India's attention has been invited to this in an aide mémoire which was handed over to the Indian High Commissioner yesterday, as well as in oral representations made to him.

7. The Government of Pakistan has no wish to allow the situation to deteriorate further, and while reserving its position to claim compensation for the damage caused to the Pakistan High Commission in New Delhi, request the Government of India to rescind its decision to ban the overflights of Pakistan aircraft, and invites it to have recourse to estabished diplomatic procedures so as to allow the situation to return to normal. There is no reason why this problem, like other matters between our two countries, cannot be solved by mutual discussion, in a spirit of understanding.

8. The Ministry avails itself of this opportunity to renew to the High Commission of India in Pakistan the assurances of its highest consideration.

The High Commission of India in Pakistan,
Islamabad.

Ministry of External Affairs,
New Delhi.

No. PBP/411/6/71.

The Ministry of External Affairs presents their compliments to the High Commission for Pakistan in India and with reference to the Note Verbale dated 5th February, 1971, handed over to the High Commissioner for India by the Ministry of Foreign Affairs of the Government of Pakistan have the honour to state as follows:

The Government of India categorically reject the disclaimer of the Government of Pakistan of their responsibility for and involvement in the crime of hijacking of the Indian Airlines aircraft to Lahore airport, on 30th January, 1971, and its blowing up on 2nd February, 1971. Instead of showing a willingness to settle the matter amicably and agreeing to pay compensation for the loss and damage caused, the Government of Pakistan have sought to confuse the issue by introducing wholly extraneous matters and have even gone to the extent of questioning the sovereignty and territorial integrity of India. The Government of India regard this attitude of the Government of Pakistan as totally unco-operative, negative and obstructive. If the Government of Pakistan are not willing to settle the matter of compensation and to return the two hijackers to face their trial in India, the situation may deteriorate, and Government of Pakistan will be wholly responsible for any consequences that may follow.

The Government of India are fully convinced, on the basis of evidence, that the premeditated criminal act of hijacking and wanton destruction of the Indian Airlines aircraft within the protected area of Lahore International Airport was the direct result of the Government of Pakistan having permitted their territory to be used for instigating, abetting and encouraging unlawful and subversive activities against India. The Government of India wish to remind the Government of Pakistan that on September 1, 1970, they had informed the Government of Pakistan through their High Commission in New Delhi about the existence of a conspiracy in Pakistan to hijack Indian aircraft to that country. It was because of the active involvement of agencies of the Government of Pakistan in such subversive activities that the Government of India had recently to declare a member of the diplomatic personnel of the Pakistan High Commission in India *persona non grata*.

The responsibility of the Government of Pakistan for the criminal hijacking and deliberate destruction of the Indian Airlines aircraft is borne out, *inter alia*, by the following facts:

(i) The Government of Pakistan gave asylum to the two self-confessed criminals even while they were threatening to blow up the plane and before they had been disarmed and had surrendered themselves to the Pakistan authorities;

(ii) They have publicly expressed their solidarity with these criminals and their associates;

(iii) They refused to disarm the hijackers and take them into custody;

(iv) They failed to take adequate measures to protect the aircraft and its contents;

(v) They permitted the two criminals to move and act freely in the airport

area and terminal building, including making long-distance telephone calls to their accomplices in Pakistan and meeting political leaders like Mr. Z. A. Bhutto, Mian Mahmood Ali Hasuri, etc., journalists and others freely;

(vi) The criminals were provided with food and other amenities for 3½ days, thus facilitating their continued unlawful occupation of the plane;

(vii) The Lahore Station of Pakistan TV—a Government organisation—was, obviously with fore-knowledge, able to film and later televise the entire sequence of the blowing up of the aircraft;

(viii) The two criminals, even after they had come out of the aircraft, were allowed to prevent the local Fire Brigade from fighting the flames engulfing the aircraft;

(ix) Crowds were permitted to congregate in the protected area of an international airport when the authorities had all the resources of a Martial Law administration available to them;

(x) The two criminals were allowed to destroy the aircraft in full view of the troops, police and other airport personnel; and

(xi) The Government of Pakistan created unnecessary delays and difficulties frustrating the attempts of the Government of India to be of assistance in bringing back to India the passengers, crew and contents of the aircraft besides the aircraft itself.

The conduct of the Government of Pakistan in relation to this act of air-piracy compelled the Government of India to enforce certain meassures for ensuring safety of aviation and the restoration of public confidence in air transit. Accordingly, they were compelled to re-route their own Services to avoid overflying Pakistan and to suspend over-flights across Indian territory *by Pakistan aircraft, both civil and military. The violation by the Government* of Pakistan of their international obligations under the Tokyo Convention of 1963 on Certain Offences on Board Aircraft, the Solemn Declaration of the Extraordinary Session of the Assembly of the International Civil Aviation Organization held at Montreal in June 1970, the United Nations General Assembly Resolution No. 2645 (XXV), and the Hague Convention of Decenber 1970, and their failure even now to give compensation for the loss and damage caused to India and to prosecute the two hijackers and return them to India make it clear that the Government of Pakistan are not willing to ensure the safety and security of aviation and air transit over the sub-continent. It is therefore necessary to continue these restrictions until the Government of Pakistan accept their responsibility and make amends for what has been done and give assurances about the future.

The Government of India are amazed at the accusation made by the Government of Pakistan that India's action will interfere in the carriage of essential supplies for relief work in East Pakistan. They would like to remind the Government of Pakistan that they had given the extraordinary facilities of a blanket clearance, covering unrestricted number of over-flights, even at night, by Pakistan Air Force aircraft across Indian territory, for ferrying relief supplies to East Pakistan, for a period of over two months. Further, it was the Government of Pakistan that created all kinds of difficulties and obstructions in the way of commencing and maintaining the deliveries of relief supplies from India for the cyclone-affected people of East Pakistan. In any case, if the Government of Pakistan wish to fly any relief supplies to East Pakistan, they can still do so in foreign aircraft. Instead of accusing the Government of India, the Government of Pakistan should ponder whether

through their wilful interference in the internal affairs of India they are not creating a situation of confrontation which is not in the interests of the people of India or Pakistan.

The Government of India take serious objection to the reference to the internal affairs of India in the note under reference, and wish to remind the Government of Pakistan of their obligation to vacate their aggression on Indian territory in the Indian State of Jammu and Kashmir. If the Government of Pakistan persists in its attitude of openly or clandestinely interfering in India's internal affairs, they will be wholly responsible for the consequences of this policy.

The Government of India categorically reject the insinuation in the same note that the Pakistan High Commission in India and its personnel were deliberately subjected to demonstrations, and draw the attention of the Government of Pakistan to the extraordinary behaviour of the personnel of the mission whose fusillade of brickbats and bottles injured the police and other personnel engaged in the duty of protecting the mission and its personnel. The Government of Pakistan should realise that these spontaneous demonstrations were only a natural expression of the indignation of all sections of Indian people against the deliberate provocation of the Government of Pakistan. Govern*ment of India categorically deny that any member of the Pakistani mission* was injured or even touched by the demonstrators. The Government of India had assured the Pakistani mission that all possible measures had been taken and would continue to be taken to safeguard their security and this assurance has been fully implemented by the Government of India through the very elaborate preventive measures they took.

The demands made by the Government of India are logical and simple: first, the Government of India should be compensated for the loss of the aircraft and its contents and other losses due to destruction of the aircraft, and secondly, the two criminals who hijacked the aircraft should be surrendered to Indian authorities so that they can stand their trial.

The Ministry of External Affairs avails themselves of this opportunity to renew to the High Commission of Pakistan in India the assurances of their highest consideration.

February 9, 1971.

Ministry of Foreign Affairs,
Islamabad.

No. IN(III)-14/1/71 February 13, 1971.

The Ministry of Foreign Affairs presents its compliments to the High Commission for India in Pakistan and with reference to the Note dated the 9th February, 1971, handed over to the High Commission for Pakistan in New Delhi by the Ministry of External Affairs, Government of India, has the honour to state as follows:

2. The points raised in the Government of India's Note under reply regarding compensation for the loss of aircraft and for the return of the hijackers were dealt with in the Government of Pakistan's Note dated February 5 and the aide mémoire given to the Indian High Commissioner in Islamabad on February 6.

The Government of India, in its Note under reference, has alleged that the Government of Pakistan has demonstrated no willingness to settle the issue amicably. The allegation is far from being true. In this connection, the attention of the Government of India is invited to paragraph 7 of Pakistan's Note dated February 5, 1971, in which the Government of Pakistan called upon the Government of India to settle the issue through mutual discussion in a spirit of understanding. The Government of Pakistan is constrained to note that the Government of India has not responded positively to this constructive proposal. Instead, it has persisted in its policy of coercion and intimidation by insisting that the ban on the flight of Pakistani aircraft over Indian territory would continue until Pakistan has yielded to India's arbitrary demand for compensation. The Government of India has further threatened Pakistan with consequences if this demand is not met.

3. The Government of Pakistan has repeatedly refuted the Indian charge of Pakistan's responsibility for the hijacking and the subsequent destruction of the plane by the hijackers. Pakistan subscribes to the different conventions on hijacking. It is in the spirit that immediately after the landing of the plane at Lahore, the Government of Pakistan assured the Government of India of all possible efforts to get the plane released from the hijackers for its return to India. On its own the Government of Pakistan had invited a senior diplomat of the Indian High Commission to visit Lahore to be on the spot. This contrasts with the negative attitude of the Government of India in repeatedly declining facilities for over two months to Pakistani officials to contact their nationals in the Pakistani enclaves in Cooch Bihar where nearly 300 Pakistani have lost their lives and scores have been abducted and injured at the hands of Indians. Further, in spite of strong public feeling aroused by India's recent actions in Occupied Kashmir, the Government of Pakistan had arranged for the safe return of the passengers and crew of the plane at the first available opportunity. Unfortunately, despite its best efforts the Government of Pakistan could not prevent the subsequent blowing up of the plane by the hijackers which the Government promptly deplored.

4. It is regrettable that instead of appreciating Government of Pakistan's co-operation and humanitarian attitude, the Government of India, in its Note under reference, has tried to confuse the issue by referring to a few side issues like the hijackers moving out of the plane, establishing contacts with outsiders, etc. The Government of Pakistan has repeatedly made it clear that

on no occasion both the hijackers had left the plane at the same time. One of them invariably remained in the plane and any move to disarm or arrest the other would have resulted in the blowing up of the plane by the one on board. The hijackers were indeed allowed to speak to a few people. This was done because the hijackers refused to speak to any Government official and it was only through these non-officials that the Government of Pakistan could try to persuade the hijackers to surrender the plane. The Government of India must also be aware of several instances in which hijacked aircraft have been blown up by Arab freedom fighters in different parts of the world and the fact that none of the Governments were held responsible for hijacking and destruction of the aircraft; nor was an issue made of compensation. It is also not within the knowledge of the Government of Pakistan that such acts were at any time condemned by Government of India.

5. The Government of Pakistan is surprised at the justification offered by the Government of India in imposing a ban on the flights of Pakistani aircraft over Indian territory. The Government of Pakistan fails to see any relation between the hijacking of the Indian plane, by nationals of Kashmir, from a territory under military occupation of India, with the suspension of flights of Pakistani aircraft over Indian territory which are governed by specific international and bilateral agreements. Further, the re-routing of Indian air services as mentioned in the Note referred to above, was done not for reasons of safety but as a prelude to India's arbitrary decision to ban the flight of Pakistani aircraft. The Government of India is well aware that its aircraft have continued to fly over Pakistan territory, without any intervention, even after the imposition of the ban by the Indian Government. Therefore, while deploring India's unilateral action in violation of international and bilateral commitments, the Government of Pakistan reserves the right to claim compensation from the Government of India for the extra expenses being incurred by the Pakistani Airlines as a result of the diversion of flights of their aircraft over a much longer route due entirely to breach of contractual obligations by India. The Government of India are well aware that such a ban can be imposed only in the event of *(a)* national emergency *(b)* war or *(c)* denunciation of the convention. Since none of these conditions exist, the arbitrary action announced by India is entirely unjustified and a clear violation of solemn international agreements.

6. The Government of Pakistan regrets that the Government of India has again levelled the baseless charge against the Government of Pakistan for instigating subversive activities against India. The Government of Pakistan has repeatedly made it clear that these charges are without any foundation. In this connection the Government of Pakistan would like to remind the Government of India that on September 1, 1970, when the Pakistan High Commissioner in New Delhi was informed of a "conspiracy" to hijack an Air India plane, the High Commissioner immediately asked the Indian Government to indicate in what manner Pakistan could help and requested for details of the so-called "conspiracy" to enable the Government of Pakistan to take necessary measures. On the Government of India's refusal to disclose any details, the High Commissioner advised the Government of India to bring the facts to the notice of the Interpol if it felt any hesitation in taking the Government of Pakistan into confidence in this matter. It is, therefore, surprising that the Government of India should hold Pakistan responsible for the hijacking in January 1971, on the basis of a cryptic oral communication in September 1970.

7. Further, the Government of India, in its Note under reference, has

reminded Pakistan of its "obligation" to vacate "aggression on Indian territory in the Indian State of Jammu and Kashmir". The Government of Pakistan is amazed at this preposterous suggestion because it is without any foundation whatsoever. As the Government of India is well aware, Pakistan is not in occupation of any part of Indian territory. In this connection the Government of Pakistan would like to reiterate that unlike India which, in violation of its commitment under the UNCIP Resolutions had progressively strengthened its unlawful military hold over Occupied Kashmir, Pakistan remains willing as it always has been to honour its commitments under the said Resolutions. It is for the Government of India to ponder whether its continued forcible occupation of Kashmir and refusal to seek an amicable solution of the dispute is not leading to a condition of confrontation between India and Pakistan which is against the interest of the people of the two countries.

8. The tension generated by recent Indian actions has resulted in inflaming of public passions. In fact, the mob frenzy let loose in India has already led to unfortunate repercussions resulting in a recurrence of riots against the Muslim minority of India in Ahmadabad and Baroda. Pakistan genuinely feels that it is entirely up to the Government of India to stop the situation from deteriorating further.

9. For its part the Government of Pakistan regrets the steady deterioration in the situation and once again invites the Government of India to have recourse to an amicable settlement of the issue through discussions without resorting to coercion and threats.

10. The Ministry of Foreign Affairs avails itself of this opportunity to renew to the High Commission of India in Pakistan the assurances of its highest consideration.

The High Commission
for India in Pakistan,
Islamabad.

Attachment D

SUMMARY OF TOTAL LOSS

Additional cost due to Interwing operations via Colombo		U.S.$. 5,94,919
Loss of profit due to cancellation of services to cope with operations via Colombo		U.S.$. 35,909
	Total loss	U.S.$.6,30,828

LOSS OF PROFIT DUE TO CANCELLATION OF SERVICES TO COPE WITH INTERWING OPERATIONS VIA COLOMBO

(In U.S.$.)

	No. of flights cancelled per week	*Total revenues*	*Total cost*	*Profit*
Khi-Lon-Khi	4	224,275	209,786	14,489
Dac-Khi-Dac	3	62,369	56,069	6,299
Dac-Lhe-Dac	3	60,479	453,509	15,119
		347,123	311,214	35,909

PAKISTAN INTERNATIONAL AIRLINES

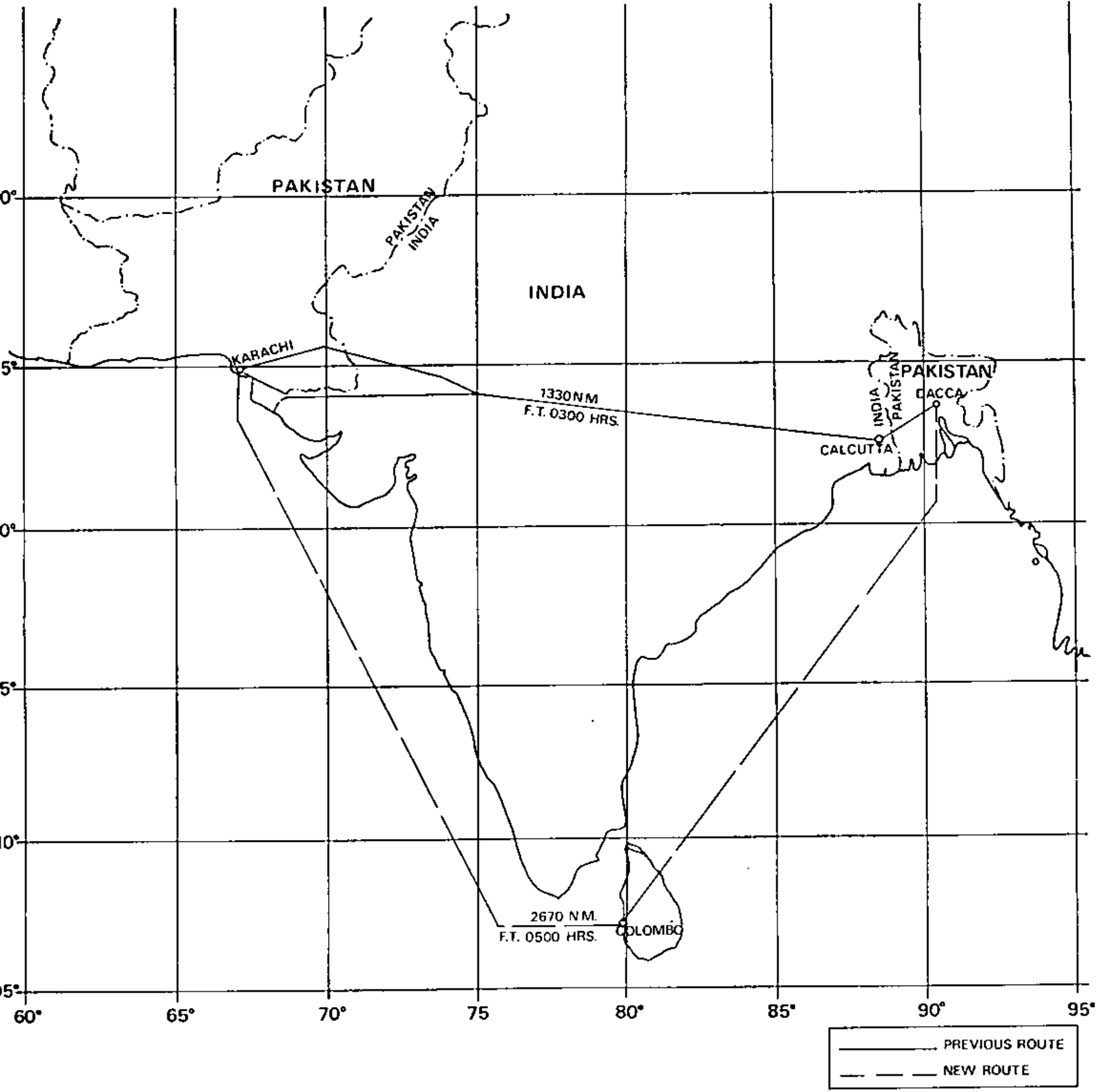
ADDITIONAL COST PER WEEK ON INTERWING OPERATIONS VIA COLOMBO

(Amount in U.S. $)

Sector	*Dac-Khi-Dac*		*Dac-Lhe-Dac*		*Dac-Isl-Dac*		*Dac-Lhe-Isl and Back*		*Dac-Khi-Dac (cargo)*	
Overflying	*India*	*Colombo*	*India*	*Colombo*	*India*	*Colombo*	*India*	*Colombo*	*India*	*Colombo*
Flying time round trip	6.36	11.55	5.26	14.68	6.17	15.30	6.50	16.05	6.36	11.55
Cost per flight hour										
Flight crew remuneration	69	69	69	69	69	69	69	69	69	69
Crew food and allowances	9	23	23	23	23	23	23	23	9	23
Aircraft fuel and oil	472	472	580	580	604	580	580	580	472	472
Direct maintenance	157	157	157	157	157	157	157	157	157	157
Depreciation	244	244	244	244	244	244	244	244	244	244
Insurance	68	68	68	68	68	68	68	68	68	68
Interest	86	86	86	86	86	86	86	86	86	86
Landing fees	55	31	57	44	50	45	99	63	55	31
Other flight expenses	16	16	16	16	16	16	16	16	16	16
Sub total	1176	1166	1300	1287	1317	1288	1342	1306	1176	1166
Shop engineering and store overheads	379	379	355	355	355	355	355	355	379	379
Passenger service cost	201	201	214	214	214	214	214	214	4	4
Station cost	698	698	654	654	654	654	654	654	698	698
Traffic handling	—	—	—	—	—	—	—	—	—	—
Advertising and publicity	186	186	175	175	175	175	175	175	186	186
Sales overheads	242	242	228	228	228	228	228	228	242	242
Central administration	440	440	411	411	411	411	411	411	440	440
Training and pre-operating cost	93	93	87	87	87	87	87	87	93	93
Cost of non-revenue flights	9	9	9	9	9	9	9	9	9	9
Sub total	2248	2248	2133	2133	2133	2133	2133	2133	2051	2051
Total operating cost	3424	3414	3433	3420	3450	3421	3475	3439	3227	3217
Cost per round trip	21777	39432	18058	50206	21286	52341	22588	55196	20524	37156
Excess cost per round trip	—	17655	—	32148	—	31055	—	32608	—	16632
Number of round trips	20	17	3	—	1	—	7	7	4	4
Excess cost due to overflying Colombo	—	300153	—	—	—	—	—	228256	—	66528
										594919

PAKISTAN INTERNATIONAL AIRLINES
SUMMARY SHOWING ADDITIONAL COST PER WEEK ON INTER-WING OPERATIONS VIA COLOMBO
(Amount in U.S.$)

	Hours round trip		*No. of frequency*	*Flight hours*		*Cost per flight hour*		*Total cost*		*Additional cost*
Overflying	*India*	*Colombo*		*India*	*Colombo*	*India*	*Colombo*	*India*	*Colombo*	
Dac-Khi-Dac	6.36	11.55	17	108.12	196.35	3424	3414	370204	670339	300135
Dac-Lhe-Isl and back	6.50	16.05	7	45.50	112.35	3475	3439	158113	368369	228256
Dac-Khi-Dac (cargo)	6.36	11.55	4	25.44	46.20	3227	3217	82095	148623	66528
				179.06	354.90			610412	1205331	594919


PAKISTAN
PAKISTAN
INDIA
INDIA
KARACHI
1330 N.M.
F.T. 0300 HRS.
INDIA
PAKISTAN
PAKISTAN
DACCA
CALCUTTA
2670 N.M.
F.T. 0500 HRS.
COLOMBO
60°
65°
70°
75
80°
85°
90°
95°
PREVIOUS ROUTE
NEW ROUTE

Annex B

COMPLAINT OF THE GOVERNMENT OF PAKISTAN, DATED 3 MARCH 1971, FILED UNDER ARTICLE 21 OF THE RULES FOR THE SETTLEMENT OF DIFFERENCES APPROVED BY THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION ON 9 APRIL 1957

Government of Pakistan — Complainant

versus

Government of India — Respondent

Contents

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No. AV-(A)11(10)/70
Government of Pakistan
Ministry of Defence
the 3rd March, 1971.

From: Air Vice Marshal A. Quadir,
Joint Secretary to the
Government of Pakistan,
Ministry of Defence (Aviation Division),
Islamabad (Pakistan).

To: The President of the Council of
the International Civil Aviation Organization,
International Aviation Building,
1080 University Street,
Montreal (Canada).

Subject: Suspension by Government of India of the flights of Pakistan aircraft over the territory of India

Sir,

I am directed by the President of Pakistan to notify that His Excellency, Mr. M. S. Shaikh, High Commissioner for Pakistan, in Canada, Ottawa, Ontario, Canada, is the Chief Agent of Pakistan in the above matter.

This is also to notify that Mr. Syed Sharifuddin Pirzada, S.Pk., Attorney General for Pakistan is the Chief Counsel in the matter.

Accept, Sir, the assurances of our highest consideration.

(Signed) A. QADIR,

Air Vice Marshal,
Joint Secretary to the Government of Pakistan.

No.AV-(A)11(10)/71
Government of Pakistan,
Ministry of Defence
the 3rd March, 1971.

From: Air Vice Marshal A. Qadir,
Joint Secretary to the
Government of Pakistan,
Ministry of Defence (Aviation Division),
Islamabad (Pakistan)

To: The President of the Council of the
International Civil Aviation Organization,
International Aviation Building,
1080 University Street,
Montreal (Canada).

Subject: Suspension by Government of India of the flights of Pakistan aircraft over the territory of India

Sir,

I am directed by the President of Pakistan to submit a complaint and to file a request on behalf of the Government of Pakistan to the Council of the International Civil Aviation Organization in accordance with the Rules of Procedure approved by the Council on 9th April, 1957. The Memorial as required under Article 21 of the Rules, is attached.

2. The illegal and unjust action by the Government of India of suspending flights of Pakistan aircraft over its territory from the 4th February, 1971, in breach of its international obligations, has caused and is causing great injustice, hardship, loss and injury to Pakistan which requires immediate attention and action of the Council. It is requested that in view of the seriousness of the situation, the Council may examine the situation immediately, inquire into the matter, make appropriate findings and recommendations and grant necessary reliefs to Pakistan as stated in the attached Memorial.

3. The Complainant requests for early action, oral hearing and the opportunity to place relevant material including case law before the Council at an early date may be given.

Accept, Sir, the assurances of our highest consideration.

(Signed) A. QADIR,

Air Vice Marshal,
Joint Secretary to the Government of Pakistan.

Note: This Complaint and the Memorial are being filed without prejudice to the application under Article 2 of the Rules of Procedure of 9th April, 1967 which is also being filed separately in compliance therewith.

MEMORIAL OF THE GOVERNMENT OF PAKISTAN UNDER ARTICLE 21 OF THE RULES OF PROCEDURE APPROVED BY THE COUNCIL ON 9TH APRIL, 1957

(a) Government of Pakistan — Complainant

versus

Government of India — Respondent

(b) His Excellency M. S. Shaikh, High Commissioner for Pakistan in Canada. — Agent of the Complainant

Names of the Counsel:

1. Syed Sharifuddin Pirzada, S.Pk., Attorney General of Pakistan. — Chief Counsel
2. Mr. Harunur Rashid, Deputy Legal Adviser, Ministry of Foreign Affairs, Government of Pakistan. — Counsel
3. Mr. Zahid Said, Deputy Legal Adviser, Ministry of Foreign Affairs, Government of Pakistan. — Counsel
4. Khawaja M. H. Darabu, Legal Adviser, Department of Civil Aviation, Government of Pakistan. — Counsel
5. Mr. Mumtaz A. Khan, Legal Adviser, Pakistan International Airlines Corporation. — Counsel

Address:

c/o The Pakistan High Commission,
Ottawa, Ontario, Canada.

(c) Statement of relevant facts:

(1) In a note dated 4th February 1971 handed over to the Government of Pakistan, the Government of India conveyed its decision "to suspend, with immediate effect, the overflight of all Pakistani aircraft, civil or military, over the territory of India."

(2) In a note dated 5th February, 1971, the Government of Pakistan protested to the Government of India that its decision to suspend flights of Pakistan aircraft over India was arbitrary and unilateral and a serious breach of

multilateral and bilateral agreements. Immediately after receipt thereof, following cable was sent to ICAO:

> "ICAO MONTREAL
> 8-4/71/AT. 11. Attention Binaghi. India banned PIA scheduled services between East and West Pakistan overflying Indian territory. This action causing injustice and hardship to Pakistan. Request intervene in accordance with Article two of the Transit Agreement. Regards.
> Civilair Karachi."

(3) Pakistan comprises of two wings which are situated more than 1,000 miles apart with Indian territory in between. Air services between the two wings are thus a vital link between the two wings of Pakistan. As a result of the decision of the Government of India to suspend overflights of Pakistan aircraft over its territory, Pakistan International Airlines, the national airline of Pakistan has been compelled to re-route its flights between the two wings of Pakistan and other international scheduled flights by circumventing the Indian territory. This has more than doubled the flight time between the two wings, considerably increased the flight time of other international flights and reduced frequency of flights on all sectors. These factors have resulted in considerable increase in the cost of operation of services of Pakistan International Airlines, loss of business and other losses to the airline, inconvenience to passengers, immense loss and injury to Pakistan and have adversely affected the economic situation of the country. Supporting data related to these facts are given under item *(d)*.

(4) The Government of Pakistan conveyed to the Government of India that the flights of Pakistan International Airlines which connected two wings of Pakistan carry, apart from passengers, essential supplies to East Pakistan. The suspension of these flights has also adversely affected the relief operations in East Pakistan currently going on in view of the recent devastations caused by the cyclone and tidal bore. In the same note the Government of India was called upon to rescind its decision to suspend overflights of Pakistan aircraft.

(5) The Government of India sought to link the recent hijacking incident in which two nationals of the State of Jammu and Kashmir hijacked an Indian aircraft from Indian occupied Kashmir to Lahore in Pakistan, with the arbitrary suspension of flights of Pakistan aircraft over Indian territory. It is stated that the State of Jammu and Kashmir is a disputed territory in respect whereof various resolutions have been passed by the United Nations Commission for India and Pakistan and the Security Council and an Agreement was entered into between India and Pakistan. The facts of this incident have duly been communicated by the Government of Pakistan to the Secretary General of the International Civil Aviation Organization by a letter, dated 19th February, 1971 (copy attached—"Attachment A"). It is submitted that reference by India to the hijacking incident is irrelevant and has no relation whatsoever with the suspension of flights of Pakistan aircraft over Indian territory. Such flights are governed by multilateral and bilateral agreements and there is no legal basis or justification whatsoever for their suspension.

(6) The decision of the Government of India to suspend the overflights of Pakistan aircraft over its territory contravenes the provisions of the Convention on International Civil Aviation, 1944, the International Air Services Transit Agreement, 1944 and the Bilateral Air Services Agreement, 1948 and thus India is in breach of its obligations thereunder.

(7) In spite of the arbitrary, unilateral and illegal decision of the Government of India to suspend overflights of Pakistan aircraft, the Government of

Pakistan has not banned Indian aircraft which are free to overfly Pakistan territory.

(8) On 18th February, 1971, an Aide Mémoire was presented on behalf of Pakistan to the Secretary General of International Civil Aviation Organization. By a letter dated 20th February, 1971, Pakistan approached the International Civil Aviation Organization Council for necessary action (copies attached—Attachment B).

(d) Copies of Notes exchanged between the two Governments are annexed hereto (Attachment C). Statement of data referred to in para. 3 of item *(c)* is attached (Attachment D).

(e) Statement of Law:

(1) Pakistan and India are parties to the Convention on International Civil Aviation, 1944, the International Air Services Transit Agreement, 1944 and *the Bilateral Air Services Agreement, 1948.*

(2) By virtue of Article 5 of the Convention on International Civil Aviation, 1944, each Contracting State agreed that all aircraft of the other contracting States not engaged in scheduled international air services shall have the right 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 subject to the right of that State to require landing. By denying this right to Pakistan aircraft engaged in other than scheduled international air services to overfly its territory or make a technical stop, India has unilaterally and arbitrarily violated the provisions of the Convention without any valid reason and is in breach of its obligations thereunder.

(3) Under Article I of the International Air Services Transit Agreement, India has granted to Pakistan 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.

Pakistan has been enjoying these freedoms of the air till 3rd February 1971, when all of a sudden India, by a Note dated 4th February, 1971, informed Pakistan of its decision to suspend with immediate effect the overflights of all Pakistan aircraft over the territory of India and thereby denying these freedoms to Pakistan. In suspending the overflights of Pakistan aircraft over its territory India has thus committed a serious breach of its obligations under the Agreement and created a situation which has caused great hardship, injustice, injury and loss to Pakistan.

(4) By virtue of the Bilateral Air Services Agreement with India of 1948, Pakistan International Airlines, the designated airline of Pakistan, has the right, *inter alia*, to transit across the territory of India without landing on its scheduled international air services. The decision of the Government of India to stop such overflights of Pakistan's designated airline contravenes the provisions of the Agreement and is in breach of its obligations thereunder.

(5) The decision of the Government of India to suspend the overflights of Pakistan aircraft over its territory is *per se* discriminatory in that aircraft of other States continue to make flights over Indian territory.

(6) It is further submitted that the Government of India has violated the principle of *pacta sunt servanda* in respect of its treaty obligations and has not acted in good faith.

(7) It is also submitted that the intention of the Government of India was to

prevent easy and direct communication between the two wings of Pakistan by suspending flights of Pakistan aircraft by direct route over Indian territory.

(8) The decision of the Government of India is arbitrary, unilateral and illegal and is in violation of the Conventions and Agreements aforesaid and is contrary and repugnant to International Law.

(f) Reliefs Desired

The Government of Pakistan seeks among others, the following reliefs by action of the ICAO Council:

(1) To decide and declare that the decision of the Government of India suspending the overflights of Pakistan aircraft over the territory of India, is illegal and in violation of India's international obligations under the Convention and agreements aforesaid.

(2) To find and declare that Pakistan has the following freedoms of the air in respect of scheduled international air services:

(a) The privilege to fly its aircraft across the Indian territory without landing.
(b) The privilege to land its aircraft in Indian territory for non-traffic purposes.

(3) To find and declare that Pakistan aircraft have the right subject to observance of the terms of the Convention on International Civil Aviation, 1944 to make flights into, or in transit non-stop across Indian territory and to make stops for non-traffic purposes in that territory without the necessity of obtaining prior permission, and subject to the right of India to require landing of non-scheduled flights.

(4) To find and declare that Pakistan aircraft are entitled to operate flights between the two wings of Pakistan and beyond by direct route over its territory.

(5) To direct the Government of India to immediately rescind their illegal decision aforesaid and not to impede in any manner the overflights of Pakistan aircraft over the territory of India.

(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.

(g) Efforts were made by Pakistan to negotiate with India but were not successful.

ATTACHMENTS A TO D

Note: Attachments A, B, C and D to the foregoing Memorial are identical to Attachments A to D to the Memorial from the Government of Pakistan circulated under Secretary General's Memorandum SG 588/71 LE 4/1.11 dated 19 March 1971.

Annex C

PRELIMINARY OBJECTIONS, DATED 28 MAY 1971, BY THE GOVERNMENT OF INDIA UNDER ARTICLE 5 OF THE RULES FOR THE SETTLEMENT OF DIFFERENCES APPROVED BY THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION ON 9 APRIL 1957

PRELIMINARY OBJECTIONS BY THE GOVERNMENT OF INDIA UNDER ARTICLE 5 OF THE SAID RULES

IN RE THE APPLICATION AND THE COMPLAINT BOTH DATED 3RD MARCH 1971, SUBMITTED BY THE GOVERNMENT OF PAKISTAN AGAINST THE GOVERNMENT OF INDIA TO THE INTERNATIONAL CIVIL AVIATION ORGANIZATION COUNCIL, UNDER ARTICLES 2 AND 21 RESPECTIVELY OF THE RULES FOR THE SETTLEMENT OF DIFFERENCES

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1. The Secretary General of the International Civil Aviation Organization, vide his letter No. LE 6/1 dated 8th April 1971, has invited the Government of India to present its Counter-Memorial to an Application dated 3rd March 1971 submitted by the Government of Pakistan under Article 2 of the Rules for the Settlement of Differences ("the Rules"). Further, the Secretary General, vide his letter No. LE 6/2 dated 8th April 1971, has invited the Government of India to present its Counter-Memorial to the Complaint dated 3rd March 1971 submitted by the Government of Pakistan under Article 21 of the Rules.

2. The Government of India find on a perusal of Pakistan's Application and Complaint, and the Memorials and Attachments, that Pakistan's Application and Complaint are not competent and not maintainable, and that the Council has no jurisdiction to handle the matters presented by Pakistan. The Government of India, therefore, file these Preliminary Objections under Article 5 of the Rules to both the Application and the Complaint. Since the contentions and submissions raised and the facts stated in these Preliminary Objections are common to both the Application and Complaint, a single set of these Preliminary Objections is filed to both the Application and the Complaint, in order to avoid repetition and duplication.

3. The Government of India would like to clarify that this is not a Counter-Memorial and that they are not here dealing with the merits of the Application and the Complaint made by Pakistan but are strictly confining themselves to the Preliminary Objections to the competence and maintainability of Pakistan's Application and Complaint and the jurisdiction of the Council.

4. In order to appreciate the Preliminary Objections to the maintainability and competence of the Application and the Complaint and to the jurisdiction of the Council, it would be necessary at the outset to give by way of background a brief sketch of facts, events and circumstances. The Government of

India will furnish evidence, material and additional facts, and elaborate the submissions and contentions, when the Council takes up the Preliminary Objections for hearing.

BACKGROUND

5. For years past, Pakistan has been pursuing and continuing a policy of political confrontation bordering on hostility against India. This policy culminated in August-September 1965 in an armed attack by Pakistan against India on a large scale. On the outbreak of the conflict, the Air Services Agreement of 1948 between the two countries was immediately suspended, and there was a stoppage of air transport services of Indian aircraft to and across Pakistan and of Pakistan aircraft to and across India. The conflict was followed by an Agreement between the two countries signed at Tashkent in the Union of Soviet Socialist Republics in January 1966. As a result of this Agreement, a special arrangement was worked out whereby the two countries permitted each other to operate some overflying services. Air services as they existed prior to the conflict were however not restored, since Pakistan refused all other aspects of normalization of relations as envisaged in the Tashkent Agreement. Up to date 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 Kashmir.
(9) Intensive hate-propaganda against India on the Radio and in the Press, which continues unabated to this day.

6. The subject-matter of Pakistan's Application and Complaint relates to the suspension, since 4th February 1971, of overflights of Pakistan aircraft over Indian territory. The conduct of Pakistan immediately preceding that date in relation to the hijacking of an Indian aircraft was most reprehensible and amounted to the very negation of all the aims and objectives, the scheme and provisions, of the Convention on International Civil Aviation, 1944 ("the Convention"), and of the International Air Services Transit Agreement, 1944 ("the Transit Agreement").

7. The facts regarding the hijacking incident are summarized below:

(a) An Indian Airlines Fokker Friendship aircraft on a scheduled flight from Srinagar to Jammu with 28 passengers and 4 crew on board was

hijacked by two persons among the passengers and diverted at gun point to Lahore in Pakistan shortly after noon on 30th January 1971. One of the two hijackers had a grenade in his hand and threatened to use it if the plane was not diverted to Lahore, while the other pointed his revolver at the pilot.

(b) The Government of India requested the Pakistan Government the same afternoon at Islamabad and through their High Commissioner in New Delhi, for the immediate release of the passengers, crew, cargo, baggage and mail as well as the aircraft. The Pakistan Government informed the Acting High Commissioner of India in Islamabad the same afternoon of its decision to allow the plane, crew and passengers to fly back to India.

(c) The Indian Civil Aviation authorities and the Government of India informed the Government of Pakistan on the morning of 31st January about a relief plane being ready to take off for Lahore, together with spare crew, to bring back the passengers, crew, cargo, baggage and mail as well as the hijacked aircraft as soon as the Pakistan authorities gave the necessary clearance. Permission was given by the Director-General of Civil Aviation of Pakistan the same morning for the relief aircraft to leave, but this was rendered infructuous by further instructions from the Pakistan authorities that the relief plane should not take off until further specific instructions from the D.G.C.A., Pakistan. Such permission was repeatedly deferred, in spite of numerous reminders from the D.G.C.A., India. The Ministers for External Affairs and Civil Aviation of India sent messages on 1st February 1971 to the Minister of Home Affairs and the Minister-in-Charge of Civil Aviation respectively in Pakistan, requesting the immediate return of the passengers and clearance for the relief aircraft to bring back the hijacked aircraft along with the baggage, cargo and mail. The Pakistan High Commission in India consistently refused to issue visas to the crew of the relief aircraft and the spare crew.

(d) Pakistan took more than 48 hours to send the passengers and crew by road to the Indian border at Hussainiwala at 15.00 hours (IST) on the 1st February 1971, though the distance from Lahore to Hussainiwala is only 36 miles. They were not allowed to bring their baggage. The Government of India had earlier made arrangements for their return to India on board a scheduled Ariana Afghan Airlines Service from Kabul to Amritsar, which landed at Lahore Airport at 23.00 hours (IST) on 31st 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 on this plane because of the alleged presence of crowds at the airport.

(e) The Government of Pakistan not only failed to return the two persons who had hijacked the aircraft but announced that they had been given asylum in Pakistan. This was done even without first disarming them and taking them into custody for their criminal acts. On the other hand, they were treated as heroes and were freely permitted to visit, by turns, the terminal building at Lahore Airport, to put long distance calls to their accomplices and friends in Pakistan and meet various people, besides being provided with food and other amenities which enabled them to continue their so-called occupation of the aircraft for 3 ½ days. This was allowed to happen on the apron of the international airport at Lahore, in full view of the authorities, troops and police there, who took no action to make them vacate the hijacked aircraft.

(f) Finally at about 20.30 hours (IST) on 2nd 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.

This took place in full view of the airport authorities, troops and police at the Lahore Airport, which is a protected area, and at a time when Martial Law was (as it still is) in force in Pakistan. The Lahore TV also televised the destruction of the aircraft on a special programme and it was made to appear as if the event was an occasion for celebration. The time extended for the television programme was clear proof that the Pakistan authorities knew the plans of the hijackers and connived at the destruction of the aircraft. This further criminal act of destroying the aircraft occurred only a few hours after the Pakistan High Commissioner in India had assured the Government of India that his Government were committed to, and were taking all necessary measures for, the safe return of the aircraft.

(g) The Government of India informed the President of the International Civil Aviation Organisation Council on 1st February 1971 about the hijacking of the Indian Aircraft, and later about its destruction. It is understood that the President of the ICAO Council sent the following message to Pakistan:

> "Regarding unlawful seizure Indian Airlines aircraft confident Pakistan acting in accordance with ICAO Assembly Resolution A-17-5 has permitted or will permit aircraft occupants and cargo continue journey immediately. Would appreciate your information regarding present situation. Am also very concerned by possibility proliferation hijackings in that part of the world unless severe measures taken. Therefore trust Pakistan will follow Assembly Declaration A-17-1 and prosecute perpetrators so as to deter repetition similar acts."

The Government of India are not aware of the response given by Pakistan to this communication. In fact, Pakistan neither permitted the aircraft, with passengers and cargo, to continue the journey immediately, nor returned the hijackers to India, nor prosecuted nor punished them in Pakistan.

(h) The Government of India had, as far back as September 1,1970, informed the Pakistan High Commissioner in India, that certain subversive elements in Pakistan were conspiring to hijack Indian aircraft and that there was definite information about a possible attempt to hijack an Indian aircraft to Pakistan, and had requested the Government of Pakistan to take adequate steps to prevent this. There was no response from the Government of Pakistan except the strange request from their High Commissioner to disclose the source from which the Government of India had obtained this information. In spite of their being forewarned, the Government of Pakistan do not appear to have taken any steps; on the contrary, from the statements made in Pakistan, it appears that the plan to hijack the Indian aircraft was in fact hatched in Pakistan by persons whose protestations were officially supported by the Government of Pakistan.

8. The Government of India were greatly perturbed over the hijacking of their aircraft in Pakistan and the unwillingness of the Government of Pakistan

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 February 2, 1971. The Government of India addressed a note to the Government of Pakistan on February 3, 1971. The text of this note as well as of some of the other correspondence exchanged between the two Governments is contained in "Attachment C" to the Memorial of the Government of Pakistan dated the 3rd March 1971. The Government of India strongly protested against the conduct of the Government of Pakistan in relation to the hijacking incident, claimed damages for the destroyed aircraft, the cargo, baggage and mail, and for the loss resulting from the detention of the aircraft in Pakistan. When no positive and satisfactory response was made by the Government of Pakistan, the Government of India decided on February 4, 1971 to suspend, with immediate effect, the overflight of all Pakistan aircraft, civil or military, over the territory of India, until the matter was satisfactorily resolved. 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.

9. 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. Indeed, the Indian Parliament adopted a unanimous Resolution on the 31st March, 1971, expressing sympathy and support for the people of East Bengal.

10. In the context of the material facts stated hereinabove, the Government of India submit that Pakistan's Application and Complaint are not competent nor maintainable, and the Council has no jurisdiction to deal with them or to handle the matters presented by Pakistan. India raises these PRELIMINARY OBJECTIONS on the following amongst other grounds. The contentions and submissions which are set out below are without prejudice to one another:

GROUND I

There is no disagreement between India and Pakistan relating to the interpretation or application of the Convention or the Transit Agreement, and no action by India under the Transit Agreement

11. This ground is without prejudice to Ground II and proceeds on the assumption that the Convention and the Transit Agreement were not superseded by a Special Régime as regards overflights between India and Pakistan.

The application of Pakistan under Article 2 of the Rules proceeds on the untenable basis that there is a disagreement between the two countries relating to the application of the Convention and the Transit Agreement. Pakistan's Application is incompetent and the Council has no jurisdiction to deal with it, because no question arises of applying the Convention or the Transit Agreement as between India and Pakistan and there is no disagreement between the two countries as to the application of either the Convention or the Transit Agreement.

12. The complaint of Pakistan under Article 21 of the Rules proceeds on the untenable basis that India has taken an action under the Transit Agreement. The complaint is incompetent and not maintainable, and the Council

has no jurisdiction to deal with it, because India has taken no action whatever under the Transit Agreement.

13. Article 84 of the Convention 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."

14. Sections 1 and 2 of Article II of the Transit Agreement run as follows:

"*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.

Section 2

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."

15. Clauses (1) and (2) of Article 1 of the Rules run as follows:

"(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).

(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)."

16. Under Article 84 of the Convention and under Article 1 (1) of the Rules, two of the conditions which are required to be fulfilled in order to make the Application competent and maintainable and in order that the Council may have jurisdiction to deal with it and handle the matter presented by the Applicant, are the following:

(a) There should be a disagreement between the two contracting States, and
(b) the disagreement should relate to the interpretation or application of the Convention.

(The Transit Agreement is dealt with subsequently.)

17. Both the aforesaid conditions postulate and presuppose the continued existence and operation of the Convention as between two States. If the Convention has been terminated, by repudiation, abrogation or otherwise, or has been suspended, as between two States, any dispute relating to such termination or suspension cannot possibly be referred to the Council under the aforesaid Articles of the Convention and the Rules, since in such a case no question of "interpretation" or "application" of the Convention can possibly arise (there being no Convention in operation as between the two States). Further, there cannot possibly be a disagreement on a point of interpretation or application of a treaty which is not in operation as between two States. In other words, so long as two contracting States accept the existence, operation and efficacy of the Convention as between them, all points of disagreement as to the interpretation or application of the Convention would be within the jurisdiction of the Council. But any question of termination or suspension of the Convention as between two States cannot be referred to the Council under the aforesaid Articles.

18. What is stated above regarding the Convention also represents accurately the position under the Transit Agreement which confers limited jurisdiction on the Council in identical words. Section 2 of Article II of the Transit Agreement and Article 1 (1) *(b)* of the Rules permit an application limited only to cases of disagreement between two States relating to the "interpretation" or "application" of the Transit Agreement.

19. The aforesaid construction of Article 84 of the Convention, Article II (2) of the Transit Agreement, and Article 1 (1) of the Rules, harmonizes with Article II (1) of the Transit Agreement and Article 1 (2) of the Rules which deal with complaints regarding an action taken by a State *under* the Transit Agreement, and not regarding termination or suspension of the Transit Agreement which would be *de hors* that Agreement.

20. The composition of the Council and its powers and functions are, again, in keeping with the limited jurisdiction which has been conferred upon it by Article 84 of the Convention, Article II of the Transit Agreement, and Article 1 of the Rules, to hear international disputes. The sovereign power of

a State to suspend, or to abrogate or otherwise terminate an international treaty—not seldom involving vastly complicated questions of fact and international law—are outside the scope of the Council's jurisdiction under the aforesaid Articles.

21. To sum up, the scheme of the aforesaid Articles is simple and clear. So long as the Convention or the Transit Agreement continues to be in operation as between two States, any disagreement as to the *construction* of its Articles or the *application* of the Articles to the existing state of facts, can be referred to the Council; and 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. These disputes are usually in the realm of political confrontation between two States, often involving military hostilities not amounting to war, and these matters of political confrontation or military hostilities are outside the ambit of the Council's competence. The question of overflying raised by Pakistan, is directly connected with military hostilities in the past and continues to be inextricably tied up with the posture of political confrontation bordering on hostility adopted by Pakistan.

22. The Government of India submit that Pakistan by its conduct has repudiated the Convention vis-à-vis India, since its conduct has militated against the very objectives underlying, and the express provisions of, the Convention, and has been completely and totally against the principle of safety in civil aviation. It is expressly stated by Section 2 of Article I of the Transit Agreement that exercise of the privileges conferred by that Agreement shall be in accordance with the provisions of the Convention. Consequently, Pakistan's conduct also amounts to a repudiation of the Transit Agreement vis-à-vis India. In the circumstances, India has accepted the position that the Convention and the Transit Agreement stand repudiated, or in any event suspended, by Pakistan vis-à-vis India.

23. Without prejudice to the above, and in the alternative, the Government of India submit that they have terminated, or in any event suspended, the Convention as regards overflying and the Transit Agreement vis-à-vis Pakistan.

24. Reciprocity is of the essence of the Convention and the Transit Agreement. The conduct of Pakistan has made it impossible for Indian aircraft to overfly 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. The Government of India do not set out here the full facts concerning justification, since, as stated above, the question of justification for termination or suspension of the Convention or the Transit Agreement is not within the scope of the Council's jurisdiction under the aforesaid Articles.

25. In the circumstances aforesaid, the Government of India submit that the Convention as regards overflying and the Transit Agreement having been terminated, or in any event suspended, as between India and Pakistan,

Pakistan's Application is outside the scope of Article 84 of the Convention, Article II (2) of the Transit Agreement and Article 1 (1) of the Rules, and is beyond the scope of the Council's jurisdiction under those Articles.

26. Likewise, the Complaint made by Pakistan is outside the ambit of Article II (1) of the Transit Agreement and Article I (2) of the Rules. The first-mentioned Article applies only where action by a State *under* the Transit Agreement is causing injustice or hardship to another State; and, similarly, Article 1 (2) of the Rules deals with complaints regarding "an action taken by a State party to a Transit Agreement and *under* that Agreement". In the present case, there is no action by India under the Transit Agreement. On the contrary, the Transit Agreement is not in operation as between India and Pakistan in the circumstances indicated above. Since there is no action by India under the Transit Agreement and the Transit Agreement has been terminated or suspended as between the two countries, the Council has no jurisdiction to deal with Pakistan's Complaint.

27. It is submitted that even if the Transit Agreement had been in force between the two countries, Pakistan's complaint would still be outside the ambit of Article II (1) of the Transit Agreement and Article 1 (2) of the Rules, since the action complained of is alleged to amount to suspension of the Transit Agreement and is not under the Agreement.

Ground II

The question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed by a Special Régime and not by the Convention or the Transit Agreement

28. The Air Services Agreement of 1948 between the two countries covered air transit across each other's territory and India's overflights into Pakistan's air space and Pakistan's overflights into India's air space. A copy of the said Agreement of 1948 is hereto annexed and marked "1". Thus air transit and overflying each other's territory was governed by a Special Régime between India and Pakistan in 1948 and continues to be so governed uptil today. The Convention and the Transit Agreement do not apply as between India and Pakistan, as regards transit and overflying each other's territory. Consequently, as regards transit and overflying, no question can arise of interpretation or application of the Convention or the Transit Agreement as between the two countries, nor of any disagreement between them on such a question; nor can there be any question of any action by India under the Transit Agreement against Pakistan. Since there has been no action by India under the Transit Agreement against Pakistan, the question of considering any hardship or injustice to Pakistan within Article II (1) of the Transit Agreement does not arise.

29. In view of the fact that the question of overflying or transiting is governed by a Special Régime as between India and Pakistan, and not by the Convention or the Transit Agreement, the Government of India submit that the Application and the Complaint of Pakistan are incompetent and not maintainable, and the Council has no jurisdiction to entertain them or handle the matters presented therein.

30. Assuming India has committed any breach of the Special Régime, or of the bilateral Air Services Agreement of 1948 as alleged by Pakistan, such a dispute cannot be referred to the Council under the Convention or under the Transit Agreement or under the Rules. There is no provision whatever con-

ferring any jurisdiction on the Council to hear or handle any disputes arising out of bilateral agreements.

31. As a result of the armed conflict in August/September 1965 between India and Pakistan, the Air Services Agreement of 1948 between the two countries was suspended. The said Agreement has since then continued to be in suspension and has never been revived. Since 1965 the airlines of Pakistan have never operated within India and airlines of India have never operated within Pakistan. The traffic between the two countries continues to be handled by third country airlines.

32. Armed hostilities ceased on September 22, 1965. On January 10, 1966, the Tashkent Declaration was signed by India and Pakistan. The leaders of the two countries declared "their firm resolve to restore normal and peaceful relations between their countries and to promote understanding and friendly relations between their peoples". Under Article VI of the Tashkent Declaration, "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 take measures to implement the existing agreements between India and Pakistan". Under Article VIII, *inter alia*, "They further agreed to discuss the return of the property and assets taken over by either side in connection with the conflict".

33. In response to the desire expressed by the President of Pakistan for the early resumption of overflights of Pakistan and Indian aircraft over each other's territory, the Government of India agreed to the resumption of overflights in the hope that the Tashkent Declaration would be scrupulously adhered to, assets and properties seized during the armed conflict would be restored, and normal relations would be established. The general understanding of the two Governments with regard to the resumption of overflights was as follows:

(1) The overflights of Indian and Pakistan aircraft across each other's territory was to be on the same basis as that prior to August 1, 1965. This basis related to the fixing of routes, procedures for operating permission, etc.
(2) The resumption was limited to overflights across each other's territory. It did not include the right to land in each other's territory even for non-traffic purposes.
(3) The resumption of overflights was agreed to on a basis of reciprocity.
(4) The resumption of overflights was to be on a provisional basis.

A copy of the exchange of signals establishing the aforesaid understanding between the two countries regarding overflights is contained in Annexure "2" hereto.

34. On the basis of the aforesaid understanding, the overflights of Pakistan and Indian aircraft across each other's territory was resumed with effect from February 10, 1966. The aforesaid understanding is hereafter referred to as "the Special Agreement of 1966".

35. 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 goodwill and several unilateral actions on the part of the Government of India to establish normalcy, Pakistan has continued to keep up a posture of confrontation bordering on hostility towards India since March 1966. For example, India unilaterally lifted the embargo on

trade on May 27, 1966, and invited Pakistan to do likewise. Till now, Pakistan has not reciprocated. On June 27, 1966, India unilaterally decided to release all cargoes seized during the conflict except military contraband. India also proposed to exchange seized properties on March 26, 1966, repeated the gesture on April 25 and December 28, 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, liberalise visa procedures, establish bilateral machinery for settling mutual problems,—all without receiving any positive response.

36. The continued policy of confrontation bordering on hostility adopted by Pakistan and the absence of normal relations between India and Pakistan since 1966, were the main reasons for the continuation of the Special Agreement of 1966 between the two countries and for the non-revival of the Air Services Agreement of 1948.

37. In view of the above, it is clear that since the Air Services Agreement of 1948 continues to remain suspended, no question can arise of any disagreement between the two countries relating to the application of that Agreement, apart from the point that any such question cannot be referred to the Council under the aforesaid Articles and the Council would have no jurisdiction to handle any such matter.

38. The Special Agreement of 1966 has governed the rights and privileges of India and Pakistan regarding air transit and overflying from February 1966 till February 1971. That Special Agreement, which was provisional and on the basis of reciprocity, could not continue in view of Pakistan's aforesaid conduct and the creation by Pakistan of conditions which made it most unsafe for Indian aircraft to overfly Pakistan territory. The freedom of Indian and Pakistan aircraft to overfly each other's territory under the Special Agreement of 1966 was always subject to permission by the respective Governments and was to be exercised in accordance with the terms and conditions of that permission. Copies of the Notifications issued by the Government of India dated *September 6, 1965, and February 10, 1966,* under Section 6 (1) *(b)* of the Aircraft Act, 1934, which make this point abundantly clear, are hereto annexed and marked Annexure "3". This basic limitation was never removed, and even the limited right of overflights was never put on a regular basis. The Special Agreement of 1966 was in force up to February 3, 1971, both in law as well as in practice, and the right of Pakistan aircraft to overfly Indian territory was subject, at all material times, to the permission of the Government of India. This permission was withdrawn on and from February 4, 1971, and India had the right to withdraw such permission under the Special Agreement of 1966. The Government of India propose to say here nothing more regarding that Special Agreement, since Pakistan's Application and Complaint do not deal with, and do not relate to, that Special Agreement. Assuming there was a breach of that Special Agreement, the Council would have no jurisdiction to hear or handle that dispute.

39. In all the circumstances aforesaid, the Government of India submit that the Council will be pleased to dismiss with costs both the Application and the Complaint of Pakistan on the ground that they are incompetent and not maintainable, and that the Council has no jurisdiction to hear them or handle the matters contained therein, because—

(a) there is no disagreement between India and Pakistan relating to the interpretation or application of the Convention or the Transit Agreement;
(b) no action has been taken by India under the Transit Agreement;
(c) the question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed by a Special Régime and not by the Convention or the Transit Agreement; and
(d) the Council has no jurisdiction to handle any dispute under a Special Régime or a Bilateral Agreement.

Annexure 1

INDIA-PAKISTAN BILATERAL AIR SERVICES AGREEMENT OF 1948

AGREEMENT BETWEEN THE GOVERNMENT OF INDIA AND THE GOVERNMENT OF PAKISTAN

RELATING TO AIR SERVICES

(With Annex and Exchange of Notes)

New Delhi, 23rd June 1948

The Government of India and the Government of Pakistan hereinafter described as the Contracting Parties,

Being parties to the Convention on International Civil Aviation and the International Air Services Transit Agreement, both opened for signature at Chicago on the 7th day of December 1944, and

Desiring to conclude an Agreement for the purpose of establishing and operating air services between and beyond the territories of India and Pakistan,

Agree as follows:

Article I

(A) Each Contracting Party grants to the other Contracting Party the right to operate the air services specified in the Annex to this Agreement (hereinafter referred to as the "specified air services") and to carry traffic to, from and in transit over, its territory as provided in this Agreement.

(B) The airlines designated as provided in Article II hereof shall have the right to use

(i) for traffic purposes, airports provided for public use at the points specified in the Annex to this Agreement and ancillary services provided for public use on the air routes specified in the said Annex (hereinafter referred to as the "specified air routes") and

(ii) for non-traffic purposes, all airports and ancillary services provided for public use on the specified air routes:

Provided that the places of first landing and final departure shall be Customs airport.

Article II

(A) Each of the specified air services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the rights under this Agreement are granted on condition that

(1) the Contracting Party to whom the rights have been granted shall have designated an airline (hereinafter referred to as a "designated airline") for the specified air route.

(2) the Contracting Party which grants the right shall have given the appropriate operating permission to the airline pursuant to paragraph (C) of this Article which it shall do with the least possible delay.

(B) Substantial ownership and effective control of the designated airlines of each Contracting Party shall be vested in the Party or its nationals.

(C) The designated airline may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it is qualified to fulfil the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operation of commercial air services.

(D) The operation of each of the specified air services shall be subject to the Agreement of the Contracting Party concerned that the route is adequate for the safe operation of air services.

Article III

A designated airline may, subject to the provisions of Article IV, carry across, set down and pick up in the territory of one Contracting Party traffic originating in or destined for the territory of the other Contracting Party or of a third country on the specified air route.

Article IV

In order to achieve and maintain equilibrium between the capacity of the specified air services and the requirements of the public for air transport on the specified air routes or sections thereof and in order to achieve and maintain proper relationship between the specified air services *inter se* and between these air services and other air services operating on the specified air route or sections thereof, the Contracting Parties agree as follows:—

(A) The airlines of each Contracting Party shall enjoy equal rights for the operation of air services for the carriage of traffic between the territories of the two Parties.

(B) To the extent that the airlines of one of the Contracting Parties are temporarily unable to make use of the rights referred to in Paragraph (A), the situation will be mutually examined by the two Parties for the purpose of aiding as soon as possible the airlines concerned increasingly to make their proper contribution to the services contemplated.

(C) In the operation by the airlines of either Contracting Party of the specified air services the interests of the airlines of the other Party shall be taken into consideration so as not to affect unduly the services which the latter provide on all or part of the same route.

(D) The air transport offered by the airlines of each Contracting Party on different sections of the specified air routes shall bear a close relationship to the needs of the public for air transport and to the traffic interests of the airlines concerned as provided in this Agreement.

(E) The services provided by a designated airline under this Agreement shall retain as their primary objective the provision (along with the airlines of the other States concerned) of capacity adequate to the traffic demands between the country of which such airline is a national and the country of ultimate destination of the traffic, and the right of the designated airlines of either Party to embark and to disembark in the territory of the other Party international traffic destined for or coming from third countries on specified air routes shall be applied in accordance with the general principles of orderly development to which both Parties subscribe and shall be subject to the general principle that capacity shall be related:

(1) to the requirements of traffic between the country of origin of the air service and destinations on the specified air route,

(2) to the air transport needs of the area through which the airline passes, and

(3) to the adequacy of other air transport services established by airlines of the States concerned between their respective territories.

Article V

When, for the purpose of economy of onward carriage of through traffic, different aircraft are used on different sections of a specified air route, with the point of change in the territory of one of the Contracting Parties, such change of aircraft shall not affect the provisions of this Agreement relating to the capacity of the air service and the carriage of traffic. In such cases the second aircraft shall be scheduled to provide a connecting service with the first aircraft, and shall normally await its arrival.

Article VI

(A) Rates shall be fixed at reasonable levels, due regard being paid to all relevant factors, including costs of comparable economic operations, reasonable profit, differences of characteristics of service and the rates charged by other operators, if any, on the route.

(B) The rates to be charged by any of the airlines designated under this Agreement in respect of traffic between the territories of the two Parties shall be agreed in the first instance between the designated airlines in consultation with other airlines operating on the route or any section thereof, and shall have regard to relevant rates adopted by the International Air Transport Association. Any rates so agreed shall be subject to the approval of the aeronautical authorities of the Contracting Parties. In the event of disagreement between the airlines, the Contracting Parties themselves shall endeavour to reach agreement and shall take all necessary steps to give effect to such agreement. Should the Contracting Parties fail to agree, the dispute shall be dealt with in accordance with Article XI. Pending the settlement of the dispute by agreement or until it is decided under Article XI, the rates already established shall prevail.

(C) Pending the acceptance by both Parties of any recommendations which the International Civil Aviation Organization may make with regard to the regulation of rates for traffic other than that defined in Paragraph (B) of this Article, the rates to be charged by an airline of one Contracting Party in respect of traffic between the territory of the other Contracting Party and a third country shall be fixed on the basis of the principles set out in paragraph (A) of this Article and after taking into consideration the interests of the airlines of the other Party and shall not vary unduly in a discriminatory manner from the rates established by the airlines of the other Party operating air services on that part of the specified air routes concerned: Provided, however, that a designated airline shall not be required to charge rates higher than those established by any other airline operating on the specified air routes.

(D) If the International Civil Aviation Organization does not within a reasonable time, establish a means of determining rates for traffic defined in paragraph (C) of this Article in a manner acceptable to both Parties, they shall consult each other in accordance with Article X of this Agreement with a view to such modification of paragraph (C) of this Article as appears desirable.

Article VII

(A) The aeronautical authorities of both Contracting Parties shall exchange information as promptly as possible concerning the authorizations extended to their respective designated airlines to render service to, through and from the territory of the other Contracting Party. This will include copies of current certificates and authorizations for service on the specified air routes, together with amendments, exemption orders and authorized service patterns.

(B) Each Contracting Party shall cause its designated airlines to provide to the aeronautical authorities of the other Contracting Party, as long in advance as practicable, copies of time tables, tariff schedules and all other relevant information concerning the operation of the specified air services and of all modifications thereof.

(C) Each Contracting Party shall cause its designated airlines to provide to the aeronautical authorities of the other Contracting Party statistics relating to the traffic carried on their air services to, from or over the territory of the other Contracting Party showing the origin and destination of the traffic.

Article VIII

(A) Fuel, lubricating oils and spare parts introduced into or taken on board aircraft in the territory of one Contracting Party by, or on behalf of, the other Contracting Party or its designated airlines shall be accorded, with respect to customs duty, inspection fees or other charges imposed by the former Contracting Party, treatment not less favourable than that granted to its national airlines engaged in international public transport or to the airlines of the most favoured nation.

(B) Supplies of fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board aircraft of the designated airlines of one Contracting Party shall be exempt in the territory of the other Contracting Party from customs duties, inspection fees or similar duties or charges, even though such supplies be used by such aircraft on flights in that territory. Goods so exempted may only be unloaded with the approval of the Customs authorities of the other Contracting Party. These goods, which are to be re-exported, shall be kept in bond, until re-exportation under Customs supervision.

Article IX

Each Contracting Party reserves the right to itself to withhold, or revoke or impose such appropriate conditions as it may deem necessary with respect to, an operating permission in case of failure by a designated airline of the other Party to comply with the laws and regulations of the former Party, or in case, in the judgment of the former Party, there is a failure to fulfil the conditions under which the rights are granted in accordance with this Agreement. Such action shall be taken only after consultation between the Parties. In the event of action by one Party under this Article, the rights of the other Party under Article XI shall not be prejudiced.

Article X

(A) In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to ensuring the observance of the principles and the implementation of the provisions outlined in this Agreement.

(B) Either Contracting Party may at any time request consultation with

the other with a view to initiating any amendments of this Agreement which may be desirable. Such consultation shall begin within a period of sixty days from the date of the request. Any modification of this Agreement agreed to as a result of such consultation shall come into effect when it has been confirmed by an exchange of diplomatic notes.

(C) When the procedure for consultation provided for in Paragraph (B) of this Article has been initiated, either Contracting Party may at any time give notice to the other of its desire to terminate this Agreement as provided in Paragraph (E) of this Article. Such notice shall be simultaneously communicated to the International Civil Aviation Organization.

(D) Changes made by either Contracting Party in the specified air routes, except those which change (1) the final point of departure within its own territory and (2) the points served by the designated airlines in the territory of the other Contracting Party, shall not be considered as modifications of this Agreement. The aeronautical authorities of either Contracting Party may therefore proceed unilaterally to make such changes, provided, however, that notice of any change shall be given without delay to the aeronautical authorities of the other Contracting Party. If such latter aeronautical authorities find that, having regard to the principles set forth in Article IV of this Agreement, the interests of any of their airlines are prejudiced by the carriage by a designated airline of the first Contracting Party of traffic between the territory of the second Contracting Party and the new point in the territory of a third country, the latter Party may request consultation in accordance with the provisions of Paragraph (B) of this Article.

(E) This Agreement shall terminate one year after the date of receipt by the other Contracting Party of the notice to terminate, unless the notice is withdrawn by Agreement before the expiration of this period. In the absence of acknowledgment of receipt by the other Contracting Party notice shall be deemed to have been received fourteen days after the receipt of the notice by the International Civil Aviation Organization.

Article XI

(A) If any dispute arises between the Contracting Parties relating to the interpretation or application of the present Agreement, the Contracting Parties shall in the first place endeavour to settle it by negotiation between themselves.

(B) If the Contracting Parties fail to reach a settlement by negotiation,

(i) they may agree to refer the dispute for decision to an arbitral tribunal appointed by agreement between them or to some other person or body; or

(ii) if they do not so agree or if, having agreed to refer the dispute to an arbitral tribunal, they cannot reach agreement as to its composition, either Contracting Party may submit the dispute for decision to any tribunal competent to decide it which may hereafter be established within the International Civil Aviation Organization or, if there is no such tribunal, to the Council of the said Organization, or failing that, to the International Court of Justice.

(C) The Contracting Parties undertake to comply with any decision given under Paragraph (B) of this Article.

(D) If and so long as either Contracting Party or a Designated airline of either Contracting Party fails to comply with a decision given under Paragraph (B) of this Article, the other Contracting Party may limit, withhold or revoke any rights which it has granted by virtue of the present Agreement and its Annex.

Article XII

This Agreement shall come into force on the first day of July 1948. The Agreement and all relative contracts shall be registered with the International Civil Aviation Organization.

Article XIII

In the event of the conclusion of a multilateral convention or agreement concerning air transport to which both Contracting Parties adhere, this Agreement shall be modified to conform with the provisions of such convention or agreement.

Article XIV

(A) For the purpose of this Agreement the terms "territory", "air service", and "airline" shall have the meaning specified in the Convention on International Civil Aviation.

(B) The term "aeronautical authorities" shall mean, in the case of India, the Director General of Civil Aviation in India, and in the case of Pakistan, the Director General of Civil Aviation, Pakistan, and in both cases any person or body authorized to perform the functions presently exercised by the abovementioned authorities.

(C) The Annex to this Agreement shall be deemed to be part of the Agreement and all references to the "Agreement" shall include references to the "Annex", except where otherwise expressly provided.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

Done this 23rd day of June, 1948, in duplicate at Karachi in the English language.

For the Government of India: *(Signed)* SRI PRAKASA,
High Commissioner for India in Pakistan.

For the Government of Pakistan: *(Signed)* A. R. NISHTAR,
Minister for Communications.

ANNEX

1. An airline designated by the Government of India shall be entitled to operate air services in both directions on each of the routes specified in this paragraph and to land for traffic purposes in the territories of Pakistan at each of the points therein specified.

(1) Delhi and/or Jodhpur to Karachi.
(2) Delhi-Lahore.
(3) Bombay-Karachi.
(4) Ahmedabad and/or Bhuj-Karachi.
(5) Bhuj-Karachi.
(6) Calcutta-Dacca.
(7) Calcutta-Chittagong.
(8) Bombay or Delhi to Karachi and thence to Muscat, points in the Persian Gulf, points in Oman & Qatar Peninsulas, points in Iran, points in Iraq,

points in the Middle East and points in Europe including the United Kingdom, and, if desired, beyond.

(9) Bombay or Delhi, Karachi, Masirah, points in the Hadramaut, Aden and via intermediate points to *Dar es Salaam* and if desired beyond.

(10) Calcutta to Chittagong, points in Burma, Siam, Indo China and Hongkong to China and if desired beyond.

2. An airline designated by the Government of Pakistan shall be entitled to operate air services in both directions on each of the routes specified in this paragraph and to land for traffic purposes in the territories of India at each of the points therein specified.

(1) Karchi-Bombay.
(2) Karachi-Ahmedabad-Bombay.
(3) Karachi-Bombay-Colombo and if desired beyond.
(4) Karachi-Delhi-Calcutta-Dacca and/or to Chittagong.
(5) Karachi-Calcutta-Rangoon and if desired beyond.
(6) Karachi-Delhi.
(7) Lahore-Delhi.
(8) Dacca-Calcutta.
(9) Chittagong-Calcutta.

3. Points on any of the specified routes may, at the option of an airline designated by one Party be omitted on any or all flight(s), provided however that service(s) Nos. 8, 9 and 10 in paragraph 1 and service(s) Nos. 4 and 5 in paragraph 2 above shall not except with the consent of the other Party be operated otherwise than as through service(s) terminating beyond the territory of the other Party.

Annexure 2

W/T SIGNAL DATED 4 FEBRUARY 1966 FROM
D.G.C.A. INDIA TO D.G.C.A. PAKISTAN

DD OPKCYA
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.

VIDDYA.

W/T SIGNAL DATED 7 FEBRUARY 1966 FROM
D.G.C.A. PAKISTAN TO D.G.C.A. INDIA

DD VIDDYA
070945 (OPKCYA)
3/66/ATT-I. 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 in accordance with procedures existing before 1 August 1965. Accordingly we propose to resume overflight of Indian territory as per following schedule.

Sub para (A). PIA interwing schedule overflying India. Karachi/Dacca/Karachi services PK 720 dep Karachi Mon Fri 0630 arr Dacca 1050 PK 722 dep Karachi daily except Mon Fri 0930 arr Dacca 1350 PK 722A dep Karachi Mon Fri 1700 arr Dacca 2120 PK 702 dep Karachi Wed 0630 arr Dacca 1050 PK 708 dep Karachi Sat 0630 arr Dacca 1050 PK 721 dep Dacca Mon Fri 1910 arr Karachi 2135 PK 723 dep Dacca daily 2230 arr Karachi 0055 PK 705 dep Dacca Thu 0200 arr Karachi 0425 PK 711 dep Dacca Sun 0200 arr Karachi 0425. Dacca/Lahore/Dacca services PK 725 dep Dacca Mon Fri 1200 arr Lahore 1330 PK 733 dep Dacca daily except Mon Fri 1500 arr Lahore 1630 PK 726 dep Lahore Mon Fri 1430 arr Dacca 1800 PK 734 dep Lahore daily except Mon Fri 1730 arr Dacca 2100. Aircraft Boeing 720B.
Sub para (B) PIA Dacca/Kathmandu/Dacca schedule overflying India. PK 531 dep Dacca Mon Wed 0615 arr Kathmandu 0955 PK 532 dep Kathmandu Mon Wed 1100 arr Dacca 1505. Aircraft DC3. All timings local. Sub para (C). Both effective 0001 lt 10th February 66.
Para 2. Suggest scheduled flights between Pakistan and India by our airlines commences first March. Our schedule will be filed shortly. For this purpose PIA and IAC may get in touch for reopening their offices in India and Pakistan respectively. Will appreciate your assistance in the matter. Para 3. Please acknowledge and intimate overflight schedules of your airlines. Para 4. This disposes of your signal No. YA 054 date 040940.

W/T SIGNAL DATED 8 FEBRUARY 1966 FROM
D.G.C.A. INDIA ADDRESSED TO D.G.C.A. PAKISTAN
AND OTHERS

DD OPKCYA VIDDYH VIPAYD VIDDZI VIDDYA AHQ
VECCYD VECCZI VABBYH
VABBYD VABBZI VOMMYH VOMMYD VOMMZI
081505 VIDDYA.
YA 101. Part 3rd of three parts. IAC Dakota services Calcutta—
Agartala-Calcutta two services per day on Tuesdays, Thursdays and Saturdays.
Dep Calcutta 0710 arr Agartala 0840
Dep Agartala 0905 arr Calcutta 1035
Dep Calcutta 1120 arr Agartala 1250
Dep Agartala 1650 arr Calcutta 1745
All timings in lt.
PDRS for overflights of services FIR Karachi-Dacca-Karachi, Lahore-Dacca-Lahore and Dacca-Kathmandu-Dacca will be the same as on first August 1965 namely—

1. PDR-7 Karachi-Mandasaur-Jamshedpur-Calcutta.
2. PDR-1 Lahore-Bhatinda-Delhi then PDR-4 Lucknow-Gaya-Dhanbad then direct to Dacca.
3. Kathmandu-Simra-Patna-Gaya-Dhanbad and then direct to Dacca.

