DISSENTING OPINION OF JUDGE NAGENDRA SINGH

1. I do hold and affirm that this Court has the jurisdiction to entertain the appeal filed by India, challenging the competence of the ICAO Council.

2. I am further of the considered opinion that there could not be a more legally justifiable case than the one now before the Court for being remitted or reverted to the Council for examination of its own jurisdiction, the reason being that the Council, required to act as a judicial organ of ICAO in this particular case, has neither applied its mind nor come to a proper legal conclusion on that aspect so far.

3. According to the accepted canons governing matters pertaining to jurisdiction, if an adjudicatory body, whether a regular court of law or an organ of the type of the ICAO Council, has a jurisdictional clause in its charter, or the constituent instrument as the case may be, it may be said to have the right to interpret the jurisdictional words such as, in this case, "interpretation or application" which occur in Article 84 of the Chicago Convention. In the Opinion concerning the *Betsey* it was held that the commissioners: "must necessarily decide upon cases being within or without their competency". See also, *Interpretation of the Greco-Turkish Agreement of 1 December 1926, P.C.I.J., Series B, No. 16*, at page 20 (1928) and the *Nottebohm* case, *I.C.J. Reports 1953*.

4. In short, therefore, when discharging this obligation, the ICAO Council would have to be governed by the following principles:

(a) The Council's competence to decide the question of its own jurisdiction must be deemed to be circumscribed by the words "interpretation or application".

(b) It follows, therefore, that this jurisdiction being specific and limited has to be interpreted carefully and strictly. The jurisprudence of the Court definitely points to the effect that a jurisdictional clause "must be strictly construed and can be applied only in the case expressly provided for therein" (*Interpretation of Peace Treaties, I.C.J. Reports 1950*, p. 227). Again the same view has been forcefully expressed in the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice (*South West Africa* cases), who held that "The principle of interpretation directed to giving provisions their maximum effect cannot legitimately be employed in order to introduce what would amount to a revision of those provisions" (*I.C.J. Reports 1962*, p. 468). In this very connection, when the case is referred back to the Council and it goes to the question of its own

competence it would be well advised to observe one of the major principles of law which may be regarded as fundamental to any determination of the issues involved:

> "The principle of consent [is an] ... essential condition for founding international jurisdiction. Such consent may be given generally, in advance, or *ad hoc*, and may in a proper case be held to have *been* given. But that it was in fact given, and that it covers the actual case before the Court, must be objectively demonstrated, and cannot simply be presumed." (*Ibid.*, p. 467.)

(c) The Council is a functional organ required to promote the objectives enshrined in the Convention as well as to undertake settlement of disputes arising out of its functions. The latter aspect, namely the settlement of disputes, is admittedly a judicial function. In the discharge of this specific function the ICAO Council has to act as a judicial tribunal and must, therefore, necessarily discharge its obligations in a judicial manner. I would further stress this point: that even though the Council is an administrative organ, because it is required under Article 84 to perform a judicial function, it is indeed indispensable for any quasi-judicial or even administrative body when required to undertake a judicial task, as in this case, not only to know to respect judicial procedures prescribed for it but also to strive to conform to proper judicial standards.

(d) Moreover, the Council cannot enlarge the field of its own jurisdiction by a wrong interpretation of the jurisdictional words as its exercise is subject to correction by the International Court of Justice (*vide* the jurisdictional clauses of the Convention (Art., 84) and Transit Agreement (Art. II)).

(e) When a challenge is made to the jurisdiction of the ICAO Council it becomes the legal duty of the Council to satisfy itself about the nature of the dispute, namely that the alleged dispute squarely falls within the specific and limited jurisdiction which has been conferred on it by States parties to the Convention, assess the evidence and contentions of the parties in relation to its jurisdiction, and arrive at a decision.

5. Again, the main ingredients of the case before the Court could be broadly categorized as follows:

(a) decision of the ICAO Council rendered on 29 July 1971;
(b) record of proceedings in the Council;
(c) pleadings of Parties, both written and oral, before the Council.

The first formulates the basis against which the appeal has been filed, making it the starting point for this Court's decision.

The second point explains the manner in which the decision of the ICAO Council has been reached.

The third point explains the nature of the dispute involved and the pleadings of the Parties on the question of competence of the ICAO Council to handle such dispute.

