

SEPARATE OPINION OF JUDGE PETRÉN

[*Translation*]

To my regret, I am unable to concur in the opinion of the majority of the Court in respect of the question whether the Chicago Convention and its annexes authorize India's appeal in the present case. In my view they do not, and so I have to set forth my grounds for reaching that conclusion. A majority of the judges, however, found that the Court did have jurisdiction to entertain that appeal, and I therefore felt I must take part in the consideration of its merits. In the event, I agree with the majority that the appeal should fail, but my view is based on reasons which, while not unrelated to those of the majority, are not identical with them.

I have therefore to append to the Judgment the following separate opinion.

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As the case is an appeal from a decision taken by the governing body of an international organization, it is first incumbent upon the Court, independently of the attitude of the Parties to the dispute, to satisfy itself, *ex officio*, that the requirements imposed by the applicable treaty provisions for an appeal to lie have been met.

What characterizes the present case is the fact that the decision of the ICAO Council from which India has appealed is not a decision on the merits of the case brought before the Council by Pakistan but a preliminary decision whereby the Council rejected an objection to its jurisdiction. The question is therefore whether an immediate appeal lies from the preliminary decision whereby a forum of first instance has affirmed its own jurisdiction. The right to appeal to this Court from the Council's decisions rests on Article 84 of the Chicago Convention, which provides that if any disagreement between two or more contracting States relating to the interpretation or application of the Convention cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council, and that any contracting State may appeal from the decision of the Council either to an *ad hoc* arbitral tribunal or to the Court. The same Article lays down that any such appeal shall be notified to the Council within 60 days of the latter's decision.

Article 86 also deals with appeals. It provides, first, that, unless the Council decides otherwise, decisions by the Council on whether an international airline is operating in conformity with the provisions of the

Convention shall remain in effect unless reversed on appeal. It next provides that on any other matter the decisions of the Council shall, if appealed from, be suspended until the appeal is decided. Article 86 says nothing as to the forms and time-limits to be observed in making an appeal.

In the present case we have to ascertain whether a decision finding that the Council has jurisdiction to deal with a case must be considered to bear upon the interpretation or application of the Convention within the meaning of Article 84 and can therefore be the subject of an appeal. If the answer is in the affirmative, the question will arise as to whether, by virtue of Article 86, an appeal can be made immediately from such a decision, with suspensory effect until the appeal is decided.

There is no cut and dried answer to the first question. The scheme of the Convention seems to indicate that Article 84 contemplates decisions on the interpretation or application of articles other than Article 84 itself. Nevertheless, if the decisions rendered by a forum in a given domain can be appealed from to another forum, it is surely inherent in the functions of the forum of appeal to rule, if need be, on the soundness of a decision whereby the first forum found that it had jurisdiction to handle a disagreement which was alleged to have no place in the domain in question. Applied to the present case, this consideration leads to the conclusion that the right of appeal conferred by Article 84 includes the right to appeal from a decision of the Council affirming its own jurisdiction to deal with a case as concerning the interpretation or application of the Convention.

Now it must be asked whether the provisions of Article 86 concerning the suspensory effect of appeals contemplate any appeals other than those against the definitive decisions of the Council on the material operating-conditions of the airlines of contracting States. The exception to the suspensory effect of appeals which is specified at the beginning of Article 86 concerns this category of decisions, which is in itself sufficient to prompt a doubt as to whether the rest of the Article further contemplates appeals against decisions on preliminary objections.

It can be shown in several ways that Article 84, in the light of which Article 86 is to be interpreted, was not so drafted as to take into account the eventuality of there being decisions by the Council on preliminary objections. Thus according to Article 84 the decisions of the Council which are subject to appeal must concern disagreements between two or more contracting States relating to the interpretation or application of the Convention which it has not been possible to settle by negotiation. But a preliminary objection contesting the jurisdiction of the Council to deal with a case does not concern anything which could constitute the subject-matter of negotiation between the parties. Moreover, Article 84 permits any contracting State, i.e., not only the original parties to a dispute but every State party to the Convention, to appeal from decisions

within the field of application of Article 84. But if the Council declares that it has jurisdiction to deal with an application by State A against State B, are we to suppose that any other party to the Convention is authorized by Article 84 to appeal from that decision? It would strain belief to imagine that the authors of the Convention could ever have intended to create so very odd a possibility. It is only in regard to the definitive decision whereby the Council rules on the interpretation or application of the Convention that States not parties to the original dispute could have any legitimate need to institute appeal proceedings.