Regarding resumption of scheduled flights between Pakistan and India it raises questions not merely of inter-air lines importance such as restoration of property, staffing, etc., which would require clearance. We are taking up the matter with Government and will revert to you as soon as possible.
Kindly acknowledge.

W/T SIGNAL FROM D.G.C.A. PAKISTAN TO D.G.C.A.
INDIA ON 9 FEBRUARY 1966

DD VIDDYA
091127 OPKCYA
DCEA/ATS 27/65. Para one in accordance with agreement between our Governments all-routes and procedures which existed prior to first August were to be restored it is noted from your signal YA 010 T00 081505Z that PDRS 3, 4 and 5 for Karachi Dacca flights have not been mentioned.
Secondly your signal indicates that on Kathmandu Dacca route our aircraft will be required to fly via Calcutta. Previously the route was Dhanbad Dacca direct. Suggest necessary amendments are effected to confirm with agreement.
Para two your schedules have been noted. All former routes over Pakistan territory as existed prior to 1/8/1965 will be available to IAC and AII on a provisional basis. This will be subject to review in case you are unable to restore all former routes and procedure.
Para three to avoid confusion and ensure flight safety it's necessary that the boundaries control of air space and transfer of control points for Karachi Bombay FIRS in the West and Dacca Calcutta FIRS in the East should remain in force as existed on 1st August.

W/T SIGNAL DATED 9TH FEBRUARY 1966 FROM
D.G.C.A. INDIA TO D.G.C.A. PAKISTAN

NR 009
DD OPKCYA
091403 VIDDYA
YA 117. Ref yr Sig T00 091127. We have opened up PDR concerning yr overflights. Other PDRS are under active consideration. It is confirmed that route Dhanbad and Dacca is direct and not via Calcutta. Flights mentioned in our Sig T00 081505 will commence operating from 10th February as suggested in yr Sig T00 091127 on provisional basis.

W/T SIGNAL DATED 19TH FEBRUARY 1966 FROM
D.G.C.A. INDIA TO D.G.C.A. PAKISTAN

NR 18
DD OPKCYA
191321 VIDDYA
YA 260. Reference yr 3/66/at I T00 120935 and 120937. As we have informed you in our signal YA 101 T00 081505 resumption of flts raises questions not merely of inter air line importance such as restoration of property, staffing, etc. These matters will have to be resolved at inter Governmental level. We regret until then it will not (repeat) not be possible to resume services. In order to facilitate decision we repeat our proposal that DGCA's of India and Pakistan should meet to resolve various problems arising out of resumption. At appropriate stage two airlines could also meet as suggested by you earlier. Regarding routes NOTAMS have been issued and you must have received them.

Annexure 3

Government of India,
Ministry of Civil Aviation.

Dated New Delhi-2; the 6th September, 1965
15 Bhadra, 1887.

Notification

G.S.R. 1299 *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 (22 of 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.

[F.No. 21-A/11-65]

(Signed) V. SHANKAR,
Secretary to the Government of India.

Government of India
Ministry of Transport and Aviation
(Department of Aviation).

Dated New Delhi-2, the 10th February, 1966
21 Magha, 1887.

Notification

G.S.R. 239: *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 sub-section (1) of Section 6 of the Aircraft Act, 1934 (22 of 1934), 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".

[F.No. 21-A/4-66]

(Signed) V. SHANKAR,
Secretary to the Government of India.

(i) *Letter of transmittal forwarding the preliminary objections*

N. Sahgal

Secretary
Ministry of Tourism and Civil Aviation
Government of India
New Delhi.

No. Av. 13024/12/71-A(2) May 28, 1971.

The Secretary General,
International Civil Aviation Organization,
International Aviation Building,
1080, University Street,
Montreal 3, P.Q. Canada.

Sir,

I have the honour to refer to your letters Nos. LE 6/1 and LE 6/2 both dated 8th April, 1971 whereby the Government of India has been invited to present its Counter Memorials to an Application and a Complaint, both dated 3rd March, 1971, submitted by the Government of Pakistan under Articles 2 and 21 respectively of the Rules for the Settlement of Differences.

2. The Government of India, on a perusal of Pakistan's Application and Complaint and the Memorials and the Attachments thereto, find that Pakistan's Application and Complaint are not competent and not maintainable and that the Council has no jurisdiction to handle the matters presented by Pakistan. Accordingly, I have been directed by the Government of India to file herewith preliminary objections under Article 5 of the Rules for the Settlement of Differences to both the Application and the Complaint. These preliminary objections are set out in the enclosure to this letter.

3. Inasmuch as the contentions and submissions raised and the facts stated in these preliminary objections are common to both the Application and the Complaint, a single set of preliminary objections to both the Application and the Complaint, is filed in order to avoid repetition and duplication. However, an additional copy of this letter along with an additional copy of the enclosure is also forwarded herewith in case it is desired that there should be a separate set of preliminary objections—one in respect of the Application and another in respect of the Complaint.

4. Further, I have the honour to request that the Council may, in accordance with Article 5 (4) of the Rules for the Settlement of Differences, arrange a meeting so that the Counsel appointed by the Government of India may have the opportunity of personally explaining and elaborating to the Council the points which have been made in the preliminary objections, of presenting arguments in support of our submissions and also of leading evidence and placing material on record which would have a direct bearing on the validity and cogency of the preliminary objections. For this purpose, I may kindly be informed, as soon as possible, of the date of the meeting.

Accept, Sir, the assurances of our highest consideration.

(Signed) N. SAHGAL,
Secretary to the Government of India.

Encls.—*Preliminary Objections.*

(ii) *Letter of transmittal notifying the names of the Agent and the Chief Counsel*

N. Sahgal

Secretary
Ministry of Tourism and Civil Aviation
Government of India
New Delhi.

No. Av.13024/12/71-A(1) May 28, 1971.

To

The Secretary General,
International Civil Aviation Organization,
International Aviation Building,
1080, University Street,
Montreal 3, P.Q. Canada.

Subject: In regard to the Application and the Complaint both dated 3rd March, 1971, submitted by the Government of Pakistan against the Government of India to the International Civil Aviation Organization Council, under Articles 2 and 21 respectively of the Rules for the Settlement of Differences.

Sir,

I am directed by the Government of India to notify that His Excellency Shri Ashok B. Bhadkamkar, High Commissioner for India in Canada, is the Chief Agent of India in the above matter.

I am also directed to notify that Shri N. A. Palkhivala, Senior Advocate, Supreme Court of India is the Chief Counsel for India in the matter and that he will be assisted by—

1. Shri B. S. Gidwani, Deputy Director General of Civil Aviation. — Counsel
2. Dr. S. P. Jagota, Director (Legal and Treaties Division), Ministry of External Affairs. — Counsel
3. Shri Yeshwant S. Chitale, Advocate, Supreme Court of India. — Counsel
4. Shri I. R. Menon, A.C.O., Civil Aviation Department. — Assistant Counsel

Shri Narendra Singh, Joint Secretary, Ministry of External Affairs, will act as Adviser to the Counsel for India.

Accept, Sir, the assurances of our highest consideration.

(Signed) N. SAHGAL,
Secretary to the Government of India.

Annex D

REPLY OF THE GOVERNMENT OF PAKISTAN, DATED 5 JULY 1971, TO THE PRELIMINARY OBJECTIONS RAISED BY THE GOVERNMENT OF INDIA

Pakistan High Commission,
505, Wilbrod Street,
Ottawa 2 - Canada.
July 5, 1971.

No. P/4/1/70.

Subject: Pakistan and India—Application under Article 2 and Complaint under Article 21 of the Rules for the Settlement of Differences

My dear Secretary General,

I have the honour to refer to your letter of 3rd June 1971, enclosing therewith the copies of the letter of the Government of India No. AV.13024/12/71-A (2) dated 28th May 1971, and the Preliminary Objections filed by the Government of India. I am forwarding herewith the reply of the Government of Pakistan thereto. The duplicate thereof is being filed at Vienna by our Ambassador.

2. Further, I have the honour to inform you that at the next meeting of the Council to be held on 27th July 1971 at Montreal the Chief Counsel of the Government of Pakistan will be available for oral argument for explaining and elaborating to the Council the points involved, for presenting documents and relevant material in support of our submissions and, if necessary, for leading evidence.

Please accept, Mr. Secretary General, the assurances of my highest consideration.

(Signed) M. S. SHAIKH,
High Commissioner.

Mr. Assad Kotaite,
Secretary General, International
Civil Aviation Organization,
1080, University Street,
Montreal 101, PQ.

Encls.: *The Reply of the Goverment of Pakistan.*

REPLY OF THE GOVERNMENT OF PAKISTAN TO THE PRELIMINARY OBJECTIONS RAISED BY THE GOVERNMENT OF INDIA UNDER ARTICLE 5 OF THE RULES FOR THE SETTLEMENT OF DIFFERENCES

IN RE THE APPLICATION AND THE COMPLAINT BOTH DATED 3RD MARCH 1971, SUBMITTED BY THE GOVERNMENT OF PAKISTAN AGAINST THE GOVERNMENT OF INDIA TO THE INTERNATIONAL CIVIL AVIATION ORGANIZATION COUNCIL, UNDER ARTICLES 2 AND 21 RESPECTIVELY OF THE RULES FOR THE SETTLEMENT OF DIFFERENCES.

THE REPLY OF THE GOVERNMENT OF PAKISTAN TO THE PRELIMINARY OBJECTIONS FILED BY INDIA.

The Reply of the Government of Pakistan to the preliminary objections filed by India challenging the jurisdiction of the Council of the International Civil Aviation Organization to consider the Application/Complaint submitted by Pakistan is set out *ad seriatim* as follows.

Para. 1. It is a statement of fact and needs no comments.

Para. 2. The statement that Pakistan's Application and Complaint are not competent and not maintainable and that the Council has no jurisdiction is misconceived, incorrect and without any legal basis at all.

Para. 3. It is stated that in the guise of preliminary objections India has in fact dealt with the merits of the dispute.

Para. 4. The facts, events and circumstances given by India as background information are totally irrelevant and extraneous to the present dispute. They are political in nature and pertain to internal and domestic matters of Pakistan which cannot be raised in these proceedings. Further, it is stated that the malicious allegations made against Pakistan by way of background information are wholly unfounded and unwarranted. It is submitted that India has deliberately introduced these extraneous matters which are outside the purview of these proceedings to confuse the issues and to protract the proceedings.

BACKGROUND

Para. 5. The statement made by India is incorrect, irrelevant and has no bearing on the issue under reference. However, to set the record straight, it is necessary to state the correct position. The 1965 conflict was the direct result of Indian army crossing the international frontiers of Pakistan following a general uprising against military occupation by India of the State of Jammu and Kashmir. The hostilities were followed by the signing of the Tashkent Declaration by Pakistan and India. Consequently, the overflights as existing before the 1st of August 1965 were resumed in accordance with the terms of the Bilateral Agreement of 1948, the Convention and the Transit Agreement. However, because of India's refusal to implement the U.N. resolution relating to the exercise by the people of the State of Jammu and Kashmir of their right of self-determination and her persistence to settle outstanding disputes on her own terms, no understanding could be arrived at on other issues.

Para. 6. The allegations made in this para. are baseless and motivated by the desire to mislead the Council. Pakistan had no connection with and responsibility for the hijacking of the Indian aircraft by two nationals of Kashmir from

the airspace not of Pakistan but of a territory under military occupation of India. The Government of Pakistan has since initiated prosecution against the hijackers and their accomplices. The conduct of Pakistan in relation to the hijacking incident has been in conformity with the Tokyo Convention, 1963, the Hague Convention 1970, the I.C.A.O. and the U.N. resolutions on the subject and the practice of States in general.

Para. 7. The Indian version of the hijacking incident is a gross misrepresentation of facts. The correct position regarding this incident is as follows:

(a) On January 30, 1971, at 12.35 hours Indian Airlines F-27 (Reg. VT-DMA) Service ICC-422-A en route from Srinagar to Jammu, contacted Lahore Air Traffic Control Radio Telephone and informed that the aircraft was being hijacked to Lahore and would be landing in 10 minutes time. Immediately on receipt of this information, fire and security services were alerted by the Airport Manager.

(b) The Aircraft landed at Lahore airport at 12.45 hours local time. It was parked away from other aircraft with security and fire services standing by.

(c) Immediately on landing, the hijackers were requested to allow the passengers and the crew to disembark. This was not agreed to by the hijackers at first but after a lot of persuasion they agreed to let the crew and the passengers out at 14.32 hours local time.

(d) The passengers and the crew were immediately taken to the passenger lounge and subsequently transported to a hotel where arrangements for their accommodation, etc., had been made.

(e) The Director General, Civil Aviation of India was informed of the safe landing of the aircraft.

(f) The Captain of the Aircraft (Capt. G. H. Ubroi) was given clearance in writing by the Regional Controller of Civil Aviation, Lahore, that he could take off at any time he wished. The receipt of this communication was acknowledged in writing by the Captain.

(g) The Director General of Civil Aviation, India, requested permission for operating a relief flight to Lahore to transport the crew and the passengers of the hijacked aircraft back to India. The permission was immediately granted. However, before the proposed aircraft could take off from Delhi, law and order situation had deteriorated due to a large crowd having gathered at the Lahore airport. The Indian Director General of Civil Aviation was informed accordingly and advised that the relief flight should not take off for Lahore until further advice.

(h) Throughout this period one or both the hijackers remained on board the aircraft. Attempts by the Pakistan authorities to persuade them to release the plane made no headway as they refused to negotiate directly with the Government authorities. Consequently, the hijackers were allowed to contact some non-officials in the hope that they could persuade the hijackers to agree to release the aircraft. At no time hijackers came out of the plane at the same time. One of them invariably remained on board. Any attempt to disarm or arrest one would have surely blown up the aircraft as the two had threatened to do.

(i) It may be emphasised that at no time both the hijackers came off the aircraft at the same time.

(j) Throughout 30th and 31st January, 1971, negotiations continued with the hijackers in an effort to get the plane released.

(k) On February 1, 1971, the Director General, Civil Aviation, India, was advised by telephone that the law and order situation at Lahore airport was still unsatisfactory but was likely to improve by afternoon. Accordingly,

the Director General was requested to keep the relief aircraft in readiness to fly to Lahore at short notice. However, by mid-day the situation worsened and *in the interest of safety, it was thought inadvisable to ask the Indian aircraft* to leave for Lahore. Meanwhile, because of the tension prevailing in the area around Lahore airport the Pakistan authorities arranged to send the passengers and the crew to India by road under proper escort at 13.00 hours on February 1, 1971.

(l) On February 2, 1971, the Government of India announced that the demand for the release of 27 political prisoners in Indian occupied Kashmir made earlier by the hijackers as a pre-condition for the surrender of the plane, was not acceptable to India. At 20.00 hours on February 2, 1971, the hijackers blew up the aircraft. The hijackers received injuries in the process and were taken to hospital.

(m) Though Pakistan is not a signatory to the Tokyo Convention of 1963 and to the Convention for the Suppression of Unlawful Seizure of Aircraft of December 16, 1970, signed at The Hague, it condemns hijacking and is party to the U.N. Resolution 2645 (XXV) of 25 November, 1970, on aerial hijacking and to the Resolutions adopted by the 17th Session (Extraordinary), of the ICAO Assembly at Montreal in June 1970. In pursuance of the aforesaid Resolutions, Pakistan authorities not only arranged to return the passengers and the crew to India within 48 hours, but also tried all possible means to get the plane released from the hijackers for its return to India.

(n) The Government of Pakistan had deplored the act of the blowing up of the aircraft. The President of Pakistan constituted a Commission of Inquiry to inquire into the hijacking of the Indian aircraft, headed by a Senior High Court judge. The Commission examined a number of witnesses including the two hijackers. The Commission came to the conclusion that the hijacking could not have been put into execution at all without the active complicity, encouragement and assistance of the Indian Intelligence Service personnel and other Governmental authorities in the Indian held Kashmir. This was done with the object of seeking an excuse for disrupting air communication between the Eastern and the Western wings of Pakistan, to create tension between the various regions and political parties in Pakistan and to weaken Pakistan financially and to create a situation under which India could interfere actively in the internal affairs of Pakistan.

The conclusions of the Commission of Inquiry into the hijacking incident are annexed hereto (Annexure "A").

Para. 8. The allegations made by India are gross misrepresentation of facts and are motivated to confuse the issue. It is stated that immediately after the hijacking incident Pakistan took all measures to persuade the hijackers to allow the passengers and crew to disembark and to restore the aircraft to its lawful Commander. In this connection the Captain of the aircraft was given in writing by the Airport authorities that he could take off at any time. The facts regarding the hijacking incident as described in Paragraph 7 above are reiterated. Pakistan emphatically states that it took all possible measures to *restore the possession of the aircraft to its lawful Commander, provided all* the assistance possible under the circumstances to the passengers and the crew and to retrieve the cargo, baggage and mail as well as the aircraft but it could not be possible as any attempt to use force against the hijackers while they were in the aircraft would have lost all the hope in preserving the aircraft. The allegation that the conduct of Pakistan created an imminent danger to civil aviation is baseless and is emphatically denied.

Para. 9. The Government of Pakistan takes serious objection to the state-

ments made in this paragraph. The allegation is totally incorrect. It also pertains to a matter which is wholly an internal affair of Pakistan. It is clear that India has introduced this extraneous issue to justify the continuance of its illegal action of banning Pakistan aircraft overflying its territory. The stand of India that it is now inconceivable for it to fulfil its international obligations in respect of overflights is not only a clear defiance of international legal order but is a confirmation of its persistence in interfering in Pakistan's internal affairs. The resolution of the Indian Parliament to which a reference has been made is itself reflective of the attitude.

Para. 10. The statement is misconceived and has no legal basis at all. The so-called material facts are totally irrelevant to the dispute in issue. Pakistan maintains that the Council has jurisdiction to deal with the Application and Complaint presented by Pakistan. It is submitted that the Grounds I and II on which India has raised preliminary objections are misconceived, ill-founded and untenable and the following contentions and submissions, amongst others, are set out without prejudice to the stand of Pakistan.

GROUND I

Para. 11. The contention that there is no disagreement between Pakistan and India relating to the interpretation or application of the Convention or the Transit Agreement and that no action has been taken by India under the Transit Agreement is denied on the basis of the following submissions amongst others:

(a) There exists a disagreement between India and Pakistan relating to the interpretation or application of the Convention and the Transit Agreement and that India has taken action under the Transit Agreement which is causing injustice and hardship to Pakistan.

(b) A disagreement is a dispute on a point of law or fact, conflict of legal views or of interests between two parties. Pakistan maintains that India has violated its obligations under the Convention and the Transit Agreement in suspending Pakistan aircraft overflights across its territory and Pakistan has sought appropriate remedies including restoration of overflights and compensation. There has thus arisen a situation in which two parties clearly hold opposite views concerning the question of performance or non-performance of certain treaty obligations, and as to the remedies sought by one party, and as such, there exists a disagreement between the two States concerning the application and/or interpretation of the Convention and the Transit Agreement.

(c) It is well settled that a question relating to the breach of a treaty and remedies arising out of such breach, including compensation, is a question relating to its application. Since Pakistan's application to the Council is based on a breach of the Convention and the Transit Agreement, and a request has been made for an appropriate remedy, including compensation, the Council has therefore jurisdiction in the matter.

(d) The mere denial by India of the existence of a disagreement does not prove its non-existence. The fact that the claim of one party is opposed by the other is sufficient to make it a disagreement between the two parties relating to the interpretation or application of the Convention and the Transit Agreement.

Para. 12. The statement made by India that it has taken no action whatever under the Transit Agreement is misconceived and incorrect. Pakistan's complaint is maintainable under Section 1 of Article II of the Transit Agreement since the expression used therein "action by another contracting State" includes

an omission on the part of a contracting State to carry out its obligations under the Transit Agreement. It would be an absurd interpretation to hold that an action which causes hardship but is not a complete denial of rights under the Transit Agreement may be the subject of complaint but not an action which amounts to a clear denial of rights under the Transit Agreement. An interpretation which results in absurdity is not permissible in law. Therefore, the statement of India is misconceived and has no legal basis whatsoever.

Paras. 13 to 15. The statements are verbatim reproduction of some of the provisions of the Convention and the Transit Agreement and the Rules for the Settlement of Differences.

Para. 16. The statement needs nó comments.

Para. 17. The statement is hypothetical and general in nature and therefore does not need any comments. Pakistan maintains that no question has arisen between India and Pakistan regarding the termination or suspension of the Convention or the Transit Agreement. 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.

Para. 18. The statement made in this paragraph is misconceived and has no basis in law. It is stated that Article II of the Transit Agreement read with Article 1 (1) *(b)* of the Rules, permits an Application in case of any disagreement between two States relating to interpretation or application of the Transit Agreement. The language used in Article 84 of the Convention and Article II, Section 2 of the Transit Agreement is very comprehensive and covers disagreement of "any" nature relating to interpretation or application of the aforesaid Treaty.

Para. 19. The statement is ill-founded, incorrect and untenable. Assuming that a question exists regarding the 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.

Para. 20. The statement is incorrect and a misrepresentation of both facts and law. 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. Article 95 of the Convention and Article III of the Transit Agreement provide the procedure for denunciation which is one year's notice. This being the case, India cannot abrogate, or terminate or suspend the Convention and the Transit Agreement vis-à-vis Pakistan or any other contracting State through a procedure other than that prescribed in the multilateral Treaties. It is submitted that if the Indian contention is accepted, it would undermine the very basis for which the Convention and the Transit Agreement were concluded and any contracting State could defeat the procedure for settlement of disputes arising out of these treaties by purporting to repudiate its obligations unilaterally vis-à-vis other States.

In addition, after the hijacking incident, India has continued to act in relation to Pakistan on the basis of the Convention and the Transit Agreement. India is, therefore, stopped from taking the plea that the Convention and the Transit Agreement do not continue to be in force. In particular, both India and Pakistan have accepted to undertake bilateral negotiations in pursuance

of the Council's resolution of 8th April, 1971. This was reiterated in the Council's recommendation of 12th June, 1971.

Para. 21. The statement is misconceived and incorrect. India has introduced extraneous matters in order to confuse the issue. The statements made in paras. 17-18 above are reiterated.

Para. 22. The statement is a gross misrepresentation of fact and untenable in law. It is stated that Pakistan has not repudiated the Convention or Transit Agreement vis-à-vis India as alleged by India. The allegation that Pakistan's conduct amounts to repudiation of the Treaties is incorrect. India's allegations that Pakistan's conduct has militated against the objective of the Convention are incorrect. Pakistan has always adhered to and acted in accordance with the objectives of the Convention. It has also taken and continues to take all possible measures to ensure safety of civil aviation in its air space. This is substantiated by the fact that scheduled air services of 23 international airlines and other international non-scheduled flights operate to and across the territory of Pakistan with complete safety of operation on all the air routes over its territory.

Pakistan has not banned Indian aircraft from overflying Pakistan territory or make technical landings. These privileges and rights are available to India by virtue of the Convention, the Transit Agreement and the bilateral Agreement of 1948. If India is not willing to avail itself of these facilities that does not make the said privileges and rights theoretical.

Para. 23. The statement is erroneous in law and untenable. It is stated that the Convention and the Transit Agreement are in operation as between India and Pakistan. 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 these multilateral treaties. Therefore, the submission that India has terminated or in any event, suspended the Convention and the Transit Agreement vis-à-vis Pakistan is incorrect and has no legal basis. The statement made in para. 20 above is reiterated.

Para. 24. The statement is a misrepresentation of fact and law and therefore untenable. Pakistan aircraft overflying Indian territory and Indian aircraft overflying Pakistan territory is not a matter of reciprocity but of rights flowing from and based on the Convention and the Transit Agreement. The allegation against Pakistan that it has no regard for safety in civil aviation is motivated baseless and factually incorrect. Scheduled flights of nearly 23 airlines and other international non-scheduled flights operate into and across the territory of Pakistan with complete safety of operation on all the air routes over its territory. The Indian contention that it is impossible for Indian aircraft to overfly Pakistan is obviously an excuse to deny the right of Pakistan aircraft to overfly Indian territory. It is not correct to state that the Convention and the Transit Agreement vis-à-vis Pakistan stand terminated or suspended. Further, it is submitted that a disagreement regarding continuance in force of a Treaty is a disagreement regarding the application of the treaty. Indeed, it also involves a question of its interpretation. Therefore, the Council has jurisdiction to handle this dispute.

Paras. 25 and 26. In view of the foregoing, Pakistan submits that the Convention and the Transit Agreement are in force between the two States and India is under an obligation to carry out their provisions in good faith. By denying the right to Pakistan aircraft to overfly Indian territory, India is in breach of its international obligations arising out of the Convention and the Transit Agreement. It is submitted that Pakistan's Application is within the scope of Article 84 of the Convention, Article 11 (2) of the Transit Agreement and Article 1 (1) of the Rules, and within the jurisdiction of the Council under

those Articles. Likewise, Pakistan's Complaint is within the scope of Article II (I) of the Transit Agreement and Article 1 (2) of the Rules for the Settlement of Differences, and the Council has jurisdiction to deal with Pakistan's "Application" and "Complaint".

Para. 27. The statement made in this paragraph is misconceived and has no legal basis. The position explained in paragraph 13 above is reiterated.

GROUND II

Para. 28. The statement that the question of Indian aircraft overflying Pakistan, and Pakistan aircraft overflying India is governed by a "special régime" and not by the Convention or the Transit Agreement is erroneous in law and factually incorrect.

Both India and Pakistan are parties to the Convention and the Transit Agreement. Under Article I of the Transit Agreement, India has granted Pakistan the following freedoms in respect of scheduled international air services:

(i) The *privileges to fly across its territory without landing;*
(ii) The privileges to land for non-traffic purposes.

By virtue of the Convention, each contracting State agreed in the case of non-scheduled flights that there was a right to make flights into or in transit non-stop across each other's territory, and to make stops for non-traffic purposes without the necessity of obtaining prior permission, subject to the right to require landing. It is, therefore, submitted that the States which are parties to the Transit Agreement enjoy the first two freedoms of the air without the necessity of concluding any Bilateral Agreement and further, if they are parties to the Convention, they enjoy the right to overfly each other's territory in respect of non-scheduled flights without the existence of any Bilateral Agreement.

The purpose of Bilateral *Air Services Agreement is essentially to regulate* commercial air traffic between States, which matter is not governed by the Transit Agreement or the Convention. The Air Services Agreement between India and Pakistan of 1948 relates primarily to establishing commercial air services between India and Pakistan although it also reaffirms the two freedoms granted under the Transit Agreement. Therefore, it is submitted that even after the conclusion of the 1948 Bilateral Agreement, the Convention and the Transit Agreement continue to govern the rights of the parties.

Para. 29. The statement is misconceived and has no basis in law. In view of the foregoing it is submitted that the question of overflying or landing for non-traffic purpose as between India and Pakistan is governed by the Convention and the Transit Agreement and therefore the Application and the Complaint presented by Pakistan are competent and maintainable and the Council has jurisdiction to entertain or handle the matters presented therein.

Para. 30. The statement is erroneous in law and untenable. The Convention envisages that contracting States will enter into Bilateral Agreement in furtherance of the objectives of the Convention. Moreover, the Convention lays down in Article 82 a clear obligation that the Bilateral Agreements shall be consistent with the provisions of the Convention. Therefore, the jurisdiction conferred on the Council under Article XI of the Bilateral Agreement of 1948 to settle disputes arising between the two parties is not inconsistent with the provisions of the Convention and therefore, the Council has jurisdiction to settle the present dispute under the Bilateral Agreement of 1948.

Para. 31. The statement is incorrect and ill-founded. The Bilateral Agreement

of 1948 is in operation between India and Pakistan. After the armed conflict of 1965, steps were taken for the resumption of overflights in 1966 between the two countries in terms of Article VI of the Tashkent Declaration which called upon both the parties to take measures to implement "all existing agreements". Accordingly on 6th February 1966, the Prime Minister of India wrote to the President of Pakistan that "we would be agreeable to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1st of August 1965. Instructions are being issued to our civil and military authorities accordingly". In pusuance thereof the Director-General, Civil Aviation, India issued the signals in February 1966. It is thus clear that Indian Government agreed to resume overflights on the same basis as that prior to 1st August 1965, i.e., on the basis of the 1948 Bilateral Agreement, the Convention and the Transit Agreement.

Although the Bilateral Agreement of 1948 re-affirms the two freedoms granted by the Transit Agreement in respect of overflying each other's territory and making technical landings, that agreement is concurrent and not incompatible with the Transit Agreement in this respect. The Bilateral Agreement of 1948 did not intend to abrogate or suspend the operation of the Convention and the Transit Agreement as is manifest from its preamble. The Convention and the Transit Agreement are in operation between the two States. The Bilateral Agreement of 1948 also re-affirms the two freedoms granted by the Transit Agreement and does not supersede the Convention or Transit Agreement in any way. It is submitted that the Council has jurisdiction and is competent to deal with the dispute under the Convention or the Transit Agreement.

In any event, India is estopped by its conduct from asserting that the 1948 Bilateral Agreement, or for that matter the so-called special agreement of 1966 in any way supersedes the obligations under the Convention and the Transit Agreement and creates a "special régime" as between India and Pakistan. After the coming into force of 1948 Agreement, India continued to act vis-à-vis Pakistan on the basis of the Convention and the Transit Agreement. Similarly, even after the 6th of February, 1966, India continued to act vis-à-vis Pakistan on the basis of the Convention and the Transit Agreement.

Pakistan will at the hearing of the preliminary objection produce all relevant materials relating to India's conduct accepting the continued operation of the Convention and the Transit Agreement and the non-existence of any "special régime".

Para. 32. The statement needs no comments.

Para. 33. The allegations of India about "Special Agreement" and the general understanding of the two Governments in 1966 with regard to the resumption of overflights are incorrect and based on misconception of facts. The signals exchanged between the two countries on this subject clearly establish that the overflights were resumed as before and in implementation of the Agreement of 1948 and the Convention and the Transit Agreement. Thus it did not constitute any Special Agreement or general understanding or provisional basis as alleged by India. This is further borne out by the fact that in spite of the disputes mentioned by India in this paragraph remaining unresolved, aircraft of India and Pakistan continued to overfly each other's territory till 4th February 1966.

Para. 34. The statement is misconceived and baseless. It is stated that no separate agreement was concluded between India and Pakistan in 1966 which could be described as a Special Agreement creating a special régime replacing the Bilateral Agreement of 1948. As stated earlier, the Prime Minister of India in her message to the President of Pakistan on February 6th, 1966, indicated

their willingness to resume overflights immediately across each other's territory on the same basis as that prior to 1st August 1965. Therefore, the Indian contention regarding the so-called special régime is not correct. Further it is clear that Indian Prime Minister did not attach any pre-condition to the resumption of overflights. The statements made in paras. 31 and 33 above are reiterated.

Para. 35. The statement is incorrect and the factors introduced therein are extraneous to the issue involved and, therefore, outside the purview of the proceedings before the Council. Without prejudice to the above, it is stated for record that in spite of the best efforts of Pakistan, relations between the two countries have not improved because of India's refusal to resolve the basic cause of tension between the two countries, namely, the Kashmir dispute and its insistence to dictate its own terms in relation to other issues. On the other hand Pakistan has always been willing to settle peacefully all outstanding disputes with India through the accepted international procedure of negotiation, mediation and arbitration. It has also proposed the establishment of a self-executing machinery for the resolution of all outstanding disputes but the Government of India rejected it. Thus the Government of India for its own reason has shown no intention to normalize relations with Pakistan.

Para. 36. The statement is misconceived and a mis-representation of facts and law. The existence of the so-called special agreement is emphatically denied. It is a fiction of imagination. As earlier stated, after the 1965 armed conflict, overflights between two countries were resumed in terms of Article VI of the Tashkent Declaration which called upon the parties to implement all existing agreements. The statement made in paragraph 31 is reiterated.

Para. 37. The statement is misconceived and has no basis in law. The Bilateral Agreement of 1948 is in operation between India and Pakistan and the Council has jurisdiction to handle the dispute presented by Pakistan in accordance with Article XI of the Agreement. The statements made in paragraphs 30 and 31 above are reiterated.

Para. 38. The statement is denied. Pakistan emphatically maintains that the rights of Pakistan aircraft to overfly Indian territory flows not from the so-called "special agreement of 1966" but from the Convention and the Transit Agreement which continue to be in force as between Pakistan and India. The conduct of India vis-à-vis Pakistan after the 1965 armed conflict indicates that the Convention and the Transit Agreement continue to be in force as between India and Pakistan. These Treaties have not been in any way abrogated, terminated or suspended or superseded by any subsequent agreement between the two parties.

Since the right of Pakistan aircraft to overfly Indian territory and to make technical landings in its territory flows from the Convention and the Transit Agreement, these rights are continuous unless the treaties are denounced in the manner prescribed in the Treaties. Pakistan emphatically denies that India can refuse the rights accruing to Pakistan from the aforesaid Treaties and by the Bilateral Agreement of 1948. The resumption of overflights in 1966 is not incompatible with the Convention and the Transit Agreement and does not supersede these Treaties.

Further, if it is assumed that the 1948 Bilateral Air Services Agreement between India and Pakistan or the resumption of overflights in 1966 are in any manner inconsistent with the Convention, the latter, nevertheless prevails over the Bilateral Agreement of the so-called "special agreement" of 1966. It is a well-established principle of international law that when two States are parties to successive treaties relating to the same subject-matter that treaty shall prevail

which was intended by the parties to do so. Article 83 of the Convention, to which both India and Pakistan are parties, provides that contracting States may make arrangements through Bilateral Agreements not inconsistent with the provisions of the Convention. Article 82 of the Convention goes further and lays down an obligation on the contracting States not to undertake any obligations and understandings which are inconsistent with the Convention. It is therefore clear that India and Pakistan, being parties to the Convention have clearly expressed the intention that the Convention shall prevail over any subsequent Bilateral Agreement or understanding between them, in the event of any incompatibility or consistency. Consequently the Council has jurisdiction to deal with the matter.

Furthermore, neither Bilateral Agreement of 1948 between India and Pakistan, nor the so-called "special agreement" of 1966 are applicable in respect of non-scheduled flights. Rights and obligations of the parties in respect of non-scheduled flights are governed by Article 5 of the Convention which is the sole provision applicable to such flights. India's decision to suspend the overflights of all Pakistan aircraft is a ban applying also to non-scheduled flights of Pakistan aircraft. Since India is in breach of its obligations under Art. 5 of the Convention which continues to be in force as between Pakistan and India, the appropriate remedy lies with the Council and as such the Council has jurisdiction to hear the dispute.

Para. 39. The Government of Pakistan emphatically maintain that the Council has jurisdiction to deal with the Application and the Complaint of Pakistan, among others on the grounds aforesaid, it is stated that the preliminary objections filed by India are incompetent, not maintainable, mala fide and should be dismissed with costs because—

(a) there is a disagreement between Pakistan and India relating to the interpretation or application of the Convention or the Transit Agreement;

(b) India has taken action under the Transit Agreement which is causing injustice and hardship for Pakistan;

(c) the question of Pakistan's aircraft overflying Indian territory and making technical landings therein on its scheduled international air services is governed by the Transit Agreement as well as the Bilateral Agreement of 1948, likewise the question of Pakistan aircraft on non-scheduled flights overflying Indian territory and making technical landings therein is governed by the Convention;

(d) the Council has jurisdiction to entertain and decide any dispute regarding the interpretation and/or application of the Convention and the Transit Agreement and to make appropriate findings and recommendation under the Transit Agreement.

Annexure A

CONCLUSIONS OF COMMISSION OF INQUIRY INTO THE HIJACKING INCIDENT.

The President of Pakistan had constituted a Commission of Inquiry to inquire into the hijacking of the Indian civil aircraft to Pakistan which landed in Lahore on 30th January, 1971.

The Commission headed by Mr. Justice Noor-ul-Arfin, a Senior Judge of the High Court of Sind and Baluchistan, examined a number of witnesses, including Mohammad Ashraf Qureshi and Mohammad Hashim Qureshi, the two hijackers. The Commission also had before it the statements of the various leaders of India and the reports that had appeared in the Press, including the letter of Shaikh Mohammad Abdullah to Mr. Jaya Prakash Narayan published in the *Indian Express*, New Delhi of February 15, 1971 and the statement of Mr. G. M. Sadiq, Chief Minister of Indian-held Kashmir Government (hereinafter called IHK Government), as reported in the *Hindustan Times* of 3rd February 1971 (copies enclosed). The Commission unanimously came to the following conclusions:

(a) The circumstances of the hijacking of the Indian aircraft, are, firstly, to justify repressive measures in the face of widespread resentment and feeling of frustration amongst the people of IHK, arising out of policies pursued in the territory by the Government of India and the IHK régime, and, secondly, to create a situation whereby policies of the two wings of Pakistan could be spelt out differently by the majority leaders of two wings, thereby frustrating any possibility of understanding between them.

(b) (i) The persons directly responsible for the hijacking are:

Mohammad Hashim Qureshi, who is known agent of Indian Intelligence Services, and who held post of Sub-Inspector in the Indian Border Security Force and who visited Pakistan in 1969 as such agent, and was again put across the Cease-Fire Line in April, 1970, by the Intelligence Services of India, apparently to play the role of an agent provocateur, and his accomplice, Mohammad Ashraf Qureshi.

(ii) The Indian Intelligence Services, the Indian Border Security Force and other Governmental Authorities in the Indian-held Kashmir without whose active complicity, encouragement and assistance the plan for hijacking could not have been put into execution at all. It is probable that Mohammad Hashim Qureshi was even trained within India to hijack the aircraft, probably during his posting at the Srinagar Airport.

Maqbool Butt and his NLF do not appear to have made any significant or material contribution to hijacking except to fall in with the suggestion made to this effect by Mohammad Hashim Qureshi, and then, when hijacking occurred, to claim credit therefore.

(c) The motives behind the hijacking of the aircraft are these:

(i) The desire of the Indian political leaders to bring about a state of confrontation between India and Pakistan and to accentuate the tension between these two countries.

(ii) To take political advantage, for purpose of the mid-term general elec-

tions in India, of the anti-Pakistan sentiment prevailing in India, which purpose was given effect to by the various steps taken by the Govt. of India, such as the attack on Pakistani enclave in West Bengal and externment from India of Mr. Zafar Iqbal Rathore, First Secretary of the Pakistan High Commission in India.

(iii) To create justification for the repressive measures pursued by the Indian authorities in IHK territory, the arrest of political workers, the externment of Shaikh Abdullah and Mirza Afzal Baig from IHK, the imposition of ban on the Plebiscite Front and to otherwise bring discredit to the opposition parties in IHK territory, particularly to the movement led by Shaikh Abdullah and Mirza Afzal Baig and to the Plebiscite Front which organization was declared an unlawful association on 12th January, 1971.

(iv) To disrupt communications between East Pakistan and West Pakistan, and to dislocate the movement of people and supplies between these two wings.

(v) To create tension between the various regions and political parties in Pakistan, and

(vi) To weaken Pakistan financially to permit India to interfere actively in the internal affairs of Pakistan.

(d) Under the terms of reference the Commission has to report that Pakistan was in no way responsible for, or in any way connected with, the hijacking incident. As soon as the hijacked aircraft landed at the Lahore Airport, the Governmental authorities in Pakistan took every possible step to protect the members of the crew, the passengers and the aircraft. The passengers and the members of the crew were immediately removed from the aircraft to the airport lounge, where they were given lunch by the Pakistan International Airlines. They were then boarded and lodged in Hotel Ambassador, Lahore, until their departure on 1st February, 1971, for India through land route. The Governmental authorities in Pakistan extended every co-operation, assistance and facility to the Indian High Commission in Pakistan to remain in contact with the passengers and the members of the crew. Mr. Kapoor, the Attaché of the Indian High Commission, was even permitted to live with the passengers and the members of the crew in Hotel Ambassador. Further, the authorities in Pakistan took every possible step to protect the Indian aircraft. Immediate possession of the aircraft could not be taken for the following reasons:

(i) The hijackers were reported to be armed with a revolver and hand-grenade, which was discovered to be dummy weapons only after the destruction of the aircraft.

(ii) The news of the landing of the hijacked aircraft at the Lahore Airport spread quickly in the city of Lahore and very soon huge crowds collected at the Airport and continued to be there until the aircraft was set to fire by the hijackers. A serious law and order situation developed which necessitated resort to "Lathi Charge" and tear-gassing.

(iii) Notwithstanding this serious situation, the Governmental authorities took steps on the 2nd of February, 1971, to isolate the hijackers, so that conditions could be created which would permit taking possession of the aircraft. But as soon as the hijackers realised that the aircraft may be released to India, they destroyed it by setting fire thereto. Mohammad Hashim Qureshi, the principal hijacker, intended from the very beginning to destroy the aircraft at all costs, as he himself admitted in question before the Commission. The Governmental authorities in

Pakistan cannot, therefore, be fixed with any responsibility for this incident.

The two hijackers are in detention and will be dealt with in accordance with the law.

EXTRACT FROM SHAIKH ABDULLAH'S LETTER TO MR. JAYA PRAKASH NARAYAN, PUBLISHED IN THE INDIAN EXPRESS (NEW DELHI) OF 15.2.1971.

The recent unfortunate events in the sub-continent have further exacerbated the already strained relations between the two neighbours. The story, however, does not end with the hijacking and blowing up of the plane. The important question is on whom to fix the responsibility. The revelations, made since the incident, by the responsible quarters, have raised grave doubts in my mind and perhaps in the minds of many others, as to the veracity of the stories put out in regard to the agencies responsible for this act. Nevertheless, it has become abundantly clear that the chief hijacker was an employee of the Border Security Force. He had crossed over to Pakistan and reportedly got training in hijacking there, after re-crossing to this side of the ceasefire line, he was re-employed by the Security Force, and stationed on duty at the airport, ostensibly to keep watch on possible hijacking, as reported by the Press. The hijacker had told his employers the possibility of skyjacking, which information was communicated to the Kashmir Government by the agency under whose employ the hijacker was. The Kashmir Police wanted to interrogate the person, but according to the Chief Minister, Mr. Sadiq, the agency refused to identify him or surrender him to Kashmir Police for interrogation. Finally, the man with one of his accomplices, boards the plane with the full knowledge of the Border Security Force, and carries out his mission, forcing the plane to land at Lahore. His first act there was to contact the person who is reported to be the leader of the Kashmir Liberation Front, named Mohd. Maqbool Butt, now this Maqbool Butt was involved in some murder case in Kashmir and was tried and sentenced to death. (This happened in 1967 when I was in Kodaikanal and Shri D. P. Dhar, currently Indian Ambassador in Moscow, was in charge of Home Affairs in Kashmir.) But before the execution of the sentence, he mysteriously escaped from jail and crossed the border to Pakistan.

How he managed to escape the jail has uptil now remained a mystery. Regarding his enlisting the official assistance in the dramatic escape from the jail, it is being said that he was deliberately allowed to escape and cross over to Pakistan in order to use his services there for furtherance of the plans. The information about the possible hijacking of the Indian plane, had been with the Kashmir Government and Central Agencies since July, 1969, as reported. But the plan, meaningfully, unfolds itself only after our externment and banning of the Plebiscite Front.

THE HINDUSTAN TIMES—DELHI
DATED 3-2-1971

HIJACKER ON WHOSE PAY ROLL?

Hindustan Times Correspondent.

New Delhi, Feb. 2. The sharp differences between the Kashmir Government and the Centre over the internal security arrangements in the State have come

out in the open with the Chief Minister, Mr. G. M. Sadiq's allegation that hijacker Mohammad Hashim Qureshi had received protection from a Central Agency.

Greatly embarrassed by reports from Srinagar that Qureshi was a sub-inspector in the Border Security Force authoritative sources here today categorically denied that he had any connection with the Border Security Force.

It was stated that Qureshi had not been issued a BSF uniform and there was no question of his having been placed on security duty at the airport to check hijacking. Mr. Sadiq, however, told newsmen in Jammu today that Qureshi was the same person who had earlier reported on the possibility of hijacking of aircraft to Pakistan.

Damaging remarks: Perhaps, the most damaging statement by Mr. Sadiq was that the Kashmir Police had wanted to interrogate Qureshi but the Central Agency (he did not identify it) had refused them permission. He wanted to know how he came to be recruited to the Agency.

Authoritative sources here are keen to avoid a clash with the State Government on this issue. While denying Qureshi's links with BSF, they refused to identify him. They said that Qureshi had gone to Pakistan and had received intensive training in hijacking and other subversive activities. Both the hijackers Qureshi and Mohammad Ashraf were Indian National and residents of Kashmir.

It was also stated the hijacking had been organised by a Pakistan based "Liberation Front" with the complicity of the Pakistan Government. The Front was headed by one Maqbool Ahmad Butt, a Pakistani National, who had infiltrated into India in 1966, committed crimes like dacoity, house-breaking and murder and had been convicted and sentenced to death, but escaped from prison in 1968.

After that Butt had organised the Front with the objective of organising armed struggle within Kashmir. An emissary of the Front had come to India in July last and had prolonged discussions with the several senior Plebiscite Front leaders and plans for hijacking Indian aircrafts had been finalised at these meetings, it was stated.

Armed struggle: The London branch of the Front was headed by Mr. Tariq Abdullah, son of Sheikh Abdullah. A courier had been sent by the Front last year to find out why hijacking of aircraft had not taken place. These sources, however, refused to identify the courier who had met the Plebiscite Front leaders. The Front had trained people in guerrilla warfare and was supplying arms and ammunition to them.

According to the Kashmir Government, there is lack of co-ordination between the Central and State intelligence agencies with the result that many people of doubtful loyalty are getting access to sources of information. Obviously the Kashmir police had a dossier on the two hijackers. Within a few hours of the hijacking of the plane, it had established the identity of the hijackers and raided their houses in Srinagar.

This was corroborated by the hijacked passengers and crew of the aircraft on their return yesterday.

It is understood the Union Government had ordered a thorough screening of its intelligence machinery in Kashmir and discussions will soon be initiated with the State Government.

Annex E

MINUTES OF THE COUNCIL OF THE
INTERNATIONAL CIVIL AVIATION ORGANIZATION

(a) COUNCIL—SEVENTY-FOURTH SESSION

Minutes of the Second Meeting[1]

(The Council Chamber, Tuesday, 27 July 1971, at 1000 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi
Secretary: Dr. Assad Kotaite, Secretary General

Present:

Argentina	Com. R. Temporini
Australia	Dr. K. N. E. Bradfield
Belgium	Mr. A. X. Pirson
Brazil	Col. C. Pavan
Canada	Mr. J. E. Cole (Alt.)
Colombia	Major R. Charry
Czechoslovak Socialist Republic	Mr. Z. Svoboda
Federal Republic of Germany	Mr. H. S. Marzusch (Alt.)
France	Mr. M. Agésilas
India	Mr. Y. R. Malhotra
Indonesia	Mr. Karno Barkah
Italy	Dr. A. Cucci
Japan	Mr. H. Yamaguchi
Mexico	Mr. S. Alvear Lopez (Alt.)
Nigeria	Mr. E. A. Olaniyan
Norway	Mr. B. Grinde
Senegal	Mr. Y. Diallo
Spain	Lt. Col. J. Izquierdo
Tunisia	Mr. A. El Hicheri
Uganda	Mr. M. H. Mugizi (Alt.)
Union of Soviet Socialist Republics	Mr. A. F. Borisov
United Arab Republic	Mr. H. K. El Meleigy
United Kingdom	A/V/M J. B. Russell
United States	Mr. C. F. Butler

Also present:

Dr. J. Machado (Alt.)	Brazil
Mr. E. G. Lee (Alt.)	Canada
Mr. B. S. Gidwani (Alt.)	India
Mr. M. García Benito (Alt.)	Spain
Mr. N. V. Lindemere (Alt.)	U.K.
Mr. F. K. Willis (Alt.)	U.S.
Mr. N. A. Palkhivala (Chief Counsel)	India
Mr. Y. S. Chitale (Counsel)	India

[1] Reproduced from ICAO Doc. 8956-c/1001, C-Min. LXXIV/2 (closed).

Mr. I. R. Menon (Assistant Counsel)	India
Mr. S. S. Pirzada (Chief Counsel)	Pakistan
Mr. K. M. H. Darabu (Assistant Counsel)	Pakistan
Mr. A. A. Khan (Obs.)	Pakistan
Mr. H. Rashid (Obs.)	Pakistan
Mr. Magsood Khan (Obs.)	Pakistan
H.E. A. B. Bhadkamkar (Agent)	India
H.E. M. S. Shaikh (Agent)	Pakistan
Secretariat:	
Dr. G. F. Fitzgerald	Sr. Legal Officer
Mr. D. S. Bhatti	Legal Officer
Miss M. Bridge	CSO

SUBJECTS DISCUSSED AND ACTION TAKEN

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. As decided on 12 June, this was a meeting to hear the parties on the preliminary objection filed by India on Pakistan's application to the Council under Article 84 of the Convention and Article II, Section 2 of the International Air Services Transit Agreement ("Case No. 1") and its complaint under Article II, Section 1 of the Transit Agreement ("Case No. 2"). The spokesman for India was Mr. N. A. Palkhivala, the spokesman for Pakistan Mr. S. S. Pirzada, both acting in the capacity of Chief Counsel for their respective countries. The whole of the meeting was taken up with the presentation by Mr. Palkhivala of the preliminary objection in Case No. 1.

2. The preliminary objection was, in essence, that Pakistan's application was not competent and not maintainable and that the Council had no jurisdiction to handle the matters contained therein. Two main grounds for this contention were submitted.

3. The first ground was that there was no disagreement between India and Pakistan over the interpretation and application of the Convention and the Transit Agreement because these two instruments were inoperative between the two countries. India regarded the Convention—and with it the Transit Agreement, whose existence was dependent upon it—as suspended or terminated between herself and Pakistan by the latter's conduct, which, so far as India was concerned, was directly contrary to the Convention's basic purpose: promotion of the safe and orderly development of international civil aviation. Alternatively, the Convention and Transit Agreement could be considered as suspended or terminated between the two countries by India's action in suspending the flight of Pakistani aircraft over Indian territory, action India was entitled to take under two fundamental principles of general international law most recently confirmed by the International Court of Justice in its Advisory Opinion of 21 June 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa).*

4. The first of these principles was that it was the sovereign right of a State to terminate a treaty even if the treaty made no provision for termination; a State challenging the exercise of that right must be able to point to some specific provision of the treaty denying it, and there was no such provision in

the Convention or the Transit Agreement. The second principle, embodied in Article 60 of the Vienna Convention on the Law of Treaties, was that a material breach of a treaty by one of the parties—in other words, a repudiation of the treaty not sanctioned by the Vienna Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty—was grounds for a State specially affected by it to suspend the operation of the treaty in whole or in part in the relations between itself and the defaulting State. There could be a dispute between the defaulting and the affected State over whether the suspension was justified, but there was no provision in the Convention or Transit Agreement giving the ICAO Council jurisdiction to deal with that kind of dispute. As noted by the ICAO Assembly at its first session (Resolution A1-23), the power of the Council to act as an arbitral body was much more restricted under the Convention than it had been under the Interim Agreement, being limited to disagreements relating to the interpretation or application of the Convention and its Annexes. Moreover, the composition of the Council did not make it an appropriate forum for dealing with such complicated questions of fact and law as were involved in the present case. In this connection Mr. Palkhivala read into the record paragraphs 16 to 24 of the preliminary objection.

5. He then denied Pakistan's affirmation that Articles 54, 89 and 95 of the Convention made the Council competent to deal with the application. He argued that the relevant provisions of Article 54, *(j)* and *(k)* dealing with infractions of the Convention, were applicable only if the Convention was in operation between the State alleged to have committed an infraction and the State complaining about it. Article 89, which recognized the freedom of action of States in times of war or national emergency, was irrelevant to the present case, having nothing to do with the right of termination for material breach. Article 95, dealing with denunciation of the Convention, was also irrelevant; India had no wish to withdraw from the Convention, repudiating her obligations and privileges under that instrument vis-à-vis all Contracting States; she wanted only the suspension of its operation in relation to one State.

6. Mr. Palkhivala next dealt with three of the points in Pakistan's reply to the preliminary objection. He claimed that the first—that "application" included termination and suspension—was a clear misuse of the language and a reflection upon the competence of the drafters of the Convention; moreover, the International Court of Justice, in the *Namibia* case, had accepted the argument of the United States counsel that there were three distinct types of disagreements relating to international treaties: disagreements over interpretation, disagreements over application, and disagreements over termination. He declared that the second point—that India had applied the Convention and Transit Agreement between itself and Pakistan since the cessation of the 1965 hostilities—was incorrect: there had been no scheduled or non-scheduled air services between India and Pakistan since 1965; the right accorded by Article 5 of the Convention to make non-traffic stops had been completely denied; and overflights had been only by specific permission, which was directly contrary to Article 5; if Pakistan had a complaint, therefore, it should have been made in 1965. The third point—that there was no right to terminate an agreement unless the agreement provided for it—was contrary to the opinion of the International Court of Justice, which, incidentally, was an appellate tribunal in disputes referred to the Council under Article 84 of the Convention.

7. The second ground for the preliminary objection was that since 1965 overflights of Indian and Pakistani aircraft had been covered by a special

régime, not by the Convention and Transit Agreement. In support of this contention, Mr. Palkhivala read the two notifications annexed to the preliminary objection; the first, dated 6 September 1965, directed that no aircraft registered in Pakistan or belonging to or operated by the Government or nationals of that country should be flown over any portion of India; the second, dated 10 February 1966, after the Tashkent Declaration, amended this directive by adding "except with the permission of the Central Government and in accordance with the terms and conditions of such permission". There was no agreement to arbitration by the Council in the event of a disagreement arising under this special régime and therefore the Council had no jurisdiction in the matter brought before it by Pakistan.

8. Mr. Palkhivala had not completed his presentation at the luncheon break.

DISCUSSION

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. *The President:* The Council is in session. This is the second meeting of the 74th Session. Some Council members have modified their representation for today's meeting, so I will give an indication of how things stand. Canada is today represented by the two Alternates to Mr. Gourdeau—Mr. Cole and Mr. Lee. The United States has an Adviser, Mr. Willis. Uganda is represented by the Alternate to Mr. Wakida—Mr. Mugizi. In addition to the permanent Representative, Mr. Malhotra, and his Alternate, Mr. Gidwani, we have, as representatives of India, the Agent—His Excellency Mr. Bhadkamkar, and the Chief Counsel, Mr. Palkhivala, who is assisted by Mr. Chitale and Mr. Menon. For Pakistan we have the Agent—His Excellency Mr. M. S. Shaikh, the Chief Counsel—Mr. S. S. Pirzada, and, as assistant to Mr. Pirzada, Mr. Darabu. Pakistan as a State also has as representatives Mr. Aftab Ahmed Khan, Mr. Rashid and Mr. Magsood Khan.

2. It will be recalled that the Council had established the 11th of July 1971 as the date for the filing of the counter-memorials in Cases No. 1 and No. 2, India/Pakistan. Meanwhile, on the 1st of June 1971 preliminary objections were filed by India on Cases No. 1 and No. 2. On the 12th of June 1971, in Vienna, the Council decided that it would hold a meeting on the 27th of July, today, and more meetings, if necessary, in order to hear the parties on the preliminary objection. The Secretary General subsequently circulated a reply by Pakistan, in English under memorandum of 7th July and in French and Spanish under memorandum of 9th July.

3. We shall now go to the first point on the Order of Business, which is the hearing on Case No. 1, and I should mention that by error the reference documents have been listed in a somewhat mixed up order. If you follow the chronological order, the one that should have been listed first is the memorandum of the Secretary General dated 3 June 1971 circulating the preliminary objection of India. The others follow in the order in which they are listed now.

4. It is my intention to give an opportunity first to India to present its preliminary objection, then to give an opportunity to Pakistan to reply. If

other interventions by both parties are necessary, I hope they will be as brief as possible. After that, Council members will have an opportunity to participate, not yet getting into the deliberations on the merits of the case itself or on the preliminary objection, but putting questions for information purposes. After the questions and replies, the Council will have to decide if it wishes to proceed to the deliberations on whether or not it is competent. So I will now invite India to present the preliminary objection on Case 1.

5. *Mr. Palkhivala:* Mr. President and honourable members, I shall first deal with Case No. 1 filed by Pakistan against India. That Case represents an application made under Article 84 of the Chicago Convention, the Convention on International Civil Aviation of 1944, which for brevity's sake I shall call "the Convention" in the course of my argument. The same application is also made under Article II, Section 2, of the International Air Services Transit Agreement of 1944, which I shall call hereafter "the Transit Agreement". The second case, which represents a complaint filed under Article II, Section 1 of the Transit Agreement, I shall deal with separately after I have finished with the first one.

6. Now, Sir, the preliminary objection is twofold and the first one rests on the proposition that any dispute arising out of termination or suspension of an international treaty, of the Convention or of the Transit Agreement, cannot be the subject-matter of proceedings before this honourable body. It is this proposition that I shall try to make good, first in the light of the express, and I would say explicit, provisions of the Convention and the Transit Agreement on this question and second by reference to the latest ruling of the International Court of Justice.

7. Mr. President, I think it would not be inappropriate to start with this: disputes between nations pertaining to the Convention or the Transit Agreement may arise in one of four ways. First, it may be a dispute as to interpretation of the treaty; second, it may be a dispute as to application of the treaty; third, it may be a dispute arising from action taken under the treaty; fourth, it may be a dispute pertaining to termination or suspension of the treaty by one State as against another. If I may for the sake of brevity call them cases of interpretation, application, action and termination, these four cases perhaps cover the normal gamut of international disputes and it is most important to note that under the terms of the Convention only the first two types of dispute can come before this honourable Council. As far as the Transit Agreement is concerned, the first three types of disputes can come before the Council. Therefore two disputes in the case of the Convention, three types of disputes in the case of the Transit Agreement, but in neither case can the fourth type, which is concerned with termination, come before this honourable Council. This is the crux of the case and I would appreciate the honourable members bearing in mind the clear distinction which the words of the English language convey to anyone familiar with the language. I am sure the distinction must be equally well brought out in the translations of these treaties, which are also authoritative texts.

8. If the honourable members have a copy of the Convention, may I request them to be kind enough to refer to Article 84 to see what are the words of this Article, which is the only Article conferring jurisdiction on this Council. The words of Article 84 are:

> "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."

May I, with your leave, Mr. President, emphasize the opening words of this Article—"any disagreement between two or more Contracting States relating to the interpretation or application of this Convention". If the disagreement pertains not to interpretation or application—the two types of disputes which are covered by the terms of the Article—but is a dispute of a third category which is not covered by the words "interpretation or application", this honourable Council would have no jurisdiction to deal with it.

9. Now one thing that is at the very basis of Article 84 is the continued existence, the continued efficacy, the continued operation, of the Convention as between two States. If two States agree that the Convention continues as between them—because every multilateral treaty is at the same time a treaty between any two of the many States parties to it—and if a dispute arises between them, it would be possible to say that it is a disagreement as to interpretation or application. In other words, the concept of interpretation as well as the concept of application contemplates and postulates the continued operational existence of the agreement. If it continues to be in operation between two States, you can interpret it, and if there is a disagreement as to interpretation, the Council will decide. If the Convention continues to be in operation between two States, any disagreement about how you apply it to existing facts can again be determined by the Council.

10. However, if one State, as a result of the conduct or misconduct of the other State, has chosen to terminate or treat as terminated this Convention vis-à-vis the wrongdoing State, then this is a dispute as to termination of the Convention by State A as against State B, and such a dispute cannot be considered by anyone familiar with the English language as a dispute as to interpretation or application, because in that case there is nothing to interpret; there is nothing to apply. You do not have in operation between the two States a convention that you can possibly interpret or apply. May I request the honourable members to bear in mind—and my proposition I shall make good by reference to the opinion of the World Court—that this power to terminate a convention or an international treaty is a power which is dehors the convention or the treaty. It is outside the convention or the treaty and it is a sovereign power which can be exercised by a State. Perhaps a State may wrongly exercise the power of terminating an international treaty. If it does so, and if there is an appropriate forum to which you can go in order to get redress, that forum may decide the matter, but my limited purpose is to show that whether another forum exists or not, which is not the subject-matter here, this honourable Council is not the forum before which any State can bring the case that another State has terminated the agreement and, in the view of the complaining State, wrongly done so. This kind of dispute is a dispute as to termination, and when I come to a very important answer which the representative of the United States gave to the World Court in the South Africa case to which I will refer, you will find that the United States itself, in a very clear and unequivocal answer, made the submission I am making here:

that the power to terminate an agreement is a distinct, separate power, unconnected with the question of application or interpretation.

11. May I request the honourable members to consider how these words apply in practice. There may be some words in the Convention which are ambiguous, capable of two meanings, at least in the view of one State. That State may tell another State "I do not interpret the words this way. My interpretation is 'X', your interpretation is 'Y'.", and if the parties do not agree as to what is the right interpretation, this Council would decide what that interpretation is. This is the meaning of "disagreement as to interpretation".

12. Now between India and Pakistan there is no such dispute at all. It is India's case, and in fact it is Pakistan's case, that India has terminated this agreement. It is true that in the final reply Pakistan says "No, it is a case of interpretation or application, which is a matter of legal submission.", but it is categorically India's case that by Pakistan's misconduct—I am using the word "misconduct" in the legal sense, and though the facts are not really relevant for this preliminary submission, I shall deal with them very briefly in a few minutes after I have finished the legal submission—the Convention has been terminated by Pakistan *qua* India. Alternatively, if you were to hold that Pakistan has not terminated the Convention *qua* India, India has terminated, or in any event suspended, the Convention *qua* Pakistan. Whether we have done so rightly or wrongly is a dispute pertaining to the termination of the agreement; it is not a case of interpretation or application. If this is the real dispute between India and Pakistan, there can be no question of interpretation. We are not interpreting any article of the Convention at all. There is no word of the Convention which is in dispute between India and Pakistan, India's case being that this Convention stands terminated as between India and Pakistan.

13. If you will now look at the word "application", as I read the English language it means the way you apply the provisions of this particular Convention to an existing set of facts. So long as this Convention continues in operation, there may arise between two States a question about how a particular provision should be applied to an existing set of facts. Now you cannot possibly apply the Convention unless it is in operation. Application logically must presuppose that the Convention is in operation. If it is in operation the question is how do you apply it to an existing set of facts. If one State says "I apply it this way.", and another State says "I apply it another way.", that would be a disagreement as to application. To give you one simple example, under Article 5 aircraft of one State not engaged in scheduled international air services have the right to fly into or non-stop across another State's territory or to make stops for non-traffic purposes.

14. Now in relation to an existing set of facts a dispute may arise over whether a particular country wants to make a non-traffic stop or not, whether a particular country is overflying non-stop across the territory or is claiming some higher right. Then there are various other provisions about search of aircraft, airport and similar charges, prevention of disease, etc. In relation to a particular set of facts this difficult question of fact or law may arise: "Are these provisions being correctly applied by one State or wrongly applied by one State?" These are disputes as to application of the Convention to an existing set of facts and since the Convention has more than 90 articles, you can well imagine a number of questions which could arise in applying it to an existing set of facts. The word "application" therefore presupposes the existence, the operation, the efficacy of the Convention as between two States. But if you do not have that and you have the question of termination—I am not

troubling the honourable members today with whether termination by India, or termination by Pakistan as we say it was, was rightful or wrongful; if there was an appropriate forum, we have no doubt that we would be able to prove to the hilt that, assuming the termination was by India, *it was rightful—but I* am requesting them to accept the submission, which is well founded in law, that since the dispute pertains to termination, it cannot possibly be treated as a case of interpretation or application.

15. In this connection may I request you, having seen that under Article 84 of the Convention only two types of disputes can possibly come to the honourable Council, disputes as to interpretation and disputes as to application, to turn to the Rules for the Settlement of Differences approved by the Council in April 1957. I shall refer to them hereafter as "the Rules". If you turn to Article 1, you will see how very precisely even the Rules for the Settlement of Differences are restricted to two types of differences—differences as to interpretation and differences as to application.

> "*Article 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."

I shall stop here because the rest of the Rule deals with something else. Then there is a sub-clause *(b)* which says that these Rules apply to only two types of disputes, disagreement as to interpretation and disagreement as to application. The rest of the Rules will not come into operation unless this first condition is satisfied, namely that the dispute falls within the ambit of Article 1, Clause 1 *(a)*, of these Rules.

16. I have finished showing that under the Convention only two types of disputes can go to the Council. May I now turn to the Transit Agreement to show that three types of disputes can go to the Council: first a dispute as to interpretation, second a dispute as to application and third a dispute arising from action taken under the Transit Agreement. You will note that so far as the Convention is concerned, unless the disagreement relates to interpretation or application it cannot come before the Council, but action taken under the Transit Agreement is separately dealt with as a matter that can go before the Council. In this connection may I request the honourable members to turn to *the Transit Agreement of December 1944, Article II, Section 2.* It is couched in words identical to those used in the Convention:

> "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."

The words are "interpretation or application".

17. Now the third type of dispute which can go to the Council is dealt with in Section 1 of the same Article II:

> "A contracting State which deems that action by another contracting State under this Agreement"—mark the words "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."

I need not read the rest. I am referring to this provision now only with a view to giving a comprehensive picture of the limits of the jurisdiction of this honourable Council. I shall refer to it in more detail when I come to the second case, the complaint of Pakistan. What I am emphasizing at the moment is that Article II, Section 1 refers to a third type of disagreement or dispute which can arise between States, pertaining to action taken under the Transit Agreement. Now the words "action taken under this Agreement" harmonize with the interpretation I have already put on the words "application or interpretation". These three categories of dispute all postulate the continued operation of the Agreement. Thus you have questions of interpretation, application and action under the Agreement.

18. You have seen that the fourth type of dispute pertaining to termination is nowhere made subject to this honourable Council's jurisdiction. Even in the Rules which deal with the Transit Agreement, you will find that the Council's jurisdiction is restricted to cases of interpretation, application and action under the Agreement. Of course, the Rules could not possibly confer a jurisdiction not conferred by the Convention or by the Transit Agreement. No such jurisdiction is conferred in case of termination by the Convention or the Transit Agreement and I am only fortifying my argument by reference to the Rules, which are within the framework of the Convention and the Transit Agreement and in the latter case expressly limit the tribunal's jurisdiction to these three types of disputes.

19. In order to prove that, may I request you to turn to that part of the Rules which deals with the Transit Agreement as distinct from the Convention. It is Article I, Clause 1 *(b)*, which talks of two types of disputes: "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')." The third type of dispute under the Transit Agreement is dealt with by the same Article 1, Clause 2: "The Rules of Parts II and III shall govern the consideration of any complaint regarding"—now mark the words—"an action taken by a State party to the Transit Agreement and under that Agreement". Two conditions have to be fulfilled. First, action must be taken by a State party to the Transit Agreement and, second, it must be action under the Agreement. This part of Article I of the Rules is exhaustive of the jurisdiction of the Tribunal to deal with cases arising under the Transit Agreement.

20. Now I come to this very important question of international law, which, fortunately for me, has been settled by the latest pronouncement of the *International Court of Justice*. May I first briefly explain to the honourable members in my own simple words what this principle is and then read the judgment of the World Court on that issue. After I have made my submissions the honourable members will see that what I am about to say is completely borne out by the judgment of the International Court of Justice. The principle of international law is this—when two or more States enter into a treaty the power to terminate it does not have to be conferred by the treaty itself. The right to terminate a treaty is inherent in a sovereign State. You may have an international forum before which the State wronged by the wrongful termination of the treaty by another State can go, or you may have

no such international forum, but the essential point is that this right to terminate a treaty is a principle of international law, which is not to be regarded as absent because the convention or treaty does not expressly confer the power of termination. In other words, the power to terminate the treaty does not have to be conferred by the treaty itself. It is dehors the treaty. It is outside the treaty. Its source is customary international law—I am using the words of the International Court of Justice. If any State says there is no such power to terminate the treaty, that State must be able to point to an express provision in the treaty which says that the States parties to this treaty shall have no power to terminate it at any time or shall have the power to terminate it only in certain ways. In other words, the power exists dehors the treaty and it can only be taken away by express words of the treaty and no other way. Now there are no express words of the Convention or of the Transit Agreement which at all affect prejudicially, at all take away or abridge, the sovereign right of a State to terminate the treaty.

21. 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." The other State has the right to terminate the treaty itself on the ground that the wrong-doing State cannot get away with the fruits of its wrong; if you have committed a breach of your part of the treaty, I am entitled to terminate the treaty. This is the international law.

22. Now a very difficult, sometimes very complicated, question will arise: Has the State which has purported to exercise the right to terminate the treaty done so for good grounds or bad grounds? The important point is that whether the right of terminating the Treaty has been exercised on good grounds or bad grounds can only be determined by the forum which has the right to decide the dispute pertaining to the termination. Such a forum is not this honourable Council. There may or may not be other forums, and in fact this was the whole case of South Africa. South Africa argued like this: we were given this mandate over Namibia by the United Nations; this mandate is an international treaty—the World Court accepted that position—and under this international treaty there is no right to terminate the mandate. The International Court of Justice ruled that there was a right to terminate the mandate and that it had in fact been terminated on justifiable grounds, because South Africa had committed a breach of its obligations under the treaty or mandate.

23. When you have this situation where the treaty itself has no provision for termination, the World Court says that the power to terminate is outside the treaty. Now may I ask you to consider whether there can be any flaw in this logic: if this power to terminate an international treaty is outside the treaty, is not to be found in the treaty itself, it must follow that a question as to termination cannot be a question as to application or interpretation of the treaty, because application means that you are trying to apply the terms of an existing treaty and interpretation means that you are trying to construe the terms of the treaty. If a State has chosen to exercise a power which is outside the treaty, it is incomprehensible to a logical mind that its action can be a case of application or interpretation. The Counsel for the United States, who strongly argued and argued in memorable words, if I may say so, put this point clearly beyond doubt and the World Court accepted it. He argued that there are three distinct types of cases, cases of interpretation, cases of application and cases of termination. He made cases of termination a third category and the World Court accepted that view.

24. The submission of South Africa that as there was no provision for termination the mandate could not be terminated was rejected. May I refer you to the Reports of Judgments of the International Court of Justice, 1971, the opinion given on 21st June 1971. I shall read slowly, because honourable members do not have the book before them. The heading of the opinion is "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)." May I refer you to pages 46-49 of this volume of the Reports. I shall read slowly in order that the very important words of the judgment may not be lost sight of. I am reading from page 46, 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." In other words, if one State does wrong and makes civil aviation impossible for me—I am not going into facts because this is not the forum where the facts can be gone into, but assume hypothetically that a State has acted in such a way that my overflying that State's territory is unsafe—that destroys the very objective, the very purpose, of the Convention and the Transit Agreement. If because of that I terminate the agreement, I have terminated it rightfully. Suppose I get panicky and hastily jump to the conclusion—I will assume wrongly jump to the conclusion—that my overflying the territory of the other State is unsafe. Suppose that the view I have taken is an unduly apprehensive one and the correct view should be that it is all right for me, it is safe enough for me, to overfly, then I have wrongfully terminated the agreement. But whether I have terminated it rightfully or wrongfully is a dispute as to termination. That is the important point. Honourable members may kindly note that I am not trying to shirk the issue whether my termination was rightful or wrongful. I say it was perfectly rightful, but it is necessary to lay down the correct law as to the limits of the honourable Council's jurisdiction. Therefore without having any apprehension in my mind as to whether on merits I would succeed or not—I have no apprehension whatever; we are confident that we would be able to establish to the hilt that our termination was rightful if it becomes necessary to do so—but assume it was wrongful, it is still not a case of application or interpretation of the agreement.

25. This is what the World Court says in paragraph 94. If I may give this background, the General Assembly of the United Nations had passed a resolution saying that on account of certain facts it considered that South Africa was unfit to continue the mandate over Namibia. This is what the World Court says in paragraph 94 on page 45: "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 ..." I will omit the next part which deals with the point, which is not relevant for our purpose, that the mandate amounted to an international treaty. Now this is what it goes on to say: "The Court stated conclusively in that Judgment"—the judgment of 1962—"that the Mandate '... in fact and in law, is an international agreement having the character of a treaty or convention'."—I am now reading the very important words of the Judgment—"The rules laid down by the Vienna Convention on the Law of Treaties"—this is the Convention of 1969—"concerning termination of a treaty relationship on account of breach by another State (adopted without a dissenting vote) may in many respects be considered as a codification of

existing customary law on the subject." In other words, the World Court 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, 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."

26. What I am emphasizing in this pronouncement of the World Court is that it is a rule of customary international law that one State can terminate a treaty if another State has committed a breach, and this power of termination is not to be found in the treaty itself; it is outside the treaty; it is founded in customary international law. This is made clear by paragraph 95, of which the material sentence is this: "The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in the case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship."

27. Now the General Assembly of the United Nations and the World Court have the jurisdiction to deal with the question of termination of a treaty. The United Nations can deal with that question between two nations. The World Court can deal with it. This honourable Council does not have the right under its charter to deal with the question of termination. This is the important point. The World Court went into the facts because it was within its jurisdiction, but this larger jurisdiction to deal with questions of termination, rightly or wrongly, is not conferred on this honourable Council. I shall now read the next paragraph which is equally important, paragraph 96 on page 47. *Here the World Court is dealing with the argument of South Africa* that because there is no provision in the mandate for terminating the mandate the United Nations had no right to terminate it. These are very pregnant words and I submit that they apply directly to our case and have tremendous significance for it. The words are these: "The silence of a treaty as to the existence of such a right"—the right to terminate the treaty—"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." In other words, the mere fact that an international treaty like the Convention or the Transit Agreement is silent as to the right of a State to terminate does not mean that there is no such right. Such a right is outside the treaty and is founded on general international law.