6. Taking into consideration the aforesaid aspects, the broad approach towards adjudication of this case which the Court could make would be to proceed to:

(i) satisfy itself whether the decision of the ICAO Council was formally valid or not, and
(ii) satisfy itself whether or not the ICAO Council has by that decision settled the issue of jurisdiction.

7. To observe proper legal sequence, the Court must address itself to the first question at the outset, because it can proceed to consider the second question only if the decision was a valid one. Thus the validity of the decision, taking into consideration the due observance of the Rules of Procedure and also demonstrating that it was not only doing justice but also observing the salutary principle of showing that justice was being "shown to be" done, is a matter of basic importance in this case. The relevance of this aspect is, indeed, obvious. It arises out of the fact that the ICAO Council has been conferred jurisdiction to take a legally correct decision on its own jurisdiction and unless such a decision has been lawfully taken, the Council cannot proceed further and this Court can hardly take a decision on behalf of the Council on matters of substance that have been raised before the lower court and have as yet to be properly examined by it to come to a correct legal finding.

It would therefore be necessary to decide first the question of validity of the Council's decision and also to examine with it the infirmities from which the decision suffers to ascertain whether they are vital to its validity, or are curable. If the Council reached a decision in utter disregard of all proper norms which go to the root of the functioning of international organizations, apart from violating the mandatory requirements for arriving at a judicial decision, it would be legitimate to draw the conclusion that the Council's decision was void, and in that event, there would be nothing left for the Court to pronounce upon, except to return the case back to ICAO for examination of its own jurisdiction. This aspect needs careful scrutiny, which is attempted below.

The Need for Examining First the Validity of the ICAO Council's Decision

8. Having regard to the principal contention of the appellant as well as in the exercise of its judicial function, it is incumbent on the Court to examine in the first instance the question of the validity or conformity with the Chicago Convention and the Transit Agreement of the decision of the ICAO Council, as embodied in the resolution of 29 July 1971.

la question de sa propre compétence, il fera bien de respecter l'un des grands principes juridiques qui peuvent être considérés comme à la base de toute décision sur les questions en litige:

> « Le principe du consentement [est une] ... base essentielle de la juridiction internationale. Ce consentement peut être donné d'avance, en termes généraux, ou bien *ad hoc* et, dans un cas déterminé, il peut être considéré comme ayant été donné. Mais il faut démontrer de façon objective qu'il a été donné en fait et qu'il couvre le cas déterminé soumis à la Cour; cela ne saurait simplement se présumer. » (*Ibid.*, p. 467.)

c) Le Conseil est un organe fonctionnel, qui a le devoir de poursuivre les objectifs énoncés dans la Convention et de se charger de régler les différends auxquels donne lieu son activité. Ce dernier aspect, celui du règlement des différends, est sans conteste une fonction judiciaire. Dans l'exercice de cette fonction-là, le Conseil de l'OACI doit agir comme un tribunal judiciaire; il est donc nécessairement tenu de s'acquitter de ses obligations à la façon d'un juge. Je voudrais aussi souligner le point suivant: bien que le Conseil soit un organe administratif, l'article 84 lui assigne une fonction judiciaire et à tout organe quasi judiciaire ou même administratif chargé, comme en l'espèce, d'assumer une tâche judiciaire, la nécessité s'impose non seulement de savoir respecter les procédures judiciaires prescrites, mais encore de respecter autant que possible les normes d'une bonne administration de la justice.

d) De plus, le Conseil ne saurait étendre le champ de sa propre compétence par une fausse interprétation des termes juridictionnels, car l'exercice de cette compétence est susceptible d'une réformation par la Cour internationale de Justice (voir les clauses juridictionnelles de la Convention (art. 84) et de l'Accord de transit (art. II)).

e) Si l'on conteste sa compétence, ce devient une obligation juridique pour le Conseil de l'OACI de vérifier la nature du différend, autrement dit de s'assurer que le prétendu différend relève de la compétence limitée et particulière que les Etats parties à la Convention lui ont conférée; il doit apprécier les moyens de preuve et les thèses des parties relatives à sa compétence et aboutir à une décision.

5. Ainsi les principaux éléments de l'affaire dont la Cour est saisie peuvent être classés, pour l'essentiel, de la manière suivante:

a) décision du Conseil de l'OACI rendue le 29 juillet 1971;
b) procès-verbaux des travaux du Conseil;
c) exposés écrits et oraux des parties devant le Conseil.