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It should also be noted that where international air transport is concerned it is obviously important, because of the economic repercussions in particular, that disputes should be rapidly settled. Hence it would scarcely be reasonable to suppose that there was any intention of opening the way to procedures likely to result in considerable delay for the settlement of disputes in this domain. But that is precisely what would have been the case if Articles 84 and 86 had to be interpreted as authorizing immediate appeals against decisions whereby the Council declared itself competent to entertain an application.

Let us begin by considering the first of the hypotheses contemplated in Article 84 in regard to the organization of appeal proceedings, namely the constitution of an *ad hoc* arbitral tribunal. The relevant provisions are contained in Article 85. If the contracting States, parties to the dispute, cannot agree on the choice of the arbitral tribunal, each of them is to name an arbitrator and these arbitrators are to name an umpire. If any of the States has failed to name an arbitrator within three months of the date of the appeal, an arbitrator is to be named on behalf of that State by the President of the Council from a list of qualified and available persons which is to be maintained by the Council. If, within 30 days, the arbitrators cannot agree on an umpire, the President of the Council is to designate an umpire from the same list. The arbitrators and the umpire then constitute an arbitral tribunal, which settles its own rules of procedure, "provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive".

This last clause is worth quoting, because it serves to underline the concern to avoid undue delays in the settlement of disputes. Imagine, therefore, the delay that would result from the suspension of proceedings before the Council so as to allow a question of jurisdiction to go to arbitration! To the 60 days within which the appeal from the Council's decision would have to be brought might be added more than four months before the arbitral tribunal was set up and began organizing its procedure. Then if the decision of the arbitral tribunal confirmed the jurisdiction of the Council, and if the Council's final decision in the case also gave rise to an appeal, it would be necessary to constitute a second ar-

bitral tribunal and thereafter to wait for its decision. At that rate, a case brought before the Council could easily drag on for years.

It would be agreeable to feel able to assume that the second hypothesis contemplated in Article 84, namely the hearing of the appeal by the International Court of Justice, connoted a more expeditious procedure.

However that might be, it seems to me that the protraction of the proceedings which the accumulation of arbitrations would entail in the first hypothesis precludes the thought that the authors of the Convention could have conceived that instrument in a manner so incompatible with their concern to avoid delays in the settlement of differences.

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The foregoing considerations have led me to the conclusion that the provisions of Articles 84 and 86 of the Convention concerning the exercise of a right of appeal, with suspensory effect, from decisions of the Council on disagreements relating to the interpretation or application of the Convention are not intended to apply to decisions rendered by the Council on preliminary objections. It remains nevertheless unthinkable, as explained above, that there should exist a right of appeal which did not also connote the right to refer decisions whereby the forum of first instance found that it had jurisdiction to the forum of appeal.

This amounts to saying that, though the right of appeal instituted by Article 84 implies as its necessary complement a right to appeal from a decision of the Council on its own jurisdiction, the Convention fails to regulate the procedure for exercising the latter right. There is therefore a gap in the Convention, but it is a gap which is filled by the Rules for the Settlement of Differences approved by the Council on 9 April 1957. The Council's power thus to repair the deficiency of the Convention emerges from Article 54 of the Convention, which in enumerating the mandatory functions of the Council includes, under (c), that of determining its own organization and rules of procedure.

The answer to the question as to whether India's present appeal is admissible or not must therefore be sought in the Rules for the Settlement of Differences.

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In these Rules, the provisions on preliminary objections occur in Chapter III, which is entitled "Action Upon Receipt of Applications". The Article dealing with preliminary objections is Article 5. According to Article 5, paragraph 3, the procedure on the merits shall be suspended as soon as a preliminary objection is filed, and the time fixed for the filing of the respondent's counter-memorial will cease to run "until the objection is decided by the Council". Paragraph 4 stipulates that if a preliminary objection is filed the Council, after hearing the

parties, shall decide the question as a preliminary issue before any further steps are taken under the Rules.