28. Now it is the exercise of this right outside the treaty which is not to be brought before the Council. This honourable Council is concerned with the interpretation of the treaty, action taken under the treaty, application of the treaty to existing facts. Anything outside the treaty is outside the jurisdiction of this honourable Council. I think the position is fairly simple. Of course my knowledge is limited, but I am not aware of any case where this particular point has been over-ruled by the Council, namely that though a treaty has been terminated, we still take upon ourselves jurisdiction to deal with it. On the contrary, the very first meeting of the ICAO Assembly expressly drew attention of the learned members of the Council to the fact that its jurisdiction is extremely limited. You can deal with any disputes—the word is "any"—but they must pertain to interpretation or application. As soon as you come to action outside the treaty, and termination according to the World Court is outside the treaty, it would be outside the jurisdiction of the Council.

29. May I read again the last sentence of paragraph 98 on page 48. Perhaps I had better read the whole paragraph because otherwise you will not get the connecting link. "President Wilson's proposed draft"—this was the original 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' ... 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." Although the power to terminate a contract is unexpressed, it must be presumed to exist in every agreement. Otherwise it would be impossible for sovereign States to enter into treaties—a State would be most reluctant. Why are so many States signatories to treaties? —because they know if the time came when, because of the misconduct of another State, they had to terminate the treaty, they would be entitled to do so. If a State was to be tied hand and foot and even for good reasons could not terminate a treaty, no State would be willing to enter into a treaty. It is open to the Convention, or to the Transit Agreement, to provide that a particular forum shall be appointed to go into the question whether termination of the Convention or Transit Agreement is proper or improper, wrongful or rightful, but there is no such provision. If there was such a provision we would go to that forum.

30. I have finished with the judgment of the World Court. Now let me read to you a very interesting answer given by the Counsel for the United States to a question put by Sir Gerald Fitzmaurice, one of the judges who sat on the bench when the Court delivered the judgment from which I have quoted.

> "Question: It has been maintained"—this is what the Judge puts to the Counsel for the United States—"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?"

It is a very relevant question, honourable members will see. What the learned Judge asked the United States Counsel is this: "If you, Mr. Counsel, are right in your submission that if the breach is committed by one State the other State can put an end to the contract, look at the consequences. The consequences will be that any State which finds an agreement or treaty inconvenient or burdensome could say 'Well, you have committed a breach and I put an end to it'."

31. Now that is the law. The United States said it is the law and that argument was accepted by the World Court. The United States Counsel himself points out the remedy. He says that the remedy lies in making an express provision in the treaty to the effect that in the event of termination a particu-

lar forum will decide whether the termination was rightful or wrongful. If one State should try to take undue advantage of another and wrongfully put an end to the treaty, this forum would decide that the termination was wrongful and redress would be given. The United States points out that the remedy is to provide a forum where you can go, a forum which will deal with questions of termination as distinct from questions of interpretation or application. This is the answer which the United States Counsel gave. I will read his exact answer. It is on page 23 of the proceedings in this case before the World Court.

> "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."—under ordinary contracts, if one party commits a breach the other can treat the contract as terminated and the US Counsel says that the same doctrine has been imported into international law—"Obviously not every breach of a contract would justify the other party in 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'." Now mark the important words—I am reading his exact words—"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 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 international 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."

This is beautifully expressed and I would like to emphasize these words. I am reading them because this submission of the US Counsel was accepted *in toto* by the World Court. What the Counsel is pointing out is this: if A and B are two parties to a contract, a simple municipal contract relating to sale of goods, and A says that B has committed a breach of the contract, he can treat the contract as terminated, nobody can challenge the validity of his action. If he is dishonest and dishonestly terminates the contract by wrongly alleging a breach by the other party, there is a civil court to which B can go. In civil law there is in every country a municipal court. What the United States Counsel points out is that that may not be so in international law.

32. In international law there is not always a forum before which you can go. There may be no forum which can be entrusted with the jurisdiction to deal with questions of termination because unless parties agree on a forum there is no such forum. Here, for example, the parties have not agreed to any forum under the Convention or under the Transit Agreement. The parties have not agreed to any forum to decide questions of termination. The United States Counsel points out that in such a case there may be no remedy, but if there is no remedy, this is, if I may read his words again, "a problem relating to the efficacy of international law". It is not something which casts any doubt on the validity of the doctrine of termination for material breach by the other party. In other words, all that you are saying is that when under international

law there is no forum, it does not mean that the right to terminate does not exist. "The best safeguard"—these are again very significant words—"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"—now mark the words—"which relate to interpretation, application and termination of international agreements." The Counsel, whoever he was, was using his words with great care and he says that the remedy lies in having an international tribunal which can deal with three types of disputes—interpretation, application and termination. Two of these types are reflected in our Convention; the third one is not. The Counsel points out—and this is the argument the World Court accepted—that in this case you may have no forum; it is a pity, but unless there is a forum expressly constituted to deal with termination, it is an international wrong which goes without remedy or redress. I am emphasizing all this with a view to showing the limits of this honourable Council's jurisdiction.

33. Before I close this chapter, may I refer you to Resolution A1-23, adopted at the first session of the ICAO Assembly in 1947 in this City of Montreal. You will find it in the volume entitled "Resolutions and Recommendations of the Assembly—1st to 9th Sessions". May I read it to you because it expressly recognizes that there are very serious limits on the Council's jurisdiction and it cannot deal with every dispute between States relating to the Convention.

34. If I may just give you the background, the Interim Agreement, arrived at before the Convention and the Transit Agreement were reached, provided that any difference between States would be left to the arbitration of the Council—"arbitration", "any difference". The words "interpretation" and "application" did not appear; any differences would go to the Council. But when they came to draft the Convention and the Transit Agreement, they expressly reduced the limits of the Council's jurisdiction and instead of "any difference" they said "any disagreement relating to the interpretation or application". This is very interesting. It shows that the nations originally thought that any differences would go to the Council, but afterwards changed their minds and said "No. Let only a limited category of differences go to the Council."

35. If I may read the whole resolution as it stands:

"*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'—mark the words—'relating to international civil aviation which may be submitted to it.'

(Then the Council is to render an advisory report or decide as an arbitrator.)

"*Whereas* the Convention on International Civil Aviation contains no such provision and the competence of the Coucil 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 ..."

36. The great importance of this resolution is this: the Assembly recognized that the original concept of giving all differences to the Council to deal with had been abandoned and that the competence of the Council was limited to disagreements relating to interpretation or application. So ICAO itself has recognized, from its very inception, the severe limits on its jurisdiction by comparison with the original idea, which ultimately was not accepted by the nations.\

37. Now one last thing on international law—and this may conclude the first part of my argument—is the Vienna Convention of 1969, from which I would like to read. The honourable members have noted the ruling of the International Court of Justice that Article 60 of the Vienna Convention merely codifies an existing rule of international law. So it is nothing new. It is an existing rule of customary international law, which is merely codified by the Vienna Convention. I shall read only the relevant portion of Article 60, Clause 2 *(b)*:

> "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."

In other words, if there is a multilateral treaty—the Convention and the Transit Agreement are, needless to add, multilateral treaties—and if one nation does a wrong specially affecting another, the nation which is specially affected can suspend or terminate the operation of the treaty in whole or in part *qua* that one State only. Thus I continue to be a party to the Convention and the Transit Agreement. I will honour them *qua* all other parties, but *qua* the nation which has done me a wrong, I purport to suspend them in whole or in part, and I am entitled to do so. This is the clear right given under the Vienna Convention, but I need not dwell at length on it because, as the International Court of Justice pointed out,—and I am repeating it because it is very important—Article 60 is only a codification of an existing rule of international law.

38. Now under that rule of international law, which existed prior to the Vienna Convention, I had the right to suspend the Convention and the Transit Agreement, as against Pakistan, in whole or in part. This right was given to me not by the Convention, not by the Transit Agreement, but by international law, and I am asking you honourable gentlemen to consider how it is possible for a logical mind to put forward the proposition that is a case of application, of interpretation. It is something outside the agreement altogether. It is something outside the international treaty altogether. What is outside?—my right to suspend or terminate. It is that right which I have exercised.

39. This finishes my reading of the relevant provisions of the statute. I will call the treaty and the Rules the statute because we are a law-abiding nation and to us they have the force of law. I therefore refer to them as a statute. I have referred to the law or the statute to satisfy you as to how limited the jurisdiction of the court is. In this connection, in our preliminary objections, which necessarily have to be brief and concise because we did not want to set

out the entire argument, we have, on pages 11 to 18, set out the legal propositions and I would request the honourable members to read a few portions with me, because we tried to put as concisely as we could the correct law on the subject as we understand it. On page 11 of our preliminary objections you find the relevant provisions of the Convention and the Transit Agreement set out. I will not read them now because I have already read them.

40. If I may refer the honourable members to paragraph 16 of the preliminary objections: "Under Article 84 of the Convention and under Article 1 (1) of the Rules, two of the conditions which are required to be fulfilled in order to make the Application competent and maintainable, and in order that the Council may have jurisdiction to deal with it and handle the matter presented by the Applicant, are the following: *(a)* there should be a disagreement between the two contracting States, and *(b)* the disagreement should relate to *the interpretation or application of the Convention.* (The Transit Agreement is dealt with subsequently.)"

41. I will now read paragraph 17: "Both the aforesaid conditions postulate and presuppose the continued existence and operation of the Convention as between two States." Now the honourable members must have noted that the Vienna Convention of 1969 says that you may suspend the agreement in whole or in part. Once the agreement is suspended it is not in operation; that is the whole meaning and effect of suspension; and if it is not in operation there can be no question of construing or applying it. "If the Convention has been terminated, by repudiation, abrogation or otherwise, or has been suspended, as between two States, any dispute relating to such *termination* or suspension cannot possibly be referred to the Council under the aforesaid Articles of the Convention and the Rules, since in such a case no question of 'interpretation' or 'application' of the Convention can possibly arise (there being no Convention in operation as between the two States). Further, there cannot possibly be a disagreement on a point of interpretation or application of a treaty which is not in operation as between two States. In other words, so long as two contracting States accept the existence, operation and efficacy of the Convention as between them, all points of disagreement as to the interpretation or application of the Convention would be within the jurisdiction of the Council. But any question of termination or suspension of the Convention as between two States cannot be referred to the Council under the aforesaid Articles."

42. "What is stated above regarding the Convention also represents accurately the position under the Transit Agreement"—I am reading paragraph 18—"which confers limited jurisdiction on the Council in identical words. Section 2 of Article II of the Transit Agreement and Article 1 (1) *(b)* of the Rules permit an application limited only to cases of disagreement between two States relating to the 'interpretation' or 'application' of the Transit Agreement."

43. Paragraph 19. "The aforesaid construction of Article 84 of the Convention, Article II (2) of the Transit Agreement, and Article 1 (1) of the Rules harmonizes with Article II (1) of the Transit Agreement and Article 1 (2) of the Rules which deal with complaints regarding an action taken by a State *under* the Transit Agreement, and not regarding termination or suspension of the Transit Agreement, which would be *dehors* that Agreement."

44. Now paragraph 20 is a rather important submission. Very fortunately for the honourable members, they—or at least the overwhelming majority of them—are not lawyers. This particular subject of the law is not something the honourable members are very familiar with or are professionally trained to

deal with. I am saying this with the greatest respect, because I do not hold lawyers in very special esteem, far from it; I am only stating a fact. The World Court will consist of lawyers and that is why it can deal with the questions "Was the termination rightful or wrongful? Was it or was it not in accordance with international law?" These are complicated questions of fact and law which trained juries, trained judges, may deal with. The honourable members of the Council, fortunately, as I was saying, not falling in the category of lawyers, are entrusted with other tasks, diplomatic tasks, which are tasks of trying to reconcile differences between different States, but not bearing on the question of rights exercised under international law, suspension, termination, etc., which, as I said, present certain legal aspects that cannot be correctly brought before this honourable forum.

45. That is what we deal with in paragraph 20. "The composition of the Council and its powers and functions are, again, in keeping with the limited jurisdiction, which has been conferred upon it by Article 84 of the Convention, Article II of the Transit Agreement and Article 1 of the Rules, to hear international disputes. The sovereign power of a State to suspend, abrogate or otherwise terminate an international treaty—not seldom involving vastly complicated questions of fact and international law—are outside the scope of the Council's jurisdiction ..." To give you one instance, the International Court of Justice will hear a dispute for six months. A hearing on the merits of this dispute between India and Pakistan to decide which country really was in the wrong would go on for a large number of days, to put it very mildly and to make an under-estimate of the time involved. This Council is not a body that can take evidence, call witnesses, look at documents, find out which are fabricated documents, sit in judgment on the hilarious report made by the Commission in Pakistan which was asked to go into this question of hijacking. I am using my words very carefully in calling it a hilarious report. It says that India brought about this hijacking for its own secret purposes. It is like the President of a country being assassinated and his successor appointing a Commission which reports that the President brought about his own assassination. India is charged with this degree of lunacy, that it brought about the hijacking and burning of its own plane—got the two hijackers into the plane and supplied them with nothing more than dummy grenades and a pistol with which they were able to blow up the whole plane, which was surrounded by the police and the military forces of Pakistan! This amazing fantasy I will not deal with. I was only pointing out that if such a dispute were to go before the appropriate forum, it would mean an enormous consumption of time. For days and weeks, if not months, the dispute would go on, and ultimately the appropriate forum, if there is one, would decide who is right and who is wrong. The Council is not to be troubled with these questions which refer to this issue of international law: has a State justifiably or unjustifiably terminated or suspended the agreement? If it has done so justifiably, all right. If it has done so unjustifiably, the appropriate forum will give the appropriate orders. I am only pointing out that this Council is not the appropriate forum for such complicated questions of fact and law.

46. Then paragraph 21: "To sum up, the scheme of the aforesaid Articles is simple and clear. So long as the Convention or the Transit Agreement continues to be in operation as between two States, any disagreement as to the *construction* of its Articles or the *application* of the Articles to the existing state of facts can be referred to the Council; and, 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 taken under the treaty, and the Council is not the forum for deciding such disputes. These disputes are usually in the realm of political confrontation between two States, often involving military hostilities not amounting to war, and these matters of political confrontation or military hostilities are outside the ambit of the Council's competence. The question of overflying raised by Pakistan is directly connected with military hostilities in the past and continues to be inextricably tied up with the posture of political confrontation bordering on hostility adopted by Pakistan."

47. I shall not read further just now, but I should just like to make one simple submission. It is Pakistan's somewhate naïve case that the word "application" would cover termination or suspension. It just happened that on the plane I was reading *Call No Man Happy* by André Maurois, his autobiography, and there is a lovely passage where he says that to children words do not have precise meanings because the concepts of words are vague and nebulous to a child. He says that some adults go through life with this simple temperament of a child, to whom words do not convey clear-cut, definite concepts. I would submit to the honourable members that the words "interpretation" and "application" are clear-cut and precise and to equate "application" with "termination" or "suspension" or to equate "interpretation" with "termination" or "suspension" is a clear misuse of the language. These terms "application", "interpretation", "suspension", "termination" express well-known legal concepts. They are known to nations; they are known to international law; they are known to municipal law; and it is a reflection upon the competence of those who drafted the Convention and the Transit Agreement to say that they did not know the distinction between interpretation and application on the one hand and termination and suspension on the other. The distinction is so clear-cut that no draftsman of an international treaty could possibly have confused these distinct, separate, independent concepts.

48. Sir, may I now read paragraphs 22, 23 and 24 and then stop. "22. The Government of India submit that Pakistan by its conduct has repudiated the Convention vis-à-vis India, since its conduct has militated against the very objectives underlying, and the express provisions of, the Convention, and has been completely and totally against the principle of safety in civil aviation. It is expressly stated by Section 2 of Article I of the Transit Agreement that exercise of the privileges conferred by that Agreement shall be in accordance with the provisions of the Convention. Consequently, Pakistan's conduct also amounts to a repudiation of the Transit Agreement vis-à-vis India. In the circumstances, India has accepted the position that the Convention and the Transit Agreement stand repudiated, or in any event suspended, by Pakistan vis-à-vis India."

49. "23. Without prejudice to the above, and in the alternative, the Government of India submit that they have terminated, or in any event suspended, the Convention as regards overflying and the Transit Agreement vis-à-vis Pakistan." You will see that under international law any nation has the right of suspension in whole or in part. You need not suspend the whole agreement. You may suspend part of it *qua* another nation and, when the treaty is multilateral, you may suspend it *qua* one nation only.

50. "24. Reciprocity is of the essence of the Convention and the Transit Agreement. The conduct of Pakistan has made it impossible for Indian aircraft to overfly 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." It is true that Pakistan has not imposed a ban on Indian aircraft overflying Pakistan but our right of overflight is theoretical. The conditions are such that no government with a sense of responsibility to its people would choose to fly its aircraft over Pakistan if it is in the position of India today vis-à-vis Pakistan. In other words, if a nation brings about a situation where a government with a sense of responsibility to its own people dare not overfly the territory of that other State, it is no use for that other State to say that theoretically I have given you the right to overfly. There was a famous English Judge Darling, who, commenting on the principle that the doors of the courts of justice are open to rich and poor alike, added the words "So are the doors of the Ritz Hotel." It was the most expensive hotel in London at that time. Theoretically even a poor man has the right to enter the Ritz Hotel in London, but is this a right he can in practice exercise? There are many theoretical possibilities—nothing prevents us from going to the moon, but practically we just cannot do it. So the theoretical right is meaningless if in practice, as a result of a nation's conduct, I find it impossible to fly my aircraft over that nation's territory. If that is the situation I am not bound to give that nation the corresponding right to overfly my territory, because reciprocity is of the very essence of the Convention and the Transit Agreement.

51. If I may continue with paragraph 24, "Pakistan's theoretically permitting Indian aircaft 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. The Government of India do not set out here *the full facts concerning justification,* since, as stated above, the question of justification for termination or suspension of the Convention or the Transit Agreement is not within the scope of the Council's jurisdiction ..." We therefore have not gone into the detailed facts, but I shall refer to some later.

52. *The President:* I suggest we now have a coffee break.

Recess

53. *The President:* The Council is again in session and I give the floor to Mr. Palkhivala if he wishes to continue.

54. *Mr. Palkhivala:* May I refer to three Articles of the Convention which according to Pakistan's submission are supposed to lend support to their contention that there is no power to terminate the agreement and that this Council is competent to deal with the type of application Pakistan has filed. These three Articles are 54, 89 and 95.

55. With respect to Article 54, the argument urged by Pakistan is that if there is an infraction of the Convention, the aggrieved State has a right to move the Council. This Article, entitled "Mandatory Functions of the Council", says "The Council shall"—the relevant clauses are *(j)* and *(k)*—"report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council" and "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."

56. Now the answer is very clear and obvious but since the point has been

raised, even a very obvious answer must go on record, and it is this: Article 54 deals with cases where the Convention has not been terminated, has not been suspended; while it continues to be in operation, admittedly in operation, one State commits an infraction; in such a case you invoke Article 54 and say "There is an infraction and I want the Council to deal with it". The mere fact that an infraction is referred to in Article 54 does not mean that it covers cases of suspension and termination, because in law the very word "infraction" presupposes the continued efficacy of the agreement; if the whole agreement, or the material portions of it, has been terminated or suspended, the question of infraction does not arise; it is a question of termination or suspension. So the words used here do not go against me at all, because clauses *(j)* and *(k)* of Article 54 deal only with cases where the agreement continues to be in operation between two States.

57. Now Article 89. Pakistan says that under Article 89 you have a right to say that you are not bound to observe the terms of this Convention only in case of war or national emergency. Article 89 (War and Emergency Conditions) reads: "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." Again, this Article has no relevance whatever to the point at issue on this preliminary objection.

58. Article 89 says that in case of war or national emergency a nation is given freedom of action and will not be tied down to observe the terms of the Convention, even if it is not a belligerent but a neutral nation. This Article has nothing to do with what the International Court of Justice called the principle of international law that in cases of breach of the treaty by one party, another party has the right to terminate or suspend it. This right to suspend or terminate the treaty in the event of a breach by another State is not dealt with by Article 89 at all. This Article is not exhaustive of the circumstances in which the Convention can be terminated or suspended; it deals with only two. To show what, speaking frankly, I may call the absurdity of the argument, suppose this Article was not there. Is it suggested that in time of war a country would still allow aircraft of the other country to overfly, saying "This is my international contract and I do not want to be guilty of breaking it"? Surely in case of war the rule of international law must apply and even if there were no Article 89 you would still have the right to say "No more overflights. I cannot allow my enemy to overfly my territory." This is an elementary principle. Not all States were very keen to become signatories to this Convention, which was the first of its type, and certain provisions had to be put in in order to assure them that their national interests, their national security, would be safeguarded. With a view to getting wider and wider support for this Convention, this particular Article was put in, but by no process of reasoning can it be said to be exhaustive of the cases where the Convention can be suspended or terminated. It only deals with two, leaving the international law free and open. No principle of international law is superseded by Article 89. Can you read it as superseding what the World Court says is a rule of international law, namely that if one State commits a breach, another State has a right to suspend or terminate the treaty? What are the words in Article 89 which suspend this rule of international law? There are none. Therefore, again, Article 89 does not deal with our case.

59. It does, however, help me in this way. In Article 89 the word "war" is not used in the technical sense of war as distinct from military hostilities. It

would cover military hostilities. Military hostilities broke out between India and Pakistan and continued for about three weeks in August/September 1965. Now that "war" gave me the freedom of action under Article 89 and a very important point honourable members will notice is this. Freedom of action is permitted under Article 89 not just for the duration of the war—the text does not say "during the war"—but even after the war is terminated, if the essential security of the State requires some freedom of action. In our case military hostilities did break out in 1965 and since then we have never given Pakistan the right, without our permission, to overfly India at all. In fact we gave them the right to overfly with the permission of the Government of India. Now once we give it with the permission of the Government of India it means that the Convention is not in operation, because Article 5 gives the right to make flights into or in transit non-stop across another State's territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission. The whole object of this provision is that you do not need the prior permission of a State to overfly its territory or to make non-traffic stops; you are entitled to overfly and to make non-traffic stops without the Government's permission. This is the effect of the Convention.

60. Now what happened after 1965? Since 1965 the right to make stops for non-traffic purposes has been completely denied to Pakistan by us and completely denied to us by Pakistan. Since 1965 Pakistan aircraft have never made a non-traffic stop in India, and Indian aircraft have never made a non-traffic stop in Pakistan, except with special permission. Even the right to overfly has been only with the permission of our Government; I will point out the relevant notifications after I have finished the argument. After the war broke out in 1965—I am using "war" in the broad sense, because there were military hostilities perhaps not amounting to war under international law, but, as I have already said, "war" in Article 89 is used in the sense of military hostilities, not the technical international concept of war—we denied the benefit of the Convention to Pakistan. We said that any overflying or any non-traffic stop must be with our Government's permission and that has been the position since 1965. That is a separate point I will deal with later, but I am only pointing out that once the war, in the broad sense of military hostilities, broke out freedom of action was available to us under Article 89 and that freedom of action is not limited to the period of actual military hostilities. The period is not specified; it must be as long as the nation considers necessary in its own interest—because how can any outside party decide what a nation's security requires? After a war you may need five years, seven years, in order to build up your defences in such a way that your enemy cannot attack you again. No period is mentioned in Article 89. Therefore if Article 89 helps any party at all, it helps India, not Pakistan, because, military hostilities having broken out in 1965, we had freedom of action under it which was not restricted to the period of the war and which we have exercised even after the military hostilities ceased. To sum up, Article 89 has no bearing whatever on the rule of international law; it does not supersede, it does not override, the rule of international law, which is, as the World Court said, that in the case of breach by one party, another party may suspend or terminate the contract.

61. Lastly, Pakistan says "You should have given notice under Article 95." Well, I would have to be completely out of my mind to give notice under Article 95, because Article 95 deals with a completely different topic. It has no application at all to a case like the present one, where there is misconduct on the part of one State as against another. If I may read it:

"*Article 95 (Denunciation of Convention)*

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

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

Article 95 deals with the case where a State party to the Convention wants to back out and says "I do not want this Convention." In other words, so far as that State is concerned, the whole Convention is at an end; it is at an end as regards the relations between that State and all the other States which are parties to the Convention. Now India does not want that. It has never been India's desire to withdraw from this agreement. We want to honour it, and every other State which is a party to the Convention will find that India respects that agreement. So I cannot possibly denounce; this remedy is not open to me, because, if I denounce the Convention, I denounce it as regards all the States which are parties to it. If I want to terminate or suspend the contract *qua* only one State, I cannot act under Article 95, because the denunciation provision does not apply. Termination or suspension of an agreement *qua* a single State can never be denunciation of the Convention. It is a complete misuse of words to say that it is.

62. As I said at the beginning, in this case we are really concerned with the nuance of words. What do English words mean—words which are hoary with tradition, words which have come down through the centuries, words which have acquired certain precise, clear connotations. If one is prepared to play with words and treat them as matters of no consequence, or like Alice in Wonderland say that words mean what I say they mean because I am master, not the word, if that is the attitude, of course there is no need for further argument. But if the attitude is that this is an international treaty and must be read in a manner which international law understands, then denunciation means that you want to get out of a treaty altogether. That is what Article 95 deals with, and India has never had any desire whatever to denounce the Convention. It wants to be a party to the Convention; it continues to be a party; and it will honour its obligations under this Convention with respect to every State but Pakistan, between whom and us, unfortunately, military hostilities continue, political confrontation persists. I shall not apportion blame here. That is not my purpose; I am only stating facts.

63. Therefore, neither Article 54 (Infraction), Article 89 (War), nor Article 95 (Denunciation) is of any use in dealing with the questions that arise here.

64. Normally I would not have dealt with the facts of the case at all, because I am dealing with the legal point, but on full consideration I am inclined to the view that if I took about 10 or 15 minutes of the honourable members' time in stating some facts it would be helpful, just to satisfy you about the bona fides of my country's case, not with any other purpose. It is now with a view to satisfying you by proving by facts, etc., that our termination or suspension of the contract was justified—not that, but merely to show you that it is an honest bona fide exercise of the right we have under international law to terminate or suspend the contract.

65. With that objective only, may I request you to turn to the preliminary objections of India, paragraph 5. I shall not state the facts orally. I shall only read what is here, so that you can decide for yourselves whether any self-

respecting State, whether any government that was conscious of its duty to its own citizens, could possibly act any differently from the way India has acted.

66. "Paragraph 5. For years past, Pakistan has been pursuing and continuing a policy of political confrontation bordering on hostility against India. This policy culminated in August/September 1965 in an armed attack by Pakistan against India on a large scale. On the outbreak of the conflict, the Air Services Agreement of 1948 between the two countries was immediately suspended, and there was a stoppage of air transport services of Indian aircraft to and across Pakistan and of Pakistan aircraft to and across India. The conflict was followed by an Agreement between the two countries signed at Tashkent in the Union of Soviet Socialist Republics in January 1966. As a result of this Agreement, a special arrangement was worked out whereby the two countries permitted each other to operate some overflying services. Air services as they existed prior to the conflict were, however, not restored, since Pakistan refused all other aspects of normalization of relations as envisaged in the Tashkent Agreement. Up to date Pakistan has continued its policy of confrontation bordering on hostility against India, some instances of which are listed hereunder:". Now this is what continues to be done by Pakistan.

"(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 lifeline 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."

(There are no civil air flights, railway or road communications between the two countries, and international airlines like Swissair or Pan-Am may fly from Bombay to Karachi, but Indian airlines do not fly that way nor do Pakistan airlines. In other words, Pakistan airlines do not connect Pakistan with India; Indian airlines do not connect India with Pakistan. This has been the position since 1965.)

"(6) Continued ban on entry into Pakistan of Indian newspapers, books, magazines, etc., printed or published in India. (Not a single Indian newspaper can be imported into Pakistan.)
(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 Kashmir.
(9) Intensive hate-propaganda against India on the radio and in the press, which continues unabated to this day."

67. "The subject-matter of Pakistan's Application"—I am reading paragraph 6—"and Complaint relates to the suspension, since 4th February 1971, of overflights over Indian territory. The conduct of Pakistan immediately preceding that date in relation to the hijacking of an Indian aircraft was most reprehensible and amounted to the very negation of all the aims and objectives, the scheme and provisions, of the Convention and the Transit Agreement."

68. If I may pause here for a minute just to consider what this Convention

is. This Convention is not an exercise in lexigraphy; it is not merely an exercise in putting English words together, or French or Spanish words together. It has a certain objective and that objective is set out in the Preamble. Its objective is safe and orderly development of international civil aviation—safe and orderly development of international civil aviation. I am not apportioning any blame at the moment, because I am not justifying my conduct at all just now; that is not my purpose—I am on the question of law—but if between two countries safe and orderly development of international aviation is an impossibility, what do you do with the Convention as between those two countries? Do you still apply it as a formality or are you frank and honest enough to say that between these two countries it is impossible to work the very basis of this Convention? What is the point of talking of the safe and orderly development of international aviation when not a single Indian aircraft can land in Pakistan or a single Pakistani aircraft can land in India? Since 1965, as I told you, there has been no scheduled service between India and Pakistan except by foreign airlines, which are apart, but Indian and Pakistani airlines, scheduled or non-scheduled, do not connect the two countries.

69. Now if safe and orderly development, which is the prime objective, the *principal fundamental* objective, of the Convention, cannot be achieved between two States, what is left? The whole substratum of the Convention is gone as between India and Pakistan, and this has been so since 1965. This complaint is made in 1971, but if Pakistan had a case the complaint should have been made in 1965, because since then we have not given the right to overfly India or to make non-traffic stops in India without our Government's permission, which is the right guaranteed by the Convention. This right has never been given to Pakistan, nor given by Pakistan to us, since 1965. So what are we hearing after six years?

70. The other Agreement—the Transit Agreement—expressly says that it is not to have an existence independent of the Convention. It is to continue, and it is to be in operation, only in accordance with the Convention. In other words, the Convention is the very basis and foundation of the Transit Agreement. If you do not observe the Convention you cannot possibly observe the Transit Agreement, and for that may I request you to turn to Article I, Section 2 of the *Transit Agreement. Before I read it,* I do not have to remind the honourable members that both the Convention and the Transit Agreement deal with the right to overfly another nation's territory, and the right to make non-traffic stops in another nation's territory, the only difference being that the Convention deals with non-scheduled aviation and the Transit Agreement deals with scheduled international air services. Otherwise, the subject-matter, so far as this point is concerned, is the same, namely overflying and non-traffic stops.

71. Article I, section 1 speaks of two freedoms of the air: (1) the privilege to fly across the territory of another State without landing, which I will call overflying, and (2) the privilege to land for non-traffic purposes. These are the two freedoms of the air given by Section 1 of Article I. Now look at the important Section 2 of the same Article. Section 2 says "The exercise of the foregoing privileges shall be in accordance with the provisions of the Interim Agreement on International Civil Aviation and, when it comes into force, the provisions of the Convention on International Civil *Aviation, both drawn up* at Chicago on 7 December 1944." So these freedoms given by the Transit Agreement are to be exercised in accordance with the Convention, and the Convention, as I have already pointed out, talks of the safe and orderly devel-

opment of international civil aviation. This is what Pakistan would not permit and that is why we treat it as a repudiation by Pakistan of the Convention and the Transit Agreement and if Pakistan says "I have not repudiated them.", we say "We propose to terminate or suspend because your conduct has been such that it is impossible to have the terms of the Convention and the Transit Agreement in operation as between our two countries."

72. I would like to read again the second sentence of paragraph 6 of the preliminary objections—"The conduct of Pakistan immediately preceding that date" (4 February 1971) "in relation to the hijacking of an Indian aircraft was most reprehensible and amounted to the very negation of all the aims and objectives, the scheme and provisions, of the Convention and of the Transit Agreement." I would like now to take a minute to explain one important point. Unfortunately criminals have made many nations familiar with hijacking and the malpractices which are commonly called hijacking, but very fortunately for the decencies of international life, it seldom happens that the government of a State is either an accomplice before the fact or what is called in law an accomplice after the fact, which means that either you actively assist the hijacking, as one nation is reputed to have done—it may or may not be true—or, again as it is called in law, you harbour and comfort the criminals. When a government chooses to go out of its way to do things which amount to virtually making heroes of hijackers, it is about time that self-respecting nations say to it "If you have so little regard for the decencies of international aviation, we propose to terminate or suspend the contract as between you and us."

73. May I request you now to turn to the incidents connected with the hijacking in paragraph 7 and you can judge for yourselves. We have no evidence to show whether the Pakistan Government was an accomplice before the event, so I shall make no statement, but if any of the honourable members here has any doubt as to whether it was at least an accomplice after the event, that doubt should be removed by reading the report of the Commission appointed by the Pakistan Government. Fortunately that report is annexed to Pakistan's reply to our preliminary objections. As normal human beings with some knowledge of human affairs, you have only to read the report to see that any government that was really objective and did not want to identify itself with the hijackers could never have got such a document. The report is so unacceptable—to use the mildest term I can think of—that it makes you wonder how any government could solemnly present it to an international body. But before I come to that report let me read the summary of the facts about the hijacking starting on page 5 of the preliminary objection, after making this one further point. We do not suggest that a State can terminate or suspend the Convention or Transit Agreement if there is a hijacking incident, but it has the right to do so if the government of another State identifies itself with the hijackers or sympathizes with them. So it was not just the hijacking incident but also the Pakistan Government's identification with the hijackers that led to India's action. Kindly look at the facts narrated in paragraph 7 of the preliminary objection.

74. "*(a)* An Indian Airlines Fokker Friendship aircraft on a scheduled flight from Srinagar to Jammu with 28 passengers and 4 crew on board was hijacked by two persons among the passengers and diverted at gun point to Lahore in Pakistan shortly after noon on 30th January 1971. One of the two hijackers had a grenade in his hand and threatened to use it if the plane was not diverted to Lahore, while the other pointed his revolver at the pilot.

> *(b)* The Government of India requested the Pakistan Government the same afternoon at Islamabad, and through their High Commissioner in New Delhi, for the immediate release of the passengers, crew, cargo, baggage, mail as well as the aircraft. The Pakistan Government informed the Acting High Commissioner of India in Islamabad the same afternoon of its decision to allow the plane, crew and passengers to fly back to India.
>
> *(c)* The Indian civil aviation authorities and the Government of India informed the Government of Pakistan on the morning of 31st January about a relief plane being ready to take off for Lahore, together with spare crew, to bring back the passengers, crew, cargo, baggage and mail as well as the hijacked aircraft as soon as the Pakistan authorities gave the necessary clearance. Permission was given by the Director General of Civil Aviation of Pakistan the same morning for the relief aircraft to leave, but this was rendered infructuous by further instructions from the Pakistan authorities that the relief plane should not take off until further specific instructions from the DGCA Pakistan. Such permission was repeatedly deferred in spite of numerous reminders from the DGCA India. The Ministers for External Affairs and Civil Aviation of India sent messages on 1st February 1971 to the Minister of Home Affairs and the Minister-in-Charge of Civil Aviation respectively in Pakistan, requesting the immediate return of the passengers and clearance for the relief aircraft to bring back the hijacked aircraft along with the baggage, cargo and mail. The Pakistan High Commission in India consistently refused to issue visas to the crew of the relief aircraft and the spare crew."

Now this is important. Another plane, a foreign plane, was to leave Lahore for India and there was room on board for the Indian passengers. Yet the Pakistan Government would not permit them to be put on board that plane. This is the next paragraph, *(d)*.

> "*(d)* Pakistan took more than 48 hours to send the passengers and crew by road to the Indian border at Hussainiwala at 1500 hours (IST) on the 1st February 1971, though the distance from Lahore to Hussainiwala is only 36 miles."

A military government is in power, a foreign aricraft is hijacked, the passengers are there, and the military government which can deal with the problems of the entire nation cannot arrange for these passengers to go 36 miles under military escort! For 48 hours nothing can be done for these passengers. If I may continue:

> "The Government of India had earlier made arrangements for the return of the passengers to India on board a scheduled Ariana Afghan Airlines Service from Kabul to Amritsar, which landed at Lahore at 23 hours on 31st January, but although a large number of passengers disembarked from the plane 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 aircraft on this plane because of the alleged presence of crowds at the airport."

I find it impossible to believe that if a government really wanted to do it—a military government with police and military forces at its command—it could not do so simple a thing as put 20 or 30 Indian passengers aboard a plane. Other passengers could get on board.

"*(e)* The Government of Pakistan not only failed to return the two persons who had hijacked the aircraft but announced that they had been given asylum in Pakistan."—The Government of Pakistan announced publicly that the hijackers were being given asylum in Pakistan.—"This was done even without first disarming them and taking them into custody for their criminal acts. On the other hand, they were treated as heroes and were freely permitted to visit, by turns, the terminal building at Lahore Airport, to put long-distance calls to their accomplices and friends in Pakistan and meet various people, besides being provided with food and other amenities which enabled them to continue their so-called occupation of the aircraft for 3-½ days. This was allowed to happen on the apron of the international airport at Lahore, in full view of the authorities, troops and police there, who took no action to make them vacate the hijacked aircraft."

75. Now just consider the absurdity of Pakistan's explanation of why they did this. All the passengers have been removed from the aircraft. The aircraft belongs to India. The two hijackers are on the plane. The worst the hijackers could do was to blow up the plane. That was all they could do because the passengers were safe and ultimately they did blow up the plane. What did Pakistan achieve as an internationally responsible government by allowing these hijackers to come out of the plane one after another? For 3-½ days these hijackers were given food and water and were looked after. And Pakistan says "We did all this because we were worried as one of the hijackers was always on it; one would come out and one would remain; so one hijacker might blow up the plane." This great concern of Pakistan for Indian aircraft and Indian property—can you imagine that being the real motive when millions and millions of dollars worth of property has been confiscated by Pakistan and not returned? Can you seriously believe that Pakistan was concerned with the safety of India's one little aircraft, which was ultimately blown up? What prevented Pakistan from taking the two hijackers into custody? The worst they could have done was to blow up the plane. Pakistan could have asked India "Are you willing to have us arrest these people and let your plane be blown up?" Would India have said "No"? Did we have any sympathy with these criminals? Now for three and a half days, mind you, these hijackers come out of the plane, first one, then the other. They come to the terminal building. They make long distance calls, trunk calls also, to their accomplices in Pakistan, and nothing happens to them at the hands of the military and police forces at the airport.

"*(f)* Finally, at about 2000 hours on 2nd February these two criminals were allowed to blow up the hijacked Indian aircraft and even to prevent the fire brigade from putting out the fire."

76. Look at the absurdity of the whole story put forward by Pakistan. The Commission they appointed to report on this hijacking says that the two hijackers had only a dummy pistol, not a real one, and a grenade which was also a dummy. If so, how could the hijackers blow up the plane? What did they blow it up with if the pistol was a toy pistol and the grenade was a dummy grenade? These are some of the absurdities of the whole story, whereas the simple straightforward fact is that Pakistan wanted to make heroes of these hijackers and a situation was created where India found the position intolerable for any self-respecting country.

77. If I may read further in the same paragraph—clause *(f)*. "This"—the

blowing up and burning of the aircraft—"took place in full view of the airport authorities, troops and police at the Lahore Airport, which is a protected area,"—mind you, this is a protected area in Pakistan, under military occupation—and at a time when Martial Law was (as it still is) in force in Pakistan." Now mark this—"The Lahore TV also televised the destruction of the aircraft on a special programme and it was made to appear as if the event was an occasion for celebration. The time extended for the television programme" —the televison programme normally would have ended but the time was extended by the Lahore television authorities—"was clear proof that the Pakistan authorities knew the plans of the hijackers and connived at the destruction of the aircraft. This further criminal act of destroying the aircraft occurred only a few hours after the Pakistan High Commissioner in India had assured the Government of India that his Government were committed to, and were taking all necessary measures for, the safe return of the aircraft.

78. "*(g)* The Government of India informed the President of the International Civil Aviation Organization Council on 1st February 1971 of the hijacking of the Indian aircraft and later about its destruction. It is understood that the President of the ICAO Council sent the following message to Pakistan:

> 'Regarding unlawful seizure India Airlines aircraft confident Pakistan acting in accordance with ICAO Assembly Resolution A17-5 has permitted or will permit aircraft occupants and cargo continue journey immediately. Would appreciate your information regarding present situation. Am also very concerned by possibility proliferation hijackings in that part of the world unless severe measures taken. Therefore trust Pakistan will follow Assembly declaration A17-1 and prosecute perpetrators so as to deter repetition similar acts.'

The Government of India are not aware of the response given by Pakistan to this communication. In fact Pakistan neither permitted the aircraft with passengers and cargo to continue the journey immediately, nor returned the hijackers to India, nor prosecuted nor punished them in Pakistan."

Pakistan in the reply says that they are awaiting trial. They are very familiar with trials and I will say no more about it.

79. "*(h)* The Government of India had, as far back as September 1970, informed the Pakistan High Commissioner in India that certain subversive elements in Pakistan were conspiring to hijack Indian aircraft and that there was definite information about a possible attempt to hijack an Indian aircraft to Pakistan and had requested the Government of Pakistan to take adequate steps to prevent this. There was no response from the Government of Pakistan except the strange request from their High Commissioner to disclose the source from which the Government of India had obtained this information."

Imagine the attitude of a responsible government wanting to honour its international commitments about safe and orderly aviation. That government is given information by another government: "We have information that one of our planes is going to be hijacked. Please see to it that such a thing does not happen, that the hijackers do not get asylum in your country ..." What is the reply of the Pakistan Government? "Please tell us the source from which you got this information." If this is "safe and orderly development of

aviation" we may as well scrap the Convention of 1944. There is no meaning to it. It is meant to be a convention among nations which intend to honour and respect its provisions. It is not intended to be a formality between nations, one of which is at liberty to make a mockery of it and then ask the other nation to adhere to its provisions.

80. These are the facts. If anyone had any doubt as to whether the Pakistan Government itself was really involved in the hijacking, either before or after the event, it would be completely removed if you look at Pakistan's reply and at the conclusions of the Commission of Inquiry which Pakistan has annexed to it. I ask you honourable gentlemen, as men of common sense and men of knowledge of world affairs, to read this Commission's report and ask yourselves whether you believe for a moment that an honest government, which had nothing to do with the hijacking or the hijackers and had no sympathy with them, could have possibly procured such a report from a Commission appointed by it. Look at the report. As I started to say earlier, it makes hilarious reading. You only have to read it to see what type of conclusions were reached by a responsible government commission. It is Annexure A to Pakistan's reply and I propose to read the whole of it.

81. *The President:* I do not mean to interrupt you, but is the point that you are going to make now related to the preliminary objection?

82. *Mr. Palkhivala:* Sir, it has no bearing on the legality of the preliminary objection. It has a bearing on the justification for the suspension or termination of the Agreement and that justification is not within the Council's jurisdiction. So if the learned President rightly reminds me that if the preliminary objection is well founded in law—and I submit it is—then the question whether our termination was rightful or wrongful is not for the Council to consider. If that is the view then I do not have to read it at all because I would be unnecessarily wasting your time, and the learned President, if I may say, is quite logical in reminding me that on my own argument this is not relevant. I concede that point against myself straight away and I will not read it, because I see the implication of what the learned President has said. Without asking me not to read it, you have rightly reminded me that it is really not relevant. My only objective in asking the honourable members to have a look at it was to satisfy you about the bona fides of my country's case, which is not really the question before the Council because you are not concerned really with our bona fides and our justification as much as with our contention that if for any reason, good or bad, we choose to terminate the agreement, the Council has no jurisdiction to deal with it. Well, Sir, I will not read the report, but I will ask the honourable members to have a look at it later and will only make one or two comments without reading it.

83. The sum and substance of the report is this. Here is India, tremendously agitated over this hijacking, very perturbed. This is the first time in history that an Indian aircraft has been hijacked and our people, inside and outside of Parliament, are so agitated that we beg the President of the ICAO Council to intervene, we request Pakistan to send back our plane, passengers, cargo, etc., and this Commission appointed by the Pakistan Government discovers the real secret. The real secret is that Indian secret agents have somehow manœuvred this hijacking for their own purposes! In other words, the Indian Government was behind the hijacking. It is like saying that the Jews were behind the hijacking which, according to the newspapers, was the handiwork of terrorists, but according to some Commission was the handiwork of the Jews themselves, who got their own plane hijacked. My point is that if such a report is procured by a government, it tells you volumes about the bona fides

of that government. If there was not this Commission's report I could have understood a government saying "We had nothing to do with the hijacking.", but if such a Commission is appointed and such a report is made available to an international body, I can only say, weighing my words carefully, that it is an insult to that body to be asked to accept it. The report says that India itself procured this hijacking by its own agents. It says that this Mohammad Hashim Qureshi, the one who blew up the aircraft, really had no grenade and no pistol. As I have already mentioned, if that was the case, could he blow up the aircraft? How could it happen? Who supplied him with the grenade to blow up the aircraft? Did the Pakistan Government supply the grenade, and what were they doing for three and a half days while the aircraft was standing on the apron of the airport, which is an area occupied by the military? It is all too absurd for words and in deference to what the learned President said, I shall not read it.

84. I am now concluding my exposition of the first ground, the first preliminary objection, but before I do so I would just like to mention three points in Pakistan's reply to our preliminary objection. The first is that the word "application" includes termination or suspension. I will not say anything more on that point because I have already cited to you the judgment of the International Court of Justice and also the answer given by the United States Counsel, which clearly shows that application is something quite different from termination.

85. The second point which Pakistan makes is that India has applied the Convention and Transit Agreement between itself and Pakistan since the military hostilities of 1965. This is completely incorrect. Since April 1965 there has been no application of the Convention or the Transit Agreement between India and Pakistan. I shall not say anything more on this point just now, because it is a separate preliminary point which I propose to deal with as a second point. I shall therefore leave it alone just now.

86. The third point made by Pakistan is that there is no power to terminate an agreement except to the extent to which the agreement itself provides for termination. In other words, if the Convention and the Transit Agreement do not provide for suspension or termination, you have no power to terminate or suspend them. This is clearly wrong. It is contrary to what the World Court understands to be the international law, and therefore Pakistan's attempt to say that there is no power to terminate or suspend has already been negated by the International Court of Justice. I take it that the honourable members of the Council will follow the ruling of the International Court of Justice, which, as you have seen, is the authority to which an appeal from decisions of the Council lies. As the appellate authority, the superior authority, its judgment would have to be followed and that judgment is categorical and clear: you do not need a provision for termination or suspension in an agreement before you can exercise the right to terminate or suspend.

87. I have finished with the point that the Application of Pakistan is misconceived because it deals with the question of termination or suspension which is outside the Council's jurisdiction. I shall now deal with the second point—what we have called "Preliminary Objection No. 2, Special Régime".

88. *The President:* I think we should take the two cases separately. We are now dealing only with Case 1.

89. *Mr. Palkhivala:* Yes, I am not on the Complaint; I am only on the Application and am now putting forward my second preliminary objection to the Application. I shall first explain the position briefly and then read the relevant part of the pleadings. The point is briefly this. The Council has juris-

diction in cases which are governed by the Convention and the Transit Agreement; if two nations choose, as from a certain date and as a result of events like war, military hostilities, to have a special régime, a special agreement, between themselves regarding overflying, it is their business; if one of them terminates or suspends such a special régime, this Council is not the forum because the agreement is not something with which this Council deals. The Council does not deal with special régimes; it deals only with the Convention and the Transit Agreement. It is my submission that the facts leave no doubt that since 1965 there has been a special régime regarding overflying. I am referring only to overflying and making non-traffic stops, nothing else, because as you have seen from the World Court's opinion and the Vienna Convention on the Law of Treaties of 1969, which only codifies existing law, a country may suspend or terminate an international treaty in whole or in part regarding another State. So I am confining myself to overflying, because that is what Pakistan wants.

90. Now as between India and Pakistan overflying has not been governed by the Convention and Transit Agreement since the military hostilities of 1965. What happened was this. In August/September 1965, when military hostilities broke out between them, the two countries, quite naturally, obviously, and inevitably, suspended overflying; neither country could make a stop, whether for traffic or non-traffic purposes, in the other country. That was clear. Thanks to the efforts of Russia we were able to come to an agreement at Tashkent in January 1966. This agreement provided that the two countries would try to restore normal relations between them. We did our best. We went out of our way to do one thing or another, but without any response from Pakistan. I shall refer to the facts presently. It is not a bold statement; I will particularize it and show by facts and figures what we did. One of the things on which normal relations had to be restored was international aviation. So some letters were exchanged between the Prime Minister of India and the President of Pakistan and we said "All right, let us come to some arrangement." What was the arrangement?—it said that with the permission of the Indian Government, Pakistan might overfly India. The words are "with the permission of the Indian Government". Now this is the very negation of the Convention and the Transit Agreement. It is the very converse of the Convention and the Transit Agreement, because they contemplate overflying without the Government's special permission, whereas the special régime after the war between India and Pakistan was that overflying could be only with the express permission of the Government. When our notification, which I shall read presently, expressly says that overflying shall be with the permission of the Government of India, how can anyone possibly still argue, as Pakistan tries to do, that the Convention and the Transit Agreement were brought back into operation after 1965? It is impossible to say that, because when I say "with my Government's permission", I say in so many words that the benefit of the Convention and the Transit Agreement is not available to you; otherwise the question of my Government's permission does not arise.

91. Now Pakistan is fully aware that from 1966, when the Tashkent Agreement was reached, up to date, Pakistan has never overflown India without the Government's permission. This permission we may give or withhold, because permission has no meaning unless the authority which is to give it has discretion not to give it. We told Pakistan "No Convention and no Transit Agreement as between you and me; overflying is with my Government's permission." Of course Pakistan returned the compliment by saying it was also with their Government's permission, which I am not disputing, but since they are

the complainant and I am the defendant, I am concerned only with my action, not with Pakistan's. What was my action? It was clear and categorical: hereafter overflying by Pakistan can only be with the Government of India's permission. If this is so—and I will prove it by reference to our own Government's notification, which is unchallenged—you will immediately see that there was no question of applying the Convention or the Transit Agreement as between India and Pakistan after the military hostilities of 1965. If there was a special régime, as undoubtedly there was, between India and Pakistan regarding overflying after the military hostilities of 1965, it means the Convention and the Transit Agreement are not in operation as between these two States as regards overflying. Now how can an application be made to the Council saying that the Government of India has now proposed to withdraw permission for overflying? If I choose to withdraw permission that is my right as a sovereign State, and under what document have I agreed that if under the special régime I withdraw my permission for overflying, I shall appoint the Council of ICAO as the body to whom the complaint can be made? No one has agreed to such arbitration or adjudication by the Council. Therefore it is my respectful submission that the honourable members of the Council cannot be troubled with this question, which pertains to a special régime between India and Pakistan that is completely outside the Convention and the Transit Agreement.

92. May I refer you to conclusive evidence of this, conclusive because the documents are not in dispute. Would you kindly refer to India's preliminary objections, Annexure No. 3. It reproduces two notifications, one issued during and the other after the war of 1965—throughout my argument I have used the word "war" in place of "military hostilities" because I am not trying to be technically correct here; wherever I have used the word "war" you will take it as "military hostilities", because an international authority in Geneva, before which I had the honour to appear against my learned friend, the Attorney General of Pakistan, has held that the military hostilities of September 1965 did not amount to a war in international law and I accept that wording as correct; it is a case of military hostilities, not amounting to war, in September 1965. May I read the two notifications before the honourable members have a recess for lunch.

93. The first is the notification of the Government of India dated 6 September 1965.

> "*Whereas* the Central Government is of the 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 (22 of 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."

This is September 1965. Military hostilities are in progress. India says no overflying by any Pakistan aircraft. After peace was restored and the Tashkent Declaration was signed, there was a second notification, dated 10 February 1966, which is on the next page of our preliminary objections. It continues in operation even today and you will see how it reads:

> "*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 sub-section 6 of the Aircraft Act, 1934 (22 of 1934), 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'."

94. *The effect of this notification of February 1966 is clear and undoubted.* It is this. In September 1965 India said to Pakistan "No overflying at all." In February 1966 the Government of India said "Overflying only with the permission of the Central Government of India." and this is the notification in force today and means that Pakistan cannot overfly without India's permission. Therefore, as early as from September 1965, the benefits of the Convention and the Transit Agreement have not been available to Pakistan, because under both those treaties Pakistan has a right to overfly without our Government's permission. But we told them in 1966 "You may now overfly with our permission, not without it." Thus the Convention and the Transit Agreement *were terminated or suspended as early as 1966. All that has happened in 1971* is that the permission has been withdrawn, but the obligation, the requirement, the necessity of obtaining permission, which meant that the Convention and the Transit Agreement were no longer in operation between the two countries, has existed since 1966. If India has terminated or suspended the Convention and the Transit Agreement as regards Pakistan, it was done in 1966, not 1971. In 1971 we have withdrawn permission, but the termination or suspension of the international treaty took place in 1966 when Pakistan was asked to obtain permission. This is a very important point which Pakistan has completely overlooked.

95. *You have the special régime of 1965/1966 and this special régime is that* contrary to the Convention, contrary to the Transit Agreement, no Pakistan aircraft shall overfly India without our special permission. Therefore the special régime, which Pakistan accepted for overflying India, and we accepted for overflying Pakistan, came in 1965/1966. If in 1971 we have withdrawn permission, it has been withdrawn under the special régime and has nothing to do with the Convention or the Transit Agreement. May I stop here, Sir.

96. *The President:* We shall now have the break and shall reconvene at 2.30.

(b) COUNCIL—SEVENTY-FOURTH SESSION

Minutes of the Third Meeting[1]

(The Council Chamber, Tuesday, 27 July 1971, at 1430 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi

Secretary: Dr. Assad Kotaite, Secretary General

Present:

Argentina	Mr. J. M. Gabrielli (Alt.)
Australia	Dr. K. N. E. Bradfield
Belgium	Mr. A. X. Pirson
Brazil	Col. C. Pavan
Canada	Mr. J. E. Cole (Alt.)
Colombia	Major R. Charry
Czechoslovak Socialist Republic	Mr. Z. Svoboda
Federal Republic of Germany	Mr. H. S. Marzusch (Alt.)
France	Mr. M. Agésilas
India	Mr. Y. R. Malhotra
Indonesia	Mr. Karno Barkah
Italy	Dr. A. Cucci
Japan	Mr. H. Yamaguchi
Mexico	Mr. S. Alvear López (Alt.)
Nigeria	Mr. E. A. Olaniyan
Norway	Mr. B. Grinde
Senegal	Mr. Y. Diallo
Spain	Lt. Col. J. Izquierdo.
Tunisia	Mr. A. El Hicheri
Uganda	Mr. M. H. Mugizi (Alt.)
Union of Soviet Socialist Republics	Mr. A. F. Borisov
United Arab Republic	Mr. H. K. El Meleigy
United Kingdom	A/V/M J. B. Russell
United States	Mr. C. F. Butler

Also present:

Dr. J. Machado (Alt.)	Brazil
Mr. E. G. Lee (Alt.)	Canada
Mr. P. R. Joubert (Adv.)	Canada
Mr. B. S. Gidwani (Alt.)	India
Mr. M. Garcia Benito (Alt.)	Spain
Mr. N. V. Lindemere (Alt.)	U.K.
Mr. F. K. Willis (Alt.)	U.S.
Mr. N. A. Palkhivala (Chief Counsel)	India
Mr. Y. S. Chitale (Counsel)	India
Mr. I. R. Menon (Assistant Counsel)	India

[1] Reproduced from ICAO Doc. 8956-C/1001, C-Min. LXXIV/3 (Closed).

Mr. S. S. Pirzada (Chief Counsel)	Pakistan
Mr. K. H. M. Darabu (Assistant Counsel)	Pakistan
Mr. A. A. Khan (Obs.)	Pakistan
Mr. H. Rashid (Obs.)	Pakistan
Mr. Magsood Khan (Obs.)	Pakistan
H.E. A. B. Bhadkamkar (Agent)	India
H.E. M. S. Shaikh (Agent)	Pakistan
Secretariat:	
Dr. G. F. Fitzgerald	Sr. Legal Officer
Mr. D. S. Bhatti	Legal Officer
Miss M. Bridge	CSO

SUBJECTS DISCUSSED AND ACTION TAKEN

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The Chief Counsel for India, Mr. Palkhivala, completed his presentation of the preliminary objection filed by India. Continuing from the point he had reached in his explanation of the second ground for the objection, he read into the record paragraphs 28 to 39 of the objection, emphasized the "package deal" nature of the Tashkent Declaration, and stated that the question of restoring pre-1965 rights in respect of civil aviation had never arisen. On the suggestion of Pakistan itself, only overflights had been resumed on a provisional basis, subject to each Government's permission and on the basis of reciprocity. After the hijacking incident, the Government of India had come to the conclusion that reciprocity in respect of safety of civil flights was not to be expected from Pakistan and had therefore suspended flights of Pakistani aircraft over Indian territory. Pakistan's contention that India was estopped from pleading the special régime as a defence because in the last five years she had acted on the basis that the Convention and Transit Agreement applied between the two countries was very curious indeed, as if these instruments did apply, there would be no question of permission for overflights.

2. The Chief Counsel for Pakistan, Mr. Pirzada, then began his presentation of Pakistan's answer to the preliminary objection, dealing at this meeting with the Indian contention that this was a case of treaty termination, not of application or interpretation, and therefore the Council had no jurisdiction.

3. The first point he made was that the Convention was a very important multilateral treaty, establishing a permanent international organization and providing permanent machinery to deal with disputes. In the case *Certain Expenses of the United Nations*, the International Court of Justice, dealing with the same sort of treaty—the Charter of the United Nations—had ruled that its provisions should receive a broad and liberal interpretation, unless the context of a particular provision required, or there was a provision requiring, a narrower or more restricted interpretation. India was giving a very narrow and restricted interpretation to Article 84 of the Convention. The opening words "any disagreement" were just as important as the words "interpretation" and "application", on which India had placed so much emphasis, and, taken as a whole, the Article was all-embracing, wide enough to cover a dispute as to application or non-application or as to termination, as "inter-

pretation" included the question of whether there was termination. It was, for instance, much wider than Article 36 of the Statute of the International Court of Justice, which gave the latter jurisdiction over legal disputes relating only to the interpretation of a treaty. Mr. Pirzada also referred to the *Mavrommatis* case *(P.C.I.J. 1924, Series A, No. 2)* and the *Interpretation of Peace Treaties* case *(I.C.J. Reports 1950)*.

4. The second point made by Mr. Pirzada was that the International Court of Justice had also stated that whether an international dispute existed was a matter for objective determination; the mere denial of its existence did not prove its non-existence. Thus the mere denial by India that the Convention and Transit Agreement were in operation between herself and Pakistan did not mean that they were not in operation. Pakistan maintained that they were very much alive; consequently there was a disagreement relating to their interpretation or application in the terms of Article 84 of the Convention and Article II, Section 2 of the Transit Agreement and the Council had jurisdiction. The expression "application" was wide enough to include adjudication of a dispute or disagreement about termination. In addition to the opinions and judgments of the International Court, he referred to the book *Unilateral Denunciation of Treaty because of Prior Violations by Other Party* by B. Sinha. In it the Indian author pointed out that one party to a treaty might accuse another of committing breaches of obligations in order to release itself from its own obligations. The other party might retort by charging the denouncing party with mala fides. Consequently, the situation might be foreseen of a dispute arising from a divergence of opinion between the parties relative to interpretation or application of treaty obligations.

5. He maintained that the Indian contention of the existence of a sovereign right of termination outside the treaty was inapplicable in this case, because the Convention and Transit Agreement contained express provisions on suspension and termination—Articles 89 and 95 in the Convention and Article III in the Transit Agreement. He also rejected the Indian argument that Article 95 made provision only for denunciation in respect of all parties, on the ground that it was a well-established principle of law that the whole included the part. Therefore, if India wished to terminate or denounce the Convention and Transit Agreement only in respect of Pakistan, she had to have recourse to the procedure prescribed in Articles 95 and III. She had not done so; she had accordingly failed to perform her obligations under the Convention and Transit Agreement; Pakistan had the right to take action under Article 89 of the Convention and Article II of the Transit Agreement; and the Council had jurisdiction in the case.

6. Turning to the argument that the right of termination was recognized in Article 60 of the Vienna Convention, he pointed out that this right was qualified. The breach must be a "material" one, the other party was entitled only to invoke it as a ground for terminating the operation of the treaty in whole or in part, and Article 60 as a whole was subject to Article 45, which provided that a State could not invoke the breach as a ground for termination or suspension of operation of a treaty if, after becoming aware of the facts, *(a)* it had expressly agreed that the treaty remained in force or in operation or *(b)* it must, by reason of its conduct, be considered as having acquiesced in its maintenance in force or in operation. In this connection it was interesting to note that on the very day India had taken the unlawful action of suspending Pakistani overflights, the Ministry of Tourism and Civil Aviation had sent a message to the President of the Council deploring the detention of the passengers and crew of the hijacked aircraft in Pakistan for

two days and the destruction of the aircraft as "contrary to the principles of the Chicago Convention and other international conventions...". In a commentary on Article 60 of the Vienna Convention, the International Law Commission had said that the formula "invoke as a ground" was intended to underline that the right arising under the Article was not a right arbitrarily to pronounce a treaty terminated; if the other party contested the breach or its character as a "material" breach, there would be a "difference" between the parties in regard to which the normal obligations of the parties, under the United Nations Charter and under general international law, to seek a solution of the question through pacific means would apply. The Commission therefore contemplated that even in cases covered by Article 60 there would have to be recourse to the machinery for settlement of disputes when there was an allegation and denial of material breach. If Article 60 was applicable in the present case, which he disputed because of the express provisions for termination in the Convention and Transit Agreement, it was subject to the doctrines of material breach and disproportionate reprisal and the Council had jurisdiction to deal with a disagreement between two States in respect thereof.

7. Mr. Pirzada also rejected the argument that if the contract ended, the arbitration clause also ended and the arbitrator therefore did not have jurisdiction, citing the judgment of the House of Lords in the case *Heyman* v. *Darwin* in 1942—"Even in the case of termination, repudiation or rescission, the arbitration clause will be applicable and the arbitrator will have jurisdiction to determine whether the termination or repudiation was justifiable or not or whether the injured party may claim compensation." Thus whether Article 60 of the Vienna Convention, the advisory opinion of the International Court of Justice, or the analogy of municipal law was applied, a contract—in this case the Convention and Transit Agreement—could not be terminated by unilateral action.

8. As for the argument that the Council, because of its composition, was not an appropriate body to settle intricate and delicate questions of law, the fact remained that Article 84 empowered the Council to consider disagreements between Contracting States that could not be settled by direct negotiations giving the right of appeal from its decision to an *ad hoc* tribunal or the International Court of Justice. Even under municipal law, parties could agree to refer questions of law as well as of fact to the arbitration of persons who were experts in their own line. Why, then, should not such questions be referred for adjudication to a body like the ICAO Council?

9. In answer to the allegations of India concerning Pakistan's conduct in the hijacking incident, Mr. Pirzada read into the record the relevant parts of Pakistan's response to the preliminary objection in support of his contention that its behaviour had been correct and honourable. He suspended his presentation at this point, indicating that he would complete it at the next meeting.

10. In reply to questions by the Representatives of the United States and Australia, he stated that no progress had been made in response to the Council's invitation of 8 April to the two parties to negotiate directly for the purpose of settling the dispute or narrowing the issues. Pakistan had accepted that invitation and, in view of the Indian Government's note of 31 May 1971 and the letter of the Director General of Civil Aviation for India of 3 June, had understood that India had accepted it too. That had also been the understanding of the Council. India had now advised that this was not the case. In a note dated 21 July 1971, in answer to one from Pakistan on 25 June expres-

sing the hope that negotiations could start before the end of June, India's High Commissioner in Pakistan had referred to the filing of the preliminary objection and had said that there was therefore no question of holding the proposed bilateral talks in accordance with the Council's resolution of 8 April. Mr. Palkhivala explained that the Indian reply had been prompted by the belief that the negotiations should be held outside the framework of the Council resolution—India having maintained all along that Indo-Pakistan questions should be settled bilaterally without third party interference—and that the question of overflights could not be dissociated from the other questions outstanding between the two countries; subject to these considerations India was willing to have negotiations.

11. There was a brief discussion on the kind of minutes to be issued for this series of meetings, ending with the understanding that there would be the usual "expanded summary" plus a verbatim record in the English, French and Spanish languages.

DISCUSSION

Subject No. 26: Settlement of Differences between Contracting States

Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. *The President:* The Council is again in session and the Chief Counsel for India continues to have the floor.

2. *Mr. Palkhivala:* Thank you. If I may, Sir, I shall continue with Ground No. II, which is that there has been a special régime between India and Pakistan regarding overflying since the military hostilities of 1965. In that connection I had read a notification of 6 September 1965, which prohibited all overflying, and one of 10 February 1966, which modified the first notification to the extent that there could be overflying with the permission of the Central Government. I pointed out that the fact that the permission of the Government of India was necessary was the very negation of the Convention and the Transit Agreement because under those two treaties you do not need the Government's permission for overflying. That is where I stopped.

3. To continue the argument from that point, may I request the honourable members to turn to page 20 of the preliminary objection. If I explain the facts in my own words, I am likely to take more time than if I read the brief narration given there. To save time, therefore, I shall read the part of the preliminary objection dealing with Ground No. II.

4. "The Air Services Agreement of 1948 between the two countries covered air transit across each other's territory and India's overflights into Pakistan's airspace and Pakistan's overflights into India's airspace. A copy of the Agreement is hereto annexed and marked '1'. Thus air transit and overflying each other's territory was governed by a special régime between India and Pakistan in 1948 and continues to be so governed up until today. The Convention and the Transit Agreement do not apply as between India and Pakistan as regards transit and overflying each other's territory. Consequently, as regards transit and overflying, no question can arise of interpretation or application of the Convention or the Transit Agreement as between the two countries, nor of any

disagreement between them on such a question; nor can there be any question of any action by India under the Transit Agreement against Pakistan. Since there has been no action by India under the Transit Agreement against Pakistan, the question of considering any hardship or injustice to Pakistan within Article II (1) of the Transit Agreement does not arise."

"29. In view of the fact that the question of overflying or transiting is governed by a special régime as between India and Pakistan, and not by the Convention or the Transit Agreement, the Government of India submit that the Application and the Complaint of Pakistan are incompetent and not maintainable, and the Council has no *jurisdiction* to entertain them or handle the matters presented therein."

Now, Sir, comes the important part of the facts.

"30. Assuming India had committed any breach of the special régime or of the Bilateral Air Services Agreement of 1948, as alleged by Pakistan, such a dispute cannot be referred to the Council under the Convention or under the Transit Agreement or under the Rules. There is no provision whatever conferring any jurisdiction on the Council to hear or handle any disputes arising out of bilateral agreements."

"31. As a result of the armed conflict in August/September 1965 between India and Pakistan, the Air Services Agreement of 1948 between the two countries was suspended. The said Agreement has since then continued to be in suspension and has never been revived." This is very important and *Pakistan's denial of it is incorrect.* "*Since 1965 the airlines* of Pakistan have never operated within India and airlines of India have never operated within Pakistan. The traffic between the two countries continues to be handled by third country airlines."

"32. Armed hostilities ceased on September 22, 1965. On January 10, 1966 the Tashkent Declaration was signed by India and Pakistan. The leaders of the two countries declared 'their firm resolve to restore normal and peaceful relations between their countries and to promote understanding and friendly relations between their peoples'. Under Article VI of the Tashkent Declaration, 'The Prime Minister of India and the President of Pakistan have agreed'—these are the exact words—'to consider measures towards the restoration of economic and trade relations, communications as well as cultural exchanges between India and Pakistan, and take measures to implement the existing agreements between India and Pakistan'. Under Article VIII, *inter alia*, 'They further agreed to discuss the return of the property and assets taken over by either side in connection with the conflict'."

5. If I may pause here for a minute, after the armed conflict, after the hostilities of September 1965, you have the Tashkent Declaration, which is not concerned with aviation at all; it is an omnibus bilateral treaty under which both countries say "We shall restore normal communications and restore the old treaties." Now either the two countries obey, observe and respect the terms of the Tashkent Declaration or they do not. No one country can pick out aviation and say "I want this right to be restored", because there is no single, isolated right as regards aviation conferred by the Tashkent Declaration. The Tashkent Declaration is a package deal, an omnibus, bilateral treaty. You either take it or leave it; you take the whole or none of it; neither nation can say "I shall disregard some of the material provisions of the Tashkent

Declaration, but I expect to be given the right to overfly.", taking one isolated item out of the numerous items which, as I said, are parts of the package deal represented by the Tashkent Declaration.

6. Now India's complaint—I am not making the complaint before the Council because the Council is not the body to hear it; but I am only stating a historical fact—has been that Pakistan has refused to respect and observe the terms of the Tashkent Declaration. Therefore the question of restoring their pre-1965 rights as regards aviation never arose. In fact, as will be seen from the signals between the two countries attached to our preliminary submission, Pakistan itself said "Let us resume overflying on a provisional basis." It used the word "provisional". We agreed to that. In our reply we said "All right, on a provisional basis let there be restoration." This restoration, the honourable members will recall, was only in respect of overflying, not non-traffic stops, which are also covered by the Convention and the Transit Agreement. Therefore one part of the Convention and the Transit Agreement was never restored. Even the part which was restored, namely overflying, was not the absolute right as conferred by the Convention and the Transit Agreement, but was subject to each Government's permission. In other words, as I was saying before lunch, the Convention and the Transit Agreement were never restored between the two countries. The bilateral treaty of 1948 was never restored. On a provisional basis, India and Pakistan, subject every time to each Government's permission, said "All right. On a provisional basis and subject to each Government's approval, let us have overflying." That is all that happened under the special régime of 1966.

7. I come now to paragraph 33 of India's preliminary objection.

> "33. In response to the desire expressed by the President of Pakistan for the early resumption of overflights of Pakistan and Indian aircraft over each other's territory, the Government of India agreed to the resumption of overflights in the hope that the Tashkent Declaration would be scrupulously adhered to, assets and property seized during the armed conflict would be restored, and normal relations would be established." (This never happened.) "The general understanding of the two Governments with regard to the resumption of overflights was as follows:
>
> (1) *The overflights of Indian and Pakistan aircraft* across each other's territory were to be on the same basis as prior to August 1, 1965. This basis related to the fixing of routes, procedures for operating permission, etc."

The honourable members will recall that before 1965 Pakistan airlines used to connect Pakistan with India and Indian airlines used to connect India with Pakistan. You could fly from Delhi to Karachi or Delhi to Lahore by Indian airlines or Pakistan airlines prior to 1965, but not at any date after 1965. Therefore the old aviation freedom was never restored between the two countries. This is most important.

> "(2) The resumption was limited to overflights across each other's territory. It did not include the right to land in each other's territory even for non-traffic purposes.
>
> (3) The resumption of overflights was agreed to on a basis of reciprocity (which after the hijacking became impossible in practice, though theoretically it continued to be possible for India to fly over Pakistan territory).

(4) The resumption of overflights was to be on a provisional basis. [A copy of the exchange of signals establishing the aforesaid understanding between the two countries regarding overflights is contained in Annexure '2' hereto.]"

8. Will you kindly turn to Annexure 2, second signal from Pakistan to India. To save time, I am only picking out the essential words and leaving the rest unread. "We have received instructions from our Government" that is the Pakistan Government—"that the Government of India has agreed on a reciprocal basis"—mark the words "reciprocal basis"—"to the resumption of overflights of each other's territory." Now when two Governments say "this is reciprocal." what they mean is reciprocal for all purposes of aviation, not in the theory of law, but for practical purposes as practical governments wanting to fly across another country's territory. If our aircraft flying over our own territory—we regard Kashmir as a part of India—can be hijacked to Pakistan with the consequences you have already seen, what would be the safety of our aircraft if they were to fly over Pakistan territory? The position would be much worse and much less safe. In other words, for all practical purposes the Government of India, after the hijacking, came to the conclusion that reciprocity in the field of safety of aviation was not to be expected of Pakistan vis-à-vis India. Since for all practical purposes reciprocity was not available to India, and it would have been extremely dangerous to permit Indian aircraft to overfly Pakistan territory, India said "Well, on a reciprocal basis in 1966 we had permitted resumption of overflying. If that reciprocal basis is not available to India for practical purposes, we cannot allow overflying to Pakistan." This is the clear justification under international law for India's attitude. I am not elaborating this point because, as I have already said, the honourable members do not have to decide whether there was justification or not; they only have to decide whether this point is within their jurisdiction at all.

9. Then, will you kindly turn to the fifth page of the Annexure, where there is a signal from the DGCA Pakistan to DGCA India on the 9th February 1966. It is on page 30. I will omit the first 10 or 12 lines of this signal and may I request you to turn to the last paragraph but one, on page 31, the last sentence but one: "All former routes over Pakistan territory as existed prior to 1/8/1965 will be available to IAC and AII on a provisional basis." Mark the word "provisional". The agreement was purely provisional; the special régime was on a purely provisional basis. This is Pakistan's own suggestion to India. Of course, the scheduled airlines of India and Pakistan were thinking of resuming their flights for traffic purposes, but that type of aviation freedom was never restored even on a provisional basis. Then India replies in the next signal, the one dated 9th February 1966 from DGCA India to DGCA Pakistan. The last sentence of this signal runs thus: "Flights mentioned in our SIG T00 081505 will commence operating from 10th February as suggested in your SIG T00 091127 on provisional basis."

10. Then the next signal from India to Pakistan, the last one, reads: "Reference your 3/66/AT I T00 120935 and 120937. As we have informed you in our SIGNAL YA 101 T00 081505, resumption of flights raises questions not merely of inter-airline importance such as restoration of property, staffing, etc. These matters will have to be resolved at inter-governmental level. We regret until then it will not, repeat not, be possible to resume services. In order to facilitate decision we repeat our proposal that DGCA's India and Pakistan should meet to resolve various problems arising out of resumption. At appro-

priate stage two airlines could also meet as suggested by you earlier. Regarding routes NOTAMS have been issued and you must have received them." In short, the net result was that the scheduled airlines never resumed flights between the two countries, even on a provisional basis.

11. Now this is the situation and what is the essence of these signals? I have been trying to emphasize that what emerges from these signals is the following: first, that the special régime regarding aviation is purely provisional; second, that it is on a basis of reciprocity, so that if one country does not play the game the other country is not bound to give the facility; and three, that when the resumption of overflying is effected, the honourable members have already seen the notification of 10 February 1966 which says it is with the permission of the Central Government. Therefore, in short, the Convention and the Transit Agreement are out; they are not in operation at all between India and Pakistan as from 1965/1966.

12. If I may read further, paragraph 34 of the preliminary objection says:

> "On the basis of the aforesaid understanding, the overflights of Pakistan and Indian aircraft across each other's territory were resumed with effect from February 10, 1966. The aforesaid understanding is hereafter referred to as 'the Special Agreement of 1966'."