La première rubrique énonce sur quelle base l'appel a été interjeté, définissant ainsi le point de départ de la décision de la Cour.

La deuxième se réfère à la manière dont le Conseil de l'OACI est arrivé à sa décision.

maintenant bien établi dans la jurisprudence de la Cour. Je peux citer à ce propos le paragraphe suivant de l'avis consultatif rendu par la Cour dans l'affaire de la *Namibie*:

> « Ce n'est pas sur la validité de la résolution 2145 (XXI) de l'Assemblée générale ou des résolutions connexes du Conseil de sécurité ni sur leur conformité avec la Charte que porte la demande d'avis consultatif. Cependant, dans l'exercice de sa fonction judiciaire et puisque des objections ont été formulées, la Cour examinera ces objections dans son exposé des motifs, avant de se prononcer sur les conséquences juridiques découlant de ces résolutions. » (*C.I.J. Recueil 1971*, p. 16, cf. p. 45.)

Une fois encore il est nécessaire d'étudier attentivement la décision du Conseil incorporée à la résolution du 29 juillet 1971, non seulement parce qu'elle est le point de départ et le fondement du présent appel, mais aussi parce qu'elle présente la caractéristique spéciale d'être « réduite à sa plus simple expression » et nous oblige à déterminer dans quelle mesure exacte elle apporte une solution à la question de compétence. Je me propose donc d'examiner ci-dessous à la fois le contenu et la régularité de la décision du Conseil de l'OACI avant d'envisager les conséquences juridiques qui en découlent.

I. Contenu et régularité de la décision du Conseil et limites dans lesquelles la Cour peut statuer

9. Le Conseil, comme tribunal, a l'obligation de s'assurer tout d'abord qu'il existe bien un différend relevant de la compétence limitée et particulière que la Convention lui confère. Pour qu'on puisse considérer qu'un différend existe, il ne suffit pas d'une *affirmation* suivie d'une *négation*. Si la formule « affirmation-négation » devait invariablement fonder la compétence dans toutes les affaires, il serait trop facile d'établir cette compétence sans entrer aucunement dans les détails de l'affirmation et de la négation et sans tenir compte de l'infinie diversité des causes qui peuvent surgir, toutes différentes par les faits et les circonstances, diversité qui risque fort d'écarter l'application de la formule « affirmation-négation » à la compétence à l'égard des différends.

Comme l'a dit la Cour permanente dans l'affaire *Mavrommatis*: « Un différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes » (*C.P.J.I. série A n° 2*, p. 11).

Un tribunal doit donc commencer par examiner dans quelles circonstances le différend a surgi et déterminer ensuite la nature et le caractère de ce différend, préciser en d'autres termes si ce différend relève de la compétence limitée et particulière qui lui a été conférée. En l'espèce, le différend est survenu à propos de la décision du Gouvernement indien de suspendre les vols de ses aéronefs au-dessus du Pakistan et les vols des aéronefs pakistanais au-dessus de l'Inde le 4 février 1971, pour répondre au comportement du Pakistan dans l'affaire du détournement

This principle has now been well established in the jurisprudence of the Court. I may cite in this connection the following paragraph from the Advisory Opinion of this Court in the *Namibia* case:

> "The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (*I.C.J. Reports 1971*, p. 16 at p. 45.)

Again, it is necessary to scrutinize carefully the Council's decision as embodied in the resolution of 29 July 1971, not only because it is the starting point and the basis of this appeal but also because of its special feature of "bare-bone" content in order to ascertain the exact quantum of its determination of the case on the issue of jurisdiction itself. I therefore propose to examine below both the content and the validity of the ICAO Council's decision before examining the legal consequences flowing from it.

I. The Content and Validity of the Council's Decision and the Limits to the Court's Verdict

9. It is the Council's duty as a tribunal to first satisfy itself that a dispute exists which falls within the limited and specific jurisdiction conferred on it by the Convention. A dispute cannot be deemed to exist merely by an *assertion* and a *denial*. If the formula of assertion and denial were to invariably confer jurisdiction in all cases, it would be all too easy a way to establish jurisdiction without going into any details of the assertion and denial and ignoring the infinite variety of cases that may arise with different facts and circumstances which may easily defeat the application of that principle of "assertion and denial" in relation to jurisdiction over disputes.