Nowhere in this Chapter III of the Rules is there any provision suggesting the existence of an appeal from decisions taken by the Council under this Chapter. It is only in the following Chapter IV, "Proceedings", that provisions on appeals are found, in Article 18. That Article is preceded within the same Chapter, by others regulating the various stages of the proceedings on the merits. Those proceedings culminate in the decision, and to this Article 15 devotes a series of provisions, among which paragraph 2 (v) requires that the decision should contain the conclusions of the Council together with its reasons for reaching them. Paragraph 1 of Article 18 itself contains provisions regarding the notification of the Council's decision to the parties in the case and other contracting States, while it is paragraph 2 which notes that the decisions on certain disagreements between two or more contracting States are subject to appeal pursuant to Article 84 of the Convention. The same paragraph stipulates *in fine* that any such appeal should be notified to the Council through the Secretary General within 60 days of receipt of notification of the decision of the Council.

It should finally be observed that the following two Articles occur at the end of Chapter VI, entitled "General Provisions":

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."

Examination of the Rules therefore shows that the preliminary objections which are not mentioned in the Convention make their appearance in Article 5 of the Rules. That recalls the situation which exists in regard to the International Court of Justice: the Statute (Art. 36, para. 6) contains a mere allusion to preliminary objections, which are however the subject of provisions in the Rules of Court at present in force (Art. 62). The purpose of such provisions is to ensure that preliminary objections are settled in the framework of a separate procedure before the proceedings on the merits have advanced beyond the stage of the first exchange of pleadings. The Council's Rules bear witness to the same concern by obliging the Council, if any preliminary objection is raised, to decide the question, described as a preliminary issue,

before any further steps are taken under the Rules. However, the analogy with the Rules of the Court, whose proceedings take place within a single forum without any organ of appeal, goes thus far and no farther.

As to the question whether an isolated appeal may suspend the proceedings on the merits, the only indication afforded by Article 5 of the Council's Rules is the provision of paragraph 3 whereby a preliminary objection has the effect of causing the time-limit fixed for the filing of the respondent's counter-memorial to cease to run until the Council has decided the objection. That provision, which of course contemplates the event that the Council should reject the objection, does not envisage the suspension of the proceedings on the merits beyond the date on which the Council gives its decision on objection. Otherwise, on the hypothesis that the decision rejecting the objection might be subject to an isolated appeal, the date specified as the new starting-point for the proceedings on the merits ought to have been the date on which the rejection becomes *res judicata*, i.e., either the sixtieth day after the decision of the Council or the date on which any appeal therefrom is dismissed.

The conclusion to which Article 5 points is therefore that the Rules do not admit of any direct appeal from a decision whereby the Council rejects a preliminary objection. This conclusion is confirmed by the fact that the articles concerning the procedure on the merits and appeals are grouped together in the same chapter, whereas the provisions on preliminary objections are in another chapter. This must be seen as an indication that only final decisions rendered at the conclusion of the proceedings on the merits, the contents of which are prescribed by Article 15, are subject to appeal by virtue of Article 18.

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It is in the Convention, complemented by the Rules of the Council, that the answer must be sought to the question whether there exists any right of immediate appeal from a decision by the Council rejecting an objection to its own jurisdiction. The doctrines and practices which have evolved with regard to preliminary objections such as are featured in other international instruments cannot over-ride the relevant provisions of the Chicago Convention and the Rules which complement it. In this connection, I do not think it irrelevant to draw attention to an important difference which exists between the context of an objection to the jurisdiction of the ICAO Council and that of an objection to the jurisdiction of the International Court of Justice in a case brought directly before it. As the proceedings in such cases take place before a single forum, the desirability of avoiding any discussion of the merits before the objection is decided upon cannot be counter-balanced by the presumption created against the soundness of the objection through its dismissal by a forum of first instance. That, on the other hand, is precisely what can happen in cases that begin before the Council. It ought

furthermore to be noted that the Court possesses the power to prescribe interim measures of protection, which can serve to safeguard rights that would otherwise be jeopardized by procedural delays. But it seems doubtful, to say the least, whether it could order measures of protection in a case which only concerned the Council's jurisdiction to entertain an application. The Council's own inability to do so would appear beyond doubt.