13. Now comes an important paragraph which shows why the hope of the Tashkent Declaration being fulfilled was completely frustrated by Pakistan's attitude to India:

> "35. 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 goodwill and several unilateral actions on the part of the Government of India to establish normalcy, Pakistan has continued to keep up a posture of confrontation bordering on hostility towards India since March 1966. For example, India unilaterally lifted the embargo on trade on May 27, 1966 and invited Pakistan to do likewise. Till now, Pakistan has not reciprocated. On June 27, 1966 India unilaterally decided to release all cargoes seized during the conflict except military contraband. India also proposed to exchange seized properties on March 26, 1966 and repeated the gesture on April 25 and December 28, 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."

The Tashkent Declaration talked of restoration of properties seized during the armed conflict. India openly and officially said: "We are prepared to restore all the properties." Pakistan's response was to sell the Indian properties and take the proceeds into their own national exchequer. This was a clear violation of the Tashkent Declaration. How could India be expected, then, to restore normal aviation freedoms?

> "India offered to increase cultural exchanges, liberalise visa procedures, establish bilateral machinery for settling mutual problems,—all without receiving any positive response.
>
> 36. The continued policy of confrontation bordering on hostility adopted by Pakistan and the absence of normal relations between India

and Pakistan since 1966 were the main reasons for the continuation of the Special Agreement of 1966 between the two countries and for the non-revival of the Air Services Agreement of 1948.

37. In view of the above, it is clear that since the Air Services Agreement of 1948 continues to remain suspended, no question can arise of any disagreement between the two countries relating to the application of that Agreement, apart from the point that any such question cannot be referred to the Council under the aforesaid Articles and the Council would have no jurisdiction to handle any such matter."

14. In paragraph 38 we point out how this Special Agreement, namely no overflying without the Government's permission, continues to operate even today:

> "The Special Agreement of 1966 has governed the rights and privileges of India and Pakistan regarding air transit and overflying from February 1966 till February 1971."—when the hijacking incident resulted in the Indian Government's withdrawing its permission—"That Special Agreement, which was provisional and on the basis of reciprocity, could not continue in view of Pakistan's aforesaid conduct and the creation by Pakistan of conditions which made it most unsafe for Indian aircraft to overfly Pakistan's territory. The freedom of Indian and Pakistan aircraft to overfly each other's territory under the Special Agreement of 1966 was always subject to permission by the respective Governments and was to be exercised in accordance with the terms and conditions of that permission. Copies of the Notifications issued by the Government of India dated September 6, 1965 and February 10, 1966 ... which make this point abundantly clear, are hereto annexed and marked Annexure '3'."—I have already read those notifications just before lunch and you have seen that in so many words they say quite clearly "No overflying without the Government's permission"—"This basic limitation was never removed."

Therefore the complaint of Pakistan in 1971 is a complaint which refers to what happened in 1965. For five years they never complained. It is now that the complaint is made. I mean the application; I am not using the word "complaint" in the technical sense of the Rules. If the application has any substance, it should have been made in 1965/1966, because from that date on, as you have seen, the Convention and the Transit Agreement have been suspended between the two countries.

15. If I may read further in paragraph 38:

> "This basic limitation was never removed, and even the limited right of overflights was never put on a regular basis. The Special Agreement of 1966 was in force up to February 3, 1971, in law as well as in practice, and the right of Pakistan to overfly Indian territory was subject at all material times to the permission of the Government of India. This permission was withdrawn from February 4, 1971, and India had the right to withdraw such permission under the Special Agreement of 1966. The Government of India propose to say here nothing more regarding that Special Agreement, since Pakistan's Application and Complaint do not deal with, and do not relate to, that Special Agreement."

16. There is a summary in the form of four propositions in paragraph 39 of the preliminary objection:

"*(a)* there is no disagreement between India and Pakistan relating to the

interpretation or application of the Convention or the Transit Agreement. (That is why this honourable Council has no jurisdiction. I will not read *(b)* just now because it pertains to the second case—the Complaint, but *(c)* and *(d)* are relevant.)

(c) the question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed by a Special Régime and not by the Convention or the Transit Agreement; and

(d) the Council has no jurisdiction to handle any dispute under a Special Régime or a Bilateral Agreement."

17. Now, Sir, this in brief is the case of India regarding the question of jurisdiction. In the course of my argument, which I hope has not been unduly long, I have referred to the fact that in the English language the words "interpretation" and "application" are so clear, so precise and with such a clear-cut legal connotation that their meaning cannot possibly be misunderstood. I did not refer to the French and Spanish texts of the Convention and Transit Agreement, which I am aware are equally authoritative; that is only because of the limits of my own education. I am unfortunately ignorant of those two languages, which a civilized man ought to know, and it is my ignorance of them which is responsible for my not referring to those words in the two other languages. People who understand French and Spanish, however, tell me that the equivalents of the English "interpretation" and "application" are so clear, so unambiguous, that the arguments which have been heard as regards the English text would apply with equal force to the French and Spanish texts of the Convention and Transit Agreement. I ask the honourable members' pardon for not being able to say anything more regarding the words in those two languages.

18. I have come to the end of my argument on the first case except for just one fact which I wanted to mention and that is Pakistan's somewhat curious contention that India is estopped from pleading the Special Régime because India has throughout the last five years, from 1966 to 1971, acted on the basis that the Convention and the Transit Agreement apply as between the two countries. Now let us not confuse the issue by referring to anything other than overflying, because the whole Application of Pakistan is about overflying. The question of making non-traffic stops in India is out because we have never allowed Pakistan to make these stops, except perhaps on some rare occasions which I am not aware of and which have been with the special permission of the Government. So far as overflying is concerned, if we have said, as we have categorically, that it can only be with the permission of the Government and if the Convention and Transit Agreement in turn say that permission of the Government is not necessary, I completely fail to see how any human mind can reconcile the two and say that when the Indian Government says "Take my permission.", what it means is that "I give you the rights under the Convention and the Transit Agreement." It is a contradiction in terms and my simple mind is not able to reconcile these two positions, which to me appear clearly contradictory. A government saying "Take my permission." is a government which expressly says "I do not recognize the Convention and the Transit Agreement as between our two countries.", because if these two international treaties were recognized, the question of the Government's permission can never arise. You have seen already what the Indian Government categorically said in 1966 and that notification continues in force today: that Pakistan shall not overfly India except with the Indian Government's permission. Therefore the case of Pakistan that India has accepted for the last

five years the Convention and the Transit Agreement as regards overflying in its relations with Pakistan is the complete contrary, the very opposite, of the truth.

19. I have, Mr. President, finished my argument on the first case. I was wondering if you would like me to deal with the second case.

20. *The President:* No. We will deal with the two cases separately.

21. *Mr. Palkhivala:* Then all that remains is to hand over, if I may, to your office, Mr. President, these photostat copies of excerpts from the judgment of the International Court of Justice and the question and answer between the International Court and the US Counsel, because I understand that the ICAO Secretariat has not yet received copies of this judgment and the proceedings. Therefore, Sir, in order that the honourable members may be able to read the relevant provisions of the judgment for themselves, we are having photostats made from the official report of the judgment and from a typed copy of the question put to the United States Counsel and the answer given by him, which, as I have already indicated, has been endorsed and made a ruling of the International Court of Justice. The photostat copies should be ready in half an hour and if you will permit me I shall hand them over later.

22. If I may add one thing, when the Tashkent Declaration was signed, our Prime Minister wrote to the President of Pakistan. I shall read the text of her letter, written on 3 February 1966, merely to show that after the Tashkent Declaration the only question which the two Governments considered was overflying with each Government's permission; the question of stops in the two countries for non-traffic purposes did not arise at all. This is what the Prime Minister of India said: "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 planes across each other's territory..." The rest is the historical part which I have already read. Not that *anything turns on it, but it is one of the strange coincidences in the history* of relations between the two countries that this letter is dated the 3rd of February 1966 and on the eve of the fifth anniversary of it, to be precise the 2nd of February 1971, our aircraft was blown up on Pakistan territory. Thank you, Sir. I am sorry if I have taken a little longer than I originally expected.

23. *The President:* Thank you very much. I now turn the floor over to the Chief Counsel of Pakistan.

24. *Mr. Pirzada:* Mr. President and honourable members of the Council, my endeavour will be to submit before you that the objections filed by India are misconceived, bad in law and incompetent, and I will endeavour to show to you that this august Council has jurisdiction to entertain the Application and the Complaint filed by Pakistan. I will deal with the various contentions which have been raised by the Counsel for India today in support of the said objection, but I must say that the Counsel for India did not confine himself to the legal points; here and there he touched on matters pertaining to the merits of the dispute. He has also, on occasion, made certain allegations which with regret, but with restraint and respect, *I will have to revert to and repudiate on* the relevant and appropriate occasion.

25. The main foundation of the argument is that this is a case of termination of the agreement or treaty and is not a case of application or interpretation and therefore, according to the Counsel for India, this body has no jurisdiction to go into it. Now I will meet the various points raised here in my own way and will try as far as possible to be concise and precise. I will not take you to Alice in Wonderland or the Ritz Hotel according to the dictum of Lord Justice Darling, as has been suggested by my esteemed friend here, but I

will go somewhat on the following lines. First and foremost, as we are dealing with a very important and fundamental convention, which guarantees the freedom of civil aviation, I will submit to you what are the canons of construction or rules of interpretation applicable in such circumstances; then I will apply those rules to the various provisions and articles of the Convention and the Transit Agreement and base my contention thereon.

26. Coming first to the canon of construction applicable to the Convention as well as to the Transit Agreement, you will notice that it is a multilateral treaty and that it provides an organization and a machinery of a permanent character to deal with disputes. As soon as we have noted, among others, these two points, then the following canon of construction, which has been laid down by the International Court of Justice, is immediately attracted and becomes applicable. I am referring to the leading case *Certain Expenses of the United Nations* and I am relying on a passage from the pronouncement of that august Court to show what the rule of interpretation or canon of construction is in such cases. I will not trouble you with the original citation. I shall refer to certain passages given in *International Law Through the Cases* by Green, third edition, pages 601 to 603. It was laid down therein that the cardinal rule of interpretation is that the words ought to be read in their ordinary and natural sense. If so read, they make sense; that is the end of the matter. Then, proceeding further, it is mentioned and stated that "In the interpretation of a multilateral treaty which establishes a permanent international organization to accomplish certain stated purposes there are particular considerations to which regard should be had. The Charter's principles were of necessity expressed in broad and general terms. It attempts to provide against the unknown ... Its text reveals that it was intended—subject to amendments—to endure for all time ... its provisions were intended to adjust themselves to the ever-changing pattern of international existence. It established international machinery to accomplish its stated purposes. Its particular provisions should receive a broad and liberal interpretation unless the context of any particular provision requires, or there is to be found elsewhere in the Charter something to compel, a narrower and restricted interpretation." Therefore what emerges and what is laid down here as a well-settled principle is this: that the interpretation of a multilateral treaty like the one with which we are directly concerned here today must be large and liberal and not in any narrow sense, or, as we say in our domestic jurisdiction, especially in the common law, not in a pedantic sense. The interpretation that has been canvassed before you all along, both in the Objections and today, is a narrow one, a very narrow one. Whether we go to the English text or to the French or Spanish, the canon will be the same: that we have to give a large and liberal interpretation to the provisions because there is regular permanent machinery available under the Convention that is equally entitled to go into the matters under the Transit Agreement. Having laid down this canon of construction, I will now take you to the provisions of the Convention. If I refer to some other provisions and then come to the relevant Article, the matter will become clear.

27. Now the main Article on which we are placing reliance, and which, of course, has been referred to even by the Counsel for India, is Article 84 of the Convention. Let us read the words because I regret to say that although reference was made to the expression "interpretation or application of this Convention", and though the Article was read, it was not considered in its full context and *in toto*. I shall read again the relevant portion, especially the first part of it. It says: "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." For the present the rest is not relevant. Now please take into consideration that the opening words are equally important and they are: "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention". Therefore we have to consider the following expressions: "any", then "disagreement", then "interpretation", and, lastly, "application of the Convention". Each one is important and I will show you that the effect of the inclusion of all these expressions is this: that it is a comprehensive clause, in fact much wider than Article 36 of the Statute of the International Court of Justice. It is all-embracing and can cover all disputes.

28. But let us go back now to these expressions. Article 36 of the Statute of the International Court of Justice talks of "interpretation of a treaty", but here we have not only interpretation, not only application, but the expression "any disagreement between two or more contracting States". In other words, "any" would certainly cover all questions, but the emphasis is also on the word "disagreement", relating, of course, to the interpretation or to the application of the Convention. Now this word "disagreement", which is synonymous with and in fact interchangeable with the word "dispute", has been considered many a time by the Permanent Court of Justice and the International Court of Justice. I will refer only to two cases to show how it has been interpreted.

29. First of all, let me refer to the case *Interpretation of Peace Treaties*. Now this is a passage which deals with the elucidation of the expression "dispute" or "disagreement". "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America, charged Bulgaria, Hungary and Romania with having violated in various ways the provisions of the article dealing with human rights and fundamental freedoms in the peace treaty, and called upon the three Governments to take remedial measures to carry our their obligations under the treaty. The three Governments, on the other hand, denied the charges. There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen." Then it is added: "Inasmuch as the disputes relate to the question of performance or non-performance of obligations provided in the Articles dealing with human rights and fundamental freedoms, they are clearly disputes concerning the interpretation or execution of the peace treaties." Now the emphasis here is on a situation in which two sides hold clearly opposite views concerning the question of performance or non-performance of certain treaty obligations. I will show in due course that even assuming that the contention advanced by India is correct, the situation is the same as the one I have been speaking of and is covered by the dictum of the International Court of Justice.

30. The second case is *Mavrommatis Palestine Concessions* and in it the expression "dispute" or "disagreement" was defined and interpreted by the International Court in this way: "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 latter power is asserting its own rights by claiming from His Britannic Majesty's Government an indemnity on the ground that one of its subjects has been treated by the Palestine or British authorities in a manner incompatible with certain international obligations which they are bound to observe... Therefore it is a dispute, because there is a conflict of legal views or interests between two States."

31. *There is a third case, but I am deferring it for the present,* because after I have covered other grounds it will more or less clarify the whole matter. So when there is a conflict between two States and one is asserting one view and the other is denying the same, it is a disagreement and, if it is a disagreement, then the Council has jurisdiction to go into, determine and decide it. For example, in this case, India is saying that the Convention and the Transit Agreement had been unilaterally, though unjustifiably, terminated by it and once they are terminated they are not in existence; if they are not in existence, then this Council has no jurisdiction to go into the action of India. We, on the other hand, maintain—I will show this on another independent ground—that the Convention and the Transit Agreement are very much alive and it is a case of application as well as of interpretation of the Convention. Once we say it is a case of application, the mere denial by India that it is a case of application will *not be sufficient. In fact, I will show to you presently that a case of denun*ciation or termination of a convention or treaty is a case of application as well as of interpretation of the treaty.

32. I am referring to an Indian author himself. I am relying on the book entitled *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*, by B. P. Sinha. The page is 2 and the paragraph reads like this: "It is likely that a State may allege violations of obligations of a treaty by other party or parties in order to justify its act or decision for unilateral repudiation of its obligations under the treaty. Motivated by policy considerations, a party to a treaty may accuse another of committing breaches of obligations in order to release itself from its obligations, which it may consider as being onerous. An accused party may retort by charging the complaining or denouncing party with mala fides"—as we do in this case—"in *initiating charges of violations of treaty obligations. The complaining or* denouncing party's charges of violations of obligations by other party or parties may indeed be genuine and justified and the denial of such charges by an accused party or parties may be just a smoke-screen to hide an illegal act. A complaining or denouncing party may refuse to accept the bona fides of the accused party and vice versa. Consequently, a situation may be foreseen where a dispute may arise"—kindly note these words—"from a divergence of opinion between the parties related to interpretation or application of treaty obligations." I repeat the words "A situation may arise from a divergence of opinion between the parties related to interpretation or application of treaty obligations.", and that is the situation which has arisen here. More than that, even on the language of Article 84—and the same will be the position under Article III of the Transit Agreement—I have shown that if a disagreement of this kind arises, then it will be deemed to be a disagreement relating to the interpretation or application of the Convention and the Council certainly will have jurisdiction to determine the same.

33. I now come to the main point. It has been suggested that the question of termination of a treaty is *dehors* the treaty, that in fact it is the sovereign right of a State to denounce a treaty at any time it likes. Now reliance was placed on the so-called "principle of customary international law", then on Article 60 of the Vienna Convention and finally on certain observations made

recently by the International Court of Justice in the famous case wherein a reference was made by the Security Council concerning Namibia. I will deal with these sub-points in a moment, but all these questions certainly would not arise under the Convention and Transit Agreement, because the principle, or alleged principle, of customary international law, Article 60 of the Vienna Convention, and what was expressed as an advisory opinion by the International Court of Justice in the case of Southwest Africa against South Africa are all concerned with cases where the convention or treaty is silent as to the mode and manner of its termination, whereas the Convention and the Transit Agreement have express provisions on termination. In fact, the Convention and Transit Agreement were evolved after mature consideration and deliberation, having regard to various exigencies and situations that might arise. If they contain any express provisions on termination, the question of having recourse to implied powers would not arise. That would be the first and foremost point.

34. Now let us see what are the provisions contained in the Convention and in the Transit Agreement. They took into consideration certain events which can take place and in those events certain rights accrue to the contracting parties. For example, they took into consideration the event of war and made provision for denunciation. So they did contemplate and in fact provide for termination, denunciation and repudiation in certain circumstances. Let us look at the Convention first. Article 89 reads: "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." So in the Convention we are not relying on implied powers. For example, even in municipal jurisdictions and in ordinary contracts—because there was an attempt to draw an analogy between a treaty and an ordinary contract under municipal law—either there is an express provision or if there is no provision you can rely on the doctrine of implied power to terminate those contracts. Here express provision has been made and therefore my first point would be that the Convention can be repudiated, denounced, or terminated in the manner provided and in the presence of express provisions recourse need not be had to implied powers. As I have just said, the drafters of the Convention contemplated war and in Article 89 took special care to clothe contracting States with certain rights.

35. I come now to Article 95. It says: "*(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." Dealing with this, the Counsel for India says that this is a right of denunciation, not a right of termination, and secondly he urged that denunciation is denunciation in respect of all the States which are contracting parties to this multilateral treaty, the Convention, not in respect of only one State. It is a well-established principle of law that the whole includes the part. If Article 95 contemplates denunciation in respect of all parties, it equally contemplates denunciation in respect of one of them. It may be India against Pakistan or vice versa, and therefore if India desired to terminate or denounce the Convention just in respect of Pakistan, it had to do so in the manner and the mode provided herein. Unless it does so there is no legal or valid denunciation or termination and Pakistan can justifiably come before this Council

urging that India's unilateral or arbitrary action is illegal, and in fact its failure to perform its obligation under the Convention and the Transit Agreement immediately attracts the Complaint and the Application which have been presented by Pakistan and clothes the Council with jurisdiction to hear and determine the same.

36. Therefore my first point is that in view of the express provisions in Articles 89 and 95 and having regard to Article III of the Transit Agreement, there is no termination of the Convention or the Transit Agreement by India and that in fact they are operative, they are in existence. In any case, when we say they apply and when India says they do not apply, there is certainly a disagreement within the meaning of the Articles for the purposes of both the Convention and the Transit Agreement.

37. Now take the alternate case, the case which is being suggested by India, namely that a State has a right to terminate a treaty under customary law, which has now been given recognition in Article 60 of the Vienna Convention. Let us go to Article 60 of the Vienna Convention. First of all, the opening part of the Article is very important. It starts: "A material breach of a bilateral treaty"—first it refers to a bilateral treaty and secondly only in case of material breach by one of the parties is the other entitled to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. So in case of a bilateral treaty and then only for a material breach—not any breach, not a technical breach, not in a case where you can make a mountain out of a molehill—in case of material breach of a bilateral treaty by one of the parties, what happens? It entitles the other to invoke the breach as a ground for termination. It is only an entitlement to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. And action under Article 60 is subject to Article 45 of the same Vienna Convention, which provides that a State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, after becoming aware of the facts, it either expressly agrees that the treaty is valid, remains in force or continues in operation or by reason of its conduct must be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be. I will deal with the case of estoppel by the conduct of India. I will come back to Article 45, but the point at this stage is that Article 60 itself firstly is qualified by very important conditions, namely material breach of a bilateral treaty and merely entitling the State to invoke the breach as a ground, and secondly is subject to other provisions, one of which is Article 45.

38. The International Law Commission itself, in its reports and comments, elucidated what was really intended to be coverd by Article 60 of the Vienna Convention. First of all, it referred to two cases in which the question was about termination. In one case the question was raised by implication, with one party resisting termination and saying "No, the treaty is in force; therefore there is a dispute; it must be investigated and relief may be given." In the second case the question was directly raised, one party saying "We have repudiated." and the other party "There has not been a legal and proper repudiation and therefore the tribunal has jurisdiction." The Commission said that in these cases a dispute would arise and would have to be adjudicated. Now this is a commentary in the Report of the International Law Commission on the Second Part of its 17th Session, 3 to 28 January 1966, *Official Records of the 21st Session*, Supplement No. 9 (A/6309/Rev. 1), pages 82 and 83.

39. I will first refer to the two cases and then to the paragraph in which the Commission has elucidated this point. The two cases referred to are *Diversion of Waters from the Meuse* and *Tacna-Arica Arbitration*. In the case *Diversion of Waters from the Meuse*, Belgium contended that by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against it. Belgium did not claim to denounce the treaty, but it did assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision. Although it pleaded its claim rather as an application of the principle *inadimplementi non est adimplendum*. The Court, having found that Holland had not violated the Treaty, did not pronounce upon the Belgian contention. In the other case, the only other case that seems to be of much significance, *Tacna-Arica Arbitration*, Peru contended that by preventing the performance of Article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from her obligations under that Article. The Arbitrator, after examining the evidence, rejected the Peruvian contention, saying that "It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necesaary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement and, in the opinion of the Arbitrator, a situation of such gravity has not been shown." So the question of justification and termination was considered relating to, concerning, and in the construction of the Treaty.

40. After referring to these cases and other provisions and opinions of jurists, the Commission concluded, in paragraph 6 on page 83, "Paragraph 1 provides that a 'material' breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. The formula 'invoke as a ground' is intended to underline that the right arising under the Article is not a right arbitrarily to pronounce the treaty terminated".—It is not a right arbitrarily to pronounce the treaty terminated.—"If the other party contests the breach or its character as a 'material' breach"—as we are doing here—"there will be a difference"—please note this expression—"between the parties, with regard to which the normal obligations incumbent upon the parties under the Charter and under general international law to seek a solution to the question through pacific means will apply." Therefore, the International Law Commission contemplated that even in the cases covered by Article 60, when there is an allegation of material breach and a denial, recourse will have to be had to the machinery provided by the treaty for the settlement of disputes, namely adjudication or negotiation or whatever provision is incorporated therein.

41. Now Article 60 and this principle found recognition in the recent case of *Namibia* and in the opinion expressed by the International Court of Justice, which was referred to this morning and relied upon by the learned Counsel for India. I had the honour and privilege to appear in the said case and to support the resolution of the General Assembly revoking the Mandate of South Africa over Namibia and I will in a moment explain what the point involved was. In fact it has no bearing on the point under consideration in the case before this Council. The honourable members of the Council will recall that the Mandate over Namibia was given to South Africa by the League of Nations. The League of Nations was replaced by the General Assembly of the United Nations in 1946. The question arose that by various breaches of the obligations which were cast on South Africa under that Mandate and by

its practice of *apartheid*—the discrimination which the Government of South Africa as mandatory was practising against the population—it had forfeited its right to govern that Territory. This became the subject-matter of various advisory opinions and decisions of the International Court of Justice right from 1950 to 1971, and in the year 1950, as well as in 1962, the International Court of Justice found that by its conduct South Africa had committed breaches of the material conditions of the Mandate. Therefore the Mandate stood terminated. This was eventually so determined by a resolution of the General Assembly, and eventually the Security Council made a reference to the International Court of Justice seeking its opinion as to the consequences arising out of that resolution and the obligation of the various States to honour the resolutions passed by the General Assembly and reflected in various other resolutions of the Security Council.

42. The contention of South Africa was that the Mandate was irrevocable as there was no provision for revocation in it at the time of the League of Nations. It is this aspect which was dealt with on pages 46 to 47 and in paragraphs 91 to 96. The International Court of Justice therefore was dealing with a mandate which South Africa claimed was irrevocable, as in the Mandate there was no provision for revocation, and hence the Court applied the analogy of Article 60 of the Vienna Convention. There was no express provision and not only this, because, if you proceed further and read paragraphs 99 to 106, it will become clear that the following propositions emerge from the advisory opinion of the International Court of Justice. First, they said that the fact that there is no express provision in the Mandate does not mean that trusteeship by South Africa becomes ownership by South Africa; the Mandate will still be terminable in case of material breach. They also dealt with the contention of South Africa that there had not been a unilateral and arbitrary termination of the Mandate by the General Assembly. In fact they said that the opinion was expressed by this very court on earlier occasions, wherein on facts they found that South Africa was guilty of *apartheid* and various other acts of omission and commission and breach of obligations under the Mandate. Therefore there was ample justification for the General Assembly to pass the resolution, and then in the particular jurisdiction which the International Court of Justice was exercising, it expressed that advisory opinion. Nothing has been said in this case and in this advisory opinion which militates against the submission which I have been canvassing before you, because I have pointed out two cases of the International Court of Justice which deal directly with situations arising in circumstances similar to those in which India and Pakistan have come before you today in this case.

43. Then the analogy of municipal law was given. In fact this was also referred to by the International Court. Now what happens even in municipal law? There are agreements and contracts entered into by and between parties. These sometimes make express provision for termination, rescission and repudiation. On other occasions recourse has to be had to implied powers of repudiation, rescission and termination, and in a number of cases there have been clauses in the contracts for the reference to arbitration of disputes relating to or arising under the contract. Cases have arisen wherein one party has alleged that it has repudiated the contract and therefore as the contract has gone, the arbitration clause has also gone, because if the contract is alive the part of it pertaining to arbitration is alive and if the contract goes the arbitration clause goes and the arbitrator then does not have the jurisdiction to decide and adjudicate on the matter. That was the approach taken by some of the courts before 1942, but in that year the point was well settled in the

famous case of *Heyman* v. *Darwin*. This case was decided by the House of Lords and is reported in 1942 Appeal Cases, 356. The decision was that even in case of repudiation, rescission or termination, the arbitration clause will be applicable and the arbitrator will have jurisdiction to determine whether circumstances exist wherein the party who claims to repudiate or terminate the contract was justified or whether the claim of the other party, saying that the contract was alive and that he is entitled to either damages or compensation, is valid.

44. So whether we apply Article 60 of the Vienna Convention, or whether we go to the recent Advisory Opinion expressed by the International Court of Justice, or whether we follow the analogy of the municipal jurisdictions and ordinary law of contracts, the fact remains that by unilateral action of one of the parties, or one of the Contracting States, the contract or the Convention cannot be said to have been terminated and in fact the tribunal in those cases, the International Court in certain other cases, and the Council in the present case, does have jurisdiction to determine the disagreement between the parties.

45. In view of these submissions, I need not trouble or detain you with other articles of the Convention on which reliance was placed by the other side to show that only cases of infractions are covered, because, as I have said, this Article 84 is an article of a comprehensive character, wide enough to cover a dispute or disagreement as to application or non-application or as to interpretation, which would include a dispute as to the termination thereof, and the Council will be competent and will have jurisdiction to go in this matter.

46. When I was referring to the case *Interpretation of Peace Treaties* and the *Mavrommatis* case, I had said there was a third case of the International Court of Justice. Mr. President, this is the case known as the *Chorzów Factory Indemnity* case. It is a judgment of the Permanent Court of International Justice of 1928, *Series A*, *No. 17*, and it concerned a German interest in Polish Upper Silesia. Therein the Permanent Court held that "it is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. The reparation due by one State to another does not change its character by the fact that it takes the form of indemnity and calculation of damages. The Court observed that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation and therefore the Court retains the jurisdiction to determine the same." So a case wherein compensation is claimed or reparation is sought for failure to comply with obligations is a case of application of a treaty or a convention, and there the International Court said that it has jurisdiction and likewise here our submission would be that the Council has jurisdiction to determine the same.

47. Now apart from this, my alternative submission is that India itself approached this body immediately after the so-called hijacking incident. The various allegations they have made here I repudiate and deny; I will refer to them at the appropriate moment. At the present time, I am referring to the communication received by the honourable President of this Council from the Minister of Tourism and Civil Aviation of the Government of India, dated 4 February 1971, which was circulated by the President to all Council Members. Now on page 3 of this communication it is stated: "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 avia-

tion. 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 16 December 1970." So even on the 4th of February, when India purports to take the illegal action which it has taken against Pakistan, its Minister of Tourism and Civil Aviation approached this Council and made these allegations against Pakistan, one of which was that the action of Pakistan was contrary to the principles of the Chicago Convention and other international conventions. This they could state only if the Convention and the agreements were in force and in operation. Under Article 45 of the Vienna Convention this is conduct which can be taken into consideration to show that there has been no termination. I read out Article 45 a little while ago and, I repeat, the said Article provides: "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, after becoming aware of the facts, ... it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

48. *The President:* We will have a coffee break now—15 minutes.

Recess

49. *The President:* I invite the Chief Counsel for Pakistan to continue his presentation.

50. *Mr. Pirzada:* Mr. President and honourable members of the Council, before the tea-break I was dealing with Article 60 of the Vienna Convention and I was emphasizing that even under it the right of a State to invoke a breach of a treaty as a ground for termination only arises in case of material breach. Therefore what I wish to emphasize is that in cases where there is no express provision in the treaty or convention or agreement for termination and if recourse is to be had to implied powers, all the conditions contemplated by Article 60 of the Vienna Convention, and in fact by the other Articles in the said Convention, have to be complied with. In Article 60 it is not just a case of mere breach; the breach must be of a material character or, to use the words of the American Counsel in the case of South West Africa, of a fundamental character. Reliance has been placed on an answer given by that Counsel and I will explain in a moment the context in which I understood him to have given it. But the fact remains that if that ground is to be invoked by the State, it cannot be invoked at any time, according to the caprice or whim of a State, on any insignificant breach, but only in case of material breach of an obligation under that treaty.

51. Now a point hinted at by the learned Counsel this morning was that whether a treaty or a convention can be terminated and if so, under what circumstances are intricate and complicated questions of law and therefore the Convention could not have contemplated their adjudication by the Council. He referred to the composition of the Council, its technical character, and, according to him, its non-legal character. With all due respect to him, if we go to Article 84 we find that in the event of any disagreement between two or more States relating to the interpretation, construction, or application of the Convention, an effort has first to be made to settle it by negotiation and if that

fails it is to be submitted to the Council. Then there is the provision: "Any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with other parties to the dispute or to the Permanent Court of International Justice." So the Convention itself contemplated that all kinds of questions may arise—legal, complicated, certainly—they will arise and in the first instance they are to be determined by the Council. Later on, certain rights of appeal have been given to the Contracting States. Therefore not much reliance can be placed on the argument based on the composition of this august Council. In fact, it is our experience even with municipal jurisdictions that there are cases arising out of important contracts in which important, intricate and complicated questions of law as well as of fact are referred to domestic tribunals or arbitrators chosen by the parties. Some of the arbitrators are not lawyers but men well versed in their own line and they are quite competent to decide. They may decide questions of fact; they may decide questions of law. So it is no answer to say that because the composition of the Council is of a particular kind, intricate questions cannot be dealt with and decided by the Council. I submit, with respect, that the Council is entitled to decide all questions in cases of disagreement as to the interpretation or application of the Convention.

52. Mr. President, in the morning my learned friend, while dealing with the legal aspects and developing his contentions on the points arising out of India's preliminary objections, referred to paragraphs 5, 6 and 7 of his preliminary objections, which deal with various allegations as to the conduct of Pakistan in the matter arising out of the hijacking of the plane. It is only for the purpose of putting the record straight that I have to take your valuable time and I seek your indulgence to read out our reply thereto, so that the record must reflect the correct position, because Pakistan has done everything which it was possible for it to do and has fulfilled all its obligations. Its conduct throughout was correct; it was honourable. The paragraphs read were, as far as I recollect, 5, 6 and 7 and I will read our replies thereto, with your permission:

> "*Para. 5.* The statement made by India is incorrect, irrelevant and has no bearing on the issue under reference. However, to set the record straight, it is necessary to state the correct position. The 1965 conflict was the direct result of Indian army crossing the international frontiers of Pakistan following a general uprising against military occupation by India of the State of Jammu and Kashmir."—and I repudiate the statement by my friend that Kashmir is a part of India; it certainly is not.—"The hostilities were followed by the signing of the Tashkent Declaration by Pakistan and India. Consequently, the overflights as existing before the 1st of August 1965 were resumed in accordance with the terms of the Bilateral Agreement of 1948, the Convention and the Transit Agreement. However, because of India's refusal to implement the United Nations resolution relating to the exercise by the people of the State of Jammu and Kashmir of their right to self-determination and her persistence to settle outstanding disputes on her own terms, no understanding could be arrived at on other issues.
>
> *Para. 6.* The allegations made in this paragraph are baseless and motivated by the desire to mislead the Council. Pakistan had no connection with and responsibility for the hijacking of the Indian aircraft by two nationals of Kashmir from the airspace not of Pakistan but of a territory under military occupation of India. The Government of Pakistan has

since initiated prosecution against the hijackers and their accomplices. The conduct of Pakistan in relation to the hijacking incident has been in conformity with the Tokyo Convention 1963, The Hague Convention 1970, the ICAO and the UN resolutions on the subject and the practice of States in general.

Para. 7. The Indian version of the hijacking incident is a gross misrepresentation of facts." We deny all the allegations you heard in the morning. "The correct position regarding this incident is as follows:

(a) On January 30, 1971, at 12.35 hours, Indian Airlines F-27 (Reg. VT-DMA) *Service ICC-422-A, en route from Srinagar to Jammu*, contacted Lahore Air Traffic Control Radio Telephone and informed that the aircraft was being hijacked to Lahore and would be landing in 10 minutes time. Immediately on receipt of this information, fire and security services were alerted by the Airport Manager.

(b) The aircraft landed at Lahore Airport at 12.45 hours local time. It was parked away from other aircraft, with security and fire services standing by.

(c) Immediately on landing, the hijackers were requested to allow the passengers and the crew to disembark. This was not agreed to by the hijackers at first but after a lot of persuasion they agreed to let the crew and the passengers out at 14.32 hours local time.

(d) The passengers and the crew were immediately taken to the passenger lounge and subsequently transported to a hotel where arrangements for their accommodation, etc., had been made.

(e) The Director General, Civil Aviation of India was informed of the safe landing of the aircraft.

(f) The Captain of the aircraft (Capt. G. H. Ubroi) was given clearance in writing by the Regional Controller of Civil Aviation, Lahore, that he could take off at any time he wished. The receipt of this communication was acknowledged in writing by the Captain.

(g) The Director General of Civil Aviation, India, requested permission for operating a relief flight to Lahore to transport the crew and the passengers of the hijacked aircraft back to India. The permission was immediately granted. However, before the proposed aircraft could take off from Delhi, law and order situation had deteriorated" —this is a very important point—"due to a large crowd having gathered at the Lahore airport. The Director General of Civil Aviation was informed accordingly and advised that the relief flight should not take off for Lahore until further advice.

(h) Throughout this period one or both the hijackers remained on board the aircraft. Attempts by the Pakistan authorities to persuade them to release the plane made *no headway as they refused to negotiate* directly with the Government authorities. Consequently, the hijackers were allowed"—it was not the case that they were asked to come to the lounge and phone, as alleged this morning—"to contact some non-officials in the hope that they could persuade the hijackers to agree to release the aircraft. At no time hijackers came out of the plane at the same time. One of them invariably remained on board. Any attempt to disarm or arrest one would have surely blown up the aircraft as the two had threatened to do.

(i) It may be emphasized that at no time both the hijackers came off the aircraft at the same time.

(j) Throughout 30th and 31st January, 1971, negotiations continued with the hijackers in an effort to get the plane released.

(k) On February 1, 1971, the Director General Civil Aviation, India, was advised by telephone that the law and order situation at Lahore airport was still unsatisfactory but was likely to improve by afternoon. Accordingly, the Director General was requested to keep the relief aircraft in readiness to fly to Lahore at short notice. However, by mid-day the situation worsened and in the interest of safety"—and we do mean in the interest of safety; the accusation is otherwise—"it was thought inadvisable to ask the Indian aircraft to leave for Lahore." In fact it would have been endangered because the crowds were there. "Meanwhile, because of the tension prevailing in the area around Lahore airport, the Pakistan authorities arranged to send the passengers and the crew to India by road under proper escort at 13.00 hours on February 1, 1971." I may pause here to say that we have on record an expression of appreciation by the Indian High Commissioner in Pakistan for the way in which we housed these passengers and provided them with other facilities.

(l) On February 2, 1971, the Government of India announced that the demand for the release of 27 political prisoners in Indian-occupied Kashmir made earlier by the hijackers as a pre-condition for the surrender of the plane was not acceptable to India. At 20.00 hours on February 2nd, 1971, the hijackers blew up the aircraft. The hijackers received injuries in the process and were taken to hospital.

(m) Though Pakistan is not a signatory to the Tokyo Convention of 1963 and to the Convention for the Suppression of Unlawful Seizure of Aircraft of December 16, 1970, signed at The Hague, it condemns hijacking and is party to the UN resolution 2645 (XXV) of 25 November 1970 on aerial hijacking and to the resolution adopted by the 17th Session (Extraordinary) of the ICAO Assembly at Montreal in June 1970. In pursuance of the aforesaid resolutions, Pakistan authorities not only arranged to return the passengers and the crew to India within 48 hours, but also tried all possible means to get the plane released from the hijackers for its return to India.

(n) The Government of Pakistan had deplored the act of blowing up of the aircraft. The President of Pakistan constituted a Commission of Inquiry to inquire into the hijacking of the Indian aircraft, headed by a senior High Court judge. The Commission examined a number of witnesses, including the two hijackers. The Commission came to the conclusion that the hijacking could not have been put into execution at all without the active complicity, encouragement and assistance of the Indian Intelligence service personnel and other Governmental authorities in the Indian-held Kashmir. This was done with the object of seeking an excuse for disrupting air communications between the Eastern and the Western wings of Pakistan, to create tension between the various regions and political parties in Pakistan and to weaken Pakistan financially and to create a situation under which India could interfere actively in the internal affairs of Pakistan."

53. Then we have enclosed the conclusions reached by the Commission presided over by a senior judge of the High Court. I may also mention that the Commission examined the two hijackers and one of them has made a number

of statements. I do not wish to prejudge or prejudice his trial, but I will only submit, with respect, that there is ample cogent, clear and convincing evidence available to show that he was an Indian Security agent. The commission examined and took statements from a number of other witnesses, some not merely ordinary individuals—one of them was the Prime Minister of Kashmir, another a former Prime Minister of Kashmir, and Shaikh Mohammad Abdullah, who is the accredited representative of the people of the State of Jammu and Kashmir.

54. One of the insinuations or allegations made by the learned Counsel was that when our High Commissioner was sounded about the likely hijacking he asked for the disclosure of the source of information. The facts have not been correctly stated. In the first place, he asked for the source of the information but simultaneously indicated that if the Indian authorities had any hesitation about disclosing it, they could inform INTERPOL. I may refer here to Attachment C to our Application, a note by the Ministry of Foreign Affairs of the Government of Pakistan, dated 13 February 1971, and I am referring to paragraph 6. It reads:

> "The Government of Pakistan regrets that the Government of India has again levelled the baseless charge against the Government of Pakistan for instigating subversive activities against India. The Government of Pakistan has repeatedly made it clear that these charges are without any foundation. In this connection, the Government of Pakistan would like to remind the Government of India that on September 1, 1970, when the Pakistan High Commissioner in New Delhi was informed of a 'conspiracy' to hijack an Air India plane, the High Commissioner immediately asked the Indian Government to indicate in what manner Pakistan could help and requested for details of the so-called 'conspiracy' to enable the Government of Pakistan to take necessary measures. On the Government of India's refusal to disclose any details, the High Commissioner advised the Government of India to bring the facts to the notice of the INTERPOL if it felt any hesitation in taking the Government of Pakistan into confidence in this matter. It is, therefore, surprising that the Government of India should hold Pakistan responsible for the hijacking in January 1971, on the basis of a cryptic oral communication in September 1970."

55. Mr. President, I will ask your indulgence to stop here and to continue tomorrow, because I have some more grounds to cover and the fresh point I have to deal with relates to the second Objection raised by the learned Counsel.

56. *The President:* Thank you. Does any Council Member wish to make any point at this stage? Otherwise we will adjourn and continue tomorrow at 10 o'clock. The Representative of the United States.

57. *Mr. Butler:* Thank you Mr. President. At the meeting in Vienna at which the Council scheduled this meeting today I asked if we could have information on the status of negotiations. Do you have any information for the Council on that matter?

58. *The President:* You have already seen two letters circulated by the Secretary General and it is all the information we have. The Representative of France.

59. *Mr. Agésilas:* Shall we have a detailed record of this meeting?

60. *The President:* Yes. There are two possibilities: either to have the usual summary, which could be prepared rather rapidly or, if you wish, to have also

a verbatim of this discussion. I think it is important to decide this point either today or tomorrow, because it may have a bearing on whether or not the Council proceeds immediately after the hearing to a decision on its jurisdiction. As we have a few minutes now, I would like to hear what Representatives prefer for this particular case. The Representative of the United Kingdom.

61. *Air Vice Marshal Russell:* Thank you, Mr. President, I hope the two possibilities you suggested are not necessarily mutually exclusive. I think time on the one hand and completeness on the other are important here and I hope that a summary, which could be quite brief but containing the substance, can be put in hand so that we can have it rapidly. For the future—I don't think it necessary to take a decision now—but I should be very surprised if we didn't on the whole feel that under these extraordinary circumstances the work, effort and time which has to be put into a complete verbatim transcript were not going to prove entirely justified and indeed necessary.

62. *The President:* As you say, they are not mutually exclusive; one does not exclude the other. Any other views? The Representative of Belgium.

63. *Mr. Pirson:* Mr. President, I share the view of the Representative of the United Kingdom. I think we should have both—as soon as possible a summary and later the verbatim. Thank you.

64. *The President:* The verbatim, of course, will take time because it will have to be translated. I see that many are nodding, so I take it that for this point we are discussing now we shall have both: a brief summary plus the verbatim in due time. The Representative of Indonesia.

65. *Mr. Karno Barkah:* Thank you, Mr. President. I have the same idea and I would like to add that we had not asked for verbatim for the Vienna meeting because I had understood that there was a request for it at the beginning and had assumed that it would continue automatically. I just wanted to ask whether the verbatim for the Vienna meeting would be available.

66. *The President:* No, we had not agreed that there was going to be a verbatim for all the proceedings. It is up to the Council each time to decide. There is, of course, a provision in the Rules for the Settlement of Differences saying that the Secretary General shall keep a full record of the proceedings and this we have in our files because it will have to be available for any purpose for which it may be required in future. There is also Article 30, the second part of which says that "A verbatim transcript shall be made of any oral testimony and any oral arguments and incorporated into the record of the proceedings." We are keeping that, but distribution to the Council, which of course involves much more work, has been on the basis of a request and I understand now that for the proceedings today and tomorrow we shall have that record. The Representative of Australia.

67. *Dr. Bradfield:* Thank you, Mr. President. On the point raised by the Representative of the United States, the information which the Secretary General gave us in his letter of the 7th of July raised some hopes of negotiations taking place and being successful. Could we know whether any negotiations have in fact taken place up to this time?

68. *The President:* We have the two agents here; perhaps they could speak on that.

69. *Mr. Pirzada:* Mr. President, it will be recalled that at Vienna a resolution was adopted by this Council and one part of it related to negotiations between the two States. That was on the 12th of June 1971. Our understanding was—and this is borne out by the letters on record which I shall refer to later if it becomes necessary—that India had accepted the invitation to hold negotiations with Pakistan. Therefore on the 25th of June 1971 the Government of

Pakistan addressed a communication to the Government of India. I understand that a copy of this communication has been supplied to the Secretariat. If not, I will see to it that a copy is supplied and circulated. I will read the second paragraph:

> "2. The Government of Pakistan has noted the willingness of the Government of India to undertake negotiations for settling the dispute in accordance with the resolution of the Council of ICAO dated April 8th 1971, which was further endorsed by the Indian Delegation at a recent meeting of the Council in Vienna on June 12th 1971, wherein the Council recommended to the parties to enter into immediate negotiations. Further, the Government of Pakistan notes that the Government of India prefers to hold the discussions in New Delhi at a mutually convenient date. The Government of Pakistan will be willing to empower its High Commissioner in India to commence these negotiations at a proximate date, if possible before the end of June 1971."

Now, we wrote as early as the 25th of June and we wanted the commencement of these negotiations, if possible, before the end June 1971. I regret to inform this honourable Council that the reply received from the Government of India dated 21st July 1971—a copy came into our hands only yesterday—is to the following effect:

> "The High Commission for India in Pakistan presents its compliments to the Ministry of Foreign Affairs, Government of Pakistan, and with reference to the Ministry's note of June 25, 1971, on the question of the Indo-Pakistan civil aviation dispute, has the honour to state as follows:
>
> The Ministry's note is incorrect in stating that the Government of India has agreed to bilateral talks on the question in accordance with the resolution of the Council of ICAO dated April 8, 1971 and that the Indian Delegation at the meeting of the Council in Vienna on June 12 had also subscribed to this position. The High Commission would like to remind the Ministry that India had suggested bilateral talks long before ICAO Council passed its resolution of April 8 and that it had done so in accordance with India's settled policy to settle all Indo-Pakistan questions bilaterally, step by step, without third party interference. Pakistan is no doubt aware that India has filed Preliminary Objections against ICAO's jurisdiction to entertain the Pakistan application on the question and, therefore, there would be no question of holding the proposed bilateral talks in accordance with the resolution of the Council of ICAO of April 8. This position, as well as India's concern about the normalization of Indo-Pakistan relations, was made abundantly clear by the Indian Delegation in the ICAO Council meeting in Vienna on June 12. This is clear from paragraphs 6 and 9 of the minutes of the above meeting, forwarded to the Government of India by the Secretary General of ICAO Council with his letter No. LE6/1 LE6/2 of June 15. These paragraphs are attached to this Note for ready reference."

Because of this attitude no progress has been made.

70. *The President:* Counsel for India?

71. *Mr. Palkhivala:* In reply to what the learned Counsel for Pakistan has just said, what India pointed out is merely this: if we do not protest against Pakistan saying that the negotiations are in pursuance of the very laudable suggestion made by the Council of ICAO, the allegation is that we are estopped from taking our preliminary points. So in order not to leave any

room for such technical hair-splitting and such nice points of estoppel and the rest, India made it clear that if we hold negotiations with Pakistan, which we are prepared to do, do not say afterwards you are estopped from taking the preliminary points because you have done it in pursuance of the resolution of the ICAO Council. Don't bring ICAO in here, because if we don't protest at that stage you will have left the point as you have left it in your written reply and as the Council has raised the point today, India is estopped from arguing this. So merely with a view not to give more food to Pakistan to raise this point of estoppel—there is no substance in the point, as I shall point out when I come to my reply tomorrow—but merely with a view to leaving no doubt on this matter, we said: "These negotiations are not under the jurisdiction of ICAO but outside that jurisdiction." That is the first point. The second is this: India is making it clear that you cannot talk of overflying in isolation, unconnected with anything else. These are major issues which are all interconnected. We can live as friends, but it has to be on a wider area than merely international aviation. These are the two points we make clear and subject to them, we are willing to have negotiations.

72. *The President:* The Representative of Pakistan.

73. *Mr. Pirzada:* Mr. President, it is very difficult for us to clearly understand the stand of India. In earlier communications issued after the resolution this Council adopted on 8 April 1971, India indicated its willingness to hold negotiations. I am referring now to the letter No. DG/148, dated 3rd June 1971, from the Director General of Civil Aviation, India, to the Secretary General of this Council. It reads:

> "I have the honour to refer to your letter No. LE 6/1 May 19 and to state the following.
>
> The Government of India has all along been willing to have bilateral negotiations with the Government of Pakistan for the purpose of settling the issues arising out of the hijacking of the Indian plane and related and subsequent developments. In fact, the Government of India has been of the view that bilateral negotiations with Pakistan are the only way of solving these questions. It is unfortunate that the Government of Pakistan chose to make an application and a complaint to the Council of ICAO without attempting to resolve the issues by means of bilateral negotiations. I might inform you that we have again recently reiterated to the Government of Pakistan our willingness to enter into bilateral negotiations on all related matters."

Now this reiteration of willingness is with reference to our letter wherein we clearly referred to the resolution of this Council. This is the letter by the Government of Pakistan dated 11 May 1971, and it reads:

> "The Ministry of Foreign Affairs presents its compliments to the High Commission for India in Pakistan and with reference to the resolution of the Council of the International Civil Aviation Organization dated April 8th 1971 on Pakistan's application against India on the ban of our flights has the honour to state as follows.
>
> In response to Part 1 of the said resolution, the Government of Pakistan hereby expresses its readiness to enter into immediate bilateral negotiations with the Government of India for the purpose of settling the dispute. The Government of Pakistan will be willing to open the negotiations with the High Commissioner for India in Pakistan if the latter is authorized by the Government of India to do so. Alternatively, the Go-

> vernment of Pakistan is willing to empower its High Commissioner in India to start the negotiations."

In reply, the Government of India in their letter dated 31st May 1971, which I circulated at Vienna, in the last paragraph state:

> "It is presumed from the Pakistan Ministry of Foreign Affairs Note dated 11th May 1971 that the Government of Pakistan would be willing to undertake negotiations on the issues outlined in the above-mentioned note from the Government of India. The Government of India would therefore be willing to undertake negotiations as suggested by the Government of Pakistan in New Delhi, the dates for which can be fixed according to mutual convenience."

They referred to the fact that this was in reply to our letter of 11th May 1971. On the basis of this correspondence, I had made a statement at Vienna that both the parties had agreed to hold negotiations in pursuance of the resolution adopted by the Council on 8 April 1971. Now India wants, if it wants at all, to hold the so-called negotiations on its own terms. You have seen the attitude of India; I need not comment on it any further.

74. *The President:* No more points on this? The Representative of the United States.

75. *Mr. Butler:* Thank you, Mr. President, on another point. Today both parties, I believe, have referred to a question and response in a recent case before the International Court of Justice. I believe it would be very useful for the Council to have the entire text of the question that was put to the US Counsel and the response that was submitted and then made part of the record. Would it be possible to have that for the Council Members? It has been cited a number of times and I think the entire text should be made available.

76. *The President:* The Secretariat will see whether it can obtain that text and circulate it. We will do our best to provide the official text.

Well then, tomorrow we will continue with this case. I would like to point out the following: we will continue with the hearing on Case No. 1, after which we will go to the hearing on Case No. 2. Then the first thing the Council will have to decide—and this will be part of the deliberations, so the agents will leave the room but the States as such continue to be represented if they wish—is whether it wishes to go to the decision right away, and if not, when. So that will be the sequence of events tomorrow. If the Council decides that it wishes to vote tomorrow on whether this matter is within its jurisdiction then that will be the next step that will take place tomorrow. We had listed a Council meeting for Thursday morning to deal with another question—resolution 39/1—but it was understood in Vienna that that would be taken after we had completed the consideration of this particular hearing. So if by any chance we do not finish tomorrow and it is still necessary to continue with this question on Thursday morning, that other subject will have to wait until Thursday afternoon or something like that. The Representative of Senegal?

77. *Mr. Diallo:* Thank you, Mr. President. When you say resolution 39/1 you are speaking of the resolution concerning South Africa? When would the later meeting be—next year or when, exactly?

78. *The President:* I just explained that if we do not finish with this subject tomorrow, we will continue with it Thursday morning and immediately afterwards with resolution 39/1. It will be the morning or afternoon of Thursday.

(c) COUNCIL—SEVENTY-FOURTH SESSION

Minutes of the Fourth Meeting[1]

(The Council Chamber, Wednesday, 28 July 1971, at 1000 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi
Secretary: Dr. Assad Kotaite, Secretary General

Present:

Argentina	Com. R. Temporini
Australia	Dr. K. N. E. Bradfield
Belgium	Mr. A. X. Pirson
Brazil	Col. C. Pavan
Canada	Mr. J. E. Cole (Alt.)
Colombia	Major R. Charry
Czechoslovak Socialist Republic	Mr. Z. Svoboda
Federal Republic of Germany	Mr. H. S. Marzusch (Alt.)
France	Mr. M. Agésilas
India	Mr. Y. R. Malhotra
Indonesia	Mr. Karno Barkah
Italy	Dr. A. Cucci
Japan	Mr. H. Yamaguchi
Mexico	Mr. S. Alvear López (Alt.)
Nigeria	Mr. E. A. Olaniyan
Norway	Mr. B. Grinde
Senegal	Mr. Y. Diallo
Spain	Lt. Col. J. Izquierdo
Tunisia	Mr. A. El Hicheri
Uganda	Mr. M. H. Mugizi (Alt.)
Union of Soviet Socialist Republics	Mr. A. F. Borisov
United Arab Republic	Mr. H. K. El Meliegy
United Kingdom	A/V/M J. B. Russell
United States	Mr. C. F. Butler

Also present:

Dr. J. Machado (Alt.)	Brazil
Mr. L. S. Clark (Alt.)	Canada
Mr. B. S. Gidwani (Alt.)	India
Mr. M. García Benito (Alt.)	Spain
Mr. N. V. Lindemere (Alt.)	U.K.
Mr. F. K. Willis (Alt.)	U.S.
Mr. N. A. Palkhivala (Chief Counsel)	India
Mr. Y. S. Chitale (Counsel)	India
Mr. I. R. Menon (Assistant Counsel)	India
Mr. S. S. Pirzada (Chief Counsel)	Pakistan
Mr. K. M. H. Darabu (Assistant Counsel)	Pakistan
Mr. A. A. Khan (Obs.)	Pakistan

[1] Reproduced from ICAO Doc. 8956-C/1001, C-Min. LXXIV/4 (Closed).

Mr. H. Rashid (Obs.)	Pakistan
Mr. Magsood Khan (Obs.)	Pakistan
H.E. A. B. Bhadkamkar (Agent)	India
H.E. M. S. Shaikh (Agent)	Pakistan

Secretariat:

Dr. G. F. Fitzgerald	Sr. Legal Officer
Mr. D. S. Bhatti	Legal Officer
Miss M. Bridge	CSO

SUBJECTS DISCUSSED AND ACTION TAKEN

Subject No. 26: Settlement of Disputes between Contracting States Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. Continuing his reply to the presentation of India's preliminary objection, the Chief Counsel for Pakistan, Mr. Pirzada, maintained that the opinion of the International Court of Justice in the *Namibia* case was distinguishable. He also pointed out that the answer of the United States Counsel upon which India had relied must be read in context. Having himself appeared in the *Namibia* case, he recalled that this answer had been to a question put by Judge Sir Gerald Fitzmaurice, who, in his own dissenting opinion, had drawn a distinction between treating a contract as terminated and putting an end to it and had pointed out that, strictly speaking, all the party alleging breach by another could do was declare that it no longer considered itself bound to continue performing its own part of the contract; it would not necessarily follow—and certainly not from the unilateral declaration of that party—that the contract was, in the objective sense, at an end; if it did, there would be all too easy a way out of inconvenient contracts. Mr. Pirzada also read a passage from the judgment of the American Judge Dillard, who had explained the answer of the United States Counsel. He added that the majority of the judges of the International Court in the *Namibia* case had decided the issue of the revocation of the South African Mandate on the ground that the General Assembly possessed supervisory powers and could terminate the Mandate for breaches of obligation by South Africa. India possessed no supervisory powers over Pakistan; both countries had equal status and therefore a dispute between them about breaches and the alleged termination of the Convention and Transit Agreement would have to be dealt with by the Council.

2. Turning then to the second ground of the preliminary objection—that since February 1966 the relations between India and Pakistan on the matter of overflights had been governed by a special régime, provisional in character and making overflight subject to the permission of the State concerned—he noted that India's original contention had been that air transit and overflying had been governed by a special régime since 1948 (paragraph 28 of the preliminary objection), notwithstanding the fact that in 1952 India had appealed to the Council, charging Pakistan with acts violating Articles 5, 6 and 9 of the Convention and the Transit Agreement, in particular with refusing to permit Indian aircraft engaged in commercial air services to fly over West Pakistan. He called attention to Pakistan's favourable response, at that time, to the Council's suggestion that there should be bilateral negotiations and to the fact that an amicable settlement had been reached. He noted that

the Chief Counsel for India had not pressed the original contention and had confined his arguments to the post-September 1965 period, perhaps because the position was clear and beyond cavil or controversy. The relations between India and Pakistan on air transit and overflying had, since 1948, been governed by the Convention, the Transit Agreement and the bilateral agreement of 1948.

3. Maintaining that the legal position before the 1965 hostilities and since February 1966 had been that the Convention and Transit Agreement were in operation between India and Pakistan, he denied that the Tashkent Declaration was a "package deal"; stated that various parts of it had been implemented; read into the record paragraphs 35 and 36 of Pakistan's reply to the preliminary objection in this connection; and quoted the letter of 6 February 1966 from the Prime Minister of India to the President of Pakistan, stating that India would be agreeable to an immediate resumption of overflights "on the same basis as that prior to 1st August 1965" and that instructions were being issued accordingly to the Indian civil and military authorities. Mr. Pirzada also referred to the Indian Government's note of 3 March 1971, in which it was clearly stated that "after Indo-Pakistan conflict of August/September 1965 they"—the Government of India—"would have been well within their right to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalized. However, on a specific request made by the then President of Pakistan, the Government of India agreed, in February 1966, to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights." Having done this and agreed to the resumption of overflights in accordance with the arrangements in existence prior to 1 August 1965, India could not now talk of the so-called "package deal". He added that the phrase "on a provisional basis" in the signals exchanged between the Director General of Civil Aviation for Pakistan and the Director General of Civil Aviation for India on 9 February 1966, on which the Chief Counsel for India had relied so heavily, applied, as a complete reading of the signals made unmistakably clear, to routes and schedules, not to the restoration of overflights. Also, no special permission had been required for the overflights; the schedule of flights had simply been filed with the appropriate authorities.

4. In further support of his contention that the Convention and Transit Agreement were still in operation, he pointed out that under Article 82 Contracting States could not enter into arrangements inconsistent with the Convention, as the so-called special régime would have been; that there was no "later treaty"—to use the phraseology of Article 30 of the Vienna Convention on the Law of Treaties; and that the investigation into an accident to an Indian aircraft in East Pakistan in 1969 had been conducted by Pakistan in accordance with the relevant provisions of the Convention and its Annexes.

5. As for the alleged danger to Indian aircraft flying over Pakistan, twenty-three international airlines were operating over Pakistan and notwithstanding the "posture of political confrontation" with which Pakistan was charged, Indian airlines had flown safely over Pakistani territory for more than 20 years. One hijacking did not change the situation and was no excuse for declaring the Convention inoperative between India and Pakistan. There had been many hijackings in other parts of the world without any such action.

6. Summing up, Mr. Pirzada stated that although Article 36 of the Statute of the International Court of Justice gave the Court jurisdiction only over the interpretation of a treaty, in cases brought before it termination and suspension had been considered part of interpretation; that the expression "any

disagreement relating to the interpretation or application of this Convention and its Annexes" in Article 84 of the Convention was very wide, permitting unilateral termination on unjustified grounds to be investigated and adjudicated by the Council; that there were express provisions in the Convention on termination and suspension, but even if there had not been, the right of suspension or termination under customary international law, recognized in Article 60 of the Vienna Convention, was a qualified right; and that if a contracting State could unilaterally terminate them with respect to any other State, conventions would become merely pieces of paper, liable to be scrapped at the whim of any State.

7. The Chief Counsel for India, Mr. Palkhivala, then answered a number of the points made by the Chief Counsel for Pakistan. Commenting first on the assertion that an international treaty must be given a liberal interpretation, he suggested that there was a vast difference between giving a liberal interpretation and giving a misinterpretation. Concepts so fundamentally different as interpretation and application on the one hand and termination and suspension on the other could not be reconciled by a liberal interpretation, *and no case had been cited in which a court had held that interpretation or* application included termination. The question at issue here was whether the Council had jurisdiction to deal with questions of termination or suspension, not whether the termination or suspension was justified or not, and it was impossible to equate the words "any disagreement relating to the interpretation or application of this Convention and its Annexes" in Article 84 of the Chicago Convention with the description of the jurisdiction of the International Court of Justice in Article 36 of its Statute ("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, the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, the nature or extent of the reparation to be made for the breach of an international obligation"). If the Council should decide that its jurisdiction extended to cases of termination or suspension, that decision was not likely to go unchallenged when there was provision in Article 84 for an appeal to the International Court of Justice.

8. In reply to the argument that there were express provisions in the Convention and Transit Agreement overriding the right of termination recognized in Article 60 of the Vienna Convention, he pointed out that there was no provision dealing with termination by one State in relation to another for material breach. The purpose of Article 89 was precisely to avoid the necessity for termination in war or emergency conditions by recognizing the freedom of action of a Contracting State in such conditions. Article 95 was concerned with denunciation and he did not think it was capable of the construction that the denunciation could be with respect to one State. If it were, it would in the present case, mean that the right of overflight would continue for a year until the denunciation became effective, which would be nonsensical. His own construction made complete sense: the whole basis of the Convention was reciprocity; if there was no reciprocity, or if there was a material breach, the injured State had the right, under customary international law, to consider the treaty at an end as far as its relations with the wrongdoer were concerned.

9. The part of Article 60 of the Vienna Convention cited by the representative of Pakistan (Clause 1) was inapplicable to the present case; it dealt with bilateral treaties; the treaties involved in this case were multilateral and Clause 2 of Article 60 said that a material breach of a multilateral treaty by one of the

parties entitled any 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. Article 45 of the Vienna Convention also had no bearing on this case; India had never expressly agreed that the Convention and Transit Agreement remained in force between India and Pakistan—since the hostilities of 1965 overflight had been only with the permission of the Indian Government and non-traffic stops had not been permitted, which was directly contrary to Article 5 of the Convention and Article I of the Transit Agreement. The communication to the President of the Council of 4 February 1971—the very day India banned overflights by Pakistani aircraft—could not be considered acquiescence in the continued operation of the Convention between Pakistan and India, simply because it referred to the Convention; this reference merely recognized ICAO's responsibility in regard to safety in international civil aviation; and the communication referred also to the Tokyo Convention of 1963 and The Hague Convention of 1970, to which neither India nor Pakistan was a party.

10. He found it impossible to reconcile the contention that it was safe for Indian aircraft to fly over Pakistan with the alleged helplessness of the Government of Pakistan in the face of the crowds that had gathered at Lahore Airport after the landing of the hijacked plane. It was no answer to say that 23 foreign airlines were safely overflying Pakistan.

11. As for the special régime, that referred to in paragraph 28 of the preliminary objection was the bilateral air services agreement of 1948. In his oral presentation he had referred only to the agreement reached in 1966, because it was unnecessary to go into the history of Indo-Pakistan relations for a decision on the question now before the Council. The letter from the Prime Minister of India to the President of Pakistan was only a token of India's goodwill and readiness to co-operate in the restoration of normal relations; it did not mean the restoration, in practice and in law, of the operation of the Convention and Transit Agreement between the two countries. India had wanted this, but Pakistan would not have it. The signals between the DGCA's, far from disproving his case, demonstrated that the Convention and Transit Agreement had not come back into operation; if they had, the aircraft of one country would not need permission to fly over the territory of the other and they would also have the right to make non-traffic stops. The special régime dated from 1966, India's participation in the Convention and Transit Agreements from 1947 and 1945 respectively; and under Article 30 (3) of the Vienna Convention the later treaty prevailed over the earlier when there were incompatible provisions.

12. Finally, he considered that the construction he was putting upon the Convention was one in harmony with the Council's functions, one that would permit it to continue its excellent work without becoming involved in issues which it was not called upon, and perhaps was not qualified, to decide, and to remain above political squabbles.

DISCUSSION

Subject No. 26: Settlement of Disputes between Contracting States
Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. *The President:* The Council is in session. This is the 4th Meeting. Yesterday I had made an announcement regarding the composition of represen-

tation and today Canada is represented by another Alternate, Mr. Clark. Before continuing with the question we had yesterday I would like Dr. Fitzgerald to give an explanation regarding a certain paper which was distributed this morning and which you all have in front of you.

2. *Dr. Fitzgerald:* Thank you, Mr. President. I believe that yesterday the Indian representation had promised to make certain material available to the Council. The Indian Agent has very kindly made available to the Secretariat in quantity extracts from certain publications and these have been circulated to Council Representatives this morning. You will note that you have the extracts from the recent Advisory Opinion of the International Court of Justice on the South African case, in French and English, because these were obviously taken from the official Court publications. You have a photostat or Xerox copy—I do not know which it is—of Sir Gerald Fitzmaurice's questions to the United States Counsel during the proceedings before the International Court concerning the South African case, and then, of course, you have the text of Article 36 of the Statute of the International Court of Justice. We are grateful to the Agent of India for having made these papers available to the Council.

3. *The President:* Any questions on that point? Then we shall continue with the discussion and I invite the Chief Counsel for Pakistan to continue with his presentation.

4. *Mr. Pirzada:* Thank you, Mr. President. You will remember that yesterday I was making my submission in reply to the contention of the Counsel for India that under general customary international law a State has a right to terminate a treaty or suspend its operation in whole or in part. That was the argument of the Indian Counsel and I was replying thereto. You will recall that I had placed before you the language of Article 60 of the Vienna Convention and I had said that that right was not unqualified, that it was in fact a limited right. The right was limited to invoking the breach as a ground for terminating or suspending the treaty and only in case of material breach. I said material breach is a serious matter. Further, I had pointed out that as this Article 60 of the Vienna Convention is subject to the doctrine of material breach, it is also subject to another doctrine, namely that there should be no disproportionate reprisal. For example, if a fly is sent you do not need a cannon to kill it; where a file is needed, you do not use a hammer.

5. Developing his point, the learned Counsel for India referred to the pronouncement of the International Court of Justice. Photostat copies of it have now been circulated. I think he used the expression "judgment of the Court" inadvertently, because it is not a judgment; it is an advisory opinion; and you are all aware of the well-recognized distinction between an advisory opinion and a judgment. Of course it is entitled to great respect and having had the privilege of participating in it, I fully concur with the pronouncement of that august International Court. But we must understand the correct status of the pronouncement.

6. I shall first clarify what is attributed to the Counsel of the United States of America. To a question put to him by one of the Judges of that Court, he gave a certain answer and that answer is being utilized or relied upon by the Counsel for India. Now, first of all, the learned Judge who put the question was quite clear in his mind as to what he was talking about. The learned Judge was Mr. Justice Fitzmaurice and it is from the same opinion I am quoting. I must point out that Justice Fitzmaurice had given a dissenting opinion on the main point involved in the South West Africa case, but on the distinction between "terminating" and "putting an end to" the treaty there was no

controversy and the principle he enunciated was correct. This is what he had in mind—I am reading from page 266:

> "Because the learned Judge throughout has used the expression 'in treating the Treaty as terminated' ",—and now he points out why he has been using this expression—"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 breach 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 will be an all too easy way out of inconvenient contracts."

I think this was quite clear and it is in this context that the question was asked and the answer was given.

7. In his answer, which was given in abstract, not in a concrete case, the American Counsel said that occasions may arise when an aggrieved innocent party may have no remedy, but that does not mean that in certain circumstances this right in a case of fundamental breach could not be exercised by another party. Here it is entirely different, because by and under the Convention Contracting States have agreed to refer to the Council for adjudication a case relating to interpretation or application of the Convention. But I will resolve this doubt also by referring to the opinion of the American Judge himself. Of course he was not sitting in that capacity, but he clearly understood the question and the answer, and I am referring now to a paragraph from the opinion of Justice Dillard. I am reading from pages 167 to 168. I quote:

> "I shall conclude on another note. It is true, of course, that prior to the termination of the Mandate by the General Assembly there had never been a judicial determination that this was legally permissible. Furthermore, it is accurate to say the General Assembly in the exercise of its supervisory powers did not calmly and rationally analyse the extent of those powers under the grant of authority accorded by the San Francisco formula—a point made by Professor Katz in his characteristically thoughtful book on the *Relevance of International Adjudication*. The point is troublesome but is not conclusive. 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'—it was a very qualified answer that was given '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.' And now the learned Judge gives his own interpretation on this: "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 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."

So they are not outside a legal frame of reference if they are objected to by the other State.

8. The case before the International Court was a reference, wherein the *Mandate of South Africa over Namibia was terminated by the General* Assembly, with the concurrence of the Security Council, for material breaches of obligations under the mandate. The General Assembly of the United Nations and the Security Council were supervisory bodies. That means they had supervisory jurisdiction over the mandatory and therefore in that superior jurisdiction they could determine the breaches. That is why that point was considered in that light by the majority of the judges and cannot be treated as a precedent. I am now referring to paragraph 103, page 49, of the Opinion which has already been circulated, wherein this point has been clearly brought out. I quote:

> "The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966 Judgment in the *South West Africa* cases referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League, 'in pursuit *of its collective, institutional activity, to require the due performance of* the Mandate in discharge of the "sacred trust"', was specifically recognized. Having regard to this finding, the United Nations as a successor to the League, acting through its component organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly."

Therefore that case stands on a different footing altogether. The only proposition that was recognized was Article 60 of the Vienna Convention and nowhere was it determined that if the Contracting States through, by and under a convention have agreed to refer their disagreements relating to the interpretation or application of the treaty to a Council like this august body, then that cannot be done. I submit that if any submission is made to the contrary it is misconceived.

9. I will leave this point now and go to the second ground. When I complete the second ground, I will summarize briefly my submissions on both points at the same time.

10. I come now to the second ground, Mr. President. The second ground, as we heard yesterday, was that after the armed conflict in August/September 1965, a new régime came into existence between India and Pakistan and, a special régime having come into existence, the relations between the two countries regarding overflights were governed by that speical régime, which was provisional in character and subject to the permission of the State concerned. Before I deal with this point, let me first make a general statement. It was refreshing to note that the learned Counsel yesterday confined his contention only to the post-September 1965 period, because originally the case put up by India was that right from the beginning, since 1948, there was a special régime. Mr. President and members of the Council, may I invite your

attention to paragraphs 28 and 29 of the preliminary objections filed by India. Paragraph 28:

> "The Air Services Agreement of 1948 between the two countries covered air transit across each other's territory and India's overflights into Pakistan's air space and Pakistan's overflights into India's air space. A copy of the said Agreement of 1948 is hereto annexed and marked '1'. Thus air transit and overflying each other's territory was governed by a Special Régime between India and Pakistan in 1948 and continues to be so governed up till today. The Convention and the Transit Agreement do not apply as between India and Pakistan, as regards transit and overflying each other's territory."

Then this has been spelled out further in 29:

> "In view of the fact that the question of overflying or transiting is governed by a Special Régime as between India and Pakistan, and not by the Convention or the Transit Agreement, the Government of India submit that the Application and the Complaint of Pakistan are incompetent and not maintainable, and the Council has no jurisdiction to entertain them or handle the matters presented therein."

Then later on they refer to the alleged August/September 1965 arrangement.

11. Before I come to that I repeat that the statement yesterday was confined to the post-September 1965 period, which means that up to that time not only the bilateral agreement but the Convention and the Transit Agreement were in operation and that is really and legally the correct position. In fact no other position could be adopted by India because India herself, as early as 1952, in respect of a very small sector, when certain flights were diverted around the Khyber Pass, approached this very Council. I am referring to the dispute between India and Pakistan of 1952. In 1952 India herself accepted the jurisdiction of the Council and lodged a complaint with the Council charging Pakistan with acts violating Articles 5, 6 and 9 of the Convention and with violation of the Transit Agreement. These are the words—in fact I have lifted the paragraph bodily from the Application then drawn up by India and filed here with this very body. India alleged in particular that Pakistan refused to permit Indian aircraft engaged in commercial air services to fly over West Pakistan. When the dispute came before the Council Pakistan adopted a very constructive and co-operative approach and responded very favourably to the suggestion of the Council for holding negotiations, and in pursuance of the Council's recommendations an amicable settlement was reached. See Minutes of the Council, 18th Session, Document 7361 C/858, 1953, pages 15-26 and also Report of the Council for 1952, Document 7367 A7-P/1, pages 74 to 76, 1953.

12. Now this was the position in 1952 when India knocked at the door of this body and lodged a complaint charging violation of various articles of the Convention and the Transit Agreement. So, as I was submitting earlier, whatever may be the position after September 1965, which I will come to presently, it remains beyond cavil or controversy that till September 1965 admittedly—and in view of yesterday's performance of the learned Counsel himself the position now is incontrovertible—the relations between India and Pakistan with reference to overflight were governed by and under the Convention and Transit Agreement as well as by the Bilateral Agreement of 1948. The question is "Has that position been changed or altered or modified or superseded by any other arrangement to the contrary?" My respectful answer

will be "No" and that I will show through various factors, which must be placed before you in their proper perspective.

13. All conflicts are unfortunate and more unfortunate in the case of developing countries, but sometimes they are inevitable. Whatever may be the position, they did take place, and the last armed conflict between India and Pakistan, a war, took place in August and September 1965. Then the hostilities ended. They must end—there was the Security Council, there were various other efforts—and thanks to the good offices of the Government of the USSR and its esteemed leaders, the President of Pakistan and the Prime Minister of India met at Tashkent and the result was the Tashkent Declaration. Now Clause VI of that Declaration, which was signed by the then President of Pakistan and the Prime Minister of India at Tashkent on 10 January 1966, reads:

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

This certainly was contemplated—"to consider measures towards the restoration of economic and trade relations, communications as well as cultural exchanges between Pakistan and India and to take measures to implement the existing agreements between Pakistan and India." I will come to what was contemplated and what was to be done, but the fact remains that it was clearly declared, agreed to and decided that the existing agreements—including the Convention, the Transit Agreement and the Bilateral Agreement of 1948—were to be implemented.

14. Now yesterday a lot of allegations were hurled against us. I will come to the question of the so-called "package deal",, but a variety of allegations and insinuations were made against us, and it was said that owing to our conduct this clause could not be implemented. I, with respect, submit that is to the contrary. We have answered the various allegations in our reply to the preliminary objection. I will not trouble you with all the paragraphs. I will only refer to one paragraph. My learned friend had read paragraphs 32 to 36 of the preliminary objection. I will not trouble you with our replies; I am sure the honourable members of the Council will peruse them at the right time. But I would like to invite your attention to our replies to paragraphs 35 and 36. They are short ones and I seek your indulgence to read them. I quote:

> "*Paragraph 35:* The statement is incorrect and the factors introduced therein are extraneous to the issue involved and therefore outside the purview of the proceedings before the Council. Without prejudice to the above, it is stated for record that in spite of the best efforts of Pakistan, relations between the two countries have not improved because of India's refusal to resolve the basic cause of tension between the two countries, namely the Kashmir dispute, and its insistence to dictate its own terms in relation to other issues. On the other hand Pakistan has always been willing to settle peacefully all outstanding disputes with India through the accepted international procedure of negotiation, mediation and arbitration. It has also proposed the establishment of a self-executing machinery for the resolution of all outstanding disputes, but the Government of India rejected it. Thus the Government of India for its

own reason has shown no intention to normalize relations with Pakistan.

Paragraph 36: The statement is misconceived and a misrepresentation of facts and law. The existence of the so-called special agreement is emphatically denied. It is a figment"—inadvertently we said "fiction"—"of imagination. As earlier stated, after the 1965 armed conflict, overflights between the two countries were resumed in terms of Article VI of the Tashkent Declaration, which called upon the parties to implement all existing agreements. The statements made in paragraphs 30 and 31 above are reiterated."

15. Now that is the other side. I am precluded by the oath of my former office and by the Official Secrets Act to disclose the details, but the then Foreign Minister of India—now again the Foreign Minister—Swaran Singh and I as the Foreign Minister of Pakistan at the time, as well as many other dignitaries and leaders, went into this exercise, and it is known to both the parties and, in fact, to a number of the esteemed members of this Council. I need not trouble you with the various events. They speak for themselves. After the Tashkent Declaration whatever could be done was done. Major portions of the Water Treaty were implemented. Then with respect to the dispute over the Rann of Kutch we went to a duly constituted tribunal and through the process of adjudication we resolved the dispute. Many other things were done, but the allegation made yesterday was that Clause VI of the Tashkent Declaration was a "package deal", which must be accepted as a whole; you could not rely on a part of it, single out aviation and say that the agreements were revived.

16. Now, as I said, whatever could be done was done, and wherever things could be normalized or achieved between the two States they were normalized or achieved. Telecommunications were revived and eventually overflights were revived, and the reason has been acknowledged by India itself in its communication of 3 March, a note handed to our High Commissioner in New Delhi. Copies are being circulated and I invite your attention to paragraph 4 of this note, received after the hijacking incident:

> "The Government of India wish to remind Government of Pakistan that after Indo-Pakistan conflict of August/September 1965 they would have been well within their right to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalized. However, on a specific request made by the then President of Pakistan the Government of India agreed, in February 1966, to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights. Such overflights by scheduled services of civil airlines of one country across the territory of another are, as Government of Pakistan are aware, a matter of privilege."

That principle is well known to you, but the fact to which I invite your attention is that the Government of India has stated here that they agreed, on a specific request made by the then President of Pakistan, in February 1966 to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights. Yesterday it was said that you could not isolate aviation, but India herself has acknowledged that this could be done. We immediately responded to this note and in paragraph 2 of our letter dated 22 March 1971 we have stated:

> "The Government of Pakistan notes with regret that the Government of India has so far not agreed to withdraw its unjustified ban on flights

of Pakistan aircraft over Indian territory. Instead, the Government of India has suggested that these overflights are in the nature of a privilege extended to Pakistan in 1966 and that India was within its right to withdraw it unilaterally. The Government of Pakistan cannot accept this position and are formally of the opinion that the mutual overflying rights are governed by the 1948 Agreement between Pakistan and India as well as by international conventions on the subject. Even if, for the sake of argument, the Government of India could claim that after the 1965 conflict it was well within their right to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalized, the Government of India have, in the note under reference, acknowledged that the Government of India agreed, in February 1966, to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights. So far as outstanding disputes are concerned, it has always been the endeavour of the Government of Pakistan to settle them in a peaceful, just and equitable manner."

So this is my answer to the statement made by the learned Counsel about Clause VI of the Tashkent Declaration.

17. Now this Declaration was followed by a letter from the Prime Minister of India. A reference was made to it and only a portion was read, but I beg of you, honourable members and Mr. President, to read the text of this letter, because it is quite clear and explicit, without any pre-conditions. I shall read it. It is a letter dated 6 February 1966 from the High Commissioner for India in Pakistan, addressed to the President of Pakistan himself.

> "I have the honour to transmit the following message received from Smt. Indira Gandhi, Prime Minister of India:
>
> 'Dear Mr. President,
>
> 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 planes 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 overflights across each other's territory on the same basis as that prior to 1st August, 1965."

I underline and would like to re-read these words: "As it appears that such a meeting might take some time, we would be agreeable to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1st August 1965." The message continues:

> "Instructions are being issued to our civil and military authorities accordingly.
>
> I very much hope that in both our countries emphasis will be placed on the positive aspects of the Tashkent Declaration, such as early normalization of relations and the initiation of various processes of co-operation between our two countries in mutually beneficial fields."

18. Now here is India's chief spokesman, her Prime Minister, conveying to the President of Pakistan their decision to resume flights immediately across each other's territory "on the same basis". What is that basis?—no special arrangement, but the same basis as that prior to 1 August 1965.

I opened my submission on the second argument by saying that the basis until August 1965 was the Convention, the Transit Agreement and the Bilateral Agreement of 1948, a basis under which India could come and knock at the doors of this body. Today we are knocking, but of course sometimes States and persons can approbate and deprecate. This letter I read out is without preconditions and says that instructions are being issued to the civil and military authorities accordingly. It was in the process of implementing these instructions that certain signals were exchanged between the Directors General of Civil Aviation of the two Governments.

19. A particular portion of a particular signal was read out yesterday, but not in its entirety, not in its proper perspective, or within its correct context. I would therefore beg of you now to look at that signal to see whether there was any special arrangement or any provisional arrangement, as was suggested, alleged or asserted yesterday. The signals are in Annexure 2 to the objections filed by India. I will refer to two or three of them to show what really happened and whether an isolated expression in a signal or cable can be relied upon.

20. The first signal, dated 4 February 1966, is from the Director General of Civil Aviation, India to the Director General of Civil Aviation, Pakistan:

> "Our Government has agreed to restoration of overflights of scheduled services between India and Pakistan. We would suggest meeting as soon as 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."

The first sentence is a mere reiteration of the decision taken by the two Governments to restore overflights and the second has to do with the implementation of that decision and is a suggestion for a meeting. What is this meeting to do?—to determine the earliest date of resumption and routes. Pakistan responded by a signal on 7 February, which reads:

> "We have received instructions from our Government that the Government of India has agreed on a reciprocal basis to the resumption of overflights of each other's territory by our respective airlines in accordance with procedures existing before 1st August 1965."

So it was in accordance with procedures existing and in operation prior to 1st August 1965, which would, of course, certainly cover the Convention, the Transit Agreement and the Bilateral Agreement. Then the DGCA Pakistan went on to propose resumption of flights over Indian territory as per the following schedule and suggested a schedule. There was a reply from DGCA India dated 8 February 1966, in which he gave their schedule. Calcutta-Agartala, Agartala-Calcutta, Karachi-Mandasaur-Jamshedpur-Calcutta and various other schedules were given.

21. It was in reply to this cable about the schedules that the cable of 9 February 1966 was sent by the Director General of Civil Aviation of Pakistan, part of which was referred to and relied upon by the Indian Counsel yesterday. I would like to read this, because I argue that in the context this is not an independent cable; it is a cable dealing with what has preceded it, namely a schedule received from India, and it points out in paragraph 1 that:

> "In accordance with agreement between our Governments all routes and procedures which existed prior to first August were to be restored. It is noted from your signal ... that PDRS 3, 4 and 6 for Karachi-Dacca

flights have not been mentioned. Secondly your signal indicates that on Kathmandu-Dacca route our aircraft will be required to fly via Calcutta. Previously the route was Dhanbad-Dacca direct. Suggest necessary amendments are effected to confirm with agreement. Para. two—Your schedules have been noted. All former routes over Pakistan territory as existed prior to 1/8/65 will be available to IAC and AII on a provisional basis. This will be subject to review in case you are unable to restore all former routes and procedures."

Thus we are, on the administrative side, *merely conveying to them that as far* as we are concerned, they can have on a provisional basis whatever routes they were operating before 1 August 1965; if they want to review these routes, we are prepared to review, but we are merely implementing the decisions of the two Governments.

22. So overflights were not restored on a provisional basis or under a so-called special régime. They were restored on the basis of what was applicable to the two countries before 1 August 1965, as acknowledged by the Prime Minister of India in her letter. Therefore the whole argument of a special régime falls to the ground because the basis is knocked out by reading the full text of the correspondence and cables, and especially the authoritative letter of the Prime Minister of India. The signals were merely instructions in the process of implementation and, *with reference to one particular item*, routes, not all of which had been mentioned, we were reminding them that we, for our part, were willing to make available all the routes in existence prior to 1 August 1965, but they could review and reconsider and let us know. It was merely an administrative arrangement; nothing hinges on it.

23. Then reliance was placed on the notification from the *Gazette of India*, dated 6 September 1965, when the war between India and Pakistan was in progress, issuing a directive under the Aircraft Act, and the so-called amendment to it of 10 February 1966. These notifications are in Annexure 3 to India's preliminary objection. Now these notifications are their own, issued under their own domestic legislation. They certainly cannot affect Pakistan, because so far as Pakistan is concerned, the agreement arrived at between India and Pakistan was to resume overflights on the basis *existing on 1st August 1965*. It was suggested that the flights were with special permission. There was no such thing as special permission; I contest and repudiate any such suggestion. All that was done in practice was that each country filed flight schedules with the other's aeronautical authorities. Nothing else, nothing else was done.

24. Therefore my submission is that whatever was the position between India and Pakistan after 1948 became the position from February 1966 by the well-considered decision of the Governments of the two countries and there was no special arrangement of a provisional character and no question of any special permission. Therefore the Convention, the Transit Agreement and the Bilateral Agreement were all in operation. That the Convention was in operation is borne out by many other factors. I need not trouble you with them at this stage, because when we go *into the merits of the case we shall* go into greater detail. There were, in respect even of non-scheduled flights, overflying and landing in Pakistan and in India by each other's aircraft, pilgrimage or what are called Haj flights, the flights of their dignitaries, our dignitaries, etc. These were, of course, overflights, but apart from them various other obligations under the Convention and Transit Agreement were being performed by India and Pakistan. I will refer to that in a moment.

25. One point I must mention here is this. I have shown that in fact there

was no such thing as a special arrangement, agreement or régime. In any case the Convention is quite clear, and the combined effect of Articles 82 and 83 is that there cannot be any special arrangement or agreement inconsistent with the Convention. You are well aware of the provisions embodied in these two Articles, but I will refer to them just to make clear the point which I am canvassing before you.

> "*Article 82*
>
> The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with it terms and undertake not to enter into any such obligations and understandings."

The rest is not material. Then we go to Article 83:

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

So firstly there is an undertaking not to make or incur any obligations and understandings which are inconsistent with the terms of the Convention. Secondly, arrangements not inconsistent with it may be made, but these are to be forthwith registered with the Council, which shall make them public as soon as possible. Therefore there could not have been any special régime inconsistent with the Convention, the Convention being in operation.

26. *Even customary international law is to the same effect.* My learned friend yesterday made the statement that the Vienna Convention recognized certain principles of customary international law. I invoke another Article of the same Vienna Convention, Article 30—"Application of successive treaties relating to the same subject-matter". Clause 3 of this Article reads:

> "When all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

The first two treaties, namely the Convention and the Transit Agreement, were neither terminated nor suspended, and there was nothing in them incompatible with any later agreement. In fact there was no later arrangement except to this extent: that we revive the arrangements in existence on 1st August 1965.

27. Now I come to one or two illustrations. When we go to the merits we shall give a number of others. As to conduct, I will just give an isolated incident to show. I need not burden you with details at this time. In the year 1969—that means after September 1965—an Indian aircraft met with an accident in East Pakistan. In accordance with the provisions of the Chicago Convention, Pakistan investigated the accident. Invoking Annex 13 to the Chicago Convention, India nominated a representative on the inquiry and requested Pakistan to grant the necessary facilities to him and his advisers. Pakistan, carrying out its obligations under the Convention and Annex 13, afforded full facilities, which were acknowledged by the Prime Minister of India herself in a letter dated 29 September 1969 to the President of Pakistan, and I quote: "Thank you for your message of sympathy on the loss of lives as the result of the crash of the Indian aircraft. We are grateful to the Pakistan authorities for the assistance rendered by them in this regard." In the course

of the investigation, the Pakistan Inspector examined the air traffic controllers on duty at Calcutta Airport in order to ascertain whether the provisions of ICAO Document 4444 had been complied with. The Government of India confirmed during the investigation that this document was being followed by them. This amply shows that the conduct of India in relation to Pakistan during the investigation of the accident was on the basis that both countries were parties to the Chicago Convention of 1944 and were governed by that Convention, which was in operation.

28. Mr. President and members of the Council, at regular intervals the learned Counsel yesterday expressed the apprehension of the Indian authorities for the safety and security of Indian planes over the territory of Pakistan, just because of the unfortunate happening at Lahore. I need not talk about Lahore; you know what happened in September 1965; you know what the reaction of the people of Lahore could be; and you also know what the Government of Pakistan did in spite of that. It did all it could, but that is a different matter. So far as safety and security of the flights is concerned, we are likewise interested in that and we certainly could not endanger planes, whether they are theirs or ours or belong to the airlines of other countries. Twenty-three international airlines have been flying over the territory of Pakistan and not one of them has even remotely suggested anything to the contrary. And why should I talk only of those 23 international airlines? Why should I not talk of India itself? India has set out in its objections a case of so-called "confrontation" between India and Pakistan—who is responsible is a different matter—and about the two major conflicts between India and Pakistan, namely those of 1948 and 1965. Notwithstanding that atmosphere of tension, conflict and confrontation, Indian airlines have been operating and flying over the territory of Pakistan for 23 years. One isolated incident of hijacking has taken place. So many hijackings have taken place in the last two years, and you have seen what has happened. You have seen how various other States have had to act in various circumstances. You know much better than I the case of Leila Khaled, or whether particular hijackers were given a particular ransom, whether cars were placed at their disposal, or whether they were taken by special plane from one place to another. Many factors have to be taken into consideration, but that does not mean that any State, merely because of an incident of that kind, can say "From tomorrow on this Convention will not apply." If that is how international conventions are to be applied, I need not tell you what will happen.

29. Mr. President and members of the Council, to sum up on both the points, our case is this. Because her case is that the Convention and Transit Agreement have been terminated and are not in operation, India says that disputes can be classified in four categories—(1) disputes in which questions of interpretation are involved, (2) disputes in which questions of application are involved, (3) disputes concerning action taken under an agreement, and (4) disputes concerning the termination or suspension of an agreement. She contends that only cases of interpretation and application can be brought before this Council under the Convention, that only cases of interpretation, application and action under the agreement can be brought under the Transit Agreement, and that under no circumstances can cases of termination or suspension be brought here. Yesterday, I pointed out to you by various precedents that even though Article 36 of the Statute of the International Court of Justice speaks only of legal disputes concerning the interpretation of a treaty—the word "application" does not appear—any question of international law, the existence of any fact which if established would constitute

a breach of an international obligation, and the nature or extent of reparation to be made for the breach of an international obligation, in cases brought before it involving treaties or conventions in which reference is made only to disagreements relating to interpretation or application, the Court has held that the body empowered to entertain a disagreement relating to interpretation or application certainly will be entitled to adjudicate a disagreement concerning termination or suspension, because termination and suspension are part of interpretation and application. You have to determine whether the treaty or convention can be terminated or suspended and then you have to decide whether it has been terminated or suspended, as one party alleges, because the other party has not fulfilled its obligations. Therefore, whichever way you look at it, the Convention has not to be construed in a narrow sense. I laid down as a first principle that it has to be construed in a large and liberal sense and that the expression "any disagreement relating to the interpretation and application of this Convention" is very wide, embracing disputes even in respect of alleged termination or suspension, because one party or one State, unilaterally, unjustifiably and without material breach, can say that the other party's action was sufficient to justify its conduct and that it has terminated the agreement. Such unilateral termination on unjustifiable grounds certainly can be investigated, inquired into and adjudicated by this body.

30. I have explained that there was an express provision in the Convention about termination and suspension. If there is an express provision, recourse cannot be had to implied powers either under Article 60 of the Vienna Convention or otherwise. Even when the right of recourse to implied powers can be exercised, it is hedged by various conditions. It is not an unqualified right—the doctrine of material breach and the possibility of acquiescence, by reason of conduct, if the continued validity of the treaty were invoked. I pointed out that India herself, while alleging termination, approached this Council with respect to the hijacking incident and reminded us of our obligations under the Convention. I cited the opinion of the International Court of Justice in the recent case of South West Africa and I said that nothing in it militated against what I have been submitting and discussing before this august Council. On the last point I have explained my position that there was no special régime; we are governed by the arrangements, agreements and conventions which were in existence and in operation between India and Pakistan on 1 August 1965.

31. Before I conclude, Mr. President and members of the Council, if conventions are to be construed so narrowly in the manner India has suggested, whereby a Contracting State can unilaterally say "I do not like a particular State and will not allow its aircraft to touch or fly over my territory," then these conventions will become merely paper conventions, liable to be scrapped by one or more of the Contracting States at their whim and caprice and will be torn to pieces.

32. Mr. President and members of the Council, I have sufficiently detained you. I am not asking a poor litigant to come to the Ritz Hotel. I am only requesting India to come to ICAO, whose doors are open to all Contracting States, all parties to the Convention, seeking justice. Thank you, Mr. President.

33. *The President:* Thank you. We shall now have a recess of 15 minutes and then the Counsel for India may answer, if he wishes to do so.

Recess

34. *The President:* I now give the floor to the Chief Counsel for India.

35. *Mr. Palkhivala:* Mr. President and honourable members, in replying to the learned Counsel for Pakistan, I shall confine myself to the main highway of the case and not go into any sidepaths or bylanes.

36. My learned friend, and I do call him friend, first referred to the cardinal rule of interpretation. He said that when you construe an international treaty you must give it a liberal interpretation. My answer is: there is all the difference in the world between giving a liberal interpretation and giving a misinterpretation. If the Statute talks of horses you may include wild horses, Argentinian horses, horses of the Rockies, Irish horses, English horses and Arab horses, but you cannot include cows, and if this homely simile can bring home to the honourable members the distinction between a liberal interpretation and a misconstruction, I shall have made good my point.

37. The whole question at issue before the honourable members is "Are you to confuse interpretation and application of a treaty, both of which presuppose and postulate the continued existence of the treaty, with the situation where the treaty has either come to an end by termination or come to an end for the time being by suspension?" This is the real question and before I proceed further, may I request the honourable members to bear in mind the sharp and clear distinction between two questions. The first question is "Has this Council the jurisdiction to deal with cases of suspension or termination?" The second and independent question would be "Did India have justification, did India have good reasons, for suspending or terminating?" If on the first question the honourable Council comes to the conclusion that it has no jurisdiction to go into a question of suspension or termination at all, the second question cannot logically arise. To argue the two questions simultaneously would be to confuse the real question before the Council with a question which is not before the Council. I have already made clear in my opening address that I am not fighting shy of the merits, but, as I see it, I would be wasting your time if I went into the justification for the termination or suspension of the treaty as between India and Pakistan, because the real question is "Can you go into this question of termination or suspension at all?"

38. I emphasize this very much because my learned friend referred to three judgments. I do not know if they were again, in his words, "advisory opinions", but to my mind if the International Court of Justice expresses an opinion, it lays down the law and I call it in that sense a judgment. It judges what the international law is. My learned friend referred to three decisions of the International Court of Justice, each of which is miles away from the real issue before you. In none of the three cases was the International Court of Justice called upon to consider whether a tribunal whose jurisdiction is confined to the interpretation or application of a treaty can go into the question of termination or suspension. For the rest of my argument, allow me, to save time, to use only the word "termination". Wherever I use "termination", the honourable members will take it that I mean "termination or suspension". I shall try to economize on words and will only use "termination" hereafter.

39. The real question is "Has my learned friend been able to cite a single case where any court, either a civil court or the International Court of Justice, has held that the words "interpretation or application" embrace the concept of "termination"? This is the real question. To say that the International Court went into the question whether the termination of a treaty on the facts of a given case was justified or not is to prove nothing, because the International Court of Justice undoubtedly had the jurisdiction to go into that question.

The fact that the International Court of Justice can go into the question only means that its jurisdiction is much wider than the jurisdiction of the Council. The most surprising part of my learned friend's argument was with reference to Article 36 of the Statute of the International Court of Justice, which, according to him, gave a narrower jurisdiction to the International Court— and yet the International Court went into various questions of termination! That is why, in the compilation which we prepared and submitted last night for circulation among the honourable members, we included Article 36 of the Statute of the Court, so that the honourable members can judge for themselves whether the jurisdiction of this Council is at all co-extensive with the jurisdiction of the International Court of Justice.

40. Since I am on this point, may I request you immediately to turn to Article 36 of the Statute of the International Court and see whether anyone can possibly equate the words "any disagreement as to interpretation or application" with the words in which jurisdiction is conferred upon the International Court of Justice.

41. Clause 1 of Article 36 reads:

> "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."

First of all you will notice that all cases which parties refer to it can be decided by the International Court of Justice. There is no limitation by reference to application or interpretation. It does not say "all cases of application or interpretation"; it says "all cases". Suppose the words of Article 84 of the Convention had been "any disagreement between States" and the matter had ended there, there is no doubt that termination or suspension would have been included because you might say that it was a case of disagreement between two nations, one of which said "You have wrongly terminated," while the other said "I have rightly terminated." The point is that a disagreement that can go to this Council is not *any* disagreement; it is any disagreement relating to interpretation or application. In glaring contrast to Article 84 of the Convention which confers jurisdiction on this Council, the first clause of Article 36 of the Statute of the International Court of Justice places no limitation whatever on its jurisdiction. All cases which the parties refer to the International Court can be decided by the International Court, as well as all matters specially provided for in the Charter of the United Nations or in treaties or conventions. In other words, if, in the Charter of the United Nations, there are any matters enumerated which can go to the International Court, they will go, and under Article 36 of its Statute the International Court will have jurisdiction to deal with them.

42. Look now at Clause 2 of the same Article 36.

> "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: *(a)* the interpretation of a treaty".

Now the word "interpretation" comes in. So the interpretation of a treaty can be referred by parties to the treaty to the World Court and the World Court will give its opinion. Look at *(b)*, which is very interesting: "any question of international law".

The question whether, on the facts of a given case, a particular State has a

right to terminate a treaty as against another State is a question of international law. It can go to the International Court of Justice. It is expressly provided that any question of international law can go and, as the honourable members have already seen, in the South West Africa case the question was one of international law—whether a mandate or international treaty can be terminated if it does not provide for termination. The World Court gave its opinion—it can be terminated without a provision for termination in the mandate, in the treaty itself. Now this is a question of international law. It can go to the International Court of Justice. Can it come before this honourable Council? Put Article 84 of the Convention and Article 36 of the Statue of the International Court of Justice in juxtaposition. Can anyone reading them, in any language in which they happen to be available, possibly say that the two limits of jurisdiction are the same? Therefore it is completely beside the point to cite three cases of the International Court of Justice in which the Court went into the question of whether the termination of a treaty was justified or not. I have never disputed that the International Court of Justice can go into the question whether termination of a treaty was rightful or not. The real question is "Can the Council go into it?"

43. Look at Article 36 (2) *(c)* of the Statute—"the existence of any fact which, if established, would constitute a breach of an international obligation". Now the World Court could decide whether South Africa had committed a breach of an international obligation and whether that fact had been established. This is what the World Court is entitled to go into. Take *(d)*—"the nature or extent of the reparation to be made for the breach of an international obligation". Then come to this interesting Clause 6 of the same Article 36 of the Statute of the International Court of Justice. Clause 6 of Article 36 says: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." In other words, if I say to the International Court of Justice "You have no jurisdiction.", the decision of the Court that is has jurisdiction is final.

44. I have the highest regard for this Council, but I would be failing in my duty if I did not point out what is so obvious and so elementary: that the greatest respect for the Council cannot possibly make anyone argue logically that your jurisdiction is co-extensive with the jurisdiction of the International Court of Justice. If the Council were to say tomorrow "I have jurisdiction in a matter of termination", can you possibly imagine that decision becoming final when Article 84 says that an appeal from the decision of the Council shall lie to the International Court of Justice?

45. Therefore my respectful submission is that, beyond the shadow of a doubt, there can be no comparison between what the International Court of Justice can decide and what the Council can decide. In fact your functions are quite different. They are not inferior; they may be as important; I think they are as significant. They may even be more momentous. In fact your powers are such that they have to be exercised much more frequently than the powers of the International Court, and without meaning to flatter you, I think you are doing more continuous good for international relations than the World Court, which meets once in six months and takes up one case a year, whereas you deal with innumerable matters in the course of a year. But your fields are different. This is not to say that this is an inferior body; this is not to say that your functions are less important; but it is to say that the field in which you operate, very important and enormously significant as it is for good international relations, is completely different from the field in which jurisdiction is exercised by the International Court of Justice.

46. I shall not deal with the actual cases cited by my learned friend because, quite frankly, they have no application whatever. As I have already told you, none of them dealt with the real question you have to decide today, namely whether "interpretation and application" includes "termination", and no case has been cited to support the startling proposition that it does.

47. My learned friend referred to a book by Mr. B. P. Sinha. It, again, says something which has no relevance to the question of whether the Council's jurisdiction, which is limited to questions of application and interpretation, can be extended to the case of termination. In fact, as far as we, with our limited knowledge, are aware, this point is being argued here for the first time.

Perhaps this is also the first time it has arisen here, and I am not aware that an opinion contrary to ours has been expressed in any textbook or in any authoritative quarter. In any event, even if a Mr. Sinha or a Mr. Smith does choose to say something, the honourable members can still decide for themselves what the correct view is after hearing all the arguments.

48. Then my learned friend repeated the argument which he had set out in the reply to India's preliminary objections, namely that as you have an express provision on termination in the Convention, this provision overrides, supersedes, the rule of international law laid down by the World Court regarding the power to terminate a treaty. I had dealt with this point, basing my submissions expressly on the articles of the Convention—which submissions have not been answered—but since my learned friend has repeated his argument, may I request you once again to look at the articles and see whether a single one of them deals with the question of termination of the treaty by one State as against another for a breach of contract by that other State. If an article dealt with this question of the limits upon the right of a State to terminate a treaty when another State commits a breach, I could understand the argument that there was a provision, but you cannot refer to provisions which have nothing to do with this right of termination on the ground of breach by another State, but have a bearing on completely different concepts, totally different situations, that have no connection with this question of breach by one State and resulting termination of the treaty by another State.

49. Look once again at Article 89—War and Emergency Conditions. In fact it is very interesting why that provision was included, and its effect is exactly the contrary of what Pakistan would have you believe. This is a most interesting provision and after reading it again I would like you to consider the argument I am submitting for your acceptance and see whether there is any flaw in it at all. If you look at Article 89 of the Convention you find the words are these: "In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States ..." What is the result of this Article 89?—that if there is a war, you do not drive a State to terminate or suspend the Convention. The Convention itself gives the State freedom of action. In other words, this clause obviates the necessity of terminating or suspending the Convention in time of war, because the Convention, by its own force, by its own vigour, by its own terms, confers the right to freedom of action within the Convention. This has nothing to do with the right to suspend, the right to terminate, which is *dehors* the treaty, as the International Court said. This Article merely tells States that the Convention itself gives them freedom of action. So if a State is questioned about not allowing its enemies to overfly while war is going on, it can say that it does not have to declare the Convention terminated, because the Convention itself gives it complete freedom of action.

50. I do not see how you can fail to accept this construction, which is

really the right one, and regard Article 89 as conferring the right of termination. Article 89 is not concerned with termination. That is my whole point, and if a provision deals with one situation, I find it extremely difficult to understand by what process of reasoning it can be said to deal with another. To say that it deals with that other situation is to ignore the clear wording of 89, which deals with the limited contingencies of war and national emergency, nothing more. If for a reason not connected with war or a national emergency—for example, breach by another State—a State wants to terminate the treaty, it does not go to Article 89 or any other provision of the Convention, for the simple reason that no provision of the Convention deals with that situation. It goes, in the words of the International Court, to customary international law which gives it the right to terminate, and the International Court has expressly said—and I read the exact sentence—that the silence of a treaty regarding the right to terminate the treaty in the event of breach by another State does not mean that the right does not exist; the right exists outside the treaty which is being construed and applied.

51. Then my learned friend referred to Article 95. On a plain reading I do not think it is capable of the construction that denunciation can be *qua* one State. Article 95 deals with denunciation of the Convention, the Convention itself. It does not deal with the relations between two States at all. Again, there are two distinct concepts which are not to be confused. The first concept is that of a State which need not have been a party to this treaty but chose to become a party; on second thoughts—perhaps wilder or more foolish thoughts—that State chooses to back out and say "I am not very happy with this treaty." Then it has the right to denounce the treaty, the right to say "I am no longer a party to this treaty." That is what the right to denounce amounts to. It is not a question of the relations between two States only; it is a question of one State on the one hand and all the other States that are parties to the treaty on the other. This is the right interpretation of Article 95, and if a State wants to exercise its right to denounce the treaty under this Article it will have to denounce the treaty as a whole and will therefore cease to be a party to the treaty after a year has elapsed.

52. Let me put the alternative point of view of my learned friend and see whether it makes sense to you. Suppose there are two States, one of which admittedly commits breaches of its obligations. Leave aside the facts of this case which my learned friend puts in issue and take a straightforward case where one State tells another that it is not going to permit overflying its territory. What is the other State to do?—it has to denounce the Convention and then for one whole year permit the wrongdoer to keep on overflying its territory, because only after one year will the denunciation become effective. I hope I am making my point clear. I am assuming for the purpose of this argument that my learned friend's contention is correct and that this right of denunciation is wide enough to embrace the right to denounce the treaty as against one State only, not against all the States who are parties to the treaty. Assume this is the right construction and look at the absurd consequences! Assume that under Article 95 India can denounce the treaty only against one State and be a party to the treaty as regards all the other States. Look at the consequence: that if a State commits a glaring material breach of this very treaty against India, India—the wronged country—must permit the wrongdoer to continue overflying its territory for one year, because the denunciation cannot come into effect for one year under Article 95. It says: "Denunciation shall take effect one year from the date of the notification." Can you conceive of an international treaty so irrationally drafted that the wrongdoing

State for one year will be entitled to the full benefits of this treaty and the State which has been wronged is powerless to do anything in the matter except make a complaint?

53. Suppose the complaint is made, what would happen? You give a decision. The decision is not obeyed. What happens then?—you suspend the voting rights of that State, but the poor State which is wronged in the meanwhile must permit overflying. The State which is the wrongdoer may be very impudent and may not care about the loss of its voting rights. What is the sanction then? This State which is wronged must permit the wrongdoer to overfly its territory for one whole year. This is the effect of the construction my learned friend is putting on Article 95, and I say it is an untenable proposition. On the other hand, the construction I am respectfully suggesting makes complete sense. As between two States the whole basis of this Convention is reciprocity. If there is no reciprocity, if there is a situation where there is a breach of the treaty by one State, the other State has the right under international law to treat the treaty as being at an end as regards that particular State. That makes sense, that makes for justice, because it is an effective sanction. The sanction the Council can impose is, with great respect, not effective, because if the State, as I said, does not care about the loss of its voting rights, what happens? Surely you will not construe an international treaty in a manner which puts a premium upon international wrongdoing.

54. Let me deal now with the Vienna Convention, to which my learned friend referred. He read Article 60, but he read that portion which has no application to the present case. He read the first clause of Article 60, which deals with a bilateral treaty. We are dealing with a multilateral treaty. The Convention and the Transit Agreement are multilateral treaties, which are dealt with in Clause 2, which I read out. Now Clause 2 *(b)* says that 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. Now this is the power which the World Court said is inherent, implicit, in customary international law and this Article merely codifies that power. I am unable to see, then, what is the flaw in the argument I presented yesterday morning to the honourable members. I have a right under international law to suspend or terminate the treaty. If anyone says I have done it wrongly, he must find the appropriate forum in which he can say it, if there is such a forum.

55. In this connection I cited the submission made by the United States Counsel to the World Court in which he said that if such a forum did not exist, it was a shortcoming of international law, but did not mean that a State has no right to terminate a treaty in the event of a breach of the treaty by another State. The World Court accepted that argument. This is my argument: I have terminated. If, for the sake of argument, the honourable members are satisfied that this is a case of suspension or termination and therefore the Council has no jurisdiction, how can they be called upon to consider the question whether one hijacking was enough or whether 20 of my planes should have been destroyed before I could take action? Who is to decide that? If the Council has no jurisdiction to deal with the case, what is the point of telling it that there was only one hijacking incident, that there should have been at least 12 before India took action? This is a matter of justification of termination, which can be investigated only by a tribunal which can go into the question of whether the termination of the treaty by India was justified or not.

56. My learned friend referred also to Article 45 of the Vienna Convention.

Again one is at a loss to understand what bearing this Article has. Kindly look at the Article and see whether it has the remotest bearing on the question before the honourable members. Article 45 says:

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, after becoming aware of the facts:
>
> *(a)* it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
>
> *(b)* it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

Now what has India's conduct been? India has never expressly agreed after 1965 that the Convention or the Transit Agreement is in force between India and Pakistan. Has it by its conduct acquiesced in the position that the Convention and the Transit Agreement are in operation between the two States? What has been the conduct of India? In September 1965 it said "Total suspension of all overflying". In February 1966 it said "Overflying only with the permission of the Government of India and no stops by Pakistan aircraft in India for traffic or non-traffic purposes". This is the direct opposite of the Transit Agreement and the Convention. How can you possibly argue that this conduct means that India has acquiesced in the continuance of the treaty?

57. My learned friend referred to the *Namibia* case and said it has no application. I am asking the honourable members to consider whether the case does not directly apply—not only directly apply but conclusively decide the matter which the honourable Council is called upon to consider. What has been my argument and has it been met? My argument has been that interpretation or application of a treaty presupposes that the treaty is in existence and in operation. If I invoke the power or the right to terminate the treaty, it is a right or power founded on international law outside the treaty. The World Court says this is correct; the power to terminate a treaty is outside the treaty; it is founded on a principle of international law, which will prevail even if the treaty is silent as to the right of termination. How can you say this case has no relevance? It directly applies, because it directly establishes my right to terminate the treaty outside the treaty.

58. You are left, then, with only one question. If its statute tells a particular Council that it can deal with questions of interpretation or application of the treaty, can that Council go into the question whether the treaty was terminated for good reasons or bad? Is that a case of application of the treaty? Who is applying the treaty? How can you apply a treaty which, as a result of termination, is no longer in operation? You will kindly note that if I terminate a treaty, I effectively terminate it. I may be wrong in doing so, but I effectively terminate it. If I set fire to a house, I effectively destroy it. I may have no right to do so, but when I have destroyed the house by fire you cannot go on the basis that it still exists, on the ground that my setting fire to it was wrong. My setting fire to a house may be wrong, but if I have destroyed it, the house does not exist, and can a statute be construed, by any logical process of reasoning, as meaning that the house still exists because my setting fire to it was wrong?

59. Now you, the Council, are asked to consider the simple question of how to apply, how to interpret, a treaty in existence and operation. Questions in the realm of international law, questions of whether the termination was right or wrong, are questions which are expressly out of the purview of the

Council. You will recall in this connection the resolution of the Assembly to which I referred and to which there has been no reply—a resolution which expressly says that originally the Council was invested with much wider powers, but its powers were limited when the Convention was finally agreed upon.

60. My learned friend referred to the fact that after the hijacking incident, India approached the ICAO Council and therefore can be deemed to have acquiesced in the continuance of the treaty. You have only to read the letter he cited to be satisfied that it says nothing of the kind. You will kindly note what are the functions of the Council. They are not merely to deal with disagreements under Article 84. In fact India never approached the Council with an application under Article 84. She approached the Council as the keeper of the conscience of the world so far as safety in international aviation is concerned. If a State was not a party to the Convention, we could still come to ICAO and say "This is the disastrous consequence of this particular State's attitude to hijacking; please see that appropriate steps are taken." In fact it is most important to note that in this very letter, which is addressed to the President of the Coucil, we refer to the Tokyo Convention of 1963 and the Hague Convention of 1970 regarding hijacking and neither India nor Pakistan is a party to either of these Conventions. Now if my learned friend is right in his argument that if I make application to ICAO it can only be on the basis that the Convention is in operation between the two of us, by the same token it must follow that if I refer to the Tokyo Convention or the Hague Convention I want the Council to hold that both India and Pakistan are parties to those two Conventions. We are not. India and Pakistan never have been parties to either the Tokyo Convention or the Hague Convention, and yet both Conventions are referred to in this letter. Why?—because under Article 54 *(n)* and Article 55 *(e)* of the Convention, the Council of ICAO has power to deal with various matters not connected with a breach of the Convention by a party to it.

61. Article 54 (Mandatory Functions of the Council) says in Clause *(n)* that the Council shall "consider any matter relating to the Convention which any Contracting State refers to it". Now the Convention deals with safety in international aviation. If a State tomorrow were to give harbour and comfort to a criminal who had hijacked an Indian plane, and if that State were not a party to this Convention, we would still approach ICAO and say "You are the monitor of good relations in international aviation. Will you kindly use your good offices and see that the right thing is done." In other words this has nothing to do with the Convention being in operation between India and Pakistan. What it has to do with are the wider powers of the Council to see to it that the standards of safety in international civil aviation are safeguarded, and the Council would be entitled to say to a State which is not a party to the Tokyo Convention "Why do not you do the right thing? This is the honourable, the moral, thing to do." The Council may address a letter to a State. In fact you will remember that both Pakistan and India are still parties to the Convention, although it is not in operation between the two of them. Can the President of the Council not tell a State which is a party to the Convention: "You are a member of ICAO; you are a party to the Convention; may I request you to look at the moral side of it; you cannot treat a neighbouring State in this manner." I say that the Council has not only the power but the right and the duty to say so, even though the Convention may not be in operation between the wrongdoing State and the State whose aircraft has been hijacked.

62. Now look at Article 55 (Permissive Functions of the Council). Under 55 *(e)* the Council may "investigate at the request of any contracting State" —and India is a contracting State—"any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable".

63. Consider also the question of overflying and observe that under the Convention and Transit Agreement overflying is a right that cannot be negated. *Kindly credit our country with that very limited knowledge. Can you* imagine any country with that knowledge first of all treating the whole thing as being at an end and saying "You have no such right at all." and then writing a letter to the President of the Council whose implication is that it still regards India and Pakistan as being bound by the Convention? There must be something psychologically wrong with the individual who on the same day does these two things. The only way to reconcile our termination of the right of overflying with this letter to the President of the Council is to put the very obvious natural interpretation on it, which, as I said, is this: "You are the keeper of the world's conscience in international aviation; kindly use your good offices to see to it that this wrong is not done to me." This is all.

64. To say that from this it follows that we regarded the Convention as in force between India and Pakistan is completely wrong. What is overlooked is that India and Pakistan still continue to be members of ICAO and parties to the Convention and the Transit Agreement. All that has happened is that whereas the Convention and the Transit Agreement are binding on India and Pakistan as against all other parties, they are not binding on India as against Pakistan or on Pakistan as against India. That is all. Our conduct in writing to the President is completely consistent with the stand I am taking now.

65. My learned friend then referred to Article 60 of the Vienna Convention and said that under that Article there must be a material breach by a State before another State can terminate the contract. I completely agree. I am not disputing that, but are we not mixing up two questions which are separate and distinct? May I repeat those two questions again, because if I do so I have answered his point. The question before the Council is whether the Council has jurisdiction to deal with cases of termination, not whether India was justified in terminating the treaty. Therefore to say that a material breach is necessary is to go into the merits of the termination, but if the Council has no jurisdiction to deal with that question, how can it go into the merits?

66. Then my learned friend referred to Pakistan's reply to our charges concerning the hijacking. I am not going to take much time with it, because it, again, deals with the merits of the termination. But it is most interesting when you consider how specific and clear our charges are: that a foreign airline was there but passengers were not permitted to board; we were not permitted to send our own aircraft to relieve the passengers. My learned friend says a crowd collected. Does this not conclusively prove my case that it would be most dangerous for Indian aircraft to overfly Pakistan? Our plane has been hijacked by criminals. A crowd surrounds the airport. The military régime of Pakistan can do nothing for three and a half days. Suppose my plane is flying over Pakistan and has to land because of mechanical trouble; a crowd can collect and the Pakistan Government says it can do nothing. Is this safety in international aviation? If a Government expressly tells you in its own pleadings that once a crowd collects around an Indian aircraft it is helpless, can you reconcile that with its further contention that it is nevetheless safe for Indian aircraft to overfly Pakistan? My learned friend says 23 airlines

overfly Pakistan and nothing happens to them. May I say that more than 23 airlines overfly India and nothing happens to them. If there is a posture of hostility between two countries, it is irrelevant to say that each of them is friendly with 25 other countries. The question is not how many friends Pakistan has or how many friends India has. If that were the question I could say, as I have said already, that many airlines overfly India. We permit everyone to overfly. Why should we object only to Pakistan? Are we out of our minds? There must be some reason for our objection, because normally we do not adopt this attitude to other States.

67. My learned friend referred to the judgment of the World Court and to a passage in the dissenting opinion of Judge Sir Gerald Fitzmaurice. The use made of the judgment by the two parties is rather curious. I quote paragraphs, whole paragraphs, from the operative part of the judgment of the Court, whose President was no less a person than Sir Muhammad Zafrullah Khan, representing Pakistan. It is the operative part of the judgment which I quote, the part where the international law is laid down. My learned friend in reply quotes from the dissenting opinion of Judge Sir Gerald Fitzmaurice and a footnote to that dissenting opinion. What he read is the footnote to the dissenting opinion of one Judge. Now what is the law laid down by the International Court? The law is the law laid down by the majority. You cannot possibly say that a footnote to a minority opinion is the law laid down by the World Court. Even in this footnote the Judge merely says "I make a distinction between terminating a contract and putting an end to it." The words are "Note the intentional use of the phrase 'treating it as terminated' and not 'putting an end to it'. There is an important conceptual difference." But I am not on the conceptual difference between terminating and putting an end. I am on the simple, massive, clear-cut point laid down in the majority judgment of the World Court, namely, that every State has a right to terminate an international treaty if there is a breach by another State and this right is in international law outside the treaty.

68. Then my learned friend referred to the judgment of Mr. Justice Dillard on pages 167 and 168. Frankly I am unable to see anything in that judgment which has any bearing on what you have to consider. You will get these paragraphs in the verbatim notes and I think I would be wasting your time if I read them again. There is no sentence, no proposition, no principle, laid down in these passages on pages 167 and 168 which throws any light on the question you have to consider, namely, whether India has the right under international law to terminate the treaty and if there is such a right, is termination and a case of termination covered at all by the words "interpretation and application".

69. My learned friend referred to paragraph 103 on page 49. To do no injustice to the argument of Pakistan, we ourselves, in the compilation we have produced, have deliberately included this paragraph, which my learned friend referred to in his opening remarks yesterday. It does not say anything contrary to what I have already said. I will not read any of the other passages, but, if I may, I will read it to show how the real point is not faced and grappled with. You are referred to some paragraphs here and there which do not deal with the real question before the Council today.

70. What is this paragraph 103 which my learned friend wanted to read? It is this:

> "The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966

> Judgment in the *South West Africa* cases referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League, 'in the *pursuit of its collective, institutional* activity, to require the due performance of the Mandate in discharge of the "sacred trust"' was specifically recognized. Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly."

All it says is that the United Nations has a right to say whether a nation which is given the power of mandatory has abused that power. I am unable to see what bearing this paragraph has on this case, whereas you will recall that the paragraph *I* cited had an immediate and significant bearing on what you have to decide.

71. I have finished with my learned friend's argument on the first ground, the first preliminary objection. May I come to his argument on the second ground, the special régime. At the beginning my learned friend said that in the pleading I made I talked of the existence of a special régime right from 1948. Again, I am sorry that your time should be wasted on reading something which is obvious beyond the shadow of a doubt, but since the point is raised I have to answer it. What we said was that the agreement reached in 1966, after the war, is the special régime by reference to which we say that today the Convention and the Transit Agreement are not in operation. It is true that there are two cases made in the preliminary objections. The first was that even in 1948 there was a special agreement between the two States—the bilateral agreement. Therefore only the special one prevailed, not the general one like the Convention or the Transit Agreement. The second case is that, in any event, after 1966 there was a special régime, and where we have referred to "Special Régime" we have expressly said that the words mean the agreement reached in 1966. You will find that set out in paragraph 34 of the preliminary objections of India. If I may read that paragraph: "On the basis of the aforesaid understanding"—that is the understanding reached in 1966—"the overflights of Pakistan and Indian aircraft across each other's territory were resumed with effect from February 10, 1966. The aforesaid understanding is hereafter referred to as 'the Special Agreement of 1966'." Then we go on to say, in paragraph 38, "The Special Agreement of 1966 has governed the rights and privileges of India and Pakistan regarding air transit and overflying from February 1966 until February 1971."

72. I do not want to waste your time going into things prior to 1966 because 1966 is good enough for my purpose and if I were to take you into the earlier period, I would be doing something which would be a work of supererogation, something unnecessary. If a shorter point is enough to dispose of the matter, I do not propose to go into a larger issue, a more controversial area, which really is not necessary for a decision in the case. Therefore I have advisedly confined myself to the events of 1966 as the starting point of the special régime between the two countries and say nothing one way or the other as regards the period 1948-1966. This is to save your time and I do not see what is the point of the criticism here.

73. Next my learned friend referred to the Tashkent Declaration. Frankly, if anything, it shows the bona fides of India. We said "Please let us implement

the Tashkent Declaration in full." What did this Declaration say? It said "Let all the seized goods be restored; let normal trade be restored; let there be communications between the two countries; let trains run from one country to the other; let aircraft go from one country to the other—Pakistan's airlines and our own." This is the Tashkent Declaration. We said "We are willing." and I have given you examples and dates. In his reply, my learned friend said Pakistan has been always willing, always ready, etc. As against his general statement that Pakistan is always willing and always ready, I have given you specific examples with dates; that on such and such a date we said "We release all the goods of Pakistan.", but Pakistan would not release our goods. We agreed to release all the confiscated materials except military contraband but Pakistan would not reciprocate. We said "Let us open the doors to trade between the two countries; let us trade with each other." Pakistan said "No". We said "Let us have cultural exchanges; let newspapers go from one country to another." Pakistan said "No". These specific facts are not disputed, but in reply Pakistan says "I have been acting extremely reasonably, extremely well, etc.". It is for the honourable members to consider whether they are to be guided by general statements of goodwill or influenced by particular specific examples of what each country has done—not that this is relevant because it, again, has a bearing on the justification for the termination. Therefore I am not asking you to go into it. I myself referred to it, but I thought I said more than once that I was doing so only to show our bona fides, so that the honourable members may not feel that India has done something wrong and is trying to take refuge behind the plea of preliminary jurisdiction. Just to prove our bona fides, I referred to these facts, after making it clear that they really do not arise for a decision at the hands of the Council.

74. Now what Article VI of the Tashkent Declaration, which my learned friend read, says is this—and look at the carefully drafted words—"The Prime Minister of India and the President of Pakistan have agreed to consider measures towards restoration of economic and trade relations." We have agreed "to consider measures" for restoration of trade and normal communications. Of course we agreed and we suggested concrete measures which Pakistan rejected. How can you say that from this it follows that the Convention and the Transit Agreement were restored between the two countries? How can it be? They could have been restored if the two countries had fulfilled the Tashkent Declaration, but they did not. Assume the blame is India's, assume Pakistan is 100 per cent. innocent, the fact remains that owing to my cussedness—let me put it that way—the Tashkent Declaration was never implemented, but how can you from that conclude that the Transit Agreement and the Convention between the two countries, which existed prior to 1966, had been restored? You do not arrive at the right conclusion by apportioning blame between the two States or saying "This country is more to blame than the other." You reach your correct conclusion on the question of jurisdiction by reference to the simple point that whoever is to blame, the fact remains that for some reason, good or bad, there has been termination of these two treaties as between the two States.

75. Then my learned friend referred to the Indian Note to Pakistan of the 4th of March 1971. He read paragraph 4: "The Government of India wish to remind Government of Pakistan that after Indo/Pakistan conflict of August/September 1965 they would have been well within their rights to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalized. However, on a specific request made by the then President of Pakistan, the Government of India agreed, in February 1966, to

forego their right to demand prior settlement of outstanding issues and consented to resume mutual overflights." Then my learned friend says that India says that theTashkent Declaration was a package deal and must be carried out on the basis that all normal relations must be restored. This does not go against what I am saying at all. On the contrary, it gives further support to my case. What does India say? India says "After the Tashkent Declaration, which was a package deal, we had to restore all normal relations. You did not do it and so I was entitled to say that even overflying cannot be resumed. Yet, as a gesture of goodwill towards you, I permitted overflying." Pakistan is much more worried about overflying than we are. That is why it, not India, is the Plaintiff and the Applicant. Lack of overflying hurt Pakistan; it did not hurt India. Although the Tashkent Declaration was a package deal, we said "All right, as a gesture of goodwill to you, we will permit you to overfly even though you do not restore normal relations as you have agreed to do under the Tashkent Declaration." Does this prove my bona fides or is it a point against me?

76. The second document my learned friend has referred to—the letter dated 5 February 1966 from the Prime Minister of India to the President of Pakistan—says: "Our Foreign Minister and Defence Minister, on their return from Tashkent,"—this was after the Tashkent Declaration had been signed on the 10th of January 1966—"informed us of your desire for the early resumption of overflights of Pakistani and Indian planes 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."—"along with other problems connected with the restoration of communications" because formerly trains went from one country to the other, ships went, etc., but all that had been stopped, so we said "Restore all communications and have your overflying also"—"As it appears that such a meeting might take some time, we would be agreeble to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1965."

77. Now you will recall that prior to 1965 Pakistani aircraft could land in India and take on passengers—I myself went as a passenger from Bombay to Karachi on a Pakistani aircraft—and Indian aircraft could do the same in Pakistan. We wanted the restoration and said we were keen on it, but Pakistan for some reason that we say amounted to a fault on their part—they say there was no fault—would not have it. What does it prove? How do you conclude from such a letter that normal relations, and therefore the Transit Agreement and the Convention, have been restored between the two countries? They have not been, because the fact remains that even for non-traffic purposes Pakistani aircraft cannot stop in India, whereas under the Convention and the Transit Agreement they have a clear right to stop for non-traffic purposes. They could not and did not stop after 1965. So what was the good of referring to a letter? What is the real question before you? The real question before you is "Was the Convention, was the Transit Agreement, brought into operation between the two countries?" If it was not—and the practice shows conclusively that it was not—the overflying had to be with our Government's permission. That is what our notification said and it is the law of India. Even for non-traffic purposes—leave aside traffic purposes—Pakistan aircraft could not land in India.

78. Then what is the good of saying that the Convention and the Transit Agreement have been restored? They cannot be restored by this letter. This letter is only a token of India's goodwill—a gesture to show her willingness to co-operate with Pakistan in the restoration of normal relations. Can anyone argue that an expression of a desire to restore normal relations be-

tween two countries means that in practice and in law the Convention and the Transit Agreement have come back into operation? This desire was never fulfilled; that is the real point. The hope expressed by the Prime Minister of India, which bears eloquent testimony to the goodwill of India and its genuine desire to restore normal relations, was never realized. Therefore this letter is no evidence whatever of the submission made by Pakistan that the Convention and the Transit Agreement came back into effect between the two countries. *You find Madame Indira Gandhi saying in the second paragraph* "I very much hope that in both our countries emphasis will be placed on the positive aspects of the Tashkent Declaration, such as early normalization of relations and the initiation of various processes of co-operation between our two countries in mutually beneficial fields." Therefore, Mr. President and honourable members, although this letter has no bearing on the real issue you have to decide, it is lucky for me that it has been produced here. It is evidence of India's genuine desire, bona fide genuine desire, to restore normal relations, which desire remains unfulfilled to this day.

79. Then my learned friend read the signals starting on page 27. I will not read them again, but I am unable to see what point he was trying to make against my argument. What was my argument?—that the signals expressly say that the aircraft are to fly over each other's territory on a provisional basis. "Provisional" is the word used by Pakistan; "provisional" is the word used by India. The signals expressly say that overflights are on the basis of reciprocity and they are followed by the notification of the Indian Government saying "With the permission of the Government of India you can overfly, not otherwise". These signals, saying that overflights are provisional, are on the basis of reciprovity, and require the Government's permission, conclusively prove that the Convention and the Transit Agreement have not come back into operation, because every one of these conditions is inconsistent with the Convention and the Transit Agreement. If the Convention and the Transit Agreement are in operation, overflights cannot be provisional. If they are in operation you do not need an express provision for reciprocity. If they are in operation you do not need the Government of India's permission for overflying and you have a right to make non-traffic stops in India, which you cannot do and have not done since 1965. How can the signals therefore be read to mean that the Convention and the Transit Agreement were restored as between the two countries?

80. My learned friend read Articles 82 and 83 of the Convention and said that under Article 82 no two States which are signatories to the Convention can have an agreement inconsistent with the Convention. I completely agree. I accept his argument and say—this is my whole point—that if we have a special régime which is inconsistent with the Convention because under it overflights require the Government of India's permission, are provisional and on a basis of reciprocity, it is precisely because the Convention is not in operation. If it was in operation we could never have such a special régime. Articles 82 and 83 *I* should have quoted, not my learned friend, because they conclusively establish that no nation can have an agreement inconsistent with *the Convention, and if you do have such an agreement it can only* be because you do not regard the Convention as in operation between yourself and the other party. Therefore these Articles, far from supporting my learned friend, give great support and weight to the point I have made—that the Convention has not been in operation between the two countries since 1965/1966, and that is precisely why an agreement inconsistent with it could be entered into, as was done in 1966.

81. My learned friend then referred to Article 30, clause 3, of the Vienna Convention. This says that "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." I should have thought that this, again, is an Article *I* should have read. What does it say? If there is one treaty between two States and then a subsequent one, the subsequent treaty prevails over the earlier treaty. To put it briefly it means this: if you have got two treaties, one earlier in point of time than the other, and the two cannot be reconciled, the later treaty prevails over the earlier one. The Convention and the Transit Agreement are of 1948. The special régime is of 1966. Now apply Article 30, clause 3, of the Vienna Convention and see what result you get. It does not really apply, but my learned friend has relied on it, so I take it that what he means is that if both countries were parties to the Convention and the Transit Agreement and are parties to the special régime of 1966, then the principle which will apply is that the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. So in the case of a conflict between the earlier treaty and the later treaty, it is the later treaty which prevails and the earlier treaty is superseded. Whom does this Article help? Where you have a special treaty of 1966 and the Convention and Transit Agreement of 1948, the special treaty must prevail because it is the later one, and it says "You shall not overfly without the Government of India's permission." That prevails, because under the earlier treaties you had the right to overfly without the Government's permission.

82. My learned friend, finally made two points and that is the end of my reply. He said conventions are not to be narrowly construed. I am all for construing them reasonably, construing them, I would also say, within reason liberally. The only point is whether you can put such a construction upon a treaty as will serve to completely displace the very basis of the Council's jurisdiction. When the question is one of the concept itself, you cannot solve it merely by using the words "liberal" and "narrow". If two concepts are different, and termination and application are two different concepts, you have solved no problem by saying "Put a liberal construction on 'application'", because, however liberal the construction may be, the concepts are different and you cannot mix up two concepts on the principle of putting a liberal interpretation on one of them. Now just consider, therefore, whether it is right to say that I am putting a narrow construction on the Convention. I am putting a reasonable construction on the Convention. I am putting on it a construction which harmonizes with the known functions of this Council, with the excellent work it has done for the promotion of civil aviation.

83. My learned friend finally said that he has come to this Council for justice; it is like the doors of the courts of justice, which are open to rich and poor alike. Here anyone can come for justice. This is a very important point which my learned friend has made and I would like to say a word about it. On which construction are you going to fulfil and promote the purposes of the Convention and the Transit Agreement, on my learned friend's construction or mine? Look at my construction, work out the consequences. Accept my learned friend's construction, work out the consequences and see where you stand as the Council.

84. What is my construction? This Council must be permitted to carry on the excellent work it is doing above the dust and filth of political confrontation and military hostilities, not in a partisan spirit. It is above internal politics

or politics between two countries. It has nothing to do with military hostilities or their aftermath. After military hostilities, human memories being what they are, unfortunately countries which ought to be very friendly happen not to be friendly. There may be a thawing of the ice some time later. Enemies become friends, friends become enemies, but whatever the changes in the international picture may be, this Council will not take up its brush and try to paint a part of this picture; it leaves it severely alone. This Council is above the arena of political and military conflict and I want it to remain so. On my construction, this Council will not soil its hands by siding with one State against another, saying "You hijacked; you, Pakistan, gave harbour to two hijackers; if you had given it to 12, India would have been right.", or tell India "Well, this was sufficient for you to terminate." No. This Council is above all that. What I have called the filth and the squalor—"squalor" is the right word—of military hostilities and their aftermath, the political confrontations, all these are to be avoided by the Council, and on my respectful construction of the Convention, the honourable members will continue doing their excellent work without being involved in issues which, with the greatest respect, they are not called upon to decide, and, if I may say so, again with the greatest respect, which they are perhaps not qualified to decide in the sense that you have to take evidence as the World Court does, consider questions of international law, etc. To ask it to decide such issues would be putting an undue burden, an undue strain, on the Council. This is what I want the Council to adopt as the right construction.

85. What is my learned friend's construction? His construction comes to this: two nations quarrel; there may be a tremendous political confrontation; there may be border incidents; there may be firing across the border; one State tells the other "No overflying", and then this Council has to decide who is right and who is wrong. How can it do it? All my learned friend says is "Give one year's notice." So while the firing goes on across the border the weak nation, the submissive, quiet nation, must permit the wrongdoer to keep on overflying because it has to give one year's notice of denunciation. After one year, its denunciation will come into effect. The Council in the meantime will decide. What will it decide? How will it decide, on what basis will it decide, how will it be qualified to decide and under which Article will it decide whether the termination of the agreement was wrongful or not?

86. I leave it to you, Mr. President and honourable members, to consider which of the two constructions appeals to you as the one best calculated to promote the interests of international civil aviation. Will you be promoting the objectives of the Convention by getting into this political arena and trying to decide between two sides which are enemies or threaten to be enemies? Or will you be above all that and say "This is not a matter that is within my jurisdiction. I have nothing to do with your dirty quarrels. I am above all that. My objective is only to see that international civil aviation is promoted. If you two quarrel, it is your affair; sort it out as you like"? I say that my construction will give the greatest possible fillip and the greatest possible incentive to the promotion of the cause which underlies the Convention and the Transit Agreement, and therefore, far from putting a narrow construction on them, I am trying to put a construction which will redound to the credit of the Council and keep it the respected, non-partisan body, above politics and military hostilities, that it has been so far. Thank you very much, Mr. President.

87. *The President:* We shall now have the lunch break and return at 2.30.

(d) COUNCIL—SEVENTY-FOURTH SESSION

Minutes of the Fifth Meeting [1]

(The Council Chamber, Wednesday, 28 July 1971, at 1500 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi
Secretary: Dr. Assad Kotaite, Secretary General

Present:

Argentina	Com. R. Temporini
Australia	Dr. K. N. E. Bradfield
Belgium	Mr. A. X. Pirson
Brazil	Col. C. Pavan
Canada	Mr. J. E. Cole (Alt.)
Colombia	Major R. Charry
Congo (People's Republic of)	Mr. F. X. Ollassa
Czechoslovak Socialist Republic	Mr. Z. Svoboda
Federal Republic of Germany	Mr. H. S. Marzusch (Alt.)
France	Mr. M. Agésilas
India	Mr. Y. R. Malhotra
Indonesia	Mr. Karno Barkah
Italy	Dr. A. Cucci
Japan	Mr. H. Yamaguchi
Mexico	Mr. S. Alvear López (Alt.)
Nigeria	Mr. E. A. Olaniyan
Norway	Mr. B. Grinde
Senegal	Mr. Y. Diallo
Spain	Lt. Col. J. Izquierdo
Tunisia	Mr. A. El Hicheri
Uganda	Mr. M. H. Mugizi (Alt.)
Union of Soviet Socialist Republics	Mr. A. F. Borisov
United Arab Republic	Mr. H. K. El Meleigy
United Kingdom	A/V/M J. B. Russell
United States	Mr. C. F. Butler

Also present:

Dr. J. Machado (Alt.)	Brazil
Mr. L. S. Clark (Alt.)	Canada
Mr. B. S. Gidwani (Alt.)	India
Mr. M. García Benito (Alt.)	Spain
Mr. N. V. Lindemere (Alt.)	U.K.
Mr. F. K. Willis (Alt.)	U.S.
Mr. N. A. Palkhivala (Chief Counsel)	India
Mr. Y. S. Chitale (Counsel)	India
Mr. I. R. Menon (Assistant Counsel)	India
Mr. S. S. Pirzada (Chief Counsel)	Pakistan
Mr. K. M. H. Darabu (Assistant Counsel)	Pakistan

[1] Reproduced from ICAO Doc. 8956— C/1001, C/min. LXXIV/5 (Closed).

Mr. A. A. Khan (Obs.)	Pakistan
Mr. H. Rashid (Obs.)	Pakistan
Mr. Magsood Khan (Obs.)	Pakistan
H.E. A. B. Bhadkamkar (Agent)	India
H.E. M. S. Shaikh (Agent)	Pakistan

Secretariat:

Dr. G. F. Fitzgerald	Sr. Legal Officer
Mr. D. S. Bhatti	Legal Officer
Miss M. Bridge	CSO

SUBJECTS DISCUSSED AND ACTION TAKEN

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The meeting opened with the reply of the Chief Counsel for Pakistan, Mr. Pirzada, to the comments made by the Chief Counsel for India at the previous meeting. Denying the imputation that he was guilty of misinterpretation in maintaining that "disagreements relating to the interpretation or application of this Convention" included disagreements relating to termination or suspension, he cited the 1927 judgment of the Permanent Court of International Justice in the *Chorzów Factory* case, the summing up of Mr. Justice Lord Wright in the *Heyman* v. *Darwin* case considered by the House of Lords in 1942, and the judgment of the International Court of Justice in December 1962 on the revocation of the South African Mandate over South West Africa. In the first case the Court had held that differences relating to reparations which might be due by reason of failure to comply with a convention were differences relating to application, which was a wide and elastic term; in the second the Chief Justice had declared that a dispute as to whether a breach of contract by one party had operated to discharge the other or whether the contract had been frustrated was a dispute arising out of the contract; in the third the Court had ruled that the dispute came within the expression "dispute relating to the interpretation or application of the provisions of the mandate" in Article 7 of the Mandate.

2. He answered the objection that his reference to paragraph 1 of Article 60 of the Vienna Convention on the Law of Treaties was irrelevant by pointing out that under paragraph 2 there was the same limitation of the right of termination or suspension—the breach must be a material breach and it could be invoked only as a ground for suspending the operation of the treaty. He expressed surprise that the letter from the Prime Minister of India to the President of Pakistan was not considered by the Chief Counsel for India to support Pakistan's case that there was no special régime governing overflights, that they had been restored on the same basis as before 1 August 1965. He pointed out that the provisions of Article 95 of the Convention, whose application in the present case the Indian Counsel found ridiculous, were repeated in the bilateral agreement of 1948 between India and Pakistan and suggested that obligations entered into with eyes open must be honoured. He emphasized that it was not unusual for bodies like the Council to be entrusted with judicial or quasi-judicial functions and that there were rules laying down procedures for the discharge of these functions. He also assured the Council that Pakistan

certainly had no intention of raising any political questions; its concern was only with its legal rights. Finally, Mr. Pirzada stressed the importance of the issue before the Council and the far-reaching consequences of the decision to be taken on India's challenge to its jurisdiction. This was not just an Indo-Pakistan affair. India's arbitrary, illegal and discriminatory action in banning overflights was a threat to the safe and orderly development of international civil aviation.

3. Mr. Palkhivala rejoined that the 1962 judgment of the International Court had no bearing on the question whether "interpretation or application" covered termination. In this case the Court had been asked to consider four South African objections to the complaint brought by Ethiopia and Liberia: that the Mandate had ceased to be a treaty or convention in force when the League of Nations ceased to exist, that Ethiopia and Liberia had no right to interfere, that a dispute could not be said to exist because Ethiopia and Liberia had nothing to lose or gain by fighting the Mandate, and that the International Court had no jurisdiction because this was not an issue that could be settled by negotiation. All of these objections had been rejected.

Case No. 2

4. As there were no questions from Council Representatives on Case 1, the President invited the Chief Counsel for India to present the Preliminary Objection in Case No. 2—the complaint filed by Pakistan under Article II, Section 1 of the Transit Agreement. Mr. Palkhivala indicated that the grounds of objection in Case 1 applied in Case 2 and there was an additional one: that a complaint filed under Article II, Section 1 of the Transit Agreement had to relate to action taken by another Contracting State under the Agreement, and India had taken no such action; the complaint was therefore not maintainable and the Council had no jurisdiction to handle the matter. If India, for example, had required Pakistani aircraft to fly around the coastline instead of allowing them to take the most direct route across its territory, or if it had taken some other action to make the exercise of the rights granted by the Transit Agreement commercially unprofitable, it would have taken action under the Agreement causing injustice or hardship. It was a contradiction in terms to say that action which was the very antithesis of the Agreement—the banning of overflights and non-traffic stops—was "action under this Agreement".

5. Mr. Pirzada replied that according to Article II, Section 1 of the Transit Agreement, a Contracting State which deemed that action by another Contracting State under the Agreement was causing injustice or hardship to it might request the Council to examine the situation. The use of the verb "deem" indicated that it was for the complainant to determine whether the action of the other State was causing it injustice or hardships, and Pakistan so deemed. As for the contention that action could not be taken under the Agreement because it had been terminated, he had already shown that a case of alleged termination was a case of application. Furthermore, "action" had to be interpreted as including omission, and the failure of India to fulfil its obligations under the Transit Agreement was an omission. Sections 1 and 2 of Article II were not mutually exclusive, and a State considering itself an injured party had the choice of filing a complaint under Section 1 or instituting formal action under Article 84 of the Convention. In dealing with complaints the Council had not in the past taken a technical approach, and in support of this argument he cited the 1958 case of the *United Arab Republic* v. *Jordan* (cf. "Action of the Council", 35th Session, Doc. 7958-C/914, p. 20).

6. Mr. Palkhivala submitted that the verb "deems" in Article II, Section 1 of the Transit Agreement applied to "injustice or hardship", not to "action". Whether action had been taken under the Agreement had to be formally established—it was not for subjective determination by the complainant. India's whole case was that the Transit Agreement was not in operation between itself and Pakistan and therefore there could be no action under it. The Chief Counsel of Pakistan was construing Article II as giving the Council jurisdiction over any dispute between two contracting parties; if that had been the intention, the text would have said so instead of speaking of "action under this Agreement" and "any disagreement relating to the interpretation or application of this Agreement".

7. As there were no questions from members of the Council on Case 2, the President invited discussion on the suggestion of the Chief Counsel for India that India should be permitted to submit a written memorandum, setting out the arguments he had advanced more concisely than had been possible in an oral presentation, for the use of Council Representatives who wished to seek instructions before the Council took a decision in view of the importance of the point at issue for the future of ICAO and by reason of the fact that the expression "disagreement relating to interpretation or application" was used in a number of treaties. The Chief Counsel for Pakistan objected, arguing that the suggested action was unjustifiable because of the circumstances and the continuing injury being suffered by Pakistan as long as overflights were suspended, and several Representatives questioned whether it would be in conformity with Article 5, paragraph 4 of the Rules for the Settlement of Differences, which said that "If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules." The Secretariat advised that it was not unusual for a judicial tribunal, after a long and difficult argument, to request counsel to submit a written brief, which would be simply a systematic presentation of arguments already adduced, or for a court to agree to a request by counsel to file such a document. The Chief Counsel for India did not, however, press the suggestion.

8. The Chief Counsels and the Agents for India and Pakistan then withdrew —though the two countries continued to be represented by other members of their delegations—while the Council considered the preliminary objection in Case 1.

9. As reference had been made by the Chief Counsel for India to opinions expressed by the United States Counsel before the International Court in the *Namibia* case, the Representative of the United States explained that the United States position was that Article 84 of the Chicago Convention, as well as Article 7 of the Mandate which was the subject of the *Namibia* case, covered questions relating to any provisions of those instruments; it did not seem possible for one party to a convention or treaty to negate procedures for the settlement of disputes by stating that the convention or treaty was no longer in force and thereby depriving of jurisdiction the tribunal named in it to settle disputes. The Alternate Representative of India submitted that the United States position was tantamount to saying that under Article 84 the Council had jurisdiction over any dispute or difference relating to the Convention, and repeated India's contention that the expression "any disagreement relating to the interpretation or application of this Convention" had a much narrower meaning and did not include disagreements relating to termination or suspension.

10. Indications at this point by the Representatives of the United Kingdom and the Czechoslovak Socialist Republic that, not being lawyers, they must

obtain legal advice on the arguments that had been presented before they could participate in any decision on the substance of the preliminary objection gave rise to considerable discussion. The Representatives of France, Tunisia, Senegal, the People's Republic of the Congo, Italy, Belgium, Uganda, Spain and Colombia said that they were ready to take a decision—the oral presentations by the parties had been essentially elaborations of positions taken in the preliminary objection and the reply to it; though the argumentation had been lengthy, the question (whether the Council was competent to consider Pakistan's application and complaint) was basically simple and administrations had had time to form an opinion on it since the preliminary objection was filed; deferment was therefore unnecessary. The Representatives of France, the People's Republic of the Congo and Belgium said that they would not be opposed to deferment for a week or ten days, but the Representatives of Italy and Uganda expressed the view that this would not be long enough for Representatives who wished to consult their administrations, because for that they would need the verbatim record, which would not be available for at least a month. The Alternate Representative of India maintained that a decision taken now would be vitiated, as it would have been taken before a proper record was available and without proper notice, the Council having decided on 12 June to meet on 27 July only "to hear the parties on the preliminary objection filed by India".

11. As the normal hour of adjournment had arrived, the discussion was suspended at this point, with the understanding that the Council would meet again at 1000 hours on the following day.

DISCUSSION

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. *The President:* The Council is again in session and the Chief Counsel of Pakistan would like the floor.

2. *Mr. Pirzada:* Mr. President and honourable members of the Council, I shall try to be as brief as I can, because in his reply my learned friend was somewhat wide of the mark. He repeated what he had already said, to which I had replied, and his main argument in reply was that this is essentially a case of termination of a treaty by India *qua* Pakistan and that this Council has no jurisdiction to hear or determine any application in respect thereof.

We brought our case within the purview of Article 84 and I will just refer to the language of it again. It is "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". The words are "any disagreement relating to the interpretation or application of this Convention" and I had submitted that the first principle of interpretation is that the text should be construed liberally. My learned friend did not disagree with that proposition, but he imputed to me something in the nature of misinterpretation, and again reaffirming what he thought was the judgment of the International Court of Justice in the recent case of South West Africa, he stuck to the word "judgment", even though I had pointed out that there is a vast

difference between a judgment and an advisory opinion. There are two separate Articles in the Statute of the International Court of Justice—Article 65 dealing with advisory opinions and Article 36 dealing with judgments. I have great respect for the opinion expressed in the recent Advisory Opinion, but I submit it is an opinion, not a Judgment. Though my learned friend was so particular, or trying to be so particular, yesterday about the meaning of the expressions "interpretation" and "application", when it came to well-defined and well-known expressions like "judgment" and "advisory opinion", he stuck to his own way of using expressions and then imputed to me misinterpretation. In fact, he insinuated that what I was doing was tantamount to referring to a horse as a cow. Now I do not wish to use any veterinary language before this august body, but I would submit respectfully that any imputation of misinterpretation to me is highly unjustified.

3. He then tried to show that when I read a footnote from the judgment of Justice Fitzmaurice, I was reading from the dissenting opinion. You will recall that I sought your indulgence to refer to that footnote, which shows that we were so careful and meticulous in making our submissions here that we went even to a footnote.

4. I mentioned that the answer on which he places reliance, made by the Counsel for the United States of America before the International Court of Justice, was to a question put by Justice Fitzmaurice in giving his own interpretation of an expression. That is why I referred to it. I knew that it was a dissenting opinion and said so. Secondly, when I went to the observations made by the learned American Judge I pointed out that he had correctly interpreted the answer given by the American Counsel. Lastly, I relied on paragraph 103 on page 49 of the Advisory Opinion to show that the International Court, while considering the question of implied power in connection with the revocation of the Mandate, took into consideration the fact that in that case the Mandate was being terminated by the General Assembly, which has supervisory powers and can therefore go into the question of material breach and determine it. Here are two States of equal status. India does not hold any supervisory powers over Pakistan permitting it to determine the question of material breach. That question will be, and has to be, determined by some other forum or body. This forum or body has been determined in the Convention in Article 84, in the Transit Agreement in Article III, and also in the Bilateral Agreement to which I will make reference.

5. Having clarified that there was no question or occasion for me to misinterpret, I shall now try to clarify what he tried to say yesterday. Coming back to Article 84, I had respectfully submitted that the expression "disagreement relating to interpretation or application" clearly includes a case of alleged termination by any State, because the moment one State says that another State's conduct or misconduct, act of omission, or non-fulfilment of some obligation under the Convention amounts to repudiation, that it has accepted the repudiation and that it therefore considers the Convention terminated, but the other State asserts that the Convention still applies, it is a disagreement pertaining to the application of the Convention. The mere denial does not take the case out of the purview of Article 84. I cited three decisions yesterday, and if the point was not clear to my learned friend from those decisions, I will not trouble you with them again. To bring the point out more clearly I have selected one case in which the language of the Convention was identical and an interpretation was given by the Permanent Court of International Justice. In this case it was a judgment. I am referring to a case I had mentioned yesterday—the *Chorzów Factory* case. The judgment was Judgment No. 9, given in 1927 by

the Permanent Court, and is reproduced in Judgment *Series A*, Advisory Opinions *Series B*, as well as in *Series C*.