The provisions of the Convention and of the Rules for the Settlement of Differences being what they are, the Council is not permitted to depart from them, except inasmuch as Article 32 of the Rules authorizes it, subject to agreement of the parties, to vary any Rule or suspend its application if, in its opinion, such action would be conducive to a more expeditious or effective disposition of the case.

In the present case, the question of the Council's making use of Article 32 of its Rules did not arise. On the other hand, the minutes of the meeting held by the Council on 29 July 1971 (Memorial of India, Annex E) show that, after the Council had given its decision to dismiss India's objections to jurisdiction and the representative of India had announced his Government's intention to lodge an appeal from that decision, certain members of the Council asked whether the appeal would have the effect of suspending the proceedings on the merits before the Council. These questions remained unanswered at the time, but the subject is dealt with in a document entitled "Notes on Article 86 of the Chicago Convention relating to Appeals from Decisions of the Council", which is appended as Annex C to the Reply of India. This document, dated 9 September 1971, emanates from the Secretary General of ICAO and is presented as a reply to requests for information submitted by the President and certain members of the Council. Paragraph 4 of the document, dealing with the interpretation of the second sentence of Article 86, affirms, *inter alia*, that the expression "on any other matter" denotes only such matters as relate to a decision of the Council rendered under Article 84. The document goes on to observe that the expression "decisions of the Council" (i.e., those which would be suspended in the event of an appeal) is not accompanied by any qualifying words which would exclude any particular class of decision. A footnote is attached to this observation, and it begins as follows: "For example, the decision may be one affirming or negating the jurisdiction of the Council in a particular matter: *see* the words 'shall decide the question' in Article 5 (4) of the Rules for the Settlement of Differences." The footnote goes on to mention, by way of example, a number of other classes of decision, taken under various articles of the Rules, from which, according to that footnote, an appeal should be possible. Among the decisions thus referred to are decisions taken under Article 28 whereby the Council rules that a step taken after the expiration of a time-limit shall be considered as valid.

The Secretary General, then, has here given a legal opinion on one of the questions at present in issue. According to that opinion, Article

86 of the Convention would authorize direct appeals with suspensory effect even from procedural decisions concerning, for example, time-limits and also from decisions of the Council on the subject of its own jurisdiction. But, as will be clear from what I have said above, I do not feel that an analysis of the relevant provisions of the Convention and of the Council's Rules enables one to share that opinion.

If the Council is competent to depart from the provisions of its Rules only subject to the agreement of the parties and to its having formed the opinion that to do so would be in the interest of a more expeditious and effective disposition of the case, it is evident that the parties could not, by a mere agreement between themselves, open the way to an appeal for which there was no provision in the texts governing the matter. *A fortiori*, there can be no question of a *forum prorogatum* established by the filing of an appeal application by one party and the failure of the other to raise an objection within a given time. On the contrary, it would have been for the International Court of Justice, as the forum of second instance specified within the scheme of an international treaty, to determine *ex officio*, as soon as the application was filed, whether the requirements for an appeal laid down by the relevant treaty provisions had been satisfied.

It should be clear from the foregoing that, as I view the matter, there would in the present case have emerged from an examination of that point the conclusion that the appeal was premature and that objections to the jurisdiction of the Council could only be expounded at the time of any appeal against its final decision.

During the course of the oral proceedings in the present case, allusions were made to the consequences that would flow from such an interpretation of the Convention and Rules for decisions by the Council accepting objections to its jurisdiction. But the Court does not at present have to pronounce upon that very different kind of situation. Moreover, the acceptance of a preliminary objection represents a final disposition of a case and, unlike the dismissal of the objection, is not destined to be followed by a second decision concerning the interpretation or application of the Convention.

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Having thus set forth my grounds for considering that the present appeal is not admissible, I have nevertheless to bow before the opposite position, adopted by the majority, in accordance with which the Court has declared itself competent to entertain the appeal. That decision of the Court relates solely to the appeal so far as the jurisdiction of the Council to deal with the "Application" and "Complaint" of Pakistan is concerned, and not to the various charges which India has made regarding the procedure whereby the Council reached its decision. It is, therefore, necessary to examine only the first of these two points.