6. Now this was a dispute between the German and Polish Governments and it arose under Article 23 of the Geneva Convention, not under Article 36 of the Statute of the International Court of Justice. Article 23 reads like this: "Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and the Polish Governments, they shall be submitted to the Permanent Court of International Justice." Now these Articles were not complied with and the case of the Polish Government was that they were not in existence at all. As there had been a breach of obligations, the German Government claimed reparation. When the matter came before the Permanent Court, the Polish Government demurred to the Court's jurisdiction and in fact disputed it, arguing that, having regard to the language of the Article I read out just now, the Court was not competent to entertain the claim of the German Government. Dealing with this, the Court observed: "In regard to the first of these contentions the judgment of the Court states that it is a principle of international law that the breach of an agreement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparation which may be due by reason of failure to apply a convention are consequently differences relating to its application." Various other reasons were given and I need not trouble you with them. I will come to the last part. "The classification of disputes in Article 13 of the Covenant"—which I read out earlier—"and Article 36 of the Court's Statute would lead to the same conclusion. It is true that the Covenant and the Statute mention separately disputes as to the interpretation of a treaty . . ." Then the Court observes: "If Article 23, paragraph 1 covers the disputes mentioned in the first and third categories by the two provisions above mentioned, it would be difficult to understand why—failing an express provision to that effect—it should not cover the less important disputes mentioned in the fourth category. From the above considerations the Court concludes that Article 23, paragraph 1 of the Convention contemplates all differences of opinion resulting from the interpretation and application of the Articles referred to, *inclusu* of differences relating to reparation. 'Application' is a wide and elastic term." This is what I have been submitting. I have been submitting that this is a wide and elastic term and would include questions of termination. Consequently, if there has been a failure to fulfil obligations, there can be a claim for compensation, which we have made in the Application we have filed.

7. I had also cited a case of 1942 from the House of Lords coming under municipal jurisdiction and I will read out only a paragraph from Russell's well-known book on arbitration. I am reading from Russell *On Arbitration* page 47, on which this case is referred to. The case was *Heyman* v. *Darwin*, 1942, Appeal Cases, and this is the summing up in the words of Lord Wright: "A dispute as to whether a breach of contract by one party has operated to discharge the other, or whether a contract has been frustrated, is a dispute arising out of the contract, whether the contract is purely executory or partly executed. In the course of an opinion so holding, Lord Wright said '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 voided or ended. 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, whether damages are recoverable and if recoverable, what is the amount'." I

think this is sufficient to show that such disputes do fall within the purview of the clause which we have before us and which empowers this Council to entertain such applications.

8. I am deeply obliged to a distinguished Delegate for furnishing me with a photostat copy of a judgment—again I am saying a "judgment" because this was a judgment—in the case of South Africa. South Africa has figured before the International Court of Justice on a number of occasions and this is the judgment handed down in December 1962—*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, page 319. It is said here, in respect of that very Mandate we have been discussing for the last two days, that Article 7, provided that: "The mandatory agrees that if any dispute whatever should arise between the mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such dispute if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations." Note the expression "dispute relating to the interpretation or application of the provisions of the Mandate". Now the Court, when objection was raised by South Africa, answered like this: "The question which rules 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 whatsoever arising* between the mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate. The language used is broad, clear and precise. It gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever, relating not to any particular provision or provisions but to the provisions of the Mandate, obviously meaning all or any of the provisions, whether they relate to substantive obligations of the mandatory towards the inhabitants of the territory or towards the other members of the League, or to its *obligation to submit to supervision* by the League *under* Article 6, *or to* protection under Article 7 itself, for the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or an interest in the observance, by the mandatory, of its obligations both towards the inhabitants of the mandated territory and towards the League of Nations and its Members." That was essentially a dispute regarding the revocation of the Mandate and it was held to come within the compass of the expression "application and interpretation of the mandate". I will not trouble you further on this point.

9. Regarding Article 60 of the Vienna Convention about the implied power to invoke material breach as a ground for terminating a treaty, my learned friend said that I referred only to Clause 1 which dealt with bilateral treaties. For the sake of brevity I referred to Clause 1 because Clauses 1 and 2 use identical expressions and whether a treaty is multilateral or bilateral, a ground for revocation could only arise if there is material breach, not otherwise.

10. Then, referring to Article 45 when I pointed out their conduct and showed acquiescence, my learned friend asked whether I suggested that they were in such a frame of mind that on the one hand they were withdrawing the overflight rights and on the other hand approaching the ICAO Council for appropriate reliefs against Pakistan under the Convention. It is not for me to answer. All I can say is that both things happened on the same day, and I am entitled to rely on them to show acquiescence. Mind you, they with great ease say that whether the Convention applied or did not apply, so far as hijacking

was concerned they certainly could use the good offices of the President and the ICAO Council. For other things, however, when it comes to taking any action against India, those good offices cannot be used; then the doors of ICAO are to be closed. Well, consistency is a very difficult proposition even for individuals, to say nothing of States, and I will not deal with this any more.

11. On the last point, namely the second ground of the so-called "special régime", I am surprised that my learned friend is suggesting that this letter of the Prime Minister of India of 6 February 1966, which is really the basis, the crux, and the starting point of the revival of all the agreements, doesn't help the case of Pakistan. If it doesn't, I cannot say anything further because I clearly pointed out that there has been no special régime since September 1965. According to this letter of 6 February 1966—and, I repeat, this is what was agreed to—"As it appears that such a meeting might take some time, we would be agreeable to an immediate resumption of overflights 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." So overflights were restored on the same basis as prior to 1st August 1965, and I had explained the position very clearly in the morning. I reaffirm it and reiterate that in all those signals there is no question of any provisional arrangement on a reciprocal basis; they related to implementation of routes. This was the decision and it referred back to 1 August 1965; therefore the Convention, the Bilateral Agreement of 1948 and the Transit Agreement all became applicable again.

12. A kind of hardship was pleaded. When I referred to Article 95 and said that under it a period of one year is required for denunciation—because that is the mode for termination—he asked "What happens in the meantime? Do we wait?" and, anticipating that my answer would be "You could certainly come to the Council", he said that the remedy which is available from the Council is not a substantial remedy. But you agree to conventions with your eyes open; this is the mode of termination and sanctity has to be attached to it; it is a matter of honour. This sort of thing happens every day, even in the life of individuals. He made fun of the language of the Convention and my interpretation of it, saying that "denunciation" in Article 95 meant denunciation with reference to all other Contracting States. However, very similar wording is used in Article X (E) of the Bilateral Agreement of 1948 between India and Pakistan. In fact, it is even clearer: "This Agreement shall terminate"—the word "denunciation" is not used—"one year after the date of receipt by the other Contracting Party of the notice to terminate, unless the notice is withdrawn by agreement before the expiration of this period." It is a stipulation and States have to honour and abide by stipulations which they have entered into consciously and with their eyes open.

13. Finally, he tried to create an atmosphere of some political situation and said it was not the function of the Council to get involved in situations like that. I think the Convention took good care of such situations; it even incorporated provisions relating to war. This Council is the head of an international organization, a body of experts and guardian of the Convention. Rules have been framed with an elaborate machinery for taking evidence, for hearing declarations by witnesses and experts, for questions and arguments, and eventually for decisions and procedures for implementation. This is not unprecedented. After all, such bodies can be entrusted with the task of performing judicial or quasi-judicial functions, and they have to discharge their responsibilities.

14. Mr. President and members of the Council, on behalf of Pakistan I assure you that we have no intention, at any stage, of raising any extraneous

element or political matter, and that is what I had said in Vienna. We are only concerned with legal rights. If we have any, please say so. If we have none and if such sacred conventions can be discarded at the whim and caprice of one State on any ground whatsoever, you may say so. I would end by saying that it is needless to emphasize the importance of the issues involved in the proceedings before the Council. It is not merely an Indo-Pakistan affair. India has challenged the jurisdiction of the Council to hear the Application and the Complaint presented by Pakistan. The Council is well aware of the circumstances under which Pakistan had to approach the Council. The arbitrary, illegal, and discriminatory action by India of banning Pakistan's aircraft overflights across Indian territory is a positive threat to the safe and orderly growth of international civil aviation. Under Article 44 of the Convention the aims and objectives of this Organization are to ensure the development of international air transportation and to see that the rights of the Contracting States are fully respected. It is in this respect I submit, Mr. President and members of the Council, that the Council is seized of a very important issue and its decision will have far-reaching consequences.

15. Before I conclude, I would only say, in a lighthearted manner, that my learned friend says I am complaining about a house which is no longer in existence because he burned it down. *I* say that he tried to burn it, but before it could be burned down I approached the fire brigade and asked it to quench the fire. Thank you, Mr. President.

16. *The President:* Thank you. The Chief Counsel of India.

17. *Mr. Palkhivala:* Mr. President, in his last reply my learned friend referred to one point, the 1962 Judgment of the International Court of Justice, for the first time. That is why you will give me liberty to deal with it, because, as my learned friend said, one distinguished Delegate had drawn his attention to the Judgment and when I have gone, I would not like the members to think that there is something in this Judgment against me which remains unanswered. I would therefore like to deal with this one Judgment only. I will not deal with any of the other points made by my learned friend.

18. This Judgment, given by the International Court of Justice in 1962, I have gone through during the luncheon interval, because the distinguished Delegate was kind enough to draw my attention to it also. There is nothing in the Judgment, not a sentence anywhere, which has any bearing on the question the learned members of the Council have to decide upon today, namely, whether the words "interpretation and application" cover "termination". In this case the International Court was asked to consider four preliminary objections, none of which was the objection I have raised.

19. The first preliminary objection is on page 330 of the *Reports of Judgments, Advisory Opinions and Orders 1962*—Judgment of 21 December 1962. It is—if I may quote the exact words—"the Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations no longer, a 'treaty or convention in force' ". In other words, what South Africa argued was not that they had terminated the Mandate, but that the wording of the Mandate is such that once the League of Nations ceased to exist, the Mandate ceased to be a treaty or convention in force. What the International Court was asked to consider was therefore this: on a proper construction of the Mandate, does the Mandate come to an end when the League of Nations ceases to exist and the United Nations takes over, or is the successor to the League of Nations, namely, the United Nations, entitled to continue to be in the place of the League of Nations? This was a matter of interpretation of the Mandate—and the International Court ruled in favour of the view that on a

proper construction the Mandate did not cease to be in force merely because the League of Nations had ceased to exist. The International Court rightly pointed out that it was a suprising statement for South Africa to make that the Mandate was not in force, when South Africa continued to exercise the powers and rights of the mandatory. How could it keep on exercising rights and powers under the Mandate if its case was that on a proper construction the Mandate had come to an end? So the question of interpretation was directly put in issue and it was said that the Mandate was not a convention in force. The World Court said "No." Whether "interpretation and application" cover "termination" was not dealt with at all.

20. The second preliminary objection made by South Africa was that the two parties who had complained to the International Court were Ethiopia and Liberia and the Mandate had nothing to do with them. Who were they to complain? South Africa had no mandate over them and if it oppressed the people of the mandated territory, this was no concern of theirs. That point was negated by the International Court, which said that because Ethiopia and Liberia happened to be Members of the League of Nations and subsequently of the United Nations they had a right to raise this dispute.

21. The third point which was urged before the International Court is to be found in the last two lines on page 342 and at the top of page 343: The third preliminary objection was that the dispute brought before the Court by Ethiopia and Liberia could not be said to be a dispute because they had nothing to lose and nothing to gain by the South African Mandate being modified, altered, etc. What did Ethiopia and Liberia gain by fighting this battle? South Africa therefore had no dispute with Ethiopia and Liberia. This was the third preliminary objection raised and the World Court rejected it, saying that "any dispute" meant any dispute raised by a Member of the League of Nations, this was a dispute raised by the Member of the League of Nations, and the Court would therefore deal with it. Thus what was argued was the meaning of the word "dispute"—can a "dispute" be raised by a State that is not affected by the action of the two parties to the Mandate?

22. The fourth and last Preliminary Objection made by South Africa is on page 344 and was that this was not a dispute which could be settled by negotiation, and unless the dispute was such that it could be settled by negotiation, the International Court had no jurisdiction. The International Court rejected that contention too and said "No, you cannot say that this is a dispute which could not be settled by negotiation; it could be settled by negotiation and therefore the words "dispute if not settled by negotiation" are wide enough to cover it.

23. The questions raised were therefore not the questions which arise before the Council today. They are a completely different set of questions, which were represented by the four preliminary objections. Not one of them touched the question of what is the right meaning of the expression "interpretation or application of the treaty". These words were not brought to the International Court for consideration and the Court did not deal with them at all. Therefore to say that this Judgment deals with the meaning of the expression "interpretation or application" would be completely incorrect.

24. Finally, Mr. President, this brings to mind something I have been wanting to say ever since the beginning of the argument. It is this: I dare say this is a matter of such far-reaching importance because the words "interpretation or application" are, as we all know, used in a number of treaties. I can well imagine that some, if not many, of the Delegates here might like to seek instructions from their respective Governments or Administrations on what their

attitude should be to a question like this. This is understandable, natural and, if I may say so, inevitable. In view of the tremendous significance and importance of the issues involved, it is my humble submission to the learned President and honourable members that, as your verbatim notes will not be ready for many days, if not some weeks, and as they are not, to my mind, very satisfactory because when a man speaks without notes he is often inclined to use more words than he would in a precise, clear-cut statement of his case—I know I do—we should be permitted to put in a written memorandum which would set out the entire argument on this issue. This memorandum would contain nothing new; it would contain only the arguments I have presented, but in an orderly and concise form, with repetition eliminated and things in a more coherent and connected form than they would be in a verbatim transcript. The verbatim transcript in any event would take several days to produce, whereas we could prepare this memorandum and have it posted in about a fortnight. I suggest that if we are permitted to do that it would perhaps enable the different Governments and Administrations and Delegates themselves to come not to a quick or hasty conclusion, but to a well-considered decision on a matter that is of the greatest importance for the future of ICAO, not only on the important question of the limits of this Council's jurisdiction, but on the very far-reaching question of what is the meaning of the expression "interpretation or application" which you find in many treaties. I do submit that the matter is of such tremendous importance that this request of mine may be granted.

25. I am most grateful to the President and to the honourable members for the very patient hearing they have been kind enough to give me.

26. *The President:* Thank you. The Counsel for Pakistan.

27. *Mr. Pirzada:* Mr. President, all I can say is that I am really surprised at the suggestion which has been made by the learned Counsel. This is a matter which has been sufficiently delayed because of the objections filed by India, and with great respect I must say that this is a delaying device. We are suffering injury every day. It is a very serious matter and already at Vienna time was sought and the matter was brought here. Article 28 of the Rules for the Settlement of Differences says: "The Council shall determine the time-limits to be applied, and other procedural questions related to the proceedings. Any time-limit fixed pursuant to these Rules shall be so fixed as to avoid any possible delays and to ensure fair treatment of the party or parties concerned." The Government of India, a very resourceful Government and the Government of a country much bigger than Pakistan, had ample time to prepare their preliminary objections, which they prepared exhaustively, which were circulated and which were certainly considered by the members. The Council has heard arguments for two days and now, at the close of them, this suggestion is being made. Certainly the members will deliberate, consider and apply their minds, and I am entirely in their hands, but I must say, with great respect, that the suggestion of putting in a memorandum and taking another fortnight is not justifiable in the circumstances and in view of the recurring injury Pakistan is suffering. I repeat what I said in Vienna, justice delayed is justice denied.

28. *The President:* The Representative of India.

29. *Mr. Palkhivala:* The 20th of July is the date on which we received Pakistan's reply and we had to be in Montreal on the 26th.

30. *The President:* Thank you. Well, we are in the Hearing; we have heard the two parties; and I think we have now reached the point at which Representatives on Council may wish to put questions. I will in due time also ask the Council whether there is any discussion on the suggestion of India that it be permitted to file what I suppose would be a brief, limited to elucidating argu-

ments that have already been put forward. For that, of course, I would have to have a proposal that we do so and perhaps establish a time-limit, etc., and the Council will have to take a decision, if there is such a proposal. We are still on Case No. 1 and I ask the Council Representatives if they have any questions regarding it. Apparently not. Would the question of the brief just raised by the Counsel for India, which I understand was not a proposal or it would have come from the Representative of India, apply equally to Case No. 2?

31. *Mr. Palkhivala:* You mean, Sir, the written memorandum.

32. *The President:* Yes, the question of India's submitting a written memorandum applies also to Case No. 2?

33. *Mr. Palkhivala:* Yes Sir, but 99 per cent. would be common.

34. *The President:* As it was just a question, I would prefer to go to Case No. 2. Apparently the hearing on Case No. 1 has been completed and there have been no questions by any Representatives. After the hearing on Case No. 2 we will go to this question of having time to submit something additional in writing. I repeat my question: Does any Representative wish to put any questions concerning Case No. 1? No. Then we go to Case No. 2. Needless to say, anything that would be applicable to Case No. 2 which has already been said in connection with Case No. 1 should please be omitted from the statements, by just making a reference to the fact that it is applicable, so that we do not need to spend as much time on Case No. 2 as we have spent on Case No. 1. Will the Counsel for India please start.

35. *Mr. Palkhivala:* Mr. President and honourable members of the Council, Case No. 2 is the Complaint which has been filed by Pakistan against India, and there our preliminary objections are common to our preliminary objections in the first case. To the extent to which they are common, I adopt my arguments and submissions in the first case, including the request for a written argument, because my whole object in talking of a written argument was to enable the respective Governments and Administrations of the honourable Delegates to consider the whole argument before they come to a final decision.

36. Now the new point, or the additional point which is peculiar to Case No. 2 and not common with Case No. 1, is the only point which I shall deal with now. All the other points are common and I have already said I shall adopt my own arguments and submissions in the first case for the purposes of the second case.

37. The additional point is this. If you would be kind enough to turn to the Transit Agreement, you will find that Article II, Section 1, reads as follows:

> "A contracting State which deems that action by another contracting State under this Agreement"—I am emphasizing the words "action 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 shall in the opinion of the Council unreasonably fail to take 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."

Pakistan's complaint is based on, and has been lodged under, this Article II, Section 1, and the key to the Article is that the subject-matter of the complaint can be nothing else than action by another Contracting State under the Agreement.

38. Now under the Transit Agreement India has taken no action at all. The whole case of Pakistan is that India should take action under the Agreement and try to implement its terms fairly and reasonably, etc. I have taken no action and that is the whole complaint of Pakistan. In fact I ignored this Agreement as not existing, not being in force between India and Pakistan. Even if I do this completely wrongly, I find it impossible to understand how it can be said that I have taken action "under this Agreement". Again I will be told there must be a liberal interpretation, but I find it extremely difficult to reconcile myself to the view that under the notion of a liberal interpretation flags must include electric lights, floors must include ceilings, and the rest. The words "action taken under this Agreement" must surely have some meaning. Whatever large connotation you may put on the word "action", however you construe the word "under", it has to be action under the Agreement and the whole complaint of Pakistan is that I am not taking any action under this Agreement. Therefore the question of causing injustice or hardship does not arise, because even if there is injustice or hardship, it is not caused by action under the Agreement.

39. If you look at the Rules for the Settlement of Differences, Article I, Clause (2) says "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 . . .". Two conditions have to be satisfied: first, there must be action taken by a State party to the Transit Agreement, and, second, the action must be under that Agreement. Unless these two cumulative conditions are satisfied, the question of filing a complaint under Article 21 of these Rules does not arise. Under Article 21 of the Rules, read with Article II, Section 1 of the Transit Agreement, you have the right to file a complaint only in the case of action under the Agreement.

40. Now what is this Transit Agreement and what would be action under the Agreement? The Transit Agreement says that to the scheduled airlines of another State I must give the right of overflight and also the right of non-traffic stops. Now what would be action under the Agreement which may cause injustice or hardship? It would be like this: if I were to tell Pakistan "Yes, you have the right to overfly, but when you overfly you must make sure that you fly along the coast of India, not make a beeline from one point to another on the basis that a straight line is the shortest distance between two fixed points. Trace the whole coastline every time you go from West to East or East to West." This is permitting overflying, but it is action taken under the Agreement which causes injustice or injury to Pakistan. Or I tell them "You are entitled to make non-traffic stops if you come here, but you will have to take my Government servants free of charge." or I attach some other conditions which are unreasonable. Then I would be taking action under the Agreement which causes injustice or hardship.

41. In other words, what is contemplated is positive action under the Agreement, and if that action causes injustice or hardship to another State, a complaint may be filed. Then, as you see from Article II, Section 1 of the Transit Agreement, I must take reasonable steps to see that the Council's suggestions are implemented. Reasonable compliance is what is needed, and it is all in the field of positive action which may cause injustice or hardship, as I said, by my imposing onerous terms, difficult terms, that make life unnecessarily

difficult for another State's scheduled airlines. Scheduled airlines have to operate on a commercial basis, and I may make it commercially unprofitable for them by attaching all kinds of pinpricks, difficulties, to the right to overfly or the right to make non-traffic stops. If I choose to take no action at all and say "I repudiate this Agreement; I terminate it, suspend it *qua* you.", it is a contradiction in terms to say that I have taken action under the Agreement. In other words, action under the Agreement is the direct antithesis, the direct converse, of total suspension or termination of the Agreement, because when you totally suspend or terminate it, you take no action at all. That is what I have done and I submit, with respect, that it is impossible to reconcile the concept of action under the Agreement with a case where the whole argument of the party is, as India's is here, that I treat the Agreement as not in operation at all; from 1965 to date I have taken no action under this Agreement at all, no action whatsoever. I submit it is therefore impossible for the Council to assume jurisdiction in the second Case and I request it to throw out the Complaint on the grounds that there is no action under the Agreement. This is in addition to various other grounds that apply in the first Case and apply equally here, which I am not repeating. That is all, Sir.

42. *The President:* The Counsel for Pakistan on Case No. 2.

43. *Mr. Pirzada:* Mr. President and members of the Council, first of all, let us go back to the language, because no word in any article is superfluous and meaning is to be assigned to each and every word as far as possible. The language is "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." Now first and foremost I invite your attention to the word "deems". Who deems?—the Contracting State, in this case Pakistan. So it is a matter of the subjective satisfaction of Pakistan. The words are not that "a measure concerning action taken by". No, it is an enabling provision, enabling a Contracting State, when it deems that action by another Contracting State under this Agreement is causing injustice or hardship to it, to request the Council to examine the situation. This is what Pakistan deemed and that is why it has approached the Council.

44. Second, we are again in the same circle, because it is being suggested that because the Transit Agreement has been unilaterally denounced or terminated by India, the action taken cannot be deemed to be action under the Agreement. A little while ago, in dealing with Case No. 1, I referred to a number of cases, including one considered by the House of Lords having to do with questions arising under a contract. There it was held that a dispute over whether the contract had been ended or terminated would be a case under the contract and would be covered by the submission in the arbitration clauses. Now applying the same principle here, I submit, with respect, that a case even of suggested termination, or purported termination, or supposed termination will be covered.

45. The last point is that whichever way you interpret it, the word "action" has to be taken as including omission. *It does not mean only positive action*, although we can even suggest that prohibiting the aircraft of Pakistan from overflying Indian territory is a positive act. Even an omission is covered by "action" and the failure of India to fulfil its obligations under the Transit Agreement would certainly be an omission and would be covered by the expression "action". In fact our respectful submission in due course would be that Sections 1 and 2 of Article II are not mutually exclusive. They are concurrent. I am not dealing with this point at this stage because it may arise a little later; I am only indicating. It has been dealt with in a book to which

I am now referring, *Lawmaking in the International Civil Aviation Organization* by Thomas Buergenthal, page 159: "A State which 'deems that action by another Contracting State under this (Transit or Transport) Agreement is causing injustice or hardship to it may request the Council to examine the situation.' That is to say, it may file a complaint. The facts justifying the submission of a complaint could include questions relating to the interpretation or application of the Agreements."—They go back to the same Article II.—"The States involved thus have a choice between filing a complaint or instituting a formal action under Chapter XVIII of the Convention."

46. In fact I have been looking into past precedents of this august Council. A plethora of things have happened and they are under scrutiny and examination, but there is one incident and one precedent to which I would like to invite your attention. I find that this august body has not been hypertechnical, and very rightly its approach has not been very technical. It likes to do justice as far as it can. In 1958, in equally serious circumstances, a situation arose between the United Arab Republic and Jordan. Because of certain differences arising between the two States the United Arab Republic prohibited Jordanian planes from flying over or landing in the UAR. Jordan immediately retaliated by issuing a decree excluding UAR carriers from its territory and shortly afterwards requested the ICAO Council to intervene. The UAR followed suit; certain procedural steps were taken; and even before it could be determined whether it was a complaint or an application or what was the nature of the proceedings—because you have ample power under the various Articles of the Convention, and even in a court of law or before any tribunal, one proceeding could be converted into another or could be deemed to be for other purposes because the question is to give relief as long as the jurisdiction is there—this is what the Council did. I am reading from the book I just referred to, page 163: "After discussing the matter again at some length the Council concluded that it was still not clear what specific action it was being requested to take" —even in such matters they had no idea what action was sought but the Council necessarily took into consideration the situation—"and instructed the Secretary General to ascertain whether the parties wished the Council to decide the dispute under Chapter XVIII of the Convention or under the arbitral clause of their bilateral agreement. At the same time the Council invited Jordan and the UAR to permit air services between their countries to be resumed, and authorized its President to offer his good offices or those of the Secretary General towards finding a settlement of the difference. The President of the Council entered into consultation with the two parties and shortly thereafter informed the Council that both had agreed to permit the temporary resumption of air services between their respective countries." (Action of the Council—35th Session, ICAO Document 7958 -C/914, p. 20, 1958). Thank you, Mr. President.

47. *The President:* Thank you. The Counsel for India.

48. *Mr. Palkhivala:* Mr. President, my answer to my learned friend is briefly this. Article II, Section 1, provides that a Contracting State which deems that action by another Contracting State under the Agreement is causing injustice or hardship may request the Council to examine the situation, but the word "deems" does not mean in the subjective determination of the complaining State. If no action is taken, that State may still deem that action has been taken. The word "deem" refers to the injustice or hardship aspect. In other words, action under the Agreement has to be established objectively as a positive fact; there is no "deeming" there, no subjective decision there. The question is not whether Pakistan deems, thinks, imagines that action has been taken.

The word "deems" does not go to the action part of it. That action has been taken under the Agreement has to be objectively established. After that has been done comes the subjective determination of whether such action is causing injustice or hardship. Before you reach the stage of deeming subjectively that India's action is causing injustice or hardship, you have first to establish that India has taken action under this Agreement.

49. If you look at the various articles, it is clear what is meant by "action under this Agreement". For example, Article I, Section 3, talks of granting airlines the privilege to stop for non-traffic purposes if they offer reasonable commercial service. What is "reasonable commercial service"? Well, India may say "You must render these commercial services"; they may cause injustice or hardship to Pakistan; and, if so, Pakistan can complain. Section 4 of the same Article says that a State may designate the route to be followed within its territory and impose just and reasonable charges for the use of its airports and other facilities. As I was saying, India may designate a route that is unjust or causes hardship to Pakistan. Or it may impose charges that may cause injustice or hardship. But before Pakistan can complain, it has to be objectively established that the action deemed to cause injustice or hardship has been taken. So the word "deem" does not meet the point at all, because "deem" goes with "injustice or hardship"; it does not mean that in the imagination or in the view of Pakistan action is taken when in reality no action is taken. What Article II, Section 1, says is that if objectively, in reality, action has been taken, it is for Pakistan to deem or consider whether it is causing injustice or not.

50. Secondly, Sir, the book referred to by my learned friend deals, on page 159, with a completely different question, which I shall illustrate in a moment rather than argue in the abstract. What the textbook says is, and rightly, that there may be a case where, as the result of misinterpretation or misapplication of the Agreement to the existing facts, you may cause injustice or hardship. In such a case you, the aggrieved party, have two courses open to you. You may either file an application on the ground that the right interpretation, the right application, has not been adopted or you may make a complaint. If there is misinterpretation or misapplication resulting in action which causes hardship, you may file a complaint about the action under the Agreement or you may file an application on the grounds of interpretation or application. This is not the case we are dealing with here at all. We are dealing with a case where there is no action whatsoever, no interpretation, no application, and the whole case of India is that this Agreement is not in operation.

51. Therefore, Sir, I do submit that the point I have made has not been met. Neither the textbook nor the oral argument meets the real question: what does "action under this Agreement" mean? If it means "any dispute between the parties", why say "action under this Agreement"? Surely the words have some meaning. As my learned friend reads Article II, Section 1, he is virtually rewriting it to say "any dispute between the parties". Well, if that is what the charter of the Council was intended to be, nothing would have been easier than to say "any dispute between the parties". Why talk of interpretation and application? Why talk of action under the Agreement?—simply say "any dispute between the parties". But the limits of the Council's jurisdiction are very severe on the complaint part. It can deal only with a complaint about action under the Agreement, and I would be surprised if in the entire history of the Council a single case has arisen where, without any action under the Agreement, the Council has still entered into the complaint. To say that the Council is liberal, that it wants to do justice, is a tribute to the Council in which I would like to

join, but it is a far cry from that to say that because the Council has been liberal, let it now entertain my complaint although there is no action taken by India at all. As far as we are aware, this type of complaint is unprecedented in the history of ICAO, and I respectfully submit, Sir, that the Council would have no jurisdiction at all.

52. *The President:* I will now put the same question regarding Case 2. Are there any questions that Representatives would like to put to either of the parties? Apparently not. Then we have a request from India that they be permitted to file a brief, which would be limited to arguments that have been presented during the present hearing. It is a request from a party and I will now invite discussion and eventually a vote on it. Is there discussion on that question? The Representative of the United Kingdom.

53. *Air Vice Marshal Russell:* Just a question for clarification. This would not obviate the previous understanding to make a verbatim record available?

54. *The President:* No, the verbatim record will be made available; that was clear. May I then put the question to the Council? The Representative of Uganda.

55. *Mr. Mugizi:* Will this memorandum be submitted by each of the parties? I thought it was suggested that the parties be permitted to submit their arguments in writing without introducing any new ideas. Is that the case?

56. *The President:* So far I have only had a request from India. If Pakistan would make a similar request, I would consider it in the same way, but the Representative of Pakistan has already indicated the difficulties he would have with that request. The Representative of Pakistan.

57. *Mr. Pirzada:* Mr. President, the full arguments have been advanced here. They have been recorded and I am sure the Secretariat will make the verbatim record available as soon as they can. Therefore the honourable members will have access to the arguments. They already have the written objections filed by India and time is of the essence in these proceedings in view of the urgency. I therefore have already opposed this request.

58. *The President:* Thank you. The Representative of Tunisia.

59. *Mr. El Hicheri:* I should like some clarification on this request made by the Delegate of India. Does it, as I understood, mean that we shall have to wait until we have a short memorandum, explaining perhaps more concisely and precisely the preliminary objection, before the Council takes a decision on the validity of this objection? Is my understanding correct? I shall continue after I have an answer.

60. *The President:* Yes, undoubtedly that would be the case. The Council would not go into the deliberations until it had received this additional brief. If I was going to put a question it was going to be in two parts unless India modifies the request to include a time-limit, because I think there will be two things to decide: first whether the Council agrees that there may be such a written presentation and if it does—which would be determined by a vote—what time would be given to India to make that presentation. The Representative of Tunisia.

61. *Mr. El Hicheri:* Mr. President, in your opinion is such a procedure normal? In other words, is it compatible with the Rules for the Settlement of Differences? I have Article 5 of the Rules before me and it says this:

"(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 delivery of the counter-memorial."

Unless I am mistaken, this operation has been completed.

> "(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 as a preliminary issue before any further steps are taken under these Rules."

Now if my understanding is correct, the Council has heard the two parties. This is an oral procedure. I do not wish to embarrass you, but I would seek your advice, Mr. President, because in that capacity you certainly have more experience in these matters than anyone else here, on whether the filing of another brief is part of such a procedure. My own opinion is quite clearly that it is not, but I would like an opinion from you, perhaps with the assistance of our Legal Bureau, which may be more impartial than I. I may be biased in this regard, but I must say I am a little surprised at the request.

62. *The President:* I don't feel embarrassed. I am always ready to give an opinion and to be corrected. As I understand it, although it is not foreseen in the Rules that this be done, it is not forbidden by the Rules either, and there is a general provision—Article 28, paragraph 1, to which the Representative of Pakistan already referred—which says that the Council shall determine the time-limits to be applied and other procedural questions relating to the proceedings. The second sentence is also important: "Any time-limit fixed pursuant to these Rules shall be so fixed as to avoid any possible delays and to ensure fair treatment of the party or parties concerned." The Representative of France.

63. *Mr. Agésilas:* I must say that I have the same fears as the Representative of Tunisia. If we follow the procedure suggested—that is to say, if we agree to the submission of a new document—I think we risk deviating from the procedure. Suppose that when this document is compared with the verbatim which the Secretariat will establish, differences appear, or at least certain members of the Council find differences, between the way in which the Representative of India, in all good faith I am sure, summarizes in the document what he has said and the way in which the Secretariat reports it in the minutes—we shall, I think, be creating a source of very difficult discussions. I am afraid, therefore, that the adoption of this procedure would mean that we would not be strictly respecting the provisions of our Rules for the Settlement of Differences. That is my opinion, Mr. President.

64. *The President:* Any other views on this question? The Representative of Senegal.

65. *Mr. Diallo:* I see this as a sort of debate on procedure. You, Mr. President, gave an affirmative reply to the question of the Representative of Tunisia, but I do not think India has yet given a reply to this question—because they are lawyers we have with us. Do they think it is necessary to wait for this document before deciding? I do not think so, or else I have not understood very well. Could I be enlightened on this question?

66. *The President:* No, the Chief Counsel for India has requested the Council's permission to file a brief ("mémoire" in French), in writing of course, within a certain time-limit and this brief will be related to arguments that

have been adduced in this hearing today. That is as far as it goes. The Representative of Senegal.

67. *Mr. Diallo:* Yes, that is what I understood. Obviously everyone is free to write his own book afterwards, because really it has been a very instructive meeting for me—I have heard some rather extraordinary things. But the problem is this: after hearing the two parties on the question, are we fully informed or are we not? I think when you asked "Has anyone any questions?", no one raised his hand. Everyone is quite clear. Therefore we now have a decision to take. If tomorrow we receive a fine document which deals with everything that has been said here, and if it is in conflict with the minutes, what is governing for us is the minutes, which will be distributed and which we shall send to our administrations. I have not really understood very well what relation it is desired to establish between this new document India proposes to present to us later and the decision we have to take today.

68. *The President:* Well, as I understand it, if the Council would agree to the request of India, there would be no decision now. The decision of the Council on the preliminary objection of India would be taken only after this other document has been received. The Representative of the Congo.

69. *Mr. Ollassa:* I take the floor prudently and simply to ask a question, because I did not understand the last interventions very well. My understanding was that you had replied in the negative to the question put by the Representative of Tunisia—in other words, you said that the Indian request was receivable at any time, having regard to the actual procedure. That was not implied in the question put by the Representative of Tunisia. I should therefore like to have clarification.

70. *The President:* Well, I understood the question of the Representative of Tunisia to be whether it was in order, under the Rules for Settlement of Differences, to agree to the request of India. My answer was that it was really up to the Council to decide whether it was permissible or not because the Council has Article 28 and can decide as it wishes. The Representative of Tunisia.

71. *Mr. El Hicheri:* I apologize for developing my thought a little further, but I am going to let this point drop, because really it is procedure piled on procedure. We are meeting now on a question of form and I do not want to get into a whirlpool that risks carrying us far on the subject of procedure. My doubt, Mr. President, is only about whether the hearing is an oral hearing or whether, once it has been settled, it is possible to make further written submissions. Article 28 says nothing of the kind. It speaks of time-limits. The Council may now decide to extend the time-limit, but it is not said in Article 28 that it can authorize the publication of other documents. That was the specific question I put.

72. *The President:* I read the whole Article, but the words that would apply to your question are "and other procedural questions relating to the proceedings"—"other procedural questions". So it is for the Council to decide whether it has enough with this oral hearing or whether it wishes to wait and have more. It is, I think, up to each Council member. I shall have to put the question to see whether the Council wishes to accede to the Indian request and I am going to do so now unless there is more discussion. The Representative of Belgium.

73. *Mr. Pirson:* I am a little concerned about the procedure. The French text of Article 28 is preceded by four words, "Mesures intéressant la procédure" ("Procedural Measures"). In other words, the three paragraphs of Article 28 have to do with procedural measures. Article 5, paragraph (4) says "If a preliminary objection has been filed, the Council, after hearing the parties, shall

decide the question as a preliminary issue before any further steps are taken under these Rules." I have made the greatest efforts to be absolutely neutral on this question of procedure, but should we not reflect before putting this question to a vote? In the suggestion that has been made to us is there not something that is not completely in conformity with Article 5, paragraph (4)?—because Article 28 is entitled "Procedural Measures". I would like to have the advice of our Legal Bureau on this point. I am quite ready to take a decision, but I should like to be absolutely sure that we are not starting down a path that was not the one envisaged when these Rules were established.

74. *The President:* The Secretary General agrees that the Legal Bureau may reply. Dr Fitzgerald.

75. *Dr. Fitzgerald:* Thank you, Mr. President. I will be relatively brief on this question because I think it is quite clear. It is not unusual for a judicial tribunal—and the Council is now so acting under the various constitutional provisions that we have in the Convention, the Transit Agreement, and the Rules for the Settlement of Differences—to request counsel, after a long and difficult argument, to present written briefs. Now this does not mean that new issues are to be raised or that new arguments are to be brought forward; what it really means is that the court would expect a systematic presentation of what has been adduced by each of the parties and within the framework of the arguments adduced by those parties. It would not expect to have new issues raised and new rebuttals brought forward and so on. I say it is not unusual, as a matter of practice, for a court to request this or for the court to agree, should it so desire, reserving all of its rights as a court, to the request of one of the counsels or counsel on both sides to file such a document. An entirely separate question is whether or not in this particular instance the Council would wish to take a particular action. That is of no concern to the person who is now speaking to you. Thank you, Sir.

76. *The President:* The Representative of Australia.

77. *Dr. Bradfield:* Like the Representative of Belgium, I am trying to be completely impartial in this matter and also under Article 28 to look to a procedure which ensures fair treatment for both parties. I understand that you proposed to put this question in two parts—first whether or not the Council would permit India to submit another document on this subject, and, second, what time should be allowed. I am afraid that I could not give any decision on the one without the other, because to me the time involved is more important than the written arguments put forward—or as important.

From the statement of the Counsel for India I understood that he would expect, if this was agreed to, that the new document would leave for ICAO in about two weeks' time. That would mean that it would reach us in about three weeks' time. It would then have to be translated and it would therefore be another month before the Council would see it. If that is correct, I have great worries about it because I think it is getting to be a rather long time. On the other hand, if the Counsel for India could produce the document in two days instead of in two weeks, I would feel more inclined to accept such a situation. Again, I am trying to be completely impartial and to follow the principles of Article 28 and I would ask that the two matters be considered together—whether or not we should accept it and the time by which it is to be presented to us.

78. *The President:* When I referred to the possibility of taking this in two steps, I said I would do so unless the Representative of India would like to include a time-limit in his request. Perhaps you could speak on this, Mr. Palkhivala.

79. *Mr. Palkhivala:* Frankly, the idea was not to inflict upon the Council any further piece of written work; the idea was merely to assist the Council. In fact, speaking for myself, I would be quite content if, instead of a separate memorandum, which I thought could be drafted with some care and attention, the verbatim notes are made available. My only desire—I shall be very frank—is this. As I see it, there is much more to this matter than may appear to some people at first sight. My only desire is that in a matter of such far-reaching importance every State represented here should have the opportunity of considering the full arguments before coming to a conclusion. Now, I am going to speak very frankly again, because there is no use keeping back anything in my mind. If the normal practice of a particular State is to allow its Representative here to make up his own mind after hearing all the arguments, that is all right because the delegates have been kind enough to hear us very patiently. If, on the other hand, since the matter is one of the most far-reaching importance, there are Representatives who would like to have instructions from their Government or Administration—and that is not for me to ask; I am only stating a possibility—then I would say that even if you dispense with the memorandum, I would appreciate having at least the verbatim notes made available to every member before a decision is taken. As I said, my desire here is not to gain time. I am not interested in that at all. I am only interested in seeing that a just, fair decision is reached after full consideration. For that purpose I suggested a memorandum. The alternative, if you don't want a memorandum, is to have the verbatim notes made available to every member before a decision is reached. This, again, is a request; I cannot insist upon it. It is for this learned, honourable tribunal of Council members to consider whether this request is fair. If they think it is fair, I would appreciate their saying "All right, no memorandum, but let all the verbatim notes be made available." That is all. Thank you.

80. *The President:* Well, supposing that there would be no agreement to or request for a presentation of a written brief, whether the Council will take a decision right away or will wait for the verbatim minutes to be available is something we shall only know when we go to the deliberation stage, which is the next step. Perhaps we should have a coffee-break now and return in 15 minutes.

Recess

81. *The President:* The Council is again in session. We still have to decide on this question and I am not sure whether at this moment we have a request from India for permission to present a written brief on the arguments already adduced. You indicated that it was perhaps either that or having the verbatim available, but, as I said, whether the Council is ready to take a decision now or will wait for the verbatim is something we shall know only when we go to the deliberations. So I would not like you now to sign a blank cheque, because you might not get it afterwards, but I leave it to you.

82. *Mr. Palkhivala:* Mr. President. My request to the honourable members is either to have a memorandum from India setting out the arguments or, alternatively, the verbatim notes, and to consider and take them into account before coming to a decision. If the honourable members want neither and are prepared to take a decision without the memorandum, without the verbatim notes, on a matter of such far-reaching importance, it is their decision.

83. *The President:* I take it, then, that there is no request at the moment. Perhaps when we come to the deliberation, the question of whether the Council should wait for the verbatim will have to be subject to discussion also. Is there

anything more on the hearing itself before we enter into the so-called deliberation? Apparently not. Then we are going to go into the deliberation. I had indicated at the beginning of the meeting that according to the advice I had received, when the Council starts its deliberation, the usual court practice will be followed of having the Agents withdraw from the room. India and Pakistan will, of course, still be represented by other representatives whose names I read at the opening. I will ask the Chief Counsels of India and Pakistan whether they have anything to say before we begin the deliberation.

84. *Mr. Palkhivala:* Nothing further, Mr. President. Thank you.

85. *Mr. Pirzada:* Mr. President and honourable members of the Council. I would just like to take this opportunity of expressing my deep gratitude for the indulgence shown to us. Thank you.

The Agents and Chief Counsels for India and Pakistan withdraw

86. *The President:* Before we enter into the discussion I would like to know whether the request for a verbatim record applies also to this part of the discussion. The Representative of the Congo.

87. *Mr. Ollassa:* Does Article 30 of the Rules not apply in any case?

88. *The President:* Yes, but you were not here yesterday when I gave the following explanation. The Secretary General has been keeping verbatim transcripts of all the proceedings pertaining to this case since the very beginning, but, so far, they have just been included in the files of the Organization and will be made available if any party or even the public would like to have access to them. To save work we have not been distributing them in the three languages. However, yesterday, when we started the hearing on the Preliminary Objection, it was agreed that we were going to have verbatim in the three languages of everything that would be said yesterday and today. My question now is whether this applies also to the deliberation. Do you still want the verbatim? The Representative of the Congo.

89. *Mr. Ollassa:* On what would any difference be based? I ask you this, Mr. President, because you have asked us whether we want the verbatim or not. Why would there be a difference in procedure?

90. *The President:* For the hearing, the Council wanted to have all the arguments in writing, particularly because both parties have made important presentations. We are now going into a discussion which is closer to the usual type of discussion the Council has or which is similar, let us say, to the discussions we had in Vienna when we set the date, etc. But I was just asking a question; I am not suggesting that there should not be verbatim. I just want to know so that the necessary steps are taken. The Representative of the Congo.

91. *Mr. Ollassa:* In view of the importance of the question, Mr. President, we should follow the same procedure.

92. *The President:* Then we shall continue with the verbatim. We now enter into the deliberation on Case 1 and the basic proposition before the Council is the one presented by India, namely, that the Council has no jurisdiction in this Case. The Representative of the United States.

93. *Mr. Butler:* The remarks I have to make now are necessitated by the references on many occasions to the position stated by the United States in response to a question in the Court on the *Namibia* case which has just recently been decided by the International Court of Justice.

I would like to make the position of the United States clear during this discussion phase, because the response of the United States has been submitted as part of the record and it will be noted that the reply of the Counsel for the

United States in that case was addressed to the question of the suspension or termination of a treaty by one party or brought about by the material breach of that treaty by the other party. There have been extensive references to Article 60 of the Vienna Convention on the Law of Treaties and the question of material breach as far as that Convention is concerned. I should like to refer for a moment, if I may, to Article 65 of that Convention. Now, while the Vienna Convention may not be in force, as has been pointed out, many of its articles are codifications of existing international law. While paragraph 4 of Article 65 may not have the force of a treaty among States around this table it should be kept in mind as a provision thought necessary by the drafters of the Vienna Convention concerning the rights and obligations of parties to any treaty which has a provision regarding the settlement of disputes. Article 65 deals with the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. Now, obviously, the establishment of a procedure such as this is not based merely on codification of existing international law, but it is important that paragraph 4 provides that the procedure for notification of other parties to the same treaty does not affect the rights and obligations of parties to the treaty or any provisions in force which bind the parties with regard to the settlement of disputes.

It is the United States position—and our response to the Court in the *Namibia* case should be read in this context—that Article 84 of the Chicago Convention, as well as Article 7 of the Mandate which was the subject of the *Namibia* case and refers to questions of interpretation and application of the terms of the Convention, includes questions related to any provision, all provisions, of the Convention. It does not seem possible to us that one party to a convention or a treaty may negate procedures for the settlement of disputes by stating that the treaty is no longer in force and thereby depriving of its jurisdiction to settle the dispute the tribunal that has been given jurisdiction in the settlement of disputes. Thank you.

94. *The President:* Is there further discussion? The Representative of India.

95. *Mr. Gidwani:* Mr. Chairman, I am in some difficulties. I do wish that the legal point that is being raised at this stage had been raised when the lawyers were present here. However, I will try my best to answer my friend from the United States.

Briefly, the position taken by him is simply this: that the words in Article 84 of the Convention, when they refer to interpretation and application, would seem to cover each and every grievance, each and every dispute, each and every difference, but as the Chief Counsel for India explained this morning, if that were so Article 84 would simply say that if any disagreement whatsoever between two Contracting States should arise, the Council has jurisdiction. Our contention, Mr. President, is simply this, that the words "interpretation" and "application" have a narrow, restricted meaning and cannot be deemed to include termination. Thank you.

96. *The President:* If no one else wishes the floor, I will have to put the next question. That is whether the Council is ready to go now to a decision on the basic questions raised by India. Do I take the silence as meaning that we can proceed with the discussion and eventually reach a decision? The Representative of the United Kingdom.

97. *Air Vice Marshal Russell:* On this question of going now to a decision, Mr. President, we have heard lengthy discussions and expositions, although they may be brief in legal terms, and not being a lawyer, 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.

98. *The President:* Further discussion or views? The Representative of Czechoslovakia.

99. *Mr. Svoboda:* 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.

100. *The President:* Since there are two Representatives, at least, who have some difficulties, I think the first thing we have to settle is whether we proceed with the discussion and the decision now or whether there should be some interval. The Representative of Belgium.

101. *Mr. Pirson:* We have just heard the Representatives of the United Kingdom and Czechoslovakia request deferment to permit them to receive instructions. Could we know how long a delay they have in mind? Is it, for example, a week?

102. *Air Vice Marshal Russell:* 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.

103. *The President:* That clarifies your position very well, I think. I don't know whether the Representative of Czechoslovakia wishes to say more.

144. *Mr. Svoboda:* I would need a minimum of eight or ten days, if possible, to consult my Administration.

105. *The President:* The Representative of the Congo.

106. *Mr. Ollassa:* Mr. President, through you I would like to put a question to the Representative of the United Kingdom. Does he mean that he will never participate in a decision?—because he said he could not evaluate the question but made no mention of any delay. What does that mean, Mr. President? Is he going to consult to obtain advice so that he can participate or does he mean simply that he will never participate because he cannot make the evaluation himself? I did not grasp very well the nuance there was in the reply he gave us. I admit it must be very difficult for him to state his position very clearly, but I did not understand it very well. We must know if deferment will permit the entire Council to participate in the decision or not, because if there is deferment and we arrive at the same result—some saying that they cannot evaluate the correctness of the legal presentation—it would be very bad, Mr. President.

107. *The President:* I understood the second intervention of the Representative of the United Kingdom as meaning that if the Council decides now he will not take part. Perhaps he doesn't want to say what he plans to do in the future; so it is completely up to him to answer or not. The Representative of the United Kingdom.

108. *Air Vice Marshal Russell:* Of course, Mr. President, I was not saying I wouldn't participate. If the distinguished Representative of the Congo had been present yesterday, perhaps even with his eminent legal training he would have as much legal indigestion as I have. I don't wish to treat this matter in a spirit of levity; I am endeavouring to treat it seriously. The essential point to me is that this is a legal question and for me—and I am not trying to extend my position to any other Representative on this Council—the expression of a

view on the substance of the preliminary objection turns entirely on matters of law. Now 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.

109. *The President:* The Representative of France.

110. *Mr. Agésilas:* Like the Representative of Belgium, I think that as it is evident that several of our colleagues need advice or instructions before a decision is taken, we must, in fact, consider deferment. I personally would be ready to participate in the taking of a decision immediately, but I must admit that what we have heard during the last 48 hours needs some digesting. We are, however, faced with a procedure in the Rules for the Settlement of Differences that is precise and indicates that after hearing the parties the Council must decide. The Convention, like the Rules, specifies that it is the Council which must decide; it does not say that the members of the Council must be lawyers. 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 I have indicated before we have another meeting at which we can take a decision.

111. *The President:* The Representative of Tunisia.

112. *Mr. El Hicheri:* I believe the question is basically very simple. There has been a long discussion, but essentially it was on the question of whether the Council was or was not competent in this affair, and I think that since the preliminary objection was filed, chancelleries and national administrations have had time to study it and form an opinion on this question. Some of us think that the Council is competent; others are of the opinion that it is not. In any event, what I want to emphasize is that the question is simple enough. The argumentation has been rather long in my opinion, but that is another matter. 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.

I am a little embarrassed because I do not see exactly under what Article of the Rules for the Settlement of Differences deferment could be envisaged. The Rules are obviously quite flexible. In principle, we should take a decision immediately after hearing the parties. There can be objection, but it should be couched in the form of a proposal and could then be voted on. That is what I wish to emphasize, Mr. President. To be very frank, I do not think eight days would be long enough for those who are not sufficiently informed on the question even though it is almost two months since the preliminary objection was filed and the legal services and administrations of the countries represented on the Council have had time to consider it. I think that if some of us wish to request deferment for one reason or another, they should, in these conditions, make a firm proposal specifying a time-limit. I have the impression that it may be covered by Article 28 or some other provision of the Rules, which seem fairly flexible. In principle, however, we should pass immediately to a decision after hearing the parties. Now it appears that some of us are not ready to do so and there should therefore be a proposal for deferment in due and proper form.

113. *The President:* The Representative of Senegal.

114. *Mr. Diallo:* My delegation is a little embarrassed by this situation. We are in fact, moving along a procedural trail that is rather delicate. I understand the attitude of the delegations who would like a deferment because they need instructions to be able to take a position, but I reject the argument that the 27 of us here must be lawyers to decide questions of this nature. My personal opinion is that not every science may be characterized by logic and good sense, but any one worthy of the name is. In any event, we have heard the arguments of the two parties, we have evaluated them, and the question before us seems to me much simpler than all we have heard. 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.

Now there may be a problem of digesting all we have heard during the last 48 hours, but the decision does not bear on the merits of the dispute between India and Pakistan. The question before us is whether the Council is competent to deal with the problem and I think that in the two months, if not more, that we have had, everyone has made up his mind—to borrow the words of our colleague from Tunisia—not as to the substance, but as to the procedure. I say this to explain that I am ready to vote today on this question, but I do not want to press those who wish to have advice. If we must defer the vote, we must know whether or not the debate is closed, because if it is not closed, if we have to set aside another 48 hours in the month of August—well, it is very fine to have marathon sessions like this, but we must know exactly what is wanted and what we are going to do. If the debate is closed, we are going to have a meeting from 10 o'clock until noon, we know that we are here to vote, and those who do not have instructions can stay away if they wish, but we shall have fixed a time-limit for coming to a vote. We must think of the Delegations of India and Pakistan, who come from the other end of the world. Are they to be forced to wait around here for 8 or 14 days so that they can answer questions that are going to be put to them? I am not very well informed on the procedure it is desired to follow. In any event, if the debate is closed and if we must give time to the Representatives who want precise instructions from their administrations, I do not think it would be wise to oppose deferment, although I really do not see of what use it will be.

115. *The President:* Before we proceed I would like to make clear that the fact that we are now in the deliberation stage means that the hearing stage has been closed, so there is no question of going back to it. It is only a question of deliberations so that the Council can decide whether or not it has jurisdiction. The Representative of the Congo.

116. *Mr. Ollassa:* I would like to say that although I have not had the benefit of the brilliant argumentation here yesterday, I am ready to take the decision that has to be taken, because, as many speakers have said, the problem has been with us since Vienna and we have had time to think about it. Obviously it can be said that to take a decision without having heard the parties is perhaps unjust, but in a certain way the problem is objective. It is a matter of knowing whether the Council is competent or not. It is a legal problem that does not depend on the arguments of one party or the other and in my opinion it is a problem that presents itself in a rather simple way. It is claimed that we need to have in writing all the argumentation presented here. Well, I heard a good part of it and without being a great lawyer I can say immediately that many of the arguments were foreseeable and imaginable and therefore we have already taken them into account in our reasoning.

In a question as important as this, Mr. President, what is important is that the Council, as a body, should be ready to take a decision. It happens that this is not the case and because of that I fully agree that we should have a delay. I think, too, that this would be equitable to the two parties, because one wanted no delay, the other asked for 14 days, and a week's deferment would split the difference—to use a rather vulgar expression. I shall therefore vote —if there is a vote—with those who want a deferment of 8 days, which I think was one of the figures mentioned. Eight days would be much better than 10, because 10 is too close to 14.

117. *The President:* Before we continue, I would like to give some information regarding documentation. You recall that yesterday there was a request for verbatim minutes and they, of course, will take time, because they have to be translated. I think the Secretary General reckons that for these four meetings, which have been rather long, full minutes in the three languages will require between three and four weeks. On the other hand, I understand that part of the Summaries of Decisions has already gone to the Language Branch, more will be going, and just to be on the safe side, the last one, in other words this afternoon's, should be distributed in the three languages, of course, by noon next Friday. The Representative of Italy is next.

118. *Dr. Cucci:* I had not intended to speak at this stage, but I would like to say, first, that if the Council's decision is to have a deferment, I shall vote for it. If the Council wishes to take a decision immediately, I can do the same, but in my opinion we are faced today with an alternative. Is deferment necessary to enable certain Representatives on the Council to digest what they have heard and then—and this is the essential—inform their respective administrations? For me "inform administrations" means to inform them fully. As has been said, yesterday and today we have heard a whole series of very interesting things. We therefore need the minutes. The Summaries will be of no use whatever, especially for people who have no knowledge of law. That is why I say that it is absolutely meaningless to speak of a deferment of 8 days. It does not give Representatives on Council the possibility of informing their administrations. The alternatives, in my view, are to take an immediate decision—and I am ready to do so—or to have a reasonable deferment, that is to say, a deferment that will enable all of us to inform our administrations fully. The subject is either difficult or not difficult. If it is difficult, we must have the documentation from the Secretariat. Therefore—and I repeat that I am advocating neither one thing nor the other—if I am obliged to take a stand on deferment, it must be on a deferment that gives everyone the possibility of informing his administration completely. You obviously cannot inform administrations on the basis of Summaries or personal ideas that may be in conflict with the Secretariat's record when that appears. That is why, for me, 8 days is not a reasonable deferment. If an 8-day deferment is the alternative, it would be better to take an immediate decision.

119. *The President:* The Representative of Belgium.

120. *Mr. Pirson:* We are ready to participate in a decision today. We have studied with a great deal of interest the preliminary objection filed by India, which was first distributed in English on 3 June. We have also been able to study Pakistan's reply, in English, to India's preliminary objection. Because I was in Europe at the time, this study could be made in consultation with the competent services of the Belgian Government. I personally consider the very brilliant presentations we have heard yesterday and today only an explanation of the position that had been given to us very clearly in the two documents, and consequently it does not appear indispensable to defer the decision of the

Council. However, as certain Representatives wish to have deferment, I think we should give it to them, but in the meantime do nothing that could be considered contrary to Article 5 of the Rules for the Settlement of Differences. In other words, the Council must take a decision, but it can take that decision in 8 days, 10 days or 15 days. The only problem we have at the moment is this. If those Representatives wish to be informed of the views of their governments, it means that they consider that the two documents that have been presented —the preliminary objection of India, distributed on 3 June, and Pakistan's reply to it, distributed in English on 9 July—were not sufficient to permit them to come to a conclusion. In that case it is essential for these Representatives to have at least the Summary of Decisions. I am not speaking of the minutes, because I believe that to ask for them means deferring any decision for at least a month, and it seems to me that in the circumstances that would not be reasonable or in conformity with Article 28 of the Rules for the Settlement of Differences.

It seems to me, however, that we should be able to have the Summary and, when we have it, those Representatives who have just expressed a desire to be able to consult their governments can do so. If you tell us that the Summary will not be available until next Friday, that is to say, in 9 days, I believe it would be difficult for us to take a decision on the subject that same day. If we really wish to give the Representatives who wish it time to consult their administrations, we must give them a few more days—the shortest time possible compatible with Article 28 of the Rules for the Settlement of Differences. It seems to me, then, that we must give 12, 13, 14 days to permit speedy consultation with governments.

I shall therefore not oppose any request for deferment of a decision for 14 days, unless the Summaries are available sooner. If we could have the Summaries—and I realize that it is an exorbitant request I am making of the Secretariat—next Monday, we could, I think, decide the question on Monday, 9 August. We would be allowing a week after the distribution of the Summaries. If the Summaries can be distributed only next Friday, I think it would be really difficult not to defer the decision on the subject for 5 or 6 days. That would mean that the decision would have to be taken by the Council about a week after the distribution of the Summaries, and when that is will depend very much on the work of the Secretariat. We know that the particular person concerned always works with zeal, enthusiasm and intelligence, and in this case we hope she will continue to do so, but we must also be reasonable. We must not demand of others what we do not always demand of ourselves, Mr. President, that is to say, to work day and night so that we can have this material.

In sum, therefore, I would like to say that I shall not oppose any formula that consists in asking the Council to take a decision a week after the distribution of the Summaries of the debates in which we have just participated.

121. *The President:* Thank you. The Representative of Uganda.

122. *Mr. Mugizi:* Like the Representative of Italy, I would prefer, if we have a delay, that it be a meaningful one. 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. 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 didn't 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, but if we are to defer it, the period of deferment should be long enough to permit sufficient investigation of the matters which have been cited.

123. *The President:* Thank you. The Representative of Spain.

124. *Lt. Col. Izquierdo:* In general I agree with what the Representatives of Italy and Uganda have said. Basically, I am prepared to take a decision today. We actually have in our hands the documents we need. We have the Convention, the Transit Agreement and the Rules for the Settlement of Differences. We also have India's preliminary objection and Pakistan's reply. Thus the only new elements that have entered into the discussion are the masterly presentations made by the Counsels for India and Pakistan. The Summary of Decisions really would not help us, because what we have to think about seriously is in these masterly presentations. Therefore, to consult my Government on these presentations, I must first have the verbatim from the Secretariat. Then I must send it to my Government. Then, of course, there will have to be a meeting of lawyers specialized in international law, which will take 5 or 6 weeks. 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.

125. *The President:* The Representative of Colombia.

126. *Major Charry:* 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. 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 is 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.

127. *The President:* The Representative of Tunisia.

128. *Mr. El Hicheri:* Just a few words on this question, Mr. President, because, really, between deferment and no deferment, memorials and counter-memorials, time-limits, etc., I am beginning to get lost. We are advancing, but

always running away, and I ask myself when this is going to end. Besides, this seems to me more and more like a Kafka novel; I will say no more than that.

I wish only to ask you a small question, Mr. President. When we met in Vienna and decided to meet in Montreal at this time—since it was your humble servant who proposed the date that had a chance of being acceptable to the two parties—and to interfere with the holidays, the private life, the professional life, of many of our colleagues, was it simply to hear the parties and then go away, or was it to hear the parties and take a decision? That is the question I wish to ask you, Mr. President, because this affair is beginning to become rather ludicrous. Come, listen, leave, return—this must end some day.

129. *The President:* I don't know what the Representatives on the Council had in mind when they took the decision. That point 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. The Representative of Senegal.

130. *Mr. Diallo:* Just to express my opinion, Mr. President, and to say that if you ask us to decide whether we should vote today, I shall vote in favour of doing so. If you ask us whether we wish to defer, I shall abstain and the decision will be taken by the majority of my colleagues. As for having meetings in August, I would hope that after the final meeting on this question we decide to have a month's vacation in January or February, because we are in danger of not having any this year.

131. *The President:* I am hesitant to put any questions because you will recall that any decision the Council takes, even for a delay, requires a statutory majority; it requires 14 votes. I therefore don't want to put anyone in difficulty. That is why I don't want to put questions until I really have to, but of course I shall have to do so eventually. The Representative of France.

132. *Mr. Agésilas:* I have already indicated that I was ready to take a decision immediately, and a little while ago I expressed an opinion favourable to a deferment that appeared reasonable to me. But I am not in favour of a deferment of the length now being envisaged and I think, therefore, that a decision should be taken immediately, that is to say, tomorrow morning, because it will be necessary in some cases to give explanations of vote. In conclusion, then, I am in favour of a quick decision tomorrow morning.

133. *The President:* I have had no proposal for a delay. There have been only suggestions so far. May I take it that the Council will meet tomorrow morning and proceed to take a decision? The Representative of India.

134. *Mr. Gidwani:* Mr. President, the decision is naturally for the Council to take, but I would just like to draw attention to one factor: that in Vienna you took a certain decision and that decision was that you would have this meeting here to hear the parties. I am rather surprised that after hearing the parties you should immediately try to reach a deliberative judgment without making available to the Members of the Council either a summary or a verbatim record.

Mr. President, I also want to point out that the Government of Pakistan was good enough to furnish a reply to the preliminary objection filed by India, but there is no mention in the Rules of the submission of a reply. You were good enough to circulate that reply. It reached us on 20th of July. It was sent on the 22nd to our Chief Counsel, who was to leave on the 24th. We therefore did submit to you this afternoon that we would like to send a detailed memorandum on this subject to clarify the pleadings we have taken. You have also heard today that there are certain Council Representatives who would like to

report to their Governments on the legal issues involved and obtain their advice, but it seems to me that the Council perhaps wishes to consider taking a decision now. I would submit to you, Mr. President, that any decision you try to take today will be a vitiated decision if you do so without proper record, without proper minutes, without proper notice, when at the meeting in Vienna you decided that you would merely hear the parties in Montreal on 27th July.

135. *The President:* Regarding what we decided in Vienna, I read the record and I think we have no more than that. Perhaps without now deciding to take a decision tomorrow, we could say that we shall continue this discussion tomorrow morning. For the time being I have no proposal for deferment; so unless there is such a proposal tomorrow, on which we will have to vote, the Council will eventually reach the point of having to decide. We shall therefore meet tomorrow morning at 10 o'clock. The order of business for tomorrow has already been prepared. After the end of the discussion on this question, we shall go into the other question of Resolution 39/1. The Council is adjourned.

(e) COUNCIL—SEVENTY-FOURTH SESSION

Minutes of the Sixth Meeting[1]

(The Council Chamber, Thursday, 29 July 1971, at 1000 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi
Secretary: Dr. Assad Kotaite, Secretary General

Present:

Argentina	Com. R. Temporini
Australia	Dr. K. N. E. Bradfield
Belgium	Mr. A. X. Pirson
Brazil	Col. C. Pavan
Canada	Mr. J. E. Cole (Alt.)
Colombia	Major R. Charry
Congo (People's Republic of)	Mr. F. X. Ollassa
Czechoslovak Socialist Republic	Mr. Z. Svoboda
Federal Republic of Germany	Mr. H. S. Marzusch (Alt.)
France	Mr. M. Agésilas
India	Mr. Y. R. Malhotra
Indonesia	Mr. Karno Barkah
Italy	Dr. A. Cucci
Japan	Mr. H. Yamaguchi
Mexico	Mr. S. Alvear López (Alt.)
Nigeria	Mr. E. A. Olaniyan
Norway	Mr. B. Grinde
Senegal	Mr. Y. Diallo
Spain	Lt. Col. J. Izquierdo
Tunisia	Mr. A. El Hicheri
Uganda	Mr. M. H. Mugizi (Alt.)
Union of Soviet Socialist Republics	Mr. A. F. Borisov
United Arab Republic	Mr. H. K. El Meleigy
United Kingdom	A/V/M J. B. Russell
United States	Mr. C. F. Butler

Also present:

Dr. J. Machado (Alt.)	Brazil
Mr. L. S. Clark (Alt.)	Canada
Mr. B. S. Gidwani (Alt.)	India
Mr. M. García Benito (Alt.)	Spain
Mr. N. V. Lindemere (Alt.)	U.K.
Mr. F. K. Willis (Alt.)	U.S.
Mr. A. A. Khan (Obs.)	Pakistan
Mr. H. Rashid (Obs.)	Pakistan
Mr. Magsood Khan (Obs.)	Pakistan

Secretariat:

Dr. G. F. Fitzgerald	Sr. Legal Officer
Mr. D. S. Bhatti	Legal Officer
Miss M. Bridge	CSO

[1] Reproduced from ICAO Doc. 8956-C/1001, C-Min. LXXIV/6 (Closed).

SUBJECTS DISCUSSED AND ACTION TAKEN

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The meeting opened with the statement by the Alternate Representative of India reproduced in Part II, paragraph 2, of these Minutes. A request for a legal opinion from the Secretariat on the validity of an immediate decision was denied on the ground that the Council was at this time sitting as a court and according to legal practice would have to pronounce on that question itself. The Representatives of the People's Republic of the Congo and Australia, however, disagreed explicitly with the Indian position and the Representatives of Norway, Canada and France disagreed with it implicitly in declaring their readiness to proceed to a decision forthwith. The Representative of the Czechoslovak Socialist Republic, supported by the Representative of the Union of Soviet Socialist Republics, proposed deferment of a decision until 10 August, but when put to the vote this proposal failed to receive the statutory majority which it had been understood from the start of the proceedings on the Pakistan application and complaint would be required for any decision, the result of the vote being 8 for, none against, and 10 recorded abstentions (the Representatives of Argentina, Brazil, Canada, the People's Republic of the Congo, Indonesia, Mexico, Norway, Senegal, Spain and Uganda).

2. The President then expressed his intention of putting to a vote the following propositions based on the preliminary objection:

Case 1 (Application of Pakistan under Article 84 of the Convention and Article II, Section 2 of the International Air Services Transit Agreement)

(i) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation.
(ii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the International Air Services Transit Agreement.
(iii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the bilateral agreement between India and Pakistan.

Case 2 (Complaint of Pakistan under Article II, Section 1 of the International Air Services Transit Agreement)

(iv) The Council has no jurisdiction to consider the complaint of Pakistan.

The Indian Delegation asserted that this was an improper formulation. According to Article 5 of the Rules for the Settlement of Differences, if the respondent questioned its jurisdiction, the Council had to decide the question—in other words, the question of jurisdiction—as a preliminary issue before any further steps were taken under the Rules. The proper formulation therefore was "Has the Council jurisdiction to consider the disagreement in Pakistan's Application . . . ?", etc.; any other would be prejudicial to India and contrary to the Rules. The President explained that the Council so far had

been proceeding on the assumption that it did have jurisdiction; India had challenged its jurisdiction; the Council accordingly had now to decide on the challenge. The Representatives of Canada, the United States, Tunisia and the People's Republic of the Congo supported the President's formulation, maintaining that the purpose of the vote was to determine whether the challenge was upheld, not whether the Council had jurisdiction. The manner of formulation would not affect the results of the vote, but was important because of the precedent-making nature of the decisions to be taken.

3. The result of the vote on the first proposition was none in favour, 20 opposed and 4 abstentions (the Czechoslovak Socialist Republic, Japan, the Union of Soviet Socialist Republics and the United Kingdom). The Indian Delegation protested that the manner in which the vote had been taken was incorrect and inadmissible under the Rules for the Settlement of Differences, and requested a roll-call on the remaining propositions.

4. The President noted that only parties to the Transit Agreement[1] (except, of course, India) were eligible to vote on the second proposition, but the statutory majority would still be required for a decision. The result of the vote was as follows:

For: None
Against: Argentina, Australia, Belgium, Canada, the Federal Republic of Germany, France, Mexico, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic and the United States (14)
Abstained: the Czechoslovak Socialist Republic, Japan and the United Kingdom (3).

5. After several Representatives had questioned both the necessity and the desirability of putting the third proposition to the Council—and, indeed, whether Pakistan had really sought relief from the Council under the bilateral agreement—the Representative of Pakistan, after consulting his country's Chief Counsel, stated that it had not; the bilateral agreement had been mentioned simply to reinforce the case being made for Council action under the Convention and Transit Agreement. The Indian Delegation protested, calling attention to the frequent references to the bilateral agreement in Pakistan's Application and to the fact that in the preliminary objection India had denied the Council's jurisdiction to handle any dispute under a bilateral agreement; they did not, however, insist upon the third question being put, having already gone on record as considering any decision taken at this meeting improper.

6. A roll-call vote was then taken on the fourth proposition, only parties to the Transit Agreement (except India) again being eligible to participate. The result was:

For: the United States of America
Against: Argentina, Australia, Belgium, Canada, the Federal Republic of Germany, France, Mexico, Nigeria, Norway, Senegal, Spain, Tunisia and the United Arab Republic
Abstained: the Czechoslovak Socialist Republic, Japan and the United Kingdom.

[1] The following Council members are parties to the Transit Agreement: Argentina, Australia, Belgium, Canada, the Czechoslovak Socialist Republic, the Federal Republic of Germany, France, India, Japan, Mexico, Nicaragua, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic, the United Kingdom, the United States of America.

7. The result of the foregoing votes was the rejection of propositions (i), (ii) and (iv) and hence the reaffirmation of the Council's competence to consider the Application and Complaint of Pakistan. Explanations of vote were given by the Representatives of the United States, Senegal, Spain, Indonesia, Canada, Argentina, Tunisia and the People's Republic of the Congo, explanations of abstention by the Representatives of the United Kingdom, the Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics; these are reproduced in full in Part II of these Minutes (Discussion). The Indian Delegation gave notice that India would appeal the decisions just taken to the International Court of Justice because the manner and method of the voting had been wrong and expressed the view that until judgment had been rendered by the Court no further action was possible.

8. In reply to questions, the President indicated that the period given to India for the filing of its counter-memorial, interrupted by the filing of the preliminary objection, would start to run again immediately and would expire in 10 days; if the counter-memorial was not filed by the deadline, the Council would be informed by the Secretary General in a memorandum examining the consequences.

9. The Representative of Australia suggested that in communicating the Council's decision to India and Pakistan, the invitation to negotiate contained in its Resolution of 8 April 1971 should be reiterated.

DISCUSSION

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. *The President:* The Council is in session. This is the 6th Meeting of the 74th Session, and we shall continue with the deliberations concerning the preliminary objection of India in Cases No. 1 and No. 2. I understand that the Representative of India wishes to speak.

2. *Mr. Gidwani:* Thank you, Mr. President. Having regard to the trend of discussion yesterday, I think it is necessary for me to make a statement. I shall say only a few words but to my mind these words merit the closest consideration.

For the first time in the history of this Council it has been called upon to decide the question of the limits of its jurisdiction. It is a question of the most far-reaching importance involving the consideration of weighty arguments, principles of international law, and judgments and advisory opinions of the International Court of Justice. It must not be forgotten, Mr. President, that the Council is meeting today as a judicial court entrusted with the task of reaching a judicial decision on points of international law and the ambit of its own jurisdiction as an international judicial authority.

Now, Mr. President, even highly trained judicial minds would require time and the most anxious consideration before coming to a fair and a correct decision on an issue like this. It has been admitted very clearly that some of the members would like to have the assistance of their respective Governments in evaluating the arguments urged at the hearing. Some members have specifically stated that without an opportunity of discussing the matter with their Governments or Administrations, they would have to come to a decision not

on the basis of the arguments urged, but on the basis of the pleadings filed earlier relating to the preliminary objections and the treaties and the rules applicable thereto. It would make the oral hearing an idle ceremony if time was not allowed to the members to study the verbatim records and take such assistance from their Governments or Administrations as they may require. If the Council were to come to an immediate decision on an issue of this character, without waiting for the verbatim records of the arguments and without waiting for the respective Governments of the member States to consider those verbatim records of the full arguments, I am constrained to say that the Council would be failing to discharge its duty and to function as a judicial body.

It is true that there should not be any delay in the Council arriving at fair decisions, but what is the meaning of delay? Delay means taking more time than is necessary for the judicial process. Delay does not mean denying the time necessary to apply the judicial process fairly after full and adequate consideration.

If unfortunately the administrative set-up of the Secretariat is unable to produce the verbatim records within 24 hours, as is common with many other organs of the United Nations, that drawback has necessarily to be accepted as a part of the procedural problems of the Council, and the time involved in the production of the necessary verbatim records should not and cannot be construed as delay.

Mr. President, I really fail to understand how an international tribunal like this Council, after detailed arguments of such far-reaching importance, can possibly come to a quick decision without full consideration by the respective Governments of the arguments advanced here of which the Governments so far know nothing or have not been able to evaluate or assess.

It is most significant, Mr. President, to note that some members of the Council have already stated that they are not in a position to evaluate and decide upon the respective submissions made by India and Pakistan on the preliminary points of jurisdiction without further consideration. Other members have expressly stated that if the decision is to be made later, the time-lag must be meaningful and it must be after the verbatim records are made available for full consideration by them and their Governments or Administrations. This shows very clearly that if the Council were to make a decision now, the decision would have no validity or propriety in law because the members of the Council, that is some of the judges, are admittedly not in a position to evaluate and decide upon the arguments and submissions without further consideration. I repeat, Mr. President, if the Council were to make a decision now, the decision would have no validity or propriety in law. It is for the Council to consider whether it would like to come to a decision in such circumstances where time is not given to *every* judge to give full and adequate consideration to the issues involved.

Another ground on which the decision of the Council would be vitiated, if it is arrived at without waiting for the verbatim records, is that the Council, as already stated above, is here acting as a judicial court, and some of the judges, i.e., members of the Council, were not present throughout the oral hearing from the beginning to the end. They can join in the decision only after reading the verbatim records; and if they join in the decision without considering the verbatim records, then, Mr. President, the whole decision of the Council would stand vitiated on the ground that some of the judges had not applied their minds to the entire case of both sides. It is needless to add that what India and Pakistan had filed before the Council are only pleadings on preliminary objections and not arguments or Statements of the Case or full Briefs on

the preliminary objections. If a judge decides a case merely on pleadings, without considering fully the oral or written presentation of the case, the decision would not be proper in law.

It is therefore my suggestion that the final decision should be, it has to be, arrived at after the verbatim records are made available to the members of the Council and, through them, to their respective Governments.

I will furnish a copy of my statement to the Secretariat and if they would be so kind, I would like to have it distributed to the Members. I was reading from a prepared speech. Thank you.

3. *The President:* The Representative of the Soviet Union.

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. Failing this, I shall not be able to make a decision on this question. Thank you.

5. *The President:* The Representative of Colombia.

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?

7. *The President:* The Secretary General.

8. *The Secretary General:* I understand the question put by the Representative of Colombia, but it must not be forgotten that the Council is now sitting as a court, as a tribunal. It is for the court to pronounce on this question, not for the Secretariat to give a legal opinion on it. In my view, for the Secretariat to give a legal opinion would be contrary to judicial practice and ethics, because a court does not need a legal opinion. It is for it to give that opinion.

9. *The President:* Thank you. Is there further discussion? The Representative of Norway.

10. *Mr. Grinde:* I should like to state my position briefly. I can say that I am ready to take a vote today, but I do understand and respect the difficulties some Representatives have and their consequent desire to consult with their authorities at home. If the Council should find it necessary to delay action, I shall not object to this provided the time given will be meaningful. After hearing the discussion yesterday, I do not believe that a few weeks will suffice. I understand it will take quite some time to get the verbatim records and if these are to be given a real legal study by my authorities, 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. Thank you.

11. *The President:* Is there further discussion? I am not sure whether the Representative of the Soviet Union was making a proposal to defer a decision or just a statement indicating that he had difficulty in taking a decision now. The Representative of the Soviet Union.

12. *Mr. Borisov:* It was a statement.

13. *The President:* Is there further discussion? The Representative of Canada.

14. *Mr. Clark:* I find myself supporting the views so ably expressed yesterday by my distinguished friend from the People's Republic of the Congo. The question before this body apprears to be fairly straightforward: does the Council have jurisdiction to hear the case brought before it or not? The

preliminary objection lodged was, at least in my view—and I believe this view would be shared by most Representatives on the Council—clear, concise and well-documented and, professionally speaking, I think it was as well drafted a document as I have ever had occasion to study. The reply by the other Party that was distributed and circulated was also concise, clear and well drafted. The Rules for the Settlement of Differences, Article 5 (4), seem to contemplate that once the written documentation has been submitted, there would be a hearing of the parties. We have listened here, during the past two days, to the distinguished advocates for both parties, whose contribution was surely a clarification and explanation of the written cases, but the main issue remained the same and we have had the benefit of carefully studying the documentation that was distributed in advance over a reasonably lengthy period of time. Accordingly, I would be prepared to proceed to a decision on the issue of the preliminary objection at this time. On the other hand, I can also understand the preoccupation of the other delegations who seem to feel that they would rather have time to consult with their authorities. At the same time, however, the comment made by the distinguished Representative of Italy would appear to be very sound, and that was that a mere summary of the debate would not be of any particular benefit to us and therefore a short delay to allow the circulation of such a document might not, in fact, achieve its purpose. On the other hand, a delay of several months to allow translation, correlation and distribution of a complete verbatim record of the discussion of the past two days would, in our view, not really be compatible with what is contemplated in Article 28 of the Rules, and may not ensure fair treatment of both parties concerned.

So, to reiterate, the Canadian position would be that we are certainly prepared to proceed to a decision today, and would not think that a lengthy delay of several months to allow correlation and distribution of a complete verbatim record would be upholding the responsibility of this body to ensure fair treatment of both parties. Thank you.

15. *The President:* The Representative of the United States.

16. *Mr. Butler:* 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.

17. *The President:* Is there further discussion on this question? The Representative of the United Kingdom.

18. *Air Vice Marshal Russell:* I would just like to express a little disappointment at the reply given to the Representative of Colombia by the Secretary General, although I understand his point of view. It is not unique for a body of persons other than professional judges to sit in a judicial capacity, at any rate not in the United Kingdom. It is usual in such circumstances for the body to have recourse to legal advice on points of strict law and if I am correct in supposing that 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?

19. *The President:* 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.

20. *Mr. Gidwani:* Thank you, Mr. President, I just wanted to state that you quoted me correctly: that the decision if taken now would be vitiated. And I want to be very clear—it is not that India is seeking any time; India is seeking fair treatment. What we wish is that these verbatim records should be available, as indeed is provided for in the Rules for the Settlement of Differences. Quite apart from that, if it was a question of merely seeking time, it would be very easy for me to say that this particular meeting has been held here, as per the decision of the Council in Vienna, for the purpose of hearing the parties. No indication whatsoever was given to the Government of India that the Council would discuss the matter and take a decision at this meeting. Otherwise, I could have claimed my right under the Convention and sought time so that the Government of India might have an opportunity to appoint a special representative, if it wanted, for the purpose of this meeting, because every Government has the right to be represented in regard to a matter affecting its interests. Therefore the indication should be given. I did not take that pleading because the Government of India is not interested in seeking time, but it is very much interested that there should be fair treatment of the parties, that the verbatim reports should be available. If the Council is to take a vote now, its action will be improper, illegal, entirely invalid and certainly vitiated, Mr. President.

21. *The President:* 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? I think each Council member is the judge of that. Some apparently believe there was, others that they had enough material before the hearing or that there was nothing new—or not enough new—brought forward in the hearing to make it necessary for them to consult. That is how I interpret the position of some Representatives. The Representative of the Congo.

22. *Mr. Ollassa:* I consider what the Representative of India said 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, I find that the arguments brought forward were, as the Representative of Belgium said, just an illustration of the preliminary objections we have received. Besides, we know that when there is a disagreement, the proceedings are generally in writing. Therefore in principle what has been given to us in writing is the essential; the rest is only an explanation of the documents we have. Because of that, Mr. President, I am in complete agreement with the Secretary General that it is not for him to give a legal opinion. 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.

For that reason, Mr. President, I think the Secretary General really has nothing to do now. It is for us to decide, and I would leave the Representative of India the responsibility for everything he has said. He has said that the decision would be vitiated. That is not my opinion at all, because we have had the documents for a long time. There have been brilliant arguments, some of which, as I have already said, were foreseeable and imaginable. The arguments were magnificent, brilliant, and to me it was an extremely interesting legal game. I would have liked to be able to participate in it from the beginning, but it has changed absolutely nothing, Mr. President. The question remains the same as it was in Vienna. The arguments have not changed it and they cannot change the solution. That any decision taken at this time would be vitiated is an assertion by a government and must be left to that government, but to me the decision would not be vitiated. I am ready to take one and if there is no proposal for deferment we must take a decision today and make an end, because the question is clear to everybody, at any rate to governments who have had the preliminary objections to read.

23. *The President:* Is there further discussion? Apparently not, so I shall have to put the questions. There are several, because you realize that there are two cases and that different instruments are involved. In the Application of Pakistan there is the Chicago Convention, the Transit Agreement and the bilateral Air Services Agreement between India and Pakistan; that covers Case 1. Then we have Case No. 2, the Complaint. So I shall have to put those questions separately and it will be realized that all Council members, except India, of course, can vote on the question relating to the Chicago Convention and on the question relating to the bilateral agreement, but only Council-member States parties to the Transit Agreement—again, except India—can vote on what concerns that Agreement. Therefore when the votes are taken we shall have to proceed on that basis. I shall just read the list of Council-member States that are parties to the Transit Agreement. You have had that list for the old Council, but I had better read it again now for this new Council. The States that are at present parties to the Transit Agreement are Argentina, Australia, Belgium, Canada, Czechoslovakia, France, Germany, India—I made a reservation about India already—Japan, Mexico, Nicaragua, Nigeria, Norway, Senegal, Spain, Tunisia, United Arab Republic, United Kingdom, United States. There are 19, of which only 18 are eligible to vote. The Representative of France.

24. *Mr. Agésilas:* Mr. President, if you intend now to ask us to vote, I should like an opportunity, before the vote, to explain how I am going to vote. The French authorities have studied the preliminary objection filed by India with the utmost objectivity and with concern that the delicate question of the disagreement submitted to the Council should be treated in a way fair to both parties. I myself have listened attentively and with keen interest to the very complete statement by the Representative of India and the reply made by the Representative of Pakistan. I wish to summarize briefly, Mr. President, the conclusions on which the position I am going to take is based.

Three international agreements have been mentioned by the two parties:

(1) the bilateral agreement concluded between India and Pakistan in 1948;
(2) the Chicago Convention, to which the two States are parties;
(3) the International Air Services Transit Agreement.

As far as the bilateral agreement is concerned, we have noted that in 1952 India recognized the competence of the Council in applying to it to settle the

first difference it had with Pakistan at that time and the Council itself recognized its competence in agreeing to consider the Indian request. Naturally we are not forgetting the events that took place in 1965, but it remains that, to the extent it is admitted that after the Tashkent arrangements had put an end to the hostilities the 1948 Agreement had at least partially to be brought back into force, the right of one of the parties concerned to address itself to the same court—in this case the Council of ICAO—must be recognized. This is the rule of estoppel, well known to jurists.

As far as the Chicago Convention is concerned, Article 89 has been cited and commented on at some length. This Article, as we know, provides that in case of war or national emergency Contracting States regain their full freedom as regards their obligations under the Convention. If this Article could be invoked in 1965 at the time of the armed conflict, it is difficult to concede that after the Tashkent agreement and six years later—in 1971—a state of war in the legal sense could be considered to exist between the two States. As for the state of emergency, which might better correspond to the actual situation between Pakistan and India, for it to be invoked it must have been notified to the Council, which is not the case.

Since the particular conditions envisaged in Article 89 of the Convention cannot be maintained, we come back, as regards the multilateral agreements (Chicago Convention and Transit Agreement), to the general rules of international law. The two speakers have cited Article 60 of the Convention on the Law of Treaties, the Vienna Convention of 1969. We know that this Convention has not come into force, but as Article 60 does no more than codify customary international law, it can, in fact, be validly referred to.

This Article 60 recognizes the right of a State to suspend or terminate an agreement if there has been material breach by the other party. Has there been a material breach by Pakistan in the case before us? I shall not reply to this question, which touches on the very substance of the case submitted to the Council, but we must at least record that there is a dispute on this point of the existence of material breach. We are, then, faced with a disagreement in the sense of Article 84 of the Chicago Convention.

For all these reasons that I have just evoked, we cannot acknowledge that the Council is incompetent and are ready to participate in the taking of a Council decision on this point.

We could also admit another formula. Since, in the final analysis, it is a question of judging whether India's decision to suspend or terminate the agreements is validly based on a previous and material breach by Pakistan, one could admit that it would only be possible to pass final judgment on this point after an examination in substance of Pakistan's application and India's defence. If this formula were adopted, examination of the Indian preliminary objection could be associated with examination of the substance. The procedure which was interrupted would therefore be set in motion again. The Indian counter-memorial should be filed, and the Council would pursue its examination of the case, but it would be in the course of this examination that a definitive decision would be taken on the objection presented by India.

In short, Mr. President, our position consists either in voting in favour of the last formula I have just described, if it is supported, or of expressing an opinion in the sense that the Council is competent, if the general tendency is in favour of taking an immediate decision.

25. *The President:* The Representative of India has asked for the floor.

26. *Mr. Gidwani:* I have only one submission to make. I heard the distinguished Representative of the USSR say that he would make a proposal after the

coffee break, unless I am very much mistaken. I would also like to consult my advisers about what the French Delegation has said and therefore wonder, Mr. President, if you would be kind enough to let us have a coffee break.

27. *The President:* I had not understood the Representative of the USSR to say that he wanted to have a break, but if there is no objection, we can have a short one, until 11 o'clock.

Recess

28. *The President:* The discussion continues and, as I said, I hope we can come to a vote as soon as possible if the Council is ready to vote. I understand the Representative of Czechoslovakia wanted the floor.

29. *Mr. Svoboda:* After the consultation, permit me to propose deferment of the Council's decision until 10 August 1971. Thank you.

30. *The President:* Is that proposal supported? Supported by the Soviet Union. Is there discussion now on the proposal that the Council's decision on this question be deferred until 10 August? The Representative of Tunisia.

31. *Mr. El Hicheri:* Mr. President, I suppose the statutory majority rule will be applied?

32. *The President:* All decisions of the Council on this case require 14 votes to pass. The Representative of the United Arab Republic.

33. *Mr. El Meleigy:* Before we vote on the proposal, could I know how many Council members will benefit from deferment until 10 August?

34. *The President:* Perhaps when they vote they will indicate that.

35. *Mr. El Meleigy:* If some Council members were in a position to give an opinion on the point it might be helpful.

36. *The President:* I have some speakers on my list. The Representative of Nigeria.

37. *Mr. Olaniyan:* Just a small question. Could I be told whether the deferment refers only to the voting, not that on August 10th we are again going to embark on this question?

38. *The President:* I understood that the intention of the Representative of Czechoslovakia is that the taking of the decision be postponed. As I explained yesterday, in any case the hearing has been closed, so we cannot return to it. The Representative of the Congo.

39. *Mr. Ollassa:* I wish to explain what I said yesterday, now that we have a formal proposal. I said yesterday that what we are aiming at is fair treatment for the two States, and deferment for more than a week could be something that favours one State more than the other. I think, however, that our calculation was not good because it seems that one of the States asked for four weeks, whereas according to my calculations it was two. In any event, Mr. President, I believe I must say this now: for me to support deferment there would have to be many members of the Council who would have difficulty in deciding today, because more and more I have the impression that what the Representative of Tunisia said yesterday is true—these are evasive tactics. Yesterday we could have decided on deferment; the conditions were present; everyone was almost ready to agree to deferment, when suddenly we became aware that no-one was making a proposal and at that moment I changed my mind and took up again my initial position, which was that we should decide. I came here this morning with the same feeling. Now we have this new proposal, I believe there must be extraordinary or exceptional reasons, or in any case wide support, before my delegation could agree to it. This time I shall not join with the majority, because I find that this deferment has not been requested for good

reasons; for those we must have the verbatim and have it for a fairly long time. What other reason could there be for deferment? To obtain instructions?—we have had this problem before us for two months, Mr. President, and in my opinion our instructions are not going to be influenced by some example or other that has been given now by way of illustration.

I shall therefore abstain in this vote, in full knowledge of the fact that an abstention is very important in a vote on which the statutory majority applies. Thank you.

40. *The President:* The Representative of Tunisia.

41. *Mr. El Hicheri:* I have the same concern as the Representative of the People's Republic of the Congo. In all honesty—especially as the proposal comes from my friend, the Representative of the Czechoslovak Socialist Republic—I do not believe a deferment of 10 days can be of any use at all. I do not think it can serve either of the parties or the interests of the Council. I do not think it can serve even those who have asked for it, because either administrations are not informed, in which case they must have all the documents and that will certainly take more than 10 days—perhaps a minimum of two months—or else administrations have had time to come to a conclusion on the problem before us—the competence of the Council. I said yesterday that I thought it would have been possible for them in two months to form an opinion on the subject.

For these reasons, Mr. President, I cannot support the proposal made by the Representative of the Czechoslovak Socialist Republic and supported by the Representative of the Union of Soviet Socialist Republics. I believe it was made in good faith, but I do not think that in practice it can serve the interests of the Council. That is my opinion. Perhaps there will be a proposal for a longer deferment, but that is another problem. Thank you.

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. Any recorded abstentions? Congo, Brazil, Spain, Mexico, Uganda, Senegal, Norway, Indonesia, Canada, Argentina.

We continue, then, with the discussion with a view to taking a decision now. Is there any discussion before I proceed with the questions? By the way I will read the questions—all of them—before we start to vote. The Representative of Australia.

43. *Dr. Bradfield:* Mr. President, before the vote is taken I would like to make a statement explaining the Australian vote.

The Australian Delegation appreciates the difficult circumstances existing at the present time and the background against which this dispute between Pakistan and India must inevitably be considered. For this reason we have been more than ever concerned to approach the matter before us now as one dealing solely with the preliminary objection, and particularly with the legality of it.

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, as

may be required in a matter of this nature, but I do consider that I have the ability to determine whether or not the statements made, and made so ably, by the Counsel for India have contained any significant new arguments in addition to those which are contained in the original statement and to advise the appropriate organs of my Government accordingly. In consequence of this, the vote to be cast by me today is a vote of Australia based on legal opinion. I am afraid that I could not agree with the opinion of India that a decision taken by Council today would be vitiated. If I did so I would not cast a vote.

44. *The President:* Is there further discussion? I referred to several questions. Really there are four and I will read all of them so that you see why I am making the distinction. It has to do with the fact that three instruments are involved and the voting on different cases is different. Some Council Members can vote in certain cases but not in others.

Concerning Case No. 1 there will be three questions and therefore three votes. The basic propositions are the following; they are the ones that India has brought forward:

> The first is that the Council has no jurisdiction to consider that disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation. In other words, the Council has no *jurisdiction in what regards the Convention.*
>
> The second is that the Council has no jurisdiction in so far as concerns the Transit Agreement; there only States parties to the Transit Agreement can vote, except India.
>
> The third question is that the Council has no jurisdiction in so far as concerns the Bilateral Agreement between India and Pakistan.

I hope it is clear. It is always the same question, in one case for the Chicago Convention, in the second case for the Transit Agreement, in the third case for the Bilateral Agreement, and that would complete the decision regarding Case 1.

Regarding Case 2, the proposition is that the Council has no jurisdiction to consider Pakistan's Complaint, the word "Complaint" being taken from Articles 1 and 2 of the Rules for the Settlement of Differences. So these are the questions which I shall put in due course. I will ask if there is any more discussion. The Representative of the United States.

45. *Mr. Butler:* A question for clarification, Mr. President. If I understand correctly, the jurisdiction of the Council has been invoked by Pakistan as far as the Chicago Convention and the Transit Agreement are concerned under the Application and then under the Complaint. Could you clarify for me whether Pakistan invoked the terms of the Bilateral Agreement in their Application and Complaint and has the jurisdiction of the Council been requested by Pakistan on that issue?

46. *The President:* That is the way the Legal Bureau read the Application of Pakistan: the Bilateral Agreement was mentioned in the Application but since a representative of Pakistan is here I will ask him.

47. *Mr. A. A. Khan:* Mr. Chairman, I must confess my own ignorance and shortcoming, but so far as I recall—and perhaps the documents would show—we sought relief under the Convention and the Transit Agreement and we quoted the Bilateral Agreement in order to strengthen our case. This is perhaps the position.

48. *The President:* Dr. Fitzgerald.

49. *Dr. Fitzgerald:* Mr. President, we in the Secretariat had examined the relevant documentation as best we could in order to find out how the questions

could be framed as simply as possible and when we came to page 8 of Pakistan's Application we found a paragraph 8 which said that the decision of the Government of India is arbitrary, unilateral and illegal and is in violation of the Conventions (plural) and Agreements (plural). Then further down, when we get to Section F (Reliefs Desired), we find—and I quote: "The Government of Pakistan seeks, among others, the following reliefs by action of the ICAO Council: (1) To decide and declare that the decision of the Government of India suspending the overflights of Pakistan aircraft over the territory of India is illegal and in violation of India's international obligations under the Convention and Agreements" (plural) "aforesaid.", and we took it that the Bilateral Agreement of 1948 was included. Similar material is also found in the Complaint. This does not mean that the Secretariat holds any brief for inclusion or exclusion; it is just a question of trying to ascertain what were the issues to be put to vote. Thank you, Sir.

50. *The President:* Is there further discussion before I proceed with the vote on the first point? The Representative of India.

51. *Mr. Gidwani:* Merely to clarify, in the spirit of helping, sub-paragraph 8 of Pakistan's Memorial also mentions that a disagreement has arisen between the Government of Pakistan and the Government of India relating to the application of the provisions of the Convention, the International Air Services Transit Agreement, and the Bilateral Air Services Transit Agreement of 1948, and throughout they have referred to all three documents, the Bilateral Agreement along with the other two. Thank you.

52. *The President:* Thank you. The Representative of Pakistan.

53. *Mr. A. A. Khan:* Sir, the documents are quite clear.

54. *The President:* All right, then I will proceed with these four questions. The first proposition is . . . The Representative of the Congo.

55. *Mr. Ollassa:* For a clarification, Mr. President. In Case No. 2 only the Transit Agreement is involved?—because I cannot participate on what concerns the Transit Agreement.

56. *The President:* Yes, in Case No. 2 it is only the Transit Agreement. The Representative of India.

57. *Mr. Gidwani:* Mr. President, I thought that even in Case No. 1 the second issue which you raised relates to the Transit Agreement, does it not?

58. *The President:* The Representative of the Congo was asking about Case No. 2. I hope I will be clear each time. So, the first question, on which all Council Members except India are entitled to vote, is the following proposition of India: that the Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation. Those who agree with that please raise their hands. The Representative of India.

59. *Mr. Gidwani:* Mr. President, surely that will not be the way the vote will be taken. The Council has to decide it as the preliminary issue and in either case the statutory majority will be necessary: It is not that India is proposing something and if it does not receive 14 votes, India loses. Any proposal you make here has to receive 14 votes. That is my understanding.

60. *The President:* Yes, but the question is this: India has come with a basic contention to the Council; the contention is that the Council has no jurisdiction. Now I have to ask those who agree with this contention and, as you say, 14 votes are necessary. If there are not 14 votes in agreement with that contention, the Council is rejecting the contention.

61. *Mr. Gidwani:* That is not the way a vote can be taken. After all, you have to settle it as a preliminary issue and we have raised a preliminary ob-

jection. You have to say "Has the Council jurisdiction?" or "Has the Council not jurisdiction?" and each proposal must receive a statutory majority. It is not that India is proposing something and you have rejected it. It is Pakistan saying that the Council has jurisdiction and that also will be subjected to a vote.

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 this position of India. If the Council does not accept it, we continue as we were.

63. *Mr. Gidwani:* You have to settle it as a preliminary issue and you have to determine by 14 votes, a statutory majority, that you have jurisdiction. You cannot do it otherwise.

64. *The President:* The Representative of the Congo.

65. *Mr. Ollassa:* Mr. President, the result would be exactly the same, but I believe it would be well, nevertheless, to admit the justice of what the Representative of India has said. It would be better for the Council to take the decision and that this decision should be taken not by saying, if you will, "India is wrong" or "India is right", but by saying "Has the Council competence or not?" I believe it would be much better like that, Mr. President. The result is exactly the same, but if this formulation pleases India, I believe it may please everyone here. The result is exactly the same.

66. *The President:* Well, I don't know whether the result is the same or not. Really I personally only want a result. Which one it is is not for the Chair to prefer, but I would not like to put questions in a way that will set a precedent for future cases. That is the problem I see. As I see it, each time something is brought to the Council, unless the Council agrees with that something, we continue as we are. This applies to this case and would apply, of course, to the substance of the case in the future, because otherwise I shall be asking the Council to take simultaneously a positive decision and a negative decision, which I believe is rather difficult. The Representative of Canada.

67. *Mr. Clark:* Before making a comment I would like to ask a question of the Secretariat through you, Mr. President. Could I have the date and the text, because it is extremely short, of the resolution of the Council setting a date for the filing of the Indian Counter-Memorial to the Pakistan Memorial?

68. *The President:* The text and the date? The date was the 8th of April. The Secretary General will read the text.

69. *The Secretary General:* The text is the following:

"The Council:

(1) invites the two parties immediately to negotiate directly for the purpose of settling the dispute or narrowing the issues;
(2) decides, subject to the consent of the parties concerned, to render any assistance likely to further the negotiations;
(3) fixes at eight weeks the period within which India is invited to present its counter-memorial."

70. *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. Thank you, Mr. President.

71. *The President:* 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. The Representative of Tunisia is next.

72. *Mr. El Hicheri:* Very briefly, I share your concern a little, Mr. President. I agree with the Representative of the People's Republic of the Congo when he says the result will be the same. That is my opinion too, but as this is the first case of its kind, there is a risk of creating a precedent, as you have underlined, and perhaps that should determine our action. It is really the only important point here. Aside from that, I do not think there will be a great difference if the question is taken one way or the other. Thank you.

73. *The President:* Thank you. The Representative of the United States.

74. *Mr. Butler:* Merely to say that we support the view of the Delegation of Canada. We think it would have important implications for all of the work of this Council if the proposition put forward by the Representative of India were to stand. It would be impossible to try to take many decisions of the Council in both directions, particularly because of the abstention problem. Thank you.

75. *The President:* The Representative of India.

76. *Mr. Gidwani:* Mr. President, I do hope that on grounds of expediency you would not take a vote that I would really consider would result in a decision which is entirely invalid. Article 5 of the Rules for the Settlement of Differences is very clear. Clause (1) says: "If the respondent questions the jurisdiction of the Council"—we certainly have questioned the jurisdiction of the Council in this matter and we shall continue to do so for valid reasons already given—and Clause (4) clearly says: "If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question . . .", the question of your jurisdiction. You have to decide the question of your jurisdiction, not my preliminary objection. You do not work on my preliminary objection; you decide the question of your jurisdiction and to come to the conclusion that you have the jurisdiction you need the statutory majority. Any other decision, Mr. President, would be really trying to use the statutory majority rule in order to place us in an entirely unfavourable position, for no rhyme or reason. The Rules are very clear, Mr. President.

77. *The President:* I am not asking the Council to agree or disagree with India. The question I am putting to the Council is that the Council has no jurisdiction to consider the disagreement. That is all I want the Council to vote on: that the Council has no jurisdiction. I want to find out how many agree that the Council has no jurisdiction and for the reasons the Representative of Canada has just mentioned, unless the Council decides now that it has no jurisdiction, we carry on as we were before the preliminary objection of India. The Representative of India.

78. *Mr. Gidwani:* Has the Council jurisdiction or has it not? Both must receive a statutory majority in any case. It cannot be that by mere abstentions on the one proposition, the other does not stand.

79. *The President:* The Representative of the Congo.

80. *Mr. Ollassa:* Just to say, Mr. President, that I support the opinion expressed a moment ago by the Representative of Canada and by the Representative of Tunisia after what you have said, because, in the final analysis, one could also say that India herself, in coming here the first time, agreed that the Council was competent. At that time she could have said "No, I am not going

there, because it is a court that is not competent." So there really is, as they say in English, a "challenge".

81. *The President:* Is there more discussion? I regret—and I am addressing myself to the Representative of India—that I will proceed on that basis, but I am glad that the discussion has taken place. That was the way I saw the question and I see that Council members as they have spoken now seem to agree that that is the way it should be considered. So, I repeat, the first proposition is: "The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation." Those who agree with that please raise their hands. Those opposed, please raise their hands. *No votes in favour, 20 votes against.* Any recorded abstentions? The United Kingdom, Japan, Soviet Union, Czechoslovakia. Well, I think that since there have been 20 contrary votes, the question of a positive or negative decision has now been superseded. There are 20 votes against, which means that there are 20 members who consider that the Council is competent. The Representative of India.

82. *Mr. Gidwani:* Mr. Chairman, just to ask you to record my statement that the manner in which the vote has been taken is not correct and is not permitted by the Rules. Thank you.

83. *The President:* Thank you. Now we go to the second question. The Representative of India.

84. *Mr. Malhotra:* Mr. President, I don't want to raise any matter of substance, but just to request a roll-call vote. The first vote has already taken place and nothing can be done about it now, but may I have a roll-call on the other questions?

85. *The President:* For the information of new Council members, I am drawing a name to determine who is going to vote first. On the second question only those States that are parties to the Transit Agreement, except India, can vote. The question is: The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Transit Agreement.

86. *Mr. Agésilas:* Mr. President, so that it will be very clear, as a roll-call vote is involved, in replying "Yes" one endorses the negative position taken by India. Is that it? Then, to oppose it you must say "No".

87. *The President:* Yes, those who agree that the Council has no jurisdiction have to say "Yes", those who consider that the Council has jurisdiction have to say "No". The first name is Lebanon, which is not here and is not a party to the Transit Agreement. Spain. Spain is a party to the Transit Agreement.

88. *Lt. Col. Izquierdo:* As you put it, it was not very clear.

89. *The President:* Those who agree that the Council has no jurisdiction say "Yes". Those who think that the Council has jurisdiction say "No". The Representative of the Congo.

90. *Mr. Ollassa:* Mr. President, I don't wish to complicate matters for you, but in French it is difficult. Those who think the Council is not competent should say "Yes" and those who think it is should say "No".

91. *The President:* I could make it longer. Those who agree with the proposition that the Council has no jurisdiction to consider the Application under the Transit Agreement—I think this is good in the three languages—say "Yes"; those who consider that the Council has jurisdiction say "No". Spain was first and says "No". Will you continue reading, please.

92. *Dr. Fitzgerald:* Mr. President, Spain has said No.

Tunisia—No	Czechoslovakia—Abstention
United Arab Republic—No	France—No
United Kingdom—Abstention	Federal Republic of Germany—No
United States of America—No	Japan—Abstention
Argentina—No	Mexico—No
Australia—No	Nicaragua—Not here
Belgium—No	Nigeria—No
Canada—No	Norway—No
	Senegal—No

That is all, Mr. President.

93. *The President:* Thank you. *There are no votes "Yes", 14 votes "No", 3 abstentions.* The Council has therefore not agreed with the contention that the Council has no jurisdiction regarding the Transit Agreement as there were 14 votes against. The Representative of Belgium.

94. *Mr. Pirson:* When you have put your third question, Mr. President, may I speak before the vote?

95. *The President:* Yes, I will put it so as to be clear and then I certainly will allow statements. The third question is the same question except that it has to do with the Bilateral Agreement. I will put it this way: Those who agree that the Council has no jurisdiction to consider Pakistan's Application in so far as concerns the Bilateral Air Services Agreement of 1948 between India and Pakistan should vote "Yes". Those who are against that should vote "No". The Representative of Belgium.

96. *Mr. Pirson:* I wish only to say that I am not convinced that this question should be put to the Council and in these circumstances, if you proceed to a vote, I shall abstain. I do not want to go further, but really I have very serious doubts about the necessity of putting this question to the Council.

97. *The President:* I asked the Representative of Pakistan and he made a statement to the effect that the documents were clear. I don't know whether he wishes to speak again on this question. As Pakistan made the Application, it tells us how it considers the issue. I have, however, other speakers and while the Delegation of Pakistan is consulting, I will give the floor to the Representative of Tunisia.

98. *Mr. El Hicheri:* I am of the same opinion as the Representative of Belgium; I have very strong doubts about this. It is my impression that Pakistan has based its case on the Transit Agreement. On reading the documents, I did not have the impression that the interested party, Pakistan, came here to ask the Council to pronounce on its competence in regard to the Bilateral Agreement. I did not have that impression at all, Mr. President. I therefore wish to associate myself very strongly with the doubts expressed by the Representative of Belgium. Perhaps the Pakistan Delegation should be allowed a few minutes to consult their Chief Counsel. He might be able to give us a clear answer in this regard.

99. *The President:* Yes, I agree that we are in the hands of Pakistan. It is the Applicant and if it now says that it is not seeking relief under the Bilateral Agreement, India's point is no longer of interest as far as the Council is concerned. The Representative of the Congo.

100. *Mr. Ollassa:* I too am very reluctant to deal with this question; in fact I shall not deal with it at all, because I do not think the Council has to pronounce upon a bilateral agreement. I think our field has to do with multilateral agreements and if we start entering into bilaterals it is going to be very difficult. In any case, I for one do not have authority to pronounce on a bilateral agreement.

101. *The President:* Thank you. The Representative of Nigeria.

102. *Mr. Olaniyan:* Just to say that I share the view expressed by the Representative of Belgium.

103. *The President:* Thank you. The Representative of France.

104. *Mr. Agésilas:* A few minutes ago I expressed our opinion on this subject, but I think, nevertheless, that it would probably be better for the Council not to pronounce on this point.

105. *The President:* Is the Representative of Pakistan ready to speak now?

106. *Mr. A. A. Khan:* Mr. Chairman, I am grateful for the suggestion that I should seek your indulgence to consult our Chief Counsel on this point and I would appreciate it if a short time could be given to us for that purpose. Thank you very much.

107. *The President:* I still have four speakers, but if the Council agrees that we give the Delegation of Pakistan time to consult on this particular point, it may not be necessary for them to intervene. However, I will call them in the order I had them. The Representative of Spain.

108. *Lt. Col. Izquierdo:* Very briefly, just to say that I share the views expressed by the previous speakers on this particular point and that I shall, of course, be obliged to abstain on it.

109. *The President:* The Representative of the United States.

110. *Mr. Butler:* I still have the question I raised before, whether we have been asked to come to any decision, and I also question whether India addressed itself to the question of violation of the Bilateral Agreement in its preliminary objection. In reading the summary of Ground 1, it says there is no disagreement between India and Pakistan relating to the interpretation or application of the Convention or the Transit Agreement and no action by India under the Transit Agreement. In other words, there are three questions, not four. So even assuming that Pakistan had invoked it, if I am correct, the fact that India has not questioned the jurisdiction of the Council to deal with the bilateral issue is, I think, an added element.

111. *The President:* Thank you. The Representative of Senegal.

112. *Mr. Diallo:* I know that in bilateral agreements the two parties usually explicitly agree to submit any difference to ICAO, and when they have one to submit, they must do it together—in other words, by common consent. I also know that bilateral agreements are registered with ICAO so that it can follow their application and perhaps be aware of the differences that can arise, but I believe that in the present case I can say that it is not that the Council has not to express an opinion on this particular point, but that it is preferable for the Council not to do so.

113. *The President:* Thank you. The Representative of Uganda.

114. *Mr. Mugizi:* Mr. President, I would like to ask if this dispute regarding the Bilateral Agreement has been submitted in accordance with Article XI of the Agreement.

115. *The President:* The Delegation of Pakistan is seeking advice and I think I will be informed in a few minutes about this. The Representative of Uganda.

116. *Mr. Mugizi:* Mr. President, is it something to be explained by Pakistan or by the Secretary General?

117. *The President:* I think we have to know first whether Pakistan in its Application has covered also the question of the Bilateral Agreement. The Representative of Belgium.

118. *Mr. Pirson:* I do not think so, Mr. President. On your third proposition I did not wish, a few moments ago, to say what the Representative of the United

States has said, but it is my opinion also. No doubt the Representative of India could enlighten us: has India challenged the competence of the Council in regard to the Bilateral Agreement? If India has done so, does this mean that Pakistan requested the Council's intervention in the framework of the Bilateral Agreement? I do not remember exactly all the provisions of India's preliminary objection. If we find a contestation on this point by India, can we ask Pakistan if it wishes, still on this point, the Council's intervention? After that the Council will have to express an opinion. Does India wish the third proposition to be submitted to the Council?

119. *The President:* I think the Secretary General will explain.

120. *The Secretary General:* I refer to paragraph 39 *(d)*, page 25, of the preliminary objection submitted by India and wish to read the original text, in English, presented by India: "The Council has no jurisdiction to handle any dispute under a Special Régime or a bilateral agreement."

121. *The President:* Thank you. The Representative of Tunisia.

122. *Mr. El Hicheri:* Really, Mr. President, I do not see how we can extend the affair. The Government of Pakistan brought two cases before the Council; this is very clear and, besides, was presented in that way. Case No. 1 relates to disagreements between the two States in the sense of clauses *(a)* and *(b)* of Rule (1) of Article 1 of the Rules for the Settlement of Differences. Case No. 2 is a complaint relating to the International Air Services Transit Agreement in the sense of Rule (2) of Article 1 of the Rules. Now, Mr. President, the case is being extended. It is very clear that at no point did the Government of Pakistan bring before the Council a question concerning the interpretation, or misinterpretation, of the Bilateral Agreement. It came before the Council on the basis of the Chicago Convention and the Transit Agreement, and from the beginning the question has been presented in this way: Case No. 1, Case No. 2. There has never been a Case No. 3, and *a fortiori* a Case No. 4.

123. *The President:* The question is not as simple as that. According to the Secretariat, Case No. 1 has three parts, but it could have only two and we are going to learn which from Pakistan. Case No. 1 covers the Convention and the Transit Agreement; the question now is whether or not it covers the Bilateral Agreement. The Representative of Tunisia.

124. *Mr. El Hicheri:* I have not finished, Mr. President. What I said is in a Council document that has been distributed, C-WP/5372. I was not speaking from memory; I was reading something before me. Now in Case No. 1 it is a question of the Chicago Convention and the Transit Agreement, in Case No. 2 a question of the Transit Agreement. That is how the question has been presented to us from the beginning. It is another matter if Pakistan now wishes to add something else, but I am basing myself on what the plaintiff has presented so far.

125. *The President:* We have the delegation of Pakistan here and they will explain.

126. *Mr. A. A. Khan:* Thank you very much Mr. President. I apologize for this slight confusion, which is entirely due to my own shortcomings. I have sought and received clarification and I fully confirm the understanding which has been explained by the distinguished Representative of Tunisia. We did not seek relief under the Bilateral Agreement and we did not argue on that point either. As I stated earlier, this Agreement was mentioned to reinforce our case.

127. *The President:* Thank you. That is clear now and will, of course, be entered in the record. The Representative of India.

128. *Mr. Gidwani:* I really find it rather strange that at this late stage we are being told what Pakistan intended or did not intend. Your first memorandum

on this very subject, Mr. President, said that Pakistan has aired, in regard to Case No. 1, a disagreement under the Chicago Convention, under the Transit Agreement and under the Bilateral Agreement. Pakistan has said so throughout in its Application. We took the trouble, therefore, of refuting that and saying that the Council has no jurisdiction. Now we are told that Pakistan does not wish to raise this after all the pleadings and after all the argument. I seek no remedy from you for this. I merely wish to point out the manner and the method in which Council has been functioning. Thank you and I do consider it entirely improper, as I said.

129. *The President:* Well, as I explained before, the Secretary General after reading the text was also of the opinion that the Bilateral Agreement was included. Now it has been explained in a different way. The Representative of India.

130. *Mr. Gidwani:* We were told that the first Case represents this, this and this and everyone had the documentation. Now people are getting surprised as to what was before them. This comes from not having the verbatim; this comes from not having the records; this comes from giving a snap decision in the offhand manner in which the Council is giving it. Thank you.

131. *The President:* Thank you. The Representative of Belgium.

132. *Mr. Pirson:* I understand that India is objecting to the procedure. In these circumstances, does India insist that the question be put?—because if India insists that the question be put, it can be put.

133. *The President:* I think we should not complicate matters. The Representative of India was referring to the manner in which this matter was being handled. That is how I understood his intervention. The Representative of India.

134. *Mr. Gidwani:* Yes, Mr. President, you are quite right. I am not suggesting that any matter be put or not put because, as I said, all matters being put to a vote and all decisions being taken are vitiated. So it would not help very much if I put to a vote another matter, the decision in respect of which would also be vitiated.

135. *The President:* We go now to the next question, concerning Case No. 2: 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" and those who disagree with that to say "No", as in the vote we took before. I will now have to draw the name for the first to vote. Canada is the one and is a party to the Transit Agreement. Dr. Fitzgerald, will you start calling the roll, please?

136. *Dr. Fitzgerald:*

Canada—No
Czechoslovakia—Abstention
France—No
Federal Republic of Germany—No
Japan—Abstention
Mexico—No
Nicaragua—Not here
Nigeria—No
Norway—No
Senegal—No
Spain—No
Tunisia—No
United Arab Republic—No
United Kingdom—Abstention
United States of America—Yes
Argentina—No
Australia—No
Belgium—No

That is all, Mr. President.

137. *The President:* Thank you. *There was one vote in favour, 13 votes against and 3 abstentions.* The Representative of the United States.

138. *Mr. Butler:* Mr. President, I should like to explain why I voted against the jurisdiction of the Council in Case 2. Case 2 involves a complaint brought pursuant to Article II, Section 1 of the International Air Services Transit Agreement. Article II, Section 1 provides the jurisdiction of the Council in cases in which a Contracting State deems that action by another Contracting State, under the Transit Agreement, is causing injustice or hardship to it—that is, it invokes the so-called equity jurisdiction of the Council, when a Contracting State is acting pursuant to the Agreement, that such action causes injustice or hardship. On the bases of the pleadings and oral arguments, the issue before us does not appear to us to be a question of action by a State pursuant to the Transit Agreement, but of whether the action is in conformity or fails to conform to its provisions. This is a case under Article II, Section 2 involving interpretation and application of the Agreement and thus we supported the view that the Council had jurisdiction in Case 1. It is, in our mind, improperly brought under Article II, Section 1. Article II, Section 1 is not applicable here and therefore in this Case could not confer jurisdiction on the Council.

139. *The President:* I was going to say, before the intervention of the Representative of the United States, that with this decision, of course, the contention that the Council has no jurisdiction has not passed and therefore we are where we were, in other words, we shall continue considering that the Council has jurisdiction and will continue with the Case. The Representative of the Congo.

140. *Mr. Ollassa:* Mr. President, I do not understand. Is the majority of the Council always the same, even when there are States that are not parties to an agreement? That surprises me, because they cannot vote. How can the majority be the same? I really do not understand. There are 19 States that are parties to an agreement; the statutory majority should therefore be based on 19. We cannot base the majority on States which are not parties to an agreement and by virtue of Article 66 of the Convention cannot participate in a vote. That is incredible.

141. *The President:* I said nothing about the statutory majority, although I said at the beginning of these proceedings, as early as February or March, that according to the legal opinion 14 votes were necessary in any vote taken on this subject. In this case it does not matter because there was only one vote in favour of the contention. So the contention has not been approved by the Council and we continue to have jurisdiction. That is all I am going to say and I suggest that we do not need to discuss at this moment what the statutory majority is. The result is the same. Any other explanations of vote? The Representative of the United Kingdom.

142. *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. Thank you, Mr. President.

143. *The President:* The Representative of Nigeria.

144. *Mr. Olaniyan:* This is not to explain my vote. I think the question that has been raised by the Representative of the Congo is an important one . . .

145. *The President:* I am going to interrupt you because you are out of order; we have not documented the subject. If the Council wants documentation we

will provide it. I would not like now to engage in an hour's discussion on a question on which I said something some time ago. The Representative of Senegal.

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 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 was competent and on what it was not. Therefore, Mr. President, unilateral cancellation in the circumstances explained to us in the statements of the two parties to the disagreement does not appear to us to be outside the framework of the Convention, because a certain number of articles in the Convention explicitly reject the idea of discrimination. That is why, Mr. President, my delegation voted to support the competence of the Council on the three questions put to us.

147. *The President:* Thank you. The Representative of Spain.

148. *Lt. Col. Izquierdo:* Mr. President, I should like to explain briefly the position of my Government on the question we have been dealing with these past few days. We have always considered that problems of this nature, which directly involve the interests of States, deserve special attention and very careful consideration from the Council. We are satisfied that these aspects have been taken care of in the course of our debate. We have considered with the greatest care the preliminary objections submitted by the Government of India, as well as the reply of the Government of Pakistan, and have had the opportunity to hear, during these meetings, the thoughtful presentations made by the distinguished Legal Counsels of the two Governments. For a variety of reasons which have emerged in the course of our debate, we consider that the ICAO Council does have jurisdiction in this case and have voted accordingly, without this action in any way prejudging the attitude we may take on the substance of the problem.

149. *The President:* The Representative of Indonesia.

150. *Mr. Karno Barkah:* We have voted positively for the competence of the Council, but this does not prejudge our position regarding the substance of the matter, Mr. President. Indonesia has always had good relations with both India and Pakistan and will continue to have and we are doing our best to maintain strict neutrality and fairness in our decision between the two parties.

151. *The President:* Any other explanations of vote? On the question on which I interrupted the Representative of Nigeria, the Secretary General will circulate a memorandum giving all the reasons why this is so and if the Council, at a later stage, wishes to question that, it will have an opportunity to do so. I remember, however, having explained the situation when we started on this question and the Secretary General will be able to provide background information on why it is so. The Representative of India for an explanation of vote, I understand, or rather an explanation of the situation.

152. *Mr. Gidwani:* Mr. President, I have no explanation of vote; in fact I didn't vote. There is only one point I wanted to mention to you: that one should take these decisions sportingly. Unfortunately I at the moment am not taking them sportingly, because I felt there was something wrong with the method and the manner. Quite apart from that, I just wanted to thank you for all the cour-

tesy, all the patience and all the hearing that you have given me. I also wanted to inform you that having regard to the manner and method in which the decision has been taken, both on procedure and substance, it is the intention of the Government of India to move the World Court. Thank you.

153. *The President:* Thank you. The Representative of Belgium.

154. *Mr. Pirson:* Mr. President, I would like you to distribute the exact text of the three questions that were put to the Council and to repeat for us the votes on them. I think I have them precisely, but in the first case we voted without a roll-call. Could you in each case repeat the result of the vote? *The President:* When you say "distribute", would you like to see them in writing or do you want me to read them now? *Mr. Pirson:* In writing, Mr. President. *The President:* Do you want the votes now? *Mr. Pirson:* If you can combine them with the questions it would perhaps be simpler. We all would then have an official text. *The President:* Yes, that can be done, and if you will accept the English text, it can be done this afternoon. The Representative of Czechoslovakia.

155. *Mr. Svoboda:* Permit me, Mr. President, to make a statement on my vote. I abstained solely because I was unable to consult my administration during the debate which developed during the last few meetings on matters of legal importance.

156. *The President:* The Representative of Tunisia.

157. *Mr. El Hicheri:* I should like to have a clarification from the Representative of India. I think he said something very important and perhaps certain States here can be informed. If I understood correctly, the Government of India intends to appeal to the International Court of Justice. Is it on the decision taken by the Council today concerning its competence or on the substance? I should like to have a clarification on this point because I may have to inform my Government, as it is a rather important development. I do not know whether he said exactly whether the appeal would be on today's decision by the Council or on the substance, but I understood that India would appeal—or at least intended to appeal—to the International Court of Justice on the manner in which the Council interpreted its own competence.

158. *The President:* It is up to the Representative of India to reply if he so wishes.

159. *Mr. Gidwani:* Mr. President, the question of substance does not arise because the substance has not been discussed here. As I mentioned, we shall go to the International Court of Justice on the decision taken here today. Thank you.

160. *The President:* The Representative of Canada.

161. *Mr. Clark:* Only an explanation of vote. Canada, like many other countries represented here, has excellent relations with both India and Pakistan. However, we were concerned here today strictly with a point of international law and on that issue, and that issue alone, Canada was of the view that the Council of this Organization has jurisdiction. We found that for this reason, on a strict point of international law, we could not support the preliminary objection.

162. *The President:* Thank you. The Representative of Argentina.

163. *Com. Temporini:* As other delegations have said, our country has very amicable relations with the parties in this case we are considering, but in international relations Argentina has great respect for law and for the provisions of international agreements. When the pertinent documentation was received from India, we immediately sent it to our Government, which has considered it and sent us instructions. The position we took in the vote does not prejudge in any way the substance of the question.

164. *The President:* The Representative of Tunisia.

165. *Mr. El Hicheri:* As there have been several explanations of vote, all having to do with the relations members of the Council have with the two parties, I should not like to lose this opportunity to do the same. Of course, it is unnecessary to say, Mr. President, that we have very good relations with the two parties, and, addressing myself particularly to India, I may say that these are not platonic words. At a time when India was very gravely threatened and many countries failed in their obligations, Tunisia was one of the few to speak up for what it considered just. But, Mr. President, this question should not be considered from the standpoint of our friendship for one country or the other. It must be considered from the standpoint of law and of the interpretation of existing texts. In any case, the vote today, as several members of the Council have emphasized, bears only on a point of law, a question of form on the competence of the Council, and I believe it is inadmissible to interpret it as an indication of friendship or hostility towards one party or the other. This vote must be interpreted as a legal decision by the Council on a question of form. At any rate, that was the intent of our vote.

166. *The President:* The Representative of the Congo.

167. *Mr. Ollassa:* We too have excellent relations with the two parties. We came here only to decide a question of law and I wish to say immediately that the decision we took on this question has nothing to do with any solution that may be given to the substance of the problem. We think, and I believe we shall continue to think, that it is in bilateral negotiations that the two States in question will find a solution for all their problems.

168. *The President:* The Representative of Pakistan.

169. *Mr. A. A. Khan:* Mr. President, I wish to take this opportunity to thank you, Sir, the Secretariat and particularly the delegates who have been so generous in extending and reiterating their friendship for my country. We came to this august body in a spirit of humility, in a spirit of accommodation, in a spirit of goodwill. My Government does not consider the decision of this august body as a victory or a defeat for any State. It is our conviction that it is a victory for the Council, for this august body, for the responsibilities which this august body has accepted and reaffirmed. As Representative of Pakistan, I do wish to assure you, Mr. President, and distinguished delegates, that it is our intention to continue appearing before this Council in the same spirit, adhering to the Convention, adhering to the internationally established procedures, laws and conventions. With these remarks on behalf of my delegation I do wish to reiterate, once again, our thanks and our gratitude for the courtesy, for the kindness and for the consideration that all the Representatives, the Chairman, and the members of the Secretariat have extended to us. Thank you very much, Sir.

170. *The President:* Any other statements? The Representative of the Soviet Union.

171. *Mr. Borisov:* I abstained from voting on the first case because I was not given time for consultation with the competent organs of my Government. I request that this be recorded in the minutes. Thank you very much.

172. *The President:* Thank you. That will be done. The Representative of Australia.

173. *Dr. Bradfield:* I presume that the decisions of the Council in this matter will be formally communicated to the representatives of the Governments of India and Pakistan and I suggest, Mr. Chairman, that when that is done, the point recently made by the Representative of the Congo be followed and that

we reiterate our invitation to the two parties to make progress towards a solution by negotiation.

174. *The President:* Thank you. Any further points? I would like to remind the Council that, because of this decision, the time-limit which ceased to run when India deposited its preliminary objection, begins to run again as of today. Is there anything else on this question? The Representative of Senegal.

175. *Mr. Diallo:* Just to clarify our ideas, Mr. President. When will this period which begins to run again today come to an end?

176. *The President:* The original deadline was the 11th of June and we received the preliminary objection on the first of that month. India knows the dates. The Representative of India.

177. *Mr. Gidwani:* Mr. President, as I mentioned to you, we propose to go to the International Court of Justice and we will see legally whether or not a Counter-Memorial has to be filed. Personally I am of the view that no further proceedings of the Council on this matter are possible. As I said, we will go to the International Court of Justice. However, this is a matter which the Council separately, and the Government of India separately, will certainly examine.

178. *The President:* Thank you. I repeat that the deadline was the 11th of June and we received the Indian preliminary objection on the 1st of June, in other words there were 10 days more. So the deadline will be 10 days from today. Today is the 29th, so I think it will be something like the 8th of August. The Secretary General will have to determine it. The Representative of Senegal.

179. *Mr. Diallo:* Then it is in 10 days that the period will expire. I asked the question because my ideas are a little confused. Does the explanation the Delegate of India has just given mean that we shall not have the Counter-Memorial?—because I cannot place the problem. Are we still in the framework of Article 84 of the Convention which says that an appeal shall be notified to the Council within 60 days? The Representative of India has notified us at this meeting, but what are we to understand? I confess that I am a little lost, because we have not gone into the substance of the question and one Government has already expressed its intention of appealing to the International Court of Justice. How are things going to develop? I should like to have your reply summarized in the note on the decisions which was asked for a few minutes ago. That is not, of course, the "Summary of Decisions", but I should like to have this point clarified at this meeting. Thank you, Mr. President.

180. *The President:* I think that this is a very serious business and that it would not be desirable to ask India now exactly what it intends to do. I think all the Council has to note now—it is only noting—is that because of the decisions taken today, the time-limit has started to run again and that 10 days from now India has to present the Counter-Memorial, and we stop there. What happens next, what India wants to do is something we shall learn in time. The Representative of the Congo.

181. *Mr. Ollassa:* I think that after what the Representative of India has said, it is useless to adopt an ostrich policy. What India has said it has said officially and it will appear in the minutes. As it will appear in the minutes, one has a right to ask what the situation is going to be. It therefore would be desirable, at the very least, for members of the Council to have in a few days a memorandum on the main possibilities there will be if India does, in fact, do what it has just said it will do. To do what you have just said, Mr. President, is really following an ostrich policy.

182. *The President:* I don't think it is an ostrich policy. What will happen is this. We have to wait until, I think, the 8th or the 9th of August, when the deadline comes. The Secretary-General will keep the Council informed of what

happens. If there is a Counter-Memorial from India he will circulate it; if there is no Counter-Memorial he will tell the Council so and will give further explanations if he can. The Representative of the Congo.

183. *Mr. Ollassa:* Mr. President, I venture to tell you that your reply is not a good one, and it is really a pity, because there are times when even a President of the Council cannot know everything. A reply that would interest me would be that of the Director of the Legal Bureau. I should like to know, for example, whether an appeal by India to the International Court of Justice would take the case out of the Council's hands. That is one of the questions that arise. If the reply is "Yes", how can you still tell us "Well, the period starts to run again . . . I shall call a meeting if India does not file its Counter-Memorial . . ."? It is not worthwhile. We want replies to all these little questions, eventual questions, which are less eventual than you think, Mr. President, in the sense that we have an official declaration by India which will appear in the minutes. I believe there are times when one can be right, but also times when it is necessary to open the door to suggestions that are made. Could we not, as you said just a moment ago in a manner I found at one and the same time elegant and inelegant, have a memorandum on the question?

184. *The President:* At least a memorandum, yes. I think it is impossible for the Secretary General to start making an analysis now of the different possibilities and what the situation is. It is a very serious question; it has to be seriously considered. As I said, in 10 days' time we shall know what the situation is, perhaps even sooner, because we may receive something from India today or tomorrow; I don't know. So we will inform you at the latest in 10 days' time. If there is no reply from India the Secretary General will have to present the analysis you asked for in announcing that there has been no reply from India. So you will have satisfaction. What I wanted to avoid at this moment was putting the Secretary General in the position of having to improvise answers on the different hypothetical possibilities. The Representative of Senegal.

185. *Mr. Diallo:* In am really sorry to insist, Mr. President, but I would like to have clarification. In the note requested by the Delegate of Belgium a few minutes ago would it be possible at least to make reference to this official declaration by India that it is going to refer the Council's decision to the International Court of Justice? Where is that going to appear—only in the minutes we shall eventually receive or in the Summary of Decisions? Mr. President, it is proper that our Administrations know what is likely to happen, or most likely to happen, because we have heard in conversations—and it is well known—that the International Court of Justice meets twice a year. If this question was placed on its calendar and taken out of the Council's hands, we should be left on the sidelines for a considerable length of time without knowing exactly what was going to be done. If this question, however important it may be, was placed on the calendar of the International Court of Justice, it might be considered before the end of the century, but we should not know what we were going to do in the meantime. Our Administrations have only us to rely on for an exact idea of the situation, and if we have not understood it, we cannot very well explain it.

186. *The President:* I think this is what will take place. It will be many days before we have the verbatim minutes, but I am going to ask the Secretary General to give first priority to the distribution of the Summary of Discussion for today's meeting, because it is the meeting in which we have had the discussion, voting, and decisions, and we shall have in that the points made by the Representative of India today. So you will have that first and then the Summary of Discussion for Tuesday and Wednesday will be coming out next

week, at the latest on Friday, but this one you are going to have earlier and you will have in it the information you want. I understand, however, that in addition to that the wording of the questions and the results of the voting will be distributed separately today in a flimsy. The Representative of France.

187. *Mr. Agésilas:* I am going to take the liberty of asking another question, which, though a hypothetical one, the Secretariat may be able to answer more easily. Supposing India's Counter-Memorial is received in about 10 days, could the Secretariat give us an indication, even a rough one, of how long it would take to translate and distribute it and when, eventually, the Council would have to meet to deal with the substance of the question? It is an eventuality on which it would perhaps be interesting to have an indication and the Secretariat may be able to give one.

188. *The President:* Yes, that is something the Secretary General can answer, I am sure.

189. *The Secretary General:* The Council realizes that we shall have a verbatim record of these last five meetings and we shall make every effort to publish it in the three languages. We shall need at least three or four weeks for that. To answer the question of the Representative of France, obviously we shall do our best to distribute the Counter-Memorial in the three languages as soon as possible, but when we shall be able to do so will depend on its length—how many pages, if there are attachments, if there are such detailed arguments that it will take quite a time to translate them. I can, however, assure the Council that this question will be given high priority by the Language and Production Services, so that the material will be made available to Council members.

190. *The President:* As far as a Council meeting to consider the matter, I believe it is out of question to think in terms of the month of August. It will not be in August and will probably be even after Labour Day. Unless India makes a very short presentation, late September is the earliest we would be able to do anything. The Representative of India.

191. *Mr. Gidwani:* Mr. President, talking of short presentations, I should be very grateful if in the Summary Record which you are going to give today or tomorrow, as you said, the statement made by me this morning, copies of which I handed to the Secretariat, could be inserted in full. Thank you.

192. *The President:* We will attach it, because it is not normal to include statements *in extenso* in the Summary. The Representative of Belgium.

193. *Mr. Pirson:* I am aware of the difficulties, but I wish the Secretary General would give absolute priority to the distribution of the Summaries. I realize that the minutes proper will take some time. I am thinking particularly of the translation of the Summaries and I hope that we can have them at the beginning of next week at the latest, rather than at the end of next week.

194. *The President:* Well, as far as today's is concerned, yes, it will be available early next week. The other four will be within the week and, as I said before, the last of them will be out by Friday, noon at the latest. Is there anything else on this question? Apparently not, so the Council has completed discussion of this issue and at 2.30 this afternoon we shall meet for consideration of Resolution 39/1.

Annex F

1. NOTE DATED 3 FEBRUARY 1971 FROM THE HIGH COMMISSION OF INDIA IN PAKISTAN TO THE MINISTRY OF FOREIGN AFFAIRS OF THE GOVERNMENT OF PAKISTAN

(See p. 77, supra.)

2. NOTE DATED 4 FEBRUARY 1971 FROM THE HIGH COMMISSION OF INDIA IN PAKISTAN TO THE MINISTRY OF FOREIGN AFFAIRS OF THE GOVERNMENT OF PAKISTAN

(See p. 78, supra.)

Annex G

1. MESSAGE DATED 4 FEBRUARY 1971 FROM MR. N. SAHGAL, SECRETARY TO THE GOVERNMENT OF INDIA, MINISTRY OF TOURISM AND CIVIL AVIATION, TO DR. WALTER BINAGHI, PRESIDENT OF THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

I have the honour to bring to your notice the following incident of hijacking of an Indian aircraft involving detention of passengers and crew and deliberate destruction of the aircraft at Lahore international airport in Pakistan:

> An Indian Airlines Fokker Friendship aircraft VT-DMA whilst operating a scheduled service No. 422-A from Srinagar to Jammu on 30th January 1971 was hijacked at about 1238 hours IST and diverted to Lahore (Pakistan). This act of hijacking was committed by two persons, one of whom entering the cockpit threatened the Pilot with a revolver and the other threatened the passengers with a handgrenade. The aircraft was forced to land at Lahore international airport at 1325 hours IST with 28 passengers and 4 crew as also the two hijackers on board. The aircraft was also carrying considerable quantities of baggage, cargo and mail.

On the afternoon of the same day, as soon as the Indian Civil Aviation authorities learnt of the unlawful seizure and diversion of the aircraft to Lahore, the D.G.C.A. Pakistan was contacted on the telephone and by W/T signal by the D.G.C.A. India. At first the D.G.C.A. Pakistan agreed to facilitate the immediate return of the aircraft, passengers, crew, cargo and mail to India. The same assurance was also conveyed by the High Commissioner of Pakistan in India to the Secretary in the Ministry of External Affairs, Government of India. Messages continued to be sent, through all channels, to D.G.C.A. Pakistan and other concerned authorities for the return and restoration of passengers, crew members, aircraft, baggage, cargo and mail on 30th January, 31st January and on 1st February, 1971. The Pakistan authorities however took the position that whilst the passengers and crew members had been disembarked the two hijackers were still on the aircraft and were threatening to blow it up in case the Pakistani authorities tried to take charge of the aircraft. In the circumstances, the Pakistan authorities claimed that they were unable to make arrangements for the immediate return of the plane but that they would facilitate the return of the passengers and crew members.

On the morning of 31st January 1971, the Indian Civil Aviation authorities offered to send a relief plane and a spare crew to Lahore to bring back the hijacked aircraft and its passengers as well as its crew. At first, the Pakistan authorities agreed that a relief plane from India could be sent but later declined permission urging the ground that demonstrators at Lahore airport would not permit the landing or the take off of the Indian relief plane. Alternatively, the Pakistan authorities were requested to send the Indian passengers and crew members on an Ariana Afghan Airlines aircraft which landed at Lahore at about 2330 hours (IST) on 31st January 1971, but Pakistan turned down this request on the same grounds as above.

On the morning of 1st February 1971, whilst the passengers and crew mem-

bers continued to be detained in Lahore, the Minister of Civil Aviation in India addressed to the Minister in charge of civil aviation, Pakistan, a telegraphic message expressing concern and distress at the prolonged delay in allowing passengers and crew to return to India. The Minister also informed the Pakistan authorities that the Indian relief aircraft with spare crew had been standing-by awaiting clearance from the Pakistan authorities. The Minister of External Affairs, Government of India, addressed a similar message to the Home Minister of Pakistan. Still Pakistan failed to give clearance for the Indian relief plane nor were the crew members of the relief aircraft granted visas for Pakistan by the High Commission of Pakistan in India.

On the afternoon of 1st February 1971, passengers and crew members of the Indian hijacked aircraft were permitted to leave and were brought by road and handed over to the Indian authorities on the India-Pakistan border. They had been in Lahore for a period of two days. Meanwhile, the Indian hijacked aircraft VT-DMA continued to be detained at Lahore international airport. At 2030 hours (IST) on February 2, 1971, the aircraft was blown up and destroyed at the Lahore International Airport within sight nd control of the Pakistan Police, civil and military authorities, and in the .ull view of the press and television cameras. The fire brigade which was at hand took no action until the last minute.

The following factors are significant in this regard: although it was incumbent under international law and usage and custom for the Pakistan Government to have repatriated immediately the stranded passengers and crew, they took more than 48 hours to send them to the Indian-Pakistan border. The passengers and the crew were not allowed to bring their baggage nor were the cargo and mail released. Although the Pakistan Government stated that the hijackers were preventing them from boarding the aircraft and taking it into custody and were brandishing a revolver and a hand grenade to ward them off, the Government of Pakistan announced that they had given them political asylum in Pakistan on the very first day of the landing without disarming them. It is strange that instead of taking the offenders into custory and returning the plane the Government of Pakistan granted political asylum to them.

The Government of India is not aware of any instance in which political asylum has been granted by a country to offenders even when these offenders do not submit to the laws of that country and continue to threaten with firearms and grenades the safety of an international airport, persons and property thereon and on aircraft unlawfully seized from a foreign country. The hijackers were freely permitted to visit by turns the terminal building of Lahore Airport, to put in long-distance calls to accomplices in Pakistan from there and meet various people besides being provided with food and other amenities which alone enabled them to continue their unlawful possession of the aricraft for 3-$^{1}/_{2}$ days against the alleged efforts of the Pakistan authorities. This happened on the apron of the Lahore international Airport in full view of the authorities, troops and police there. Advance arrangements were also made by the Government of Pakistan for the press and T.V. to cover the destruction of the Indian aircraft. This destruction of the aircraft was dramatized on the television network of Pakistan and it was made to appear as if the event was an occasion for celebration. It was alleged by the Pakistan authorities that a large crowd had prevented them from repatriating the crew and passengers to India whereas the fact is that there is strict martial law in Pakistan and it is not possible for crowds to gather or demonstrate without the connivance of the local authorities. In point of fact there were no crowds gathered at the Lahore airport even though some politicians visited the airport. What is more the Airport was

throughout open for all normal traffic including the Ariana flight which landed there on 31st.

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 14th September 1963, Article 9 of the Convention for the Suppression of Unlawful Seizure of Aircraft adopted at The Hague on 16th December 1970. The various resolutions adopted by the International Civil Aviation Organization and the Resolution No. 2645 (XXV) adopted by the General Assembly of the United Nations have all expressed deep concern over acts of hijacking and unlawful interference with international civil aviation and have called upon States to take every appropriate measure to return immediately aircraft, passengers, crew, cargo, mail and baggage whenever an act of unlawful seizure of aircraft takes place. In this case the aircraft was destroyed with the active assistance of the Government of Pakistan. Also the Government of Pakistan detained passengers and crew for two days. Cargo, mail and baggage have not been returned as yet. The Government of India deplores this deliberate act of the Pakistan Government in violation of international law, usage and custom and reserve their right to take such further action as it may deem necessary.

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2. MESSAGE DATED 10 FEBRUARY 1971 FROM MR. N. SAHGAL, SECRETARY TO THE GOVERNMENT OF INDIA, MINISTRY OF TOURISM AND CIVIL AVIATION, TO DR. WALTER BINAGHI, PRESIDENT OF THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

This is further to my message to you, of the 4th February, conveyed through our Representative on the Council of I.C.A.O.

We have not yet received any positive response from the Government of Pakistan regarding action against hijackers and compensation for destruction of our hijacked aircraft at Lahore International Airport in full view of civil and military authorities of Pakistan. Nor have we received from Government of Pakistan any explanation for their affording full facilities and amenities to hijackers resulting in deliberate destruction of our aircraft. Further, we have also not received any explanation of circumstances in which passengers and crew were detained in Pakistan for over 48 hours; despite an Ariana Afghan Airlines flight being available and despite our offer to send relief aircraft with spare crew. We have also received no information about the fate of the baggage, cargo and mail in the hijacked aircraft. Government of Pakistan has not given any assurance that such incidents will be effectively prevented in future. On the contrary, various authoritative pronouncements from Pakistan clearly indicate that, in future also, Government of Pakistan would afford facilities and asylum to hijackers. In these circumstances, and to maintain the con-

fidence of the travelling public and in the interest of our national security, and to protect the safety of aircraft operations, we have been compelled to suspend our flights over Pakistan territory. Pakistan's actions, which are in clear violation of international law, having left us with no other alternative, in the circumstances, it is inconceivable that their aircraft should continue to overfly our territory.

Annex H

CONVENTION ON INTERNATIONAL CIVIL AVIATION [1]

(Signed at Chicago on 7 December 1944)

PREAMBLE

Whereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

Whereas it is desirable to avoid friction and to promote that cooperation between nation and peoples upon which the peace of the world depends;

Therefore, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.

PART I

AIR NAVIGATION

CHAPTER I

General Principles and Application of the Convention

Article 1

Sovereignty

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2

Territory

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

[1] Came into force on 4 April 1947, the thirtieth day after deposit with the Government of the United States of America of the twenty-sixth instrument of ratification thereof or notification of adherence thereto, in accordance with Article 91 *(b)*.

Article 3

Civil and State Aircraft

(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

(c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

Article 4

Misuse of Civil Aviation

Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.

CHAPTER II

Flight over Territory of Contracting States

Article 5

Right of Non-Scheduled Flight

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, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

Article 6

Scheduled Air Services

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Article 7

Cabotage

Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State.

Article 8

Pilotless Aircraft

No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

Article 9

Prohibited Areas

(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 distinction of nationality to aircraft of all other States.

(c) Each contracting State, under such regulations as it may prescribe, may require any aircraft entering the areas contemplated in subparagraphs *(a)* or *(b)* above to effect a landing as soon as practicable thereafter at some designated airport within its territory.

Article 10

Landing at Customs Airport

Except in a case where, under the terms of this Convention or a special authorization, aircraft are permitted to cross the territory of a contracting

State without landing, every aircraft, which enters the territory of a contracting State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination. On departure from the territory of a contracting State, such aircraft shall depart from a similarly designated customs airport. Particulars of all designated customs airports shall be published by the State and transmitted to the International Civil Aviation Organization established under Part II of this Convention for communication to all other contracting States.

Article 11

Applicability of Air Regulations

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.

Article 12

Rules of the Air

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

Article 13

Entry and Clearance Regulations

The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

Article 14

Prevention of Spread of Disease

Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting

States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties.

Article 15

Airport and Similar Charges

Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

Article 16

Search of Aircraft

The appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention.

CHAPTER III

Nationality of Aircraft

Article 17

Nationality of Aircraft

Aircraft have the nationality of the State in which they are registered.

Article 18

Dual Registration

An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

Article 19

National Laws governing Registration

The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.

Article 20

Display of Marks

Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.

Article 21

Report of Registrations

Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State. In addition, each contracting State shall furnish reports to the International Civil Aviation Organization, under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that State and habitually engaged in international air navigation. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting States.

CHAPTER IV

Measures to Facilitate Air Navigation

Article 22

Facilitation of Formalities

Each contracting State agrees to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance.

Article 23

Customs and Immigration Procedures

Each contracting State undertakes, so far as it may find practicable, to establish customs and immigration procedures affecting international air

navigation in accordance with the practices which may be established or recommended from time to time, pursuant to this Convention. Nothing in this Convention shall be construed as preventing the establishment of customs-free airports.

Article 24

Customs Duty

(a) Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. This exemption shall not apply to any quantities or articles unloaded, except in accordance with the customs regulations of the State, which may require that they shall be kept under customs supervision.

(b) Spare parts and equipment imported into the territory of a contracting State for incorporation in or use on an aircraft of another contracting State engaged in international air navigation shall be admitted free of customs duty, subject to compliance with the regulations of the State concerned, which may provide that the articles shall be kept under customs supervision and control.

Article 25

Aircraft in Distress

Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. Each contracting State, when undertaking search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this Convention.

Article 26

Investigation of Accidents

In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State.

Article 27

Exemption from Seizure on Patent Claims

(a) While engaged in international air navigation, any authorized entry of aircraft of a contracting State into the territory of another contracting State or authorized transit across the territory of such State with or without landings shall not entail any seizure or detention of the aircraft or any claim against the owner or operator thereof or any other interference therewith by or on behalf of such State or any person therein, on the ground that the construction, mechanism, parts, accessories or operation of the aircraft is an infringement of any patent, design, or model duly granted or registered in the State whose territory is entered by the aircraft, it being agreed that no deposit of security in connection with the foregoing exemption from seizure or detention of the aircraft shall in any case be required in the State entered by such aircraft.

(b) The provisions of paragraph *(a)* of this Article shall also be applicable to the storage of spare parts and spare equipment for the aircraft and the right to use and install the same in the repair of an aircraft of a contracting State in the territory of any other contracting State, provided that any patented part or equipment so stored shall not be sold or distributed internally in or exported commercially from the contracting State entered by the aircraft.

(c) The benefits of this Article shall apply only to such States, parties to this Convention, as either (1) are parties to the International Convention for the Protection of Industrial Property and to any amendments thereof; or (2) have enacted patent laws which recognize and give adequate protection to inventions made by the nationals of the other States parties to this Convention.

Article 28

Air Navigation Facilities and Standard Systems

Each contracting State undertakes, so far as it may find practicable, to:

(a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;

(b) Adopt and put into operation the appropriate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention;

(c) Collaborate in international measures to secure the publication of aeronautical maps and charts in accordance with standards which may be recommended or established from time to time, pursuant to this Convention.

CHAPTER V

Conditions To Be Fulfilled with Respect to Aircraft

Article 29

Documents Carried in Aircraft

Every aircraft of a contracting State, engaged in international navigation, shall carry the following documents in conformity with the conditions prescribed in this Convention:

(a) Its certificate or registration;
(b) Its certificate of airworthiness;
(c) The appropriate licenses for each member of the crew;
(d) Its journey log book;
(e) If it is equipped with radio apparatus, the aircraft radio station license;
(f) If it carries passengers, a list of their names and places of embarkation and destination;
(g) If it carries cargo, a manifest and detailed declarations of the cargo.

Article 30

Aircraft Radio Equipment

(a) Aircraft of each contracting State may, in or over the territory of other contracting States, carry radio transmitting apparatus only if a license to install and operate such apparatus has been issued by the appropriate authorities of the State in which the aircraft is registered. The use of radio transmitting apparatus in the territory of the contracting State whose territory is flown over shall be in accordance with the regulations prescribed by that State.

(b) Radio transmitting apparatus may be used only by members of the flight crew who are provided with a special license for the purpose, issued by the appropriate authorities of the State in which the aircraft is registered.

Article 31

Certificates of Airworthiness

Every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered.

Article 32

Licenses of Personnel

(a) The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.

(b) Each contracting State reserves the right to refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licenses granted to any of its nationals by another contracting State.

Article 33

Recognition of Certificates and Licenses

Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

Article 34

Journey Log Books

There shall be maintained in respect of every aircraft engaged in international navigation a journey log book in which shall be entered particulars of the aircraft, its crew and of each journey, in such form as may be prescribed from time to time pursuant to this Convention.

Article 35

Cargo Restrictions

(a) No munitions of war or implements of war may be carried in or above the territory of a State in aircraft engaged in international navigation, except by permission of such State. Each State shall determine by regulations what constitutes munitions of war or implements of war for the purposes of this Article, giving due consideration, for the purposes of uniformity, to such recommendations as the International Civil Aviation Organization may from time to time make.