In embarking upon this examination, one feels impelled to ask what

the Council's decision of 29 July 1971 on India's objections to jurisdiction really signified. It is a striking fact that the decision is devoid of all statement of grounds and consists solely in a declaration to the effect that the Council did not accept the objection. It was in that form that the decision was notified to the Government of India (Memorial of India, Annex N). Not only does that highlight all the difference there is between that decision and those from which, in my view, appeals based on Article 18 of the Rules and, consequently, Article 84 of the Convention are intended to be made, but, what is more, the total absence of stated grounds raises the question in the present instance as to whether the Council has given a truly exhaustive ruling on the preliminary objections. The essence of these objections was that India had legal justification to suspend its treaty relations with Pakistan in the domain of aviation and had in fact suspended them, which deprived the Council of jurisdiction to deal with the application of Pakistan. Now the rejection of the objections could only have been based on one of the two following grounds: either the Council considered that the question of India's legal justification to suspend its treaty relations with Pakistan constituted a question of interpretation or application of the Treaties, covered by the wording of Article 84 of the Convention; or the Council was not of that opinion but considered that the circumstances relied upon by India were not such as to authorize it to suspend treaty relations. These two grounds are mutually incompatible. If the question whether India was justified in suspending treaty relations was a question relating to the interpretation or application of the Treaties such as ought to be examined by the Council pursuant to Article 84 of the Convention, the Council could not dispose of that question by ruling on the objections. On the other hand, if the question of the suspension of treaty relations lay outside the field of application of Article 84, the Council had to examine it in the course of the proceedings to which the preliminary objections gave rise and could not, in ruling on those objections, espouse the view that that question was governed by Article 84.

As the Council did not indicate its choice between these two mutually exclusive grounds of decision, one cannot consider that it has really given a definitive decision on the preliminary objections raised by India. One may legitimately believe that if, in a similar situation, the International Court of Justice had not carried its examination of a preliminary objection any farther, it would have joined it to the merits under the Rules of Court at present in force. The Rules of the Council do not mention the possibility of the joinder to the merits of a preliminary objection, and that perhaps explains why the Council expressed itself as it did in its decision of 29 July 1971. However, though the Council is obliged by Article 5, paragraph 4, of its Rules to deal with preliminary objections as preliminary issues, one may not overlook the fact that an objection to the jurisdiction of a forum may raise one or more questions which are so closely bound up with the merits of the case that it is necessary to adopt a position on at least part of the merits before being able to

reply to the objection. In this connection, it should be noted that when the International Court of Justice revised its own Rules in 1972, it eliminated the old rule authorizing the joinder of preliminary objections to the merits only by substituting for it a provision, in the new Article 67, whereby, if an objection raised as a preliminary objection does not possess an exclusively preliminary character, the further proceedings will take their course without the objection having been ruled upon. Now one has to realize that the Council may be faced with similar situations requiring an identical procedure. The absence from its Rules of any provision for such procedure must be considered as a lacuna. In the present instance the Council has covered the gap by declaring, without giving any grounds, that it did not accept India's objection. The real nature of the Council's decision appears to me to be highlighted by the fact that it does not dispense the Council from the duty of examining, at the merits stage, the validity of the arguments relied on by India in support of its objections to the Council's jurisdiction, i.e., in support of the contention that the treaty relations as between the Parties are suspended. The year of appeal proceedings brought to an end by the present Judgment has not changed the situation thus created by the Council's decision in the slightest.

It may be wondered whether the majority of the Court, if the Council had formally declared that it joined the objections to the merits, would have considered such a decision as an interpretation or application of the Convention, susceptible to appeal, or as a procedural decision from which no appeal lay. But in the present context it would be pointless to pursue that question.

As I personally consider that the Council's decision was such as to produce the same effects as a joinder so far as the proceedings on the merits were concerned, I am impelled to ask myself whether a decision of that kind was justified in the circumstances. In that respect, I find that there exists between the questions of interpretation and application of the Treaties raised by both the "Application" and the "Complaint" of Pakistan and the question of the suspension of the Treaties, as presented by India in support of its objections, a relationship which is so close that the decision of the Council seems to me to have been justified. Without feeling any need to analyse the various aspects of that relationship, which the Judgment has been at such pains to detail, I therefore concur in the conclusion of the Judgment that India's appeal must be rejected.

(Signed) S. PETRÉN.