(b) Each contracting State reserves the right, for reasons of public order and safety, to regulate or prohibit the carriage in or above its territory of articles other than those enumerated in paragraph *(a)*: provided that no distinction is made in this respect between its national aircraft engaged in international navigation and the aircraft of the other States so engaged; and provided further that no restriction shall be imposed which may interfere with the carriage and use on aircraft of apparatus necessary for the operation or navigation of the aircraft or the safety of the personnel or passengers.

Article 36

Photographic Apparatus

Each contracting State may prohibit or regulate the use of photographic apparatus in aircraft over its territory.

CHAPTER VI

International Standards and Recommended Practices

Article 37

Adoption of International Standards and Procedures

Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and

organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

(a) Communications systems and air navigation aids, including ground marking;
(b) Characteristics of airports and landing areas;
(c) Rules of the air and air traffic control practices;
(d) Licensing of operating and mechanical personnel;
(e) Airworthiness of aircraft;
(f) Registration and identification of aircraft;
(g) Collection and exchange of meteorological information;
(h) Log books;
(i) Aeronautical maps and charts;
(j) Customs and immigration procedures;
(k) Aircraft in distress and investigation of accidents;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

Article 38

Departures from International Standards and Procedures

Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other States of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.

Article 39

Endorsement of Certificates and Licenses

(a) Any aircraft or part thereof with respect to which there exists an international standard of airworthiness or performance, and which failed in any respect to satisfy that standard at the time of its certification, shall have endorsed on or attached to its airworthiness certificate a complete enumeration of the details in respect of which it so failed.

(b) Any person holding a license who does not satisfy in full the conditions laid down in the international standard relating to the class of license or certificate which he holds shall have endorsed on or attached to his license a

complete enumeration of the particulars in which he does not satisfy such conditions.

Article 40

Validity of Endorsed Certificates and Licenses

No aircraft or personnel having certificates or licenses so endorsed shall participate in international navigation, except with the permission of the State or States whose territory is entered. The registration or use of any such aircraft, or of any certificated aircraft part, in any State other than that in which it was originally certificated shall be at the discretion of the State into which the aircraft or part is imported.

Article 41

Recognition of Existing Standards of Airworthiness

The provisions of this Chapter shall not apply to aircraft and aircraft equipment of types of which the prototype is submitted to the appropriate national authorities for certification prior to a date three years after the date of adoption of an international standard of airworthiness for such equipment.

Article 42

Recognition of Existing Standards of Competency of Personnel

The provisions of this Chapter shall not apply to personnel whose licenses are originally issued prior to a date one year after initial adoption of an international standard of qualification for such personnel; but they shall in any case apply to all personnel whose licenses remain valid five years after the date of adoption of such standard.

PART II

THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Chapter VII

The Organization

Article 43

Name and Composition

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.

Article 44

Objectives

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 economical 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.

Article 45 [1]

Permanent Seat

The permanent seat of the Organization shall be at such place as shall be determined at the final meeting of the Interim Assembly of the Provisional International Civil Aviation Organization set up by the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944. The seat may be temporarily transferred elsewhere by decision of the Council and otherwise than temporarily by decision of the Assembly, such decision to be taken by the number of votes specified by the Assembly. The number of votes so specified will not be less than three-fifths of the total number of contracting States.

Article 46

First Meeting of Assembly

The first meeting of the Assembly shall be summoned by the Interim Council of the above-mentioned Provisional Organization as soon as the Convention has come into force, to meet at a time and place to be decided by the Interim Council.

Article 47

Legal Capacity

The Organization shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. Full

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[1] This is the text of the Article as amended by the Eighth Session of the Assembly on 14 June 1954; it entered into force on 16 May 1958. Under Article 94 *(a)* of the Convention, the amended text is in force in respect of those States which have ratified the amendment. In respect of the States which have not ratified the amendment, the original text is still in force and, therefore, that text is reproduced below:

"The permanent seat of the Organization shall be at such place as shall be determined at the final meeting of the Interim Assembly of the Provisional International Civil Aviation Organization set up by the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944. The seat may be temporarily transferred elsewhere by decision of the Council."

juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned.

CHAPTER VIII

The Assembly

Article 48

Meetings of Assembly and Voting

(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 [1].

(b) All contracting States shall have an equal right to be represented at the meetings of the Assembly and each contracting State shall be entitled to one vote. Delegates representing contracting States may be assisted by technical advisers who may participate in the meetings but shall have no vote.

(c) 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.

Article 49

Powers and Duties of Assembly

The powers and duties of the Assembly shall be to:

(a) Elect at each meeting its President and other officers;

(b) Elect the contracting States to be represented on the Council, in accordance with the provisions of Chapter IX;

(c) Examine and take appropriate action on the reports of the Council and decide on any matter referred to it by the Council;

(d) Determine its own rules of procedure and establish such subsidiary commissions as it may consider to be necessary or desirable;

(e) Vote annual budgets and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII [2].

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[1] This is the text of the Article as amended by the Eighth Session of the Assembly on 14 June 1954; it entered into force on 12 December 1956. Under Article 94 *(a)* of the Convention, the amended text is in force in respect of those States which have ratified the amendment. In respect of the States which have not ratified the amendment, the original text is still in force and, therefore that text is reproduced below:

"*(a)* The Assembly shall meet annually 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."

[2] This is the text of the Article as amended by the Eighth Session of the Assembly on 14 June 1954; it entered into force on 12 December 1956. Under Article 94 *(a)* of the Convention, the amended text is in force in respect of those States which have ratified the amendment. In respect of the States which have not ratified the amendment, the original text is still in force and, therefore, that text is reproduced below:

"*(e)* Vote an annual budget and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII;".

(f) Review expenditures and approve the accounts of the Organization;

(g) Refer, at its discretion, to the Council, to subsidiary commissions, or to any other body any matter within its sphere of action;

(h) Delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time;

(i) Carry out the appropriate provisions of Chapter XIII;

(j) Consider proposals for the modification or amendment of the provisions of this Convention and, if it approves of the proposals, recommend them to the contracting States in accordance with the provisions of Chapter XXI;

(k) Deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.

CHAPTER IX

The Council

Article 50

Composition and Election of Council

(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 [1].

(b) In electing the members of the Council, the Assembly shall give adequate representation to (1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and (3) the States not otherwise included whose designation will insure that all the major geographic areas of the world are represented on the Council. Any vacancy on the Council shall be filled by the Assembly as soon as possible; any contracting State so elected to the Council shall hold office for the unexpired portion of its predecessor's term of office.

(c) No representative of a contracting State on the Council shall be actively associated with the operation of an international air service or financially interested in such a service.

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[1] This is the text of the Article as amended by the Thirteenth (Extraordinary) Session of the Assembly on 19 June 1961; it entered into force on 17 July 1962. Under Article 94 *(a)* of the Convention, the amended text is in force in respect of those States which have ratified the amendment. In respect of the States which have not ratified the amendment, the original text is still in force and, therefore, that text is reproduced below:

"*(a)* The Council shall be a permanent body responsible to the Assembly. It shall be composed of twenty-one 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."

Article 51

President of Council

The Council shall elect its President for a term of three years. He may be reelected. He shall have no vote. The Council shall elect from among its members one or more Vice Presidents who shall retain their right to vote when serving as acting President. The President need not be selected from among the representatives of the members of the Council but, if a representative is elected, his seat shall be deemed vacant and it shall be filled by the State which he represented. The duties of the President shall be to:

(a) Convene meetings of the Council, the Air Transport Committee, and the Air Navigation Commission;

(b) Serve as representative of the Council; and

(c) Carry out on behalf of the Council the functions which the Council assigns to him.

Article 52

Voting in Council

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.

Article 53

Participation Without a Vote

Any contracting State may participate, without a vote, in the consideration by the Council and by its committees and commissions of any question which especially affects its interests. No member of the Council shall vote in the consideration by the Council of a dispute to which it is a party.

Article 54

Mandatory Functions of Council

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 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;

(l) Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken;

(m) Consider recommendations of the Air Navigation Commission for amendment of the Annexes and take action in accordance with the provisions of Chapter XX;

(n) Consider any matter relating to the Convention which any contracting State refers to it.

Article 55

Permissive Functions of Council

The Council may:

(a) Where appropriate and as experience may show to be desirable, create subordinate air transport commissions on a regional or other basis and define groups of States or airlines with or through which it may deal to facilitate the carrying out of the aims of this Convention;

(b) Delegate to the Air Navigation Commission duties additional to those set forth in the Convention and revoke or modify such delegations of authority at any time;

(c) Conduct research into all aspects of air transport and air navigation which are of international importance, communicate the results of its research to the contracting States, and facilitate the exchange of information between contracting States on air transport and air navigation matters;

(d) Study any matters affecting the organization and operation of international air transport, including the international ownership and operation of international air services on trunk routes, and submit to the Assembly plans in relation thereto;

(e) Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.

CHAPTER X

The Air Navigation Commission

Article 56

Nomination and Appointment of Commission

The Air Navigation Commission shall be composed of twelve members

appointed by the Council from among persons nominated by contracting States. These persons shall have suitable qualifications and experience in the science and practice of aeronautics. The Council shall request all contracting States to submit nominations. The President of the Air Navigation Commission shall be appointed by the Council.

Article 57

Duties of Commission

The Air Navigation Commission shall:

(a) Consider, and recommend to the Council for adoption, modifications of the Annexes to this Convention;

(b) Establish technical subcommissions on which any contracting State may be represented, if it so desires;

(c) Advise the Council concerning the collection and communication to the contracting States of all information which it considers necessary and useful for the advancement of air navigation.

CHAPTER XI

Personnel

Article 58

Appointment of Personnel

Subject to any rules laid down by the Assembly and to the provisions of this Convention, the Council shall determine the method of appointment and of termination of appointment, the training, and the salaries, allowances, and conditions of service of the Secretary General and other personnel of the Organization, and may employ or make use of the services of nationals of any contracting State.

Article 59

International Character of Personnel

The President of the Council, the Secretary General, and other personnel shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organization. Each contracting State undertakes fully to respect the international character of the responsibilities of the personnel and not to seek to influence any of its nationals in the discharge of their responsibilities.

Article 60

Immunities and Privileges of Personnel

Each contracting State undertakes, so far as possible under its constitutional procedure, to accord to the President of the Council, the Secretary General, and the other personnel of the Organization, the immunities and privileges which are accorded to corresponding personnel of other public international organizations. If a general international agreement on the immunities and privileges of international civil servants is arrived at, the

immunities and privileges accorded to the President, the Secretary General, and the other personnel of the Organization shall be the immunities and privileges accorded under that general international agreement.

CHAPTER XII

Finance

Article 61 [1]

Budget and Apportionment of Expenses

The Council shall submit to the Assembly annual budgets, annual statements of accounts and estimates of all receipts and expenditures. The Assembly shall vote the budgets with whatever modification it sees fit to prescribe, and, *with the exception of assessments under Chapter XV* to States consenting thereto, shall apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine.

Article 62

Suspension of Voting Power

The Assembly may suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organization.

Article 63

Expenses of Delegations and Other Representatives

Each contracting State shall bear the expenses of its own delegation to the Assembly and the remuneration, travel, and other expenses of any person whom it appoints to serve on the Council, and of its nominees or representatives on any subsidiary committees or commissions of the Organization.

CHAPTER XIII

Other International Arrangements

Article 64

Security Arrangements

The Organization may, with respect to air matters within its competence directly affecting world security, by vote of the Assembly enter into appro-

[1] This is the text of the Article as amended by the Eighth Session of the Assembly on 14 June 1954; it entered into force on 12 December 1956. Under Article 94 *(a)* of the Convention, the amended text is in force in respect of those States which have ratified the amendment. In respect of the States which have not ratified the amendment, the original text is still in force and, therefore, that text is reproduced below:

"The Council shall submit to the Assembly an annual budget, annual statements of accounts and estimates of all receipts and expenditures. The Assembly shall vote the budget with whatever modification it sees fit to prescribe, and, with the exception of assessments under Chapter XV to States consenting thereto, shall apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine."

priate arrangements with any general organization set up by the nations of the world to preserve peace.

Article 65

Arrangements with Other International Bodies

The Council, on behalf of the Organization, may enter into agreements with other international bodies for the maintenance of common services and for common arrangements concerning personnel and, with the approval of the Assembly, may enter into such other arrangements as may facilitate the work of the Organization.

Article 66

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 of 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.

PART III

INTERNATIONAL AIR TRANSPORT

CHAPTER XIV

Information and Reports

Article 67

File Reports with Council

Each contracting State undertakes that its international airlines shall, in accordance with requirements laid down by the Council, file with the Council traffic reports, cost statistics and financial statements showing among other things all receipts and the sources thereof.

CHAPTER XV

Airports and Other Air Navigation Facilities

Article 68

Designation of Routes and Airports

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.

Article 69

Improvement of Air Navigation Facilities

If the Council is of the opinion that the airports or other air navigation facilities, including radio and meteorological services, of a contracting State are not reasonably adequate for the safe, regular, efficient, and economical operation of international air services, present or contemplated, the Council shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose. No contracting State shall be guilty of an infraction of this Convention if it fails to carry out these recommendations.

Article 70

Financing of Air Navigation Facilities

A contracting State, in the circumstances arising under the provisions of Article 69, may conclude an arrangement with the Council for giving effect to such recommendations. The State may elect to bear all of the costs involved in any such arrangement. If the State does not so elect, the Council may agree, at the request of the State, to provide for all or a portion of the costs.

Article 71

Provision and Maintenace of Facilities by Council

If a contracting State so requests, the Council may agree to provide, man, maintain, and administer any or all of the airports and other air navigation facilities including radio and meteorological services, required in its territory for the safe, regular, efficient and economical operation of the international air services of the other contracting States, and may specify just and reasonable charges for the use of the facilities provided.

Article 72

Acquisition or Use of Land

Where land is needed for facilities financed in whole or in part by the Council at the request of a contracting State, that State shall either provide the land itself, retaining title if it wishes, or facilitate the use of the land by the Council on just and reasonable terms and in accordance with the laws of the State concerned.

Article 73

Expenditure and Assessment of Funds

Within the limit of the funds which may be made available to it by the Assembly under Chapter XII, the Council may make current expenditures for the purposes of this Chapter from the general funds of the Organization. The Council shall assess the capital funds required for the purposes of this Chapter in previously agreed proportions over a reasonable period of time to the contracting States consenting thereto whose airlines use the facilities. The Council may also assess to States that consent any working funds that are required.

Article 74

Technical Assistance and Utilization of Revenues

When the Council, at the request of a contracting State, advances funds or provides airports or other facilities in whole or in part, the arrangement may provide, with the consent of that State, for technical assistance in the supervision and operation of the airports and other facilities, and for the payment, from the revenues derived from the operation of the airports and other facilities, of the operating expenses of the airports and the other facilities, and of interest and amortization charges.

Article 75

Taking over of Facilities from Council

A contracting State may at any time discharge any obligation into which it has entered under Article 70, and take over airports and other facilities which the Council has provided in its territory pursuant to the provisions of Articles 71 and 72, by paying to the Council an amount which in the opinion of the Council is reasonable in the circumstances. If the State considers that the amount fixed by the Council is unreasonable it may appeal to the Assembly against the decision of the Council and the Assembly may confirm or amend the decision of the Council.

Article 76

Return of Funds

Funds obtained by the Council through reimbursement under Article 75 and from receipts of interest and amortization payments under Article 74 shall, in the case of advances originally financed by States under Article 73, be returned to the States which were originally assessed in the proportion of their assessments, as determined by the Council.

CHAPTER XVI

Joint Operating Organizations and Pooled Services

Article 77

Joint Operating Organizations Permitted

Nothing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Convention, including those relating to the registration of agreements with the Council. The Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.

Article 78

Function of Council

The Council may suggest to contracting States concerned that they form joint organizations to operate air services on any routes or in any regions.

Article 79

Participation in Operating Organizations

A State may participate in joint operating organizations or in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole discretion of the State concerned, be state-owned or partly state-owned or privately owned.

PART IV

FINAL PROVISIONS

CHAPTER XVII

Other Aeronautical Agreements and Arrangements

Article 80

Paris and Habana Conventions

Each contracting State undertakes, immediately upon the coming into force of this Convention, to give notice of denunciation of the Convention relating to the Regulation of Aerial Navigation signed at Paris on October 13, 1919 or the Convention on Commercial Aviation signed at Habana on February 20, 1928, if it is a party to either. As between contracting States, this Convention supersedes the Conventions of Paris and Habana previously referred to.

Article 81

Registration of Existing Agreements

All aeronautical agreements which are in existence on the coming into force of this Convention, and which are between a contracting State and any other State or between an airline of a contracting State and any other State or the airline of any other State, shall be forthwith registered with the Council.

Article 82

Abrogation of Inconsistent Arrangements

The Contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. A contracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention.

Article 83

Registration of New Arrangements

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

CHAPTER XVIII

Disputes and Default

Article 84

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.

Article 85

Arbitration Procedure

If any contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting States parties to the dispute shall name a single arbitrator who shall name an umpire. If either contracting State party to the dispute fails to name an arbitrator within a period of three months from the date of the appeal, an arbitrator shall be named on behalf of that State by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council shall designate an umpire from the list previously referred to. The arbitrators and the umpire shall then jointly constitute an arbitral tribunal. Any arbitral tribunal established under this or the preceding Article shall settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive.

Article 86

Appeals

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. On any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding.

Article 87

Penalty for Non-Conformity of Airline

Each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article.

Article 88

Penalty for Non-Conformity by State

The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter.

CHAPTER XIX

War

Article 89

War and Emergency Conditions

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

CHAPTER XX

Annexes

Article 90

Adoption and Amendment of Annexes

(a) The adoption by the Council of the Annexes described in Article 54, subparagraph *(l)*, shall require the vote of two-thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each contracting State. Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council.

(b) The Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto.

CHAPTER XXI

Ratifications, Adherences, Amendments, and Denunciations

Article 91

Ratification of Convention

(a) This Convention shall be subject to ratification by the signatory States. The instruments of ratification shall be deposited in the archives of the Government of the United States of America, which shall give notice of the date of the deposit to each of the signatory and adhering States.

(b) As soon as this Convention has been ratified or adhered to by twenty-six States it shall come into force between them on the thirtieth day after deposit of the twenty-sixth instrument. It shall come into force for each State ratifying thereafter on the thirtieth day after the deposit of its instrument of ratification.

(c) It shall be the duty of the Government of the United States of America to notify the government of each of the signatory and adhering States of the date on which this Convention comes into force.

Article 92

Adherence to Convention

(a) This Convention shall be open for adherence by members of the United Nations and States associated with them, and States which remained neutral during the present world conflict.

(b) Adherence shall be effected by a notification addressed to the Government of the United States of America and shall take effect as from the thirtieth day from the receipt of the notification by the Government of the United States of America, which shall notify all the contracting States.

Article 93

Admission of Other States

States other than those provided for in Articles 91 and 92 *(a)* may, subject to approval by any general international organization set up by the nations of the world to preserve peace, be admitted to participation in this Convention by means of a four-fifths vote of the Assembly and on such conditions as the Assembly may prescribe: provided that in each case the assent of any State invaded or attacked during the present war by the State seeking admission shall be necessary.

Article 93 *bis*[1]

(a) Notwithstanding the provisions of Articles 91, 92 and 93 above:

(1) A State whose government the General Assembly of the United Nations has recommended be debarred from membership in international agencies established by or brought into relationship with the United

[1] On 27 May 1947 the Assembly decided to amend the Chicago Convention by introducing Article 93 *bis*. Under Article 94 *(a)* of the Convention the amendment came into force on 20 March 1961 in respect of States which ratified it.

Nations shall automatically cease to be a member of the International Civil Aviation Organization;

(2) A State which has been expelled from membership in the United Nations shall automatically cease to be a member of the International Civil Aviation Organization unless the General Assembly of the United Nations attaches to its act of expulsion a recommendation to the contrary.

(b) A State which ceases to be a member of the International Civil Aviation Organization as a result of the provisions of paragraph *(a)* above may, after approval by the General Assembly of the United Nations, be readmitted to the International Civil Aviation Organization upon application and upon approval by a majority of the Council.

(c) Members of the Organization which are suspended from the exercise of the rights and privileges of membership in the United Nations shall, upon the request of the latter, be suspended from the rights and privileges of membership in this Organization.

Article 94

Amendment of Convention

(a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.

(b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention.

Article 95

Denunciation of Convention

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

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

CHAPTER XXII

Definitions

Article 96

For the purpose of this Convention the expression:

(a) "Air service" means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

(b) "International air service" means an air service which passes through the air space over the territory of more than one State.

(c) "Airline" means any air transport enterprise offering or operating an international air service.

(d) "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, cargo or mail.

SIGNATURE OF CONVENTION

In witness whereof, the undersigned plenipotentiaries, having been duly authorized, sign this Convention on behalf of their respective governments on the dates appearing opposite their signatures.

Done at Chicago the seventh day of December 1944, in the English language. A text drawn up in the English, French and Spanish languages, each of which shall be of equal authenticity, shall be open for signature at Washington, D.C. Both texts shall be deposited in the archives of the Government of the United States of America, and certified copies shall be transmitted by that Government to the governments of all the States which may sign or adhere to this Convention.

Annex I

INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT

Signed at Chicago, on 7 December 1944

The States which sign and accept this International Air Services Transit Agreement, being members of the International Civil Aviation Organization, declare as follows:

ARTICLE I

Section 1

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.

Section 2

The exercise of the foregoing privileges shall be in accordance with the provisions of the Interim Agreement on International Civil Aviation and, when it comes into force, with the provisions of the Convention on International Civil Aviation, both drawn up at Chicago on December 7, 1944.

Section 3

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.

Such requirement shall not involve any discrimination between airlines operating on the same route, shall take into account the capacity of the aircraft, and shall be exercised in such a manner as not to prejudice the normal operations of the international air services concerned or the rights and obligations of a contracting State.

Section 4

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; these charges shall not

be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council of the International Civil Aviation Organization established under the above-mentioned Convention, which shall report and make recommendations thereon for the consideration of the State or States concerned.

Section 5

Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement.

Article II

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 supend 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.

Section 2

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 disgreement relating to the interpretation or application of the above-mentioned Convention.

Article III

This Agreement shall remain in force as long as the above-mentioned Convention; provided, however, that any contracting State, a party to the present Agreement, may denounce it on one year's notice given by it to the Government of the United States of America, which shall at once inform all other contracting States of such notice and withdrawal.

ARTICLE IV

Pending the coming into force of the above-mentioned Convention, all references to it herein, other than those contained in Article II, Section 2, and Article V, shall be deemed to be references to the Interim Agreement on International Civil Aviation drawn up at Chicago on December 7, 1944; and references to the International Civil Aviation Organization, the Assembly, and the Council shall be deemed to be references to the Provisional International Civil Aviation Organization, the Interim Assembly, and Interim Council respectively.

ARTICLE V

For the purposes of this Agreement, "territory" shall be defined as in Article 2 of the above-mentioned Convention.

ARTICLE VI

Signatures and Acceptances of Agreement

The undersigned delegates to the International Civil Aviation Conference, convened in Chicago on November 1, 1944, have affixed their signatures to this Agreement with the understanding that the Government of the United States of America shall be informed at the earliest possible date by each of the governments on whose behalf the Agreement has been signed whether signature on its behalf shall constitute an acceptance of the Agreement by that government and an obligation binding upon it.

Any State a member of the International Civil Aviation Organization may accept the present Agreement as an obligation binding upon it by notification of its acceptance to the Government of the United States, and such acceptance shall become effective upon the date of the receipt of such notification by that Government.

This Agreement shall come into force as between contracting States upon its acceptance by each of them. Thereafter it shall become binding as to each other State indicating its acceptance to the Government of the United States on the date of the receipt of the acceptance by that Government. The Government of the United States shall inform all signatory and accepting States of the date of all acceptances of the Agreement, and of the date on which it comes into force for each accepting State.

In witness whereof, the undersigned, having been duly authorized, sign this Agreement on behalf of their respective governments on the dates appearing opposite their respective signatures.

Done at Chicago the seventh day of December, 1944, in the English language. A text drawn up in the English, French, and Spanish languages, each of which shall be of equal authenticity [1], shall be opened for signature at Washington, D.C. Both texts shall be deposited in the archives of the Government of the United States of America, and certified copies shall be transmitted by that Government to the governments of all the States which may sign or accept this Agreement.

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[1] The Agreement was signed in the English original version formulated at the International Civil Aviation Conference which took place at Chicago from 1 November to 7 December 1944. No trilingual text has been opened for signature as provided for in the Agreement.

Annex J

RULES FOR THE SETTLEMENT OF DIFFERENCES

Approved by the Council on 9 April 1957

CHAPTER I

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).

(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).

PART I

CHAPTER II

DISAGREEMENTS

Article 2

Any Contracting State submitting a disagreement to the Council for settlement (hereinafter referred to as "the applicant") shall file an application to which shall be attached a memorial containing:

(a) The name of the applicant and the name of any Contracting State with which the disagreement exists (the latter hereinafter referred to as "the respondent");

(b) The name of an agent authorized to act for the applicant in the proceedings, together with his address, at the seat of the Organization, to which all communications relating to the case, including notice of the date of any meeting, should be sent;

(c) A statement of relevant facts;

(d) Supporting data related to the facts;

(e) A statement of law;

(f) The relief desired by action of Council on the specific points submitted;

(g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful.

CHAPTER III

ACTION UPON RECEIPT OF APPLICATIONS

Article 3

Action by Secretary General

(1) Upon receipt of an application, the Secretary General shall:

(a) Verify that it complies in form with the requirements of Article 2, and, if necessary, require the applicant to supply any deficiencies appearing therein;

(b) Immediately thereafter notify all parties to the instrument the interpretation or application of which is in question, as well as all Members of the Council, that the application has been received;

(c) Forward copies of the application and of the supporting documentation to the respondent, with an invitation to file a counter-memorial within a time-limit fixed by the Council.

(2) Copies of all subsequent pleadings or other documents submitted by a party to the Council shall similarly be forwarded by the Secretary General to the other party or parties in the case.

Article 4

Counter-Memorial

(1) The counter-memorial shall contain:

(a) The name of an agent authorized to act for the respondent in the proceedings, together with his address, at the seat of the Organization, to which all communications relating to the case, including notice of the date of any meeting, should be sent;

(b) Answer to points raised in the applicant's memorial under Article 2 *(c)* to *(g)*;

(c) Any additional facts and supporting data;

(d) Statement of law.

(2) In the counter-memorial there may be presented a counter-claim directly connected with the subject-matter of the application provided it comes within the jurisdiction of the Council. The Council shall, after hearing the parties, direct whether or not the question thus presented shall be joined to the original proceedings.

Article 5

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 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, 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 as a preliminary issue before any further steps are taken under these Rules.

Article 6

Action of Council on Procedure

(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.

(2) If it is decided not to invite direct negotiations at this stage, without prejudice to a later invitation as provided in Article 14, the Council shall decide which procedure under these Rules is applicable. Unless the Council decides to undertake the preliminary examination of the matter itself, it shall appoint a Committee (hereinafter referred to as "the Committee") of five individuals who shall be Representatives on the Council of Member States not concerned in the disagreement, and shall designate one of them as Chairman.

(3) The decisions under (2), in cases where negotiations are invited, may be postponed until the parties have either refused to enter into negotiations or reported that the negotiations have failed to solve the dispute.

CHAPTER IV

PROCEEDINGS

Article 7

Written Proceedings

(1) The additional pleadings which may be filed by the parties shall consist of:

Reply to be filed by the applicant,
Rejoinder to be filed by the respondent.

(2) The pleadings shall be filed with the Secretary General within time-limits fixed.

(3) There shall be annexed to every pleading, copies or originals of all the relevant documents which the party filing the pleading may wish to have considered.

(4) After the filing of the last pleading, save in the case of the submission of written evidence pursuant to Article 9 or of observations in writing pursuant to Article 19 (5), no further documents may be submitted by any party except with the consent of the other party or by permission of the Council granted after hearing the parties.

Article 8

Investigations by Council

(1) The Council may at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion. In such cases it shall define the subject of enquiry or expert opinion and prescribe the procedure to be followed.

(2) A report incorporating the results of the investigation, together with the record of the enquiry and any expert opinion, shall be submitted to the Council in such form, if any, as the Council may have prescribed, and shall be communicated to the parties.

Article 9

Evidence

If the parties should desire to produce evidence in addition to any evidence produced with the pleadings, such evidence, including testimony of witnesses and experts, shall be submitted in writing, within a time-limit fixed by the Council, but on special application the Council may agree to receive oral testimony. The Council may also request the parties to call witnesses or experts to give testimony before it at an oral hearing.

Article 10

Declaration by Witnesses and Experts

(1) The testimony of a witness shall be verified by the following declaration:

"I solemnly declare upon my honour and conscience that my testimony contains the truth, the whole truth and nothing but the truth."

(2) The statement of an expert shall be verified by the following declaration:

"I solemnly declare upon my honour and conscience that my statement is in accordance with my sincere belief."

Article 11

Questions

At the oral hearing, any Member of the Council not a party to the dispute may put questions, through the President, to the agents of the parties or to any counsel or advocate appearing for them. Such questions, if any, may be answered immediately or at a later date to be fixed by the Council.

Article 12

Arguments

(1) Upon completion of the evidence, and after a reasonable period for preparation by the parties, they may present arguments to the Council within time-limits fixed by it.

(2) The final arguments shall be in writing, but oral arguments may be admitted at the discretion of the Council.

Article 13

Procedure before the Committee

(1) If under Article 6 of the present Rules a Committee has been appointed, it shall, on behalf of the Council, receive and examine all documents submitted in accordance with these Rules and, in its discretion, hear evidence or oral arguments, and generally deal with the case with a view to action being taken by the Council under Article 15. The procedures governing the examination of the case by the Committee shall be those prescribed for the Council when it examines the matter itself. While the Committee has charge of the proceedings, the functions of the President of the Council under these Rules shall be exercised by the Chairman of the Committee.

(2) Thereafter the Committee shall, without undue delay, present to the Council a report which shall be a part of the record of the proceedings. The report shall include a summary of the evidence and other matters on record and the findings of facts and the recommendations of the Committee.

(3) The Council shall cause a copy of the report of the Committee to be delivered to each party in the case and each of the parties may, within a time-limit fixed by the Council, submit to the Council its written observations on the said report or, if permitted by the Council, its oral observations.

(4) When considering the report of the Committee, the Council may make such further enquiries as it may think fit or obtain additional evidence.

Article 14

Negotiations during Proceedings

(1) The Council may, at any time during the proceedings and prior to the meeting at which the decision is rendered as provided in Article 15 (4), invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiations have not been exhausted.

(2) If the parties accept the invitation to negotiate, the Council may set a time-limit for the completion of such negotiations, during which other proceedings on the merits shall be suspended.

(3) Subject to the consent of the parties concerned, the Council may render any assistance likely to further the negotiations, including the designation of an individual or a group of individuals to act as conciliator during the negotiations.

(4) Any solution agreed through negotiations shall be recorded by Council. If no solution is found the parties shall so report to Council and the suspended proceedings shall be resumed.

Article 15

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.

(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 of 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.

Article 16

Default of Appearance or in Defending

(1) If one of the parties does not appear before the Council or the Committee, if any, set up under Article 6, or fails to defend its case, the other party may call upon the Council to decide in favour of its claim.

(2) The Council must, before doing so, satisfy itself not only that it has jurisdiction in the matter but also that the claim is well founded in fact and law.

Article 17

Discontinuance

(1) If in the course of the proceedings the applicant informs the Council in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Secretary General, the respondent has not yet taken any step in the proceedings, the Council, or its President if the Council is not in session, will officially record the discontinuance of the proceedings, and the Secretary General shall inform the respondent accordingly.

(2) If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Council, or its President if the Council is not sitting, shall fix a time-limit within which the respondent must state whether it objects to the discontinuance of the proceedings. If no objection is so made, acquiescence will be presumed and the Council, or its President if the Council is not sitting, will officially record the discontinuance of the proceedings. If objection is made, the proceedings shall continue.

Article 18

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.

Article 19

Intervention

(1) Any State which is a party to the particular instrument, the interpretation or application of which has been made the subject of a dispute under these Rules, and which is directly affected by the dispute, has the right to intervene in the proceedings, but if it uses this right it shall undertake that the decision of the Council will be equally binding upon it.

(2) Any State which desires to intervene in a disagreement shall forthwith file a declaration to that effect with the Secretary General.

(3) Such declaration shall be communicated to the parties to the instrument concerned. If within a month of the despatch of this communication, any objection has been notified to the Secretary General with respect to the admissibility of an intervention under paragraph (1) of this Article, the decision shall rest with the Council.

(4) If no objection has been notified within the above-mentioned period or if the Council decides in favour of the admissibility of an intervention, as the case may be, the Secretary General shall take the necessary steps to make the documents of the case available to the intervening party who may file a memorial within a time-limit to be fixed by the Council, in no event later than the date fixed for the filing of the last pleading referred to in Article 7 (4).

(5) Any such memorial shall be communicated to the other parties to the disagreement who shall send to the Secretary General their observations in writing within a time-limit to be fixed by the Council. The memorial and observations may be discussed by the parties in the course of the subsequent proceedings in which the intervening party shall take part.

Article 20

Dismissal of Proceedings

(1) *(a)* If at any time before a decision is reached the parties conclude an agreement for the settlement of the dispute, or agree to discontinue the proceedings, they shall so inform the Council in writing. The Council shall then officially record the conclusion of the settlement or the discontinuance of the proceedings.

(b) In the event that the original parties to a dispute conclude such an agreement, the Council shall terminate the proceedings notwithstanding the fact that additional parties have intervened. This provision does not affect the right of an intervening party to file an application on its own behalf respecting the subject-matter of the original dispute.

(2) In case the termination of the proceedings is pursuant to a settlement between the parties, the terms of the settlement shall be transmitted to the President of the Council and he shall communicate such terms to all States previously notified under Article 3 (1) *(b)*.

PART II

CHAPTER V

COMPLAINTS

Article 21

Form of Request

Any Contracting State submitting a complaint to the Council regarding a situation defined in Article 1 (2) of these Rules shall file a request to which shall be attached a memorial containing the same particulars as in the case of an application submitted under Article 2.

Article 22

Action upon Receipt of Requests

Article 3 (1) *(a)* and *(c)*, 4 and 5 of Chapter III of Part I *(Action upon receipt of Applications)* shall apply correspondingly to a request submitted under the preceding Article.

Article 23

Appointment of Committee

(1) Upon the filing of the counter-memorial the Council shall meet and formally decide whether the matter falls under the category of complaints under the provisions listed in Article 1 (2).

(2) The Council shall, if the answer under (1) is in the affirmative, appoint a Committee composed as the Committee described in Article 6 (2) of these Rules.

Article 24

Proceedings before Committee

(1) The Committee shall thereupon inquire into the matter on behalf of the Council and shall call the States concerned into consultation.

(2) The Committee shall arrange the procedures for the consultation as far as possible in agreement with the parties, and on an informal basis in accordance with the circumstances of each case. It may request additional information and summon representatives of the parties to meet with the Committee at the seat of the Organization or in any other place.

Article 25

Report of Committee

(1) The Committee shall report to Council on the outcome of the consultation held as expeditiously as possible.

(2) If the consultation has failed to resolve the difficulty the report may include proposed findings and recommendations to the States concerned.

Article 26

Council Action

(1) After receiving the report of the Committee the Council shall consider it.

(2) If a settlement has been reached through consultation the terms of the settlement shall be recorded and communicated to all States notified of the proceedings.

(3) If consultation has failed to resolve the difficulty the Council may make appropriate findings and recommendations to the States concerned. Article 15 shall apply, *mutatis mutandis*, in this case.

PART III

CHAPTER VI

GENERAL PROVISIONS

Article 27

Agents

(1) A State which becomes a party to the proceedings on disagreements or complaints under these Rules shall name an agent authorized to represent it and to act for it in the proceedings, provided that a Representative on the Council of any Member State shall not be nominated as an agent.

(2) The agent may have the assistance of counsel or advocates. The name of any assisting counsel or advocate shall be communicated to the Council in advance of any meeting where he will be present.

(3) The agents shall be invited to attend any meeting convened to discuss the case.

Article 28

Procedural Measures

(1) The Council shall determine the time-limits to be applied, and other procedural questions related to the proceedings. Any time-limit fixed pursuant to these Rules shall be so fixed as to avoid any possible delays and to ensure fair treatment of the party or parties concerned.

(2) The Council may at any time extend any time-limit that has been fixed under these Rules, either at the request of any of the parties or at its own discretion. It may also in special circumstances and after hearing objections from any party, decide that any step taken after the expiration of a time-limit shall be considered as valid.

(3) In respect of fixing or extending a time-limit under these Rules, the President of the Council shall act on behalf of the Council when it is not in session.

Article 29

Languages

(1) A party may make its submissions, written or oral, in any of the three official languages of the Organization and, at the request of any of the other

parties, these shall be translated into each of the other languages under arrangements to be made by the Secretary General. The Council may at the request of any party authorize another language to be used by that party, in which case the necessary arrangements for translation shall be made by the party concerned.

(2) The text of the decision of the Council in case of a disagreement, or its findings and recommendations in case of a complaint, shall be rendered in the three official languages, and each of such texts shall be of equal authenticity unless all the parties agree that any of the texts shall be considered as the authentic one.

Article 30

Records and Publicity

(1) The Secretary General shall keep a full record of the proceedings.

(2) A verbatim transcript shall be made of any oral testimony and any oral arguments and incorporated into the record of the proceedings.

(3) The record of the proceedings shall, unless otherwise ordered by the Council, be open to the public. The Council may open to the public any part of the record previously ordered to be withheld from the public.

Article 31

Costs

(1) Unless otherwise decided by the Council, each party shall bear its own costs.

(2) All other costs may be assessed to the parties in proportions fixed by the Council.

Article 32

Suspension of the Rules

Subject to agreement of the parties, any of these Rules may be varied or their application suspended when, in the opinion of the Council, such action would lead to a more expeditious or effective disposition of the case.

Article 33

Amendments to the Rules

The present Rules may, at any time, be amended by the Council. No amendment shall apply to a pending case except with the agreement of the parties.

Annex K

RESOLUTIONS OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

1. Resolutions of the Assembly

(a) RESOLUTION A1-23

(See p. 51, supra*)*

(b) RESOLUTION ON UNLAWFUL SEIZURE OF AIRCRAFT ADOPTED BY THE ICAO ASSEMBLY AT ITS SIXTEENTH SESSION

(Buenos Aires, 3-26 September 1968)

A16-37: Unlawful Seizure of Civil Aircraft

Whereas unlawful seizure of civil aircraft has a serious adverse effect on the safety, efficiency and regularity of air navigation;

The Assembly,

Noting that Article 11 of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft provides certain remedies for the situation envisaged;

Being of the opinion, however, that this Article does not provide a complete remedy,

1. *Urges* all States to become parties as soon as possible to the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft;
2. *Invites* States, even before ratification of, or adherence to, the Tokyo Convention, to give effect to the principles of Article 11 of that Convention; and
3. *Requests* the Council, at the earliest possible date, to institute a study of other measures to cope with the problem of unlawful seizure.

(c) DECLARATION BY THE ASSEMBLY

A17-1: Declaration by the Assembly

Whereas international civil air transport helps to create and preserve friendship and understanding among the peoples of the world and promotes commerce between nations;

Whereas acts of violence directed against international civil air transport and airports and other facilities used by such air transport jeopardize the safety thereof, seriously affect the operation of international air services and undermine the confidence of the peoples of the world in the safety of international civil air transport; and

Whereas Contracting States, noting the increasing number of acts of violence against international air transport, are gravely concerned with the safety and security of such air transport;

The Assembly,

Condemns all acts of violence which may be directed against aircraft, aircraft crews and passengers engaged in international civil air transport;

Condemns all acts of violence which may be directed against civil aviation personnel, civil airports and other facilities used by international civil air transport;

Urgently

Calls upon States not to have recourse, under any circumstances, to acts of violence directed against international civil air transport and airports and other facilities serving such transport;

Urgently

Calls upon States, pending the coming into force of appropriate international conventions, to take effective measures to deter and prevent such acts and to ensure, in accordance with their national laws, the prosecution of those who commit such acts;

Adopts the following Declaration:

The Assembly of the International Civil Aviation Organization,

Meeting in Extraordinary Session to deal with the alarming increase in acts of unlawful seizure and of violence against international civil air transport aircraft, civil airport installations and related facilities;

Mindful of the principles enunciated in the Convention on International Civil Aviation;

Recognizing the urgent need to use all of the Organization's resources to prevent and deter such acts;

Solemnly

1. Deplores acts which undermine the confidence placed in air transport by the peoples of the world.
2. Expresses regret for the loss of life and injury and damage to important economic resources caused by such acts.
3. Condemns all acts of violence which may be directed against aircraft, crews and passengers engaged in, and against civil aviation personnel, civil airports and other facilities used by, international civil air transport.
4. Recognizes the urgent need for a consensus among States in order to secure widespread international co-operation in the interests of the safety of international civil air transport.
5. Requests concerted action on the part of States towards suppressing all acts which jeopardize the safe and orderly development of international civil air transport.
6. Requests application, as soon as possible, of the decisions and recommendations of this Assembly so as to prevent and deter such acts.

(d) Measures Recommended for Adoption to Alleviate the Consequences of an Unlawful Seizure

A17-5

Whereas it is desirable that measures be recommended for adoption by States in order to alleviate the consequences of an unlawful seizure of aircraft;

The Assembly recommends that:

(1) States should take all appropriate measures to restore control of an unlawfully diverted aircraft to its lawful commander or to preserve his control of the aircraft and to return, as soon as practicable, the aircraft and its cargo to the persons lawfully entitled to possession;
(2) States should permit the passengers and crew of an unlawfully diverted aircraft to continue their journey on the same aircraft without delay or as soon as arrangements can be made for other transportation in the event the unlawfully diverted aircraft is unserviceable;
(3) States should develop and utilize measures for the safety and care of passengers and crew of unlawfully diverted aircraft until their journey can be continued;
(4) States should adopt measures for the notification to the State of registry of an unlawfully diverted aircraft when such aircraft has landed in their territory;
(5) When a State has taken into custody any person suspected of committing an unlawful diversion of an aircraft in flight, it should immediately notify the State of nationality of that person, the State of registry of the aircraft and, if it considers it advisable, any other interested States of the fact that such person is in custody;
(6) The State of registry of an unlawfully diverted aircraft, the State of nationality of a person taken into custody on suspicion of having committed the unlawful diversion, and any other interested State should supply expeditiously to the State of landing any relevant information which is available regarding the person taken into custody;
(7) Without prejudice to its obligations under paragraphs 1 and 2 hereof, the State of landing, in accordance with its national law, should inquire into the aeronautical aspects of the act of unlawful diversion and dispatch its findings to the State of registry and to the Council of the International Civil Aviation Organization as soon as it is possible to do so;
(8) The State of registry of an aircraft which has been unlawfully diverted should, in accordance with its national law, forward, as soon as practicable, a report on the aeronautical aspects of the incident to the Council of the International Civil Aviation Organization for analysis and evaluation;
(9) In situations in which an aircraft is leased to, and operated by, a carrier of a State other than the State of registry, the State of the carrier should have the same rights and responsibilities recommended herein for the State of registry.

.2. *Resolutions of the Council*

(a) Resolution on Unlawful Seizure of Aircraft Adopted by the Council on 16 December 1968

The Council,

Noting with concern the serious threat to safety in air navigation from the increasing number of acts of forcible and unlawful seizure of aircraft, and

Taking particular account of the provisions of Article 44 *(h)* of the Convention on International Civil Aviation,

Urges Contracting States to take all possible measures to prevent acts of unlawful seizure of aircraft and, where appropriate, to co-operate with any State whose aircraft has been the subject of such a seizure.

(b) RESOLUTION ON UNLAWFUL INTERFERENCE WITH INTERNATIONAL CIVIL AVIATION AND ITS FACILITIES ADOPTED BY THE COUNCIL ON 10 APRIL 1969

The Council,

Gravely concerned that acts which unlawfully interfere with international civil aviation jeopardize the safety thereof, seriously affect the operation of international air services and undermine the confidence of the peoples of the world in the safety of international civil aviation;

Considering that the threat thus posed to international civil aviation requires *urgent and continuing attention by the Organization and the full co-operation* of all Contracting States under the Convention on International Civil Aviation in order to assure the continued safety of international civil aviation;

1. Declares that acts of unlawful interference with international civil aviation are not to be tolerated;
2. Urges all Contracting States to take all appropriate measures to prevent the occurrence of any acts of unlawful interference so as to assure continued safety in international civil aviation;
3. Decides to give immediate and continuing attention to future acts of unlawful interference with international civil aviation by:
   (i) inviting all Contracting States directly concerned to furnish it with a report on all non-political aspects of cases of unlawful interference;
   (ii) developing preventive measures and procedures to safeguard international civil aviation against such acts; and
   (iii) assisting, at the request of a Contracting State, the national authorities of that State in the adoption of such measures and procedures;
4. Establishes, in accordance with Article 52 of the Convention, a Committee of eleven members chosen from among the Members of the Council, to implement Clause (3) above under the terms of reference appearing in the Appendix to the present Resolution[1], and which will report to Council;
5. Decides that the Committee shall deal only with the aeronautical aspects of cases of unlawful interference and shall refrain from considering any case which may involve the Committee in matters of a political nature or of controversy between two or more States;
6. Decides that, for the purposes of the present Resolution, the expression "unlawful interference" means (1) unlawful seizure of aircraft and (2) sabotage or armed attack directed against aircraft used in international air transport or ground facilities used by international air transport;
7. Decides to review annually the question of whether the Committee should be continued and the composition of its membership;
8. Requests the Secretary General to invite all Contracting States to give their immediate and full co-operation to achieve the objectives of this Resolution and their suggestions for any other measures which they consider should be taken to prevent unlawful interference with international civil aviation.

[1] Appendix not reproduced.

(c) Resolution adopted by the Council on 1 October 1970

The Council,

Finding that a heightened threat to the safety and security of international civil air transport exists as a result of unlawful seizure of aircraft involving the detention of passengers, crew and aircraft contrary to the principles of Article 11 of the Tokyo Convention for international blackmail purposes, and the destruction of such aircraft;

Recognizing that Contracting States to the Convention on International Civil Aviation have obligated themselves to ensure the safe and orderly growth of international civil aviation throughout the world;

Calls upon Contracting States, in order to ensure the safety and security of international civil air transport, upon request of a Contracting State to consult together immediately with a view to deciding what joint action should be undertaken, in accordance with international law, without excluding measures such as the suspension of international civil air transport services to and from any State which, after the unlawful seizure of an aircraft, detains passengers, crew or aircraft contrary to the principles of Article 11 of the Tokyo Convention, for international blackmail purposes, or any State which, contrary to the principles of Articles 7 and 8 of the Draft Convention on Unlawful Seizure of Aircraft, fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes;

Directs the Legal Committee to consider during its Eighteenth Session, if necessary by extension of the session, an international convention or other international instruments:

(i) to give effect to the purposes set out in the preceding paragraph;
(ii) to provide for joint action by States to take such measures as may be appropriate in other cases of unlawful seizure; and
(iii) to provide for amendment of bilateral air transport agreements of contracting parties to remove all doubt concerning the authority to join in taking such action against any State.

Annex L

RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY

1. 2551 (XXIV). Forcible diversion of civil aircraft in flight

The General Assembly,

Deeply concerned over acts of unlawful interference with international civil aviation,

Considering it necessary to recommend effective measures against hijacking in all its forms, or any other unlawful seizure or exercise of control of aircraft,

Mindful that such acts may endanger the life and health of passengers and crew in disregard of commonly accepted humanitarian considerations,

Aware that international civil aviation can only function properly in conditions guaranteeing the safety of its operations and the due exercise of the freedom of air travel,

1. *Calls upon* States to take every appropriate measure to ensure that their respective national legislations provide an adequate framework for effective legal measures against all kinds of acts of unlawful interference with, seizure of, or other wrongful exercise of control by force or threat thereof over, civil aircraft in flight;

2. *Urges* States in particular to ensure that persons on board who perpetrate such acts are prosecuted;

3. *Urges* full support for the efforts of the International Civil Aviation Organization directed towards the speedy preparation and implementation of a convention providing for appropriate measures, *inter alia*, with respect to making the unlawful seizure of civil aircraft a punishable offence and to the prosecution of persons who commit that offence;

4. *Invites* States to ratify or accede to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, in conformity with the Convention.

1831st plenary meeting,
12 December 1969.

2. 2645 (XXV). Aerial hijacking or interference with civil air travel

The General Assembly,

Recognizing that international civil aviation is a vital link in the promotion and preservation of friendly relations among States and that its safe and orderly functioning is in the interest of all peoples,

Gravely concerned over acts of aerial hijacking or other wrongful interference with civil air travel,

Recognizing that such acts jeopardize the lives and safety of the passengers and crew and constitute a violation of their human rights,

Aware that international civil aviation can only function properly in conditions guaranteeing the safety of its operations and the due exercise of the freedom of air travel,

Endorsing the solemn declaration of the extraordinary session of the Assem-

ly of the International Civil Aviation Organization held at Montreal from 16 to 30 June 1970,

Bearing in mind General Assembly resolution 2551 (XXIV) of 12 December 1969 and Security Council resolution 286 (1970) of 9 September 1970 adopted by consensus at the 1552nd meeting of the Council,

1. *Condemns*, without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel, whether originally national or international, through the threat or use of force, and all acts of violence which may be directed against passengers, crew and aircraft engaged in, and air navigation facilities and aeronautical communications used by, civil air transport;

2. *Calls upon* States to take all appropriate measures to deter, prevent or suppress such acts within their jurisdiction, at every stage of the execution of those acts, and to provide for the prosecution and punishment of persons who perpetrate such acts, in a manner commensurate with the gravity of those crimes, or, without prejudice to the rights and obligations of States under existing international instruments relating to the matter, for the extradition of such persons for the purpose of their prosecution and punishment;

3. *Declares* that the exploitation of unlawful seizure of aircraft for the purpose of taking hostages is to be condemned;

4. *Declares further* that the unlawful detention of passengers and crew in transit or otherwise engaged in civil air travel is to be condemned as another form of wrongful interference with free and uninterrupted air travel;

5. *Urges* States to the territory of which a hijacked aircraft is diverted to provide for the care and safety of its passengers and crew and to enable them to continue their journey as soon as practicable, and to return the aircraft and its cargo to the persons lawfully entitled to possession;

6. *Invites* States to ratify or accede to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, in conformity with the Convention;

7. *Requests* concerted action on the part of States, in accordance with the Charter of the United Nations, towards suppressing all acts which jeopardize the safe and orderly development of international civil air transport;

8. *Calls upon* States to take joint and separate action, in accordance with the Charter, in co-operation with the United Nations and the International Civil Aviation Organization to ensure that passengers, crew and aircraft engaged in civil aviation are not used as a means of extorting advantage of any kind;

9. *Urges* full support for the current efforts of the International Civil Aviation Organization towards the development and co-ordination, in accordance with its competence, of effective measures in respect of interference with civil air travel;

10. *Calls upon* States to make every possible effort to achieve a successful result at the diplomatic conference to convene at The Hague in December 1970 for the purpose of the adoption of a convention on the unlawful seizure of aircraft, so that an effective convention may be brought into force at an early date.

1914th plenary meeting,
25 November 1970.

Annex M

LEGAL RATIONALE FOR SUSPENSION OF SERVICE UNDER BILATERAL AVIATION AGREEMENTS PURSUANT TO THE UNITED STATES RESOLUTION BEFORE THE ICAO COUNCIL

(A Paper prepared by the Government of the United States)

Summary

Termination of services by United States carriers to and from a country raises no legal problem since there is no obligation to conduct such service, but only a right.

Suspension of the service of foreign carriers to and from the United States under circumstances contemplated by the draft resolution is legally justifiable on the following grounds:

(A) The bilateral aviation agreements cannot properly be interpreted as granting foreign airlines the right to continue such services under these circumstances.

(B) Even if they were interpreted as granting such rights, the conduct against which the resolution is directed would justify suspension of services because

(i) It would constitute a breach of the bilateral; and

(ii) It would constitute a breach of the Chicago Convention, justifying suspension of the bilateral because of the nexus existing between the Chicago Convention and the bilateral.

(C) The bilateral agreements by their terms allow suspension, under these circumstances, pursuant to generally applicable laws and regulations.

Discussion

Insofar as the termination of service by United States carriers to and from another country is concerned, no legal problem is raised. We have the right to conduct such service but we have no obligation to do so.

We do not believe that our bilateral aviation agreements can properly be interpreted as granting the right to airlines of the other state party to the bilateral agreement to continue air service to and from the U.S. if that other state detains passengers, crew or aircraft contrary to the principles of Article 11 of the Tokyo Convention for international blackmail purposes, or if such state, contrary to Articles 7 and 8 of the Draft Convention on Unlawful Seizure of Aircraft, fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes. In negotiating the bilaterals we did not anticipate and specifically provide for situations such as these. However, it is clear that both parties had in mind normal, safe, commercial operations of the type contemplated by the Chicago Convention and that the grant of rights contained in each of our bilaterals is not intended to cover the continuation of operations into and from the U.S. by the planes of a state which at the same time is disrupting such normal, safe, commercial aviation generally in a manner specified in the draft resolution. Specific provisions of the bilateral support this interpretation, because a failure by a state to take practicable measures necessary to prevent the disruption of international aviation that is

caused by such acts of detention and seizure for international blackmail purposes as are specified in the resolution would not be consistent with the state's grant of rights necessary for the conduct of air traffic by our carriers as required under the bilaterals. *These points apply to bilateral agreements with countries* that are not, as well as to countries that are, party to the Chicago Convention.

The grant of rights necessary for the conduct of air services in the bilateral agreements also has to be read in the context of the Chicago Convention. The Chicago Convention of 1944 established principles and arrangements designed to assure that international civil aviation would develop "in a safe and orderly manner" (third preambular paragraph); it imposes obligation upon each contracting state "not to use civil aviation for any purpose inconsistent with" such aims (Article 4). More directly, it specifically requires each contracting state "to adopt all practicable measures . . . to facilitate and expedite navigation by aircraft between the territories of Contracting States, and *to prevent unnecessary delays to aircraft, crews, passengers and cargo* . . ." (Article 22). The Chicago Convention clearly contemplates the existence of subsequent bilateral agreements pertaining to scheduled civil aviation between its parties (Articles 6, 81, 82 and 83); the final Act of the 1944 Conference which adopted the Convention even contained a model agreement in many respects similar to our modern bilateral agreements. It is quite clear that the parties to the Chicago Convention (now 119 states) intended that it would provide the legal foundation for subsequent bilaterals between the parties to the convention. There is a nexus between the Convention and the bilateral. A forceful illustration of this relationship is contained in Article 82 which specifies that "That Contracting States accept this Convention as abrogating *all obligations and understandings between them which are inconsistent with* its terms, and undertake not to enter into any such obligations and understandings."

In view of the close relationship between the Chicago Convention and our bilateral agreements, refusal by a state to adopt generally agreed procedures to eliminate the threat to international civil aviation posed by such acts of detention and seizure for international blackmail purposes as are specified in the resolution would constitute a failure by that state to carry out its obligations under Articles 4 or 22, or both, of the Chicago Convention and this failure in turn would constitute a failure to comply with the obligation imposed by the bilaterals to grant rights necessary for the conduct of air services contemplated *therein. This would be true even if the bilaterals are interpreted to contain a* broader grant of rights than has been stated in paragraph 5 above. This point is directly related to the question whether the U.S. would be entitled to suspend air transport service under a bilateral in the event the other party thereto had, for example, refused to prosecute or extradite the hijacker of a plane belonging to a third state under circumstances covered by the resolution. The Chicago Convention recognizes that the safety and development of international aviation requires the broadest international cooperation. The obligations undertaken run to all parties to the Convention and Article 82 specifically prohibits derogation from those requirements. Condonation by a state of air hijacking for international blackmail purposes under circumstances covered by the reso*lution is* thus a breach of its obligations under the Chicago Convention not only to the State whose plane has been hijacked but also to all other parties to the Convention. Air safety is indivisible. From the standpoint of interpretation of the bilateral's requirements, therefore, such a refusal to cooperate in the elimination of these threats to air safety constitutes a failure to provide rights necessary for the conduct of air services regardless of whether the in-

dividual case of failure involves the plane of the other party to the bilateral or not.

Furthermore, in view of the nexus described above that exists between bilateral aviation agreements and the Chicago Convention, a substantial case can be made that a breach of the Chicago Convention involving risk to air safety of the magnitude involved in the circumstances covered in the resolution justifies the suspension of rights under the bilateral whether or not the State's conduct is viewed as a breach of the bilateral itself. This particular aspect of the effect of breach of a treaty has not been taken up in the Vienna Convention on the Law of Treaties. However, the doctrine on this subject was enunciated by Lord McNair in his Treatise on the Law of Treaties (1961 edition at page 571): "... In special circumstances it may be possible to show that of two separate treaties each was the consideration for the other and that they were intended to be interdependent; and that in that case the breach of one might give rise to a right to abrogate the other." Any state party to the Chicago Convention that detains passengers, crew or aircraft contrary to the principles of Article 11 of the Tokyo Convention for international blackmail purposes or that, contrary to Articles 7 and 8 of the Draft Convention on Unlawful Seizure of Aircraft, fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes would, as mentioned above, breach its obligations under Article 4 or 22, or both, of the Chicago Convention. The requirements of these Articles are, in our view, underlying requirements for the grant of rights in the subsequent bilaterals. The provisions of Article 82 of the Chicago Convention establish the element of interdependence. A breach of Article 4 or 22, or both, of the Chicago Convention by one of the parties to a bilateral aviation agreement would, therefore, give rise to a right on the part of the other party to suspend the air traffic provided for under the bilateral agreement.

Furthermore, bilateral aviation agreements customarily recognize that each party reserves the right to revoke the rights granted it by the agreement in the event of the other party's failure to comply with uniformly applied laws and regulations relating to admission and departure from its territory. It seems clear that under this provision states could adopt rules and regulations, designed to further the aims and objectives of the Chicago Convention, which deny admission to aircraft of any country that is abusing international aviation in the manner specified in the resolution.

Annex N

COMMUNICATIONS FROM ICAO AFTER THE COUNCIL MEETING OF 29 JULY 1971

1. Letter No. LE 6/1, LE 6/2 of 30 July 1971 from the Secretary General of ICAO to the High Commissioner for India, Ottawa

The Secretary General of the International Civil Aviation Organization presents his compliments and has the honour to refer to the Preliminary Objections, dated 28 May 1971, filed by the Government of India and relating respectively to the Application of the Government of Pakistan, dated 3 March 1971, filed under Article 2 of the Rules for the Settlement of Differences and the Complaint of the Government of Pakistan dated 3 March 1971, filed under Article 21 of the said Rules.

On 29 July 1971, the Council decided not to accept the Preliminary Objections aforesaid.

Accordingly, the time-limit set for delivery of the counter-memorials by the Government of India and which had ceased to run on 1 June 1971, the date on which the Preliminary Objections were filed, began to run again as from 29 July 1971 and will expire on 8 August 1971.

The Secretary General desires, on this occasion, once more to draw your attention to the Council's resolution of 8 April 1971 in which the parties were invited to negotiate.

The Secretary General takes the opportunity of conveying to your Excellency, the assurances of his highest consideration.

(Signed) Assad KOTAITE,
Secretary General.

2. Memorandum SG 609/71, LE 4/1.11 Conf., LE 4/1.12 Conf. of 10 August 1971 from the Secretary General of ICAO to Representatives on the Council

Subject: Voting in the Council on Disagreements and Complaints Brought under the Rules for the Settlement of Differences

1. During the Sixth Meeting of the Seventy-fourth Session of the Council, held on 29 July 1971, it was requested that a memorandum be circulated in which it would be explained why, even if certain Council Members did not have the right to vote in a matter brought before the Council under the Rules for the Settlement of Differences, it was still necessary to require that decisions of the Council on such matters be taken by a majority of its Members. As will be seen from the following paragraphs, a brief history of the question of voting in the case of the Rules for the Settlement of Differences provides the necessary explanation.

2. The question of voting in circumstances where parties to a difference did not have the right to vote arose during the preparation of provisional Rules for the Settlement of Differences in 1953. At that time, it was noted that, because of the provisions of Article 52 of the Convention, the majority required for a decision under the Rules would have to be a majority of all Council Members. The question also arose during the preparation of the present Rules for the

Settlement of Differences in 1955 by a Group of Experts nominated by the Chairman of the Legal Committee in consultation with the President of the Council. In its report, that Group pointed out, in the terms set forth below, the difficulty that could arise in regard to voting if certain Council Members did not have the right to vote, thus:

> "According to Article 52 of the Convention: 'Decisions by the Council shall require approval by a majority of its members'. In the opinion of the Group, this provision requires 11 votes for a decision [1]. However, since, according to Articles 53 and 84, no member of the Council may vote in the consideration by the Council of a dispute to which it is a party, it may well happen that the Council finds itself unable to give a decision. A possibility of a tie vote has also to be taken into account in this connection." (See C-WP/2271, 15/10/56, p. 6.)

This view of the Group of Experts was not disputed by the Council when the latter adopted the Rules for the Settlement of Differences in 1957.

3. Similarly, in cases involving the International Air Services Transit Agreement, the majority required by Article 52 of the Convention would continue to apply even where, in accordance with Article 66 *(b)* of the Convention, Council Members who did not have the right to vote because they had not accepted the Transit Agreement.

4. In view of the foregoing, the Council is merely being consistent with its attitude in the past when, in relation to the cases involving Pakistan and India, it follows the statement made by the President on 7 April 1971 to the effect that at "this meeting and in any other proceedings on these cases, the Council would be acting under Article 84 or 66 of the Convention, which implied observance of the statutory majority requirement in Article 52 for any decision taken". (C-Min. LXXII/20 (Closed), para. 6).

(Signed) Assad KOTAITE,
Secretary General.

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[1] Obviously, the reference of the Group of Experts to a requirement of 11 votes for a decision was made in relation to a Council which, at the time, contained 21 Members and had the Council then contained 27 Members, the Group would no doubt have included the figure of "14" instead of "11".

Annex O

TASHKENT DECLARATION

The Prime Minister of India and the President of Pakistan, having met at Tashkent and having discussed the existing relations between India and Pakistan, hereby declare their firm resolve to restore normal and peaceful relations between their countries and to promote understanding and friendly relations between their peoples. They consider the attainment of these objectives of vital importance for the welfare of the 600 million people of India and Pakistan.

I

The Prime Minister of India and the President of Pakistan agree that both sides will exert all efforts to create good neighbourly relations between India and Pakistan in accordance with the United Nations Charter. They reaffirm their obligation under the Charter not to have recourse to force and to settle their disputes through peaceful means. They considered that the interests of peace in their region and particularly in the Indo-Pakistan Sub-Continent and, indeed, the interests of the peoples of India and Pakistan were not served by the continuance of tension between the two countries. It was against this background that Jammu and Kashmir was discussed, and each of the sides set forth its respective position.

II

The Prime Minister of India and the President of Pakistan have agreed that all armed personnel of the two countries shall be withdrawn not later than 25 February 1966 to the positions they held prior to 5 August 1965, and both sides shall observe the cease-fire terms on the cease-fire line.

III

The Prime Minister of India and the President of Pakistan have agreed that relations between India and Pakistan shall be based on the principle of non-interference in the internal affairs of each other.

IV

The Prime Minister of India and the President of Pakistan have agreed that both sides will discourage any propaganda directed against the other country, and will encourage propaganda which promotes the development of friendly relations between the two countries.

V

The Prime Minister of India and the President of Pakistan have agreed that the High Commissioner of India to Pakistan and the High Commissioner of Pakistan to India will return to their posts and that the normal functioning of diplomatic missions of both countries will be restored. Both Governments shall observe the Vienna Convention of 1961 on Diplomatic Intercourse.

VI

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.

VII

The Prime Minister of India and the President of Pakistan have agreed that they will give instructions to their respective authorities to carry out the repatriation of the prisoners of war.

VIII

The Prime Minister of India and the President of Pakistan have agreed that the two sides will continue the discussion of questions relating to the problems of refugees and evictions/illegal immigrations. They also agreed that both sides will create conditions which will prevent the exodus of people. They further agreed to discuss the return of the property and assets taken over by either side in connection with the conflict.

IX

The Prime Minister of India and the President of Pakistan have agreed that the sides will continue meetings both at the highest and at other levels on matters of direct concern to both countries. Both sides have recognized the need to set up joint Indian-Pakistani bodies which will report to their Governments in order to decide what further steps should be taken.

* * *

The Prime Minister of India and the President of Pakistan record their feelings of deep appreciation and gratitude to the leaders of the Soviet Union, the Soviet Government and personally to the Chairman of the Council of Ministers of the U.S.S.R. for their constructive friendly and noble part in bringing about the present meeting which has resulted in mutually satisfactory results. They also express to the Government and friendly people of Uzbekistan their sincere thankfulness for their overwhelming reception and generous hospitality.

They invite the Chairman of the Council of Ministers of the U.S.S.R. to witness this Declaration.

Prime Minister of India	President of Pakistan
Lal Bahadur SHASTRI.	Mohammed AYUB KHAN.

Tashkent, 10 January 1966.

Annex P

LETTERS EXCHANGED BETWEEN THE PRIME MINISTER OF INDIA AND THE PRESIDENT OF PAKISTAN ON 3 FEBRUARY 1966 AND 7 FEBRUARY 1966, RESPECTIVELY

Dear Mr. President,

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.

I very much hope that in both our countries emphasis will be placed on the positive aspects of the Tashkent Declaration, such as early normalisation of relations and the initiation of various processes of co-operation between our two countries in mutually beneficial fields.

Yours sincerely,

(Signed) Indira GANDHI.

Dear Prime Minister,

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.

The late Prime Minister, Mr. Lal Bahadur Shastri discussed with me the necessity of taking such measures in our mutual relations as would make a salutary impact on our peoples and further the need for the early restoration of normal relations between the two countries. We believed that prompt action to this end would greatly facilitate the opening of a more conducive and beneficial period of relations between India and Pakistan. In this context, as a manifestation of our earnest intentions to improve relations and to generate *confidence, we discussed the desirability of a meeting between our two* Army Chiefs to draw up plans for withdrawal and resumption of air flights.

We also discussed the need to appoint Ministers, who would facilitate mutual negotiations between India and Pakistan on all our differences and disputes to enable lasting peace to return to the Sub-Continent. I am, therefore, glad to note that you have issued orders on the early resumption of air flights according to the spirit of our undertaking.

Before I conclude, permit me to add a personal note of admiration of the manner in which you have responded to the Tashkent Declaration. This leads me to believe that we are moving in the right direction, and that you will

continue to make profound contributions to a happier relationship between us.

I can assure you that you will find me readily reciprocating your endeavours in any positive measure made in this regard.

With warm regards,

Yours sincerely,

(Signed) Mohammad AYUB KHAN,

Field Marshal.

Annex Q

CONVENTION
ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT

The States Parties to this Convention
Have agreed as follows:

CHAPTER I. SCOPE OF THE CONVENTION

Article 1

1. This Convention shall apply in respect of:

(*a*) offences against penal law;
(*b*) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.

2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.
3. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.
4. This Convention shall not apply to aircraft used in military, customs or police services.

Article 2

Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

CHAPTER II—JURISDICTION

Article 3

1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.
2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 4

A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

(a) the offence has effect on the territory of such State;
(b) the offence has been committed by or against a national or permanent resident of such State;
(c) the offence is against the security of such State;
(d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
(e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

CHAPTER III. POWERS OF THE AIRCRAFT COMMANDER

Article 5

1. The provisions of this Chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

2. Notwithstanding the provisions of Article 1, paragraph 3, an aircraft shall for the purposes of this Chapter, be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board.

Article 6

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:

(a) to protect the safety of the aircraft, or of persons or property therein; or
(b) to maintain good order and discipline on board; or
(c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

Article 7

1. Measures of restraint imposed upon a person in accordance with Article 6 shall not be continued beyond any point at which the aircraft lands unless:

(a) such point is in the territory of a non-Contracting State and its authorities refuse to permit disembarkation of that person or those measures

have been imposed in accordance with Article 6, paragraph 1 *(c)* in order to enable his delivery to competent authorities;

(b) the aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities; or

(c) that person agrees to onward carriage under restraint.

2. The aircraft commander shall as soon as practicable, and if possible before landing in the territory of a State with a person on board who has been placed under restraint in accordance with the provisions of Article 6, notify the authorities of such State of the fact that a person on board is under restraint and of the reasons for such restraint.

Article 8

1. The aircraft commander may, in so far as it is necessary for the purpose of subparagraph *(a)* or *(b)* of paragraph 1 of Article 6, disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1 *(b)*.

2. The aircraft commander shall report to the authorities of the State in which he disembarks any person pursuant to this Article, the fact of, and the reasons for, such disembarkation.

Article 9

1. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft.

2. The aircraft commander shall as soon as practicable and if possible before landing in the territory of a Contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor.

3. The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this Article with evidence and information which, under the law of the State of registration of the aircraft, are lawfully in his possession.

Article 10

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

CHAPTER IV. UNLAWFUL SEIZURE OF AIRCRAFT

Article 11

1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the

aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

Chapter V. Powers and Duties of States

Article 12

Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 8, paragraph 1.

Article 13

1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.

2. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11, paragraph 1 and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.

3. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. Any Contracting State, to which a person is delivered pursuant to Article 9, paragraph 1, or in whose territory an aircraft lands following the commission of an act contemplated in Article 11, paragraph 1, shall immediately make a preliminary enquiry into the facts.

5. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 4 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 14

1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the State of landing refuses to admit him, that State may, if the person in question is not a national or permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air.

2. Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, paragraph 2, nor return of the person concerned, shall be considered as admission to the territory of the

Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a Contracting State relating to the expulsion of persons from its territory.

Article 15

1. Without prejudice to Article 14, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings.

2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a Contracting State in whose territory a person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1 or has disembarked and is suspected of having committed an act contemplated in Article 11, paragraph 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such Contracting State in like circumstances.

CHAPTER IV. OTHER PROVISIONS

Article 16

1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.

2. Without prejudice to the provisions of the preceding paragraph, nothing in this Convention shall be deemed to create an obligation to grant extradition..

Article 17

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

Article 18

If Contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one State those States shall, according to the circumstances of the case, designate the State among them which, for the purposes of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

CHAPTER VII. FINAL CLAUSES

Article 19

Until the date on which this Convention comes into force in accordance with the provisions of Article 21, it shall remain open for signature on behalf

of any State which at that date is a Member of the United Nations or of any of the Specialized Agencies.

Article 20

1. This Convention shall be subject to ratification by the signatory States in accordance with their constitutional procedures.

2. The instruments of ratification shall be deposited with the International Civil Aviation Organization.

Article 21

1. As soon as twelve of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the twelfth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the Secretary-General of the United Nations by the International Civil Aviation Organization.

Article 22

1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.

2. The accession of a State shall be effected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the date of such deposit.

Article 23

1. Any Contracting State may denounce this Convention by notification addressed to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

Article 24

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the International Civil Aviation Organization.

Article 25

Except as provided in Article 24 no reservation may be made to this Convention.

Article 26

The International Civil Aviation Organization shall give notice to all States Members of the United Nations or of any of the Specialized Agencies:

(a) of any signature of this Convention and the date thereof;
(b) of the deposit of any instrument of ratification or accession and the date thereof;
(c) of the date on which this Convention comes into force in accordance with Article 21, paragraph 1;
(d) of the receipt of any notification of denunciation and the date thereof; and
(e) of the receipt of any declaration or notification made under Article 24 and the date thereof.

In witness whereof the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

Done at Tokyo on the fourteenth day of September One Thousand Nine Hundred and Sixty-three in three authentic texts drawn up in the English, French and Spanish languages.

This Convention shall be deposited with the International Civil Aviation Organization with which, in accordance with Article 19, it shall remain open for signature and the said Organization shall send certified copies thereof to all States Members of the United Nations or of any Specialized Agency.

Annex R

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT

Preamble

The States parties to this Convention

Considering that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

Considering that the occurrence of such acts is a matter of grave concern;

Considering that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

Have agreed as follows:

Article 1

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act

commits an offence (hereinafter referred to as "the offence").

Article 2

Each Contracting State undertakes to make the offence punishable by severe penalties.

Article 3

1. For the purposes of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

2. This Convention shall not apply to aircraft used in military, customs or police services.

3. This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.

4. In the cases mentioned in Article 5, this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same State where that State is one of those referred to in that Article.

5. Notwithstanding paragraphs 3 and 4 of this Article, Articles 6, 7, 8 and 10

shall apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft.

Article 4

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

(a) when the offence is committed on board an aircraft registered in that State;
(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
(c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 5

The Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

Article 6

1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State mentioned in Article 4, paragraph 1 *(c)*, the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 8

1. The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, paragraph 1.

Article 9

1. When any of the acts mentioned in Article 1 *(a)* has occurred or is about to occur, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated by the preceding paragraph, any Contracting State in which the aircraft or its passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

Article 10

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in Article 4. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

Article 11

Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

(a) the circumstances of the offence;
(b) the action taken pursuant to Article 9;
(c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

Article 12

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.
3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

Article 13

1. This Convention shall be open for signature at The Hague on 16 December 1970, by States participating in the International Conference on Air Law held at The Hague from 1 to 16 December 1970 (hereinafter referred to as The Hague Conference). After 31 December 1970, the Convention shall be open to all States for signature in Moscow, London and Washington. Any State which does not sign this Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.
2. This Convention shall be subject to ratification by the signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, which are hereby designated the Depositary Governments.
3. This Convention shall enter into force thirty days following the date of the deposit of instruments of ratification by ten States signatory to this Convention which participated in The Hague Conference.
4. For other States, this Convention shall enter into force on the date of entry into force of this Convention in accordance with paragraph 3 of this Article, or thirty days following the date of deposit of their instruments of ratification or accession, whichever is later.
5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Convention, and other notices.
6. As soon as this Convention comes into force, it shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations and pursuant to Article 83 of the Convention on International Civil Aviation (Chicago, 1944).

Article 14

1. Any Contracting State may denounce this Convention by written notification to the Depositary Governments.

2. Denunciation shall take effect six months following the date on which notification is received by the Depositary Governments.

In witness whereof the undersigned Plenipotentiaries, being duly authorised thereto by their Governments, have signed this Convention.

Done at The Hague, this sixteenth day of December, one thousand nine hundred and seventy, in three originals, each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.