As the Permanent Court said in the *Mavrommatis* case: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons." (*P.C.I.J., Series A, No. 2*, p. 11.)

A tribunal must, therefore, first look into the circumstances in which the dispute arose and then determine the nature and character of the dispute, namely, whether or not it falls within the limited and specific jurisdiction conferred on it. In this case, the dispute arose from the decision of the Government of India to suspend overflights of its own and Pakistan aircraft over each other's territory on 4 February 1971, by way of reaction to Pakistan's conduct on the hijacking case. It was known to the tribunal, and to all its members, that the overflights had been sus-

pended. The fact of suspension was not disputed by Pakistan either. The dispute relates to the validity, or otherwise, of India's action in suspending the Convention.

10. The first point for the Council to determine, therefore, was whether the dispute related to suspension or to performance of the Treaty. If it related to suspension, and the Treaty had been validly suspended, there was no question of performance. If it related to performance, the Council could look into the matter whether India was or was not in breach of its obligations arising under the Convention. But the Convention must exist and be operative between the two Parties, before the question of breach would arise. If the dispute in fact relates to suspension, the question for decision of the ICAO Council was whether this falls within the specific and limited jurisdiction which is conferred on it by the Convention. This jurisdiction is limited in terms of Article 84 of the Convention to "any disagreement...relating to the interpretation or application of this Convention". The point for their determination would therefore be whether the terms "interpretation" and "application" included suspension and termination or applicability of the Convention itself. The decision of the ICAO Council, rendered on 29 July 1971, does not indicate anywhere the verdict of the Council on this point or, for that matter, on any other aforesaid aspects. Nor are any reasons given as to why or how the Council came to the conclusion that the nature of the dispute revolves on performance and not on suspension or, alternatively, that a dispute on suspension itself comes within the scope of "interpretation" or "application" of the Convention. If a valid decision had been given on this point, with the reasons indicating why they had come to this conclusion, the Court could and should have gone into the matter on its merits in this appeal, and decided the issue of jurisdiction one way or the other. When no decision has been given by the Council on this crucial point on the very threshold, it is not possible for this Court to assess the facts and arguments put forth by the Parties, because this has to be determined by the ICAO Council itself in the first place. It cannot be determined by this Court on behalf of the ICAO Council for reasons which are not only obvious, but so potent that they go to the root of the functions of the appellate court itself. These basic considerations are given below:

(i) This Court is exercising its appellate jurisdiction in this case and it cannot, therefore, act as a court of first instance without unlawful usurpation of the function of the Council, which, in this case, is the court of first instance.
(ii) If this Court, therefore, in its Judgment, were to even touch upon the merits or substance of the issues raised, it would be prejudging the issues which must exclusively be left to the Council to decide.

(iii) The function of the appellate court in no circumstances could be to give any lead or guidance by way of even throwing a hint, let alone an *obiter dictum*, to the lower court on questions of merit and substance, which must remain according to all tenets of law and procedure, the prime concern of the court of first instance.

In the circumstances it is necessary to repeat that the ICAO Council, performing a judicial function in this particular case, had to observe the elementary rules of a judicial tribunal in stating its reasons for its decision, to enable all concerned to know the exact extent to which it had gone into the merits when it came to a finding that the Council had jurisdiction in the case.

11. It is important, therefore, to determine first the stage and the state of the position reached by the Council in this case prior to embarking on the process of its adjudication in appeal. As stated earlier, on 29 July 1971 the Council adopted a resolution formulated in a negative manner, with neither a word of law, nor a point of reasoning, nor a single argument scribed anywhere in the records of the Council to support it. It certainly puzzled those who were then required to vote, but it still continues to puzzle those who are now required to read the proceedings leading to this resolution which are reproduced below for ready reference:

> "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' . . .
>
> 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' [1]."

[1] See Memorial of India, Annex E, *(e)*, Discussion, paras. 86-91.

The above is in short both the form and the content of the decision of the Council.

The Extent to Which this Appellate Court Can Go Into the Merits of the Substantive Issues Which Remain the Prime Concern of the Council

12. As stated earlier, since the Council merely held that it had jurisdiction to entertain Pakistan's Application and Complaint, this Court is seised only of that decision, and therefore it must accept the elementary principle that nothing in its Judgment should prejudge the merits, which should be sent back to the Council for its examination without any pronouncement by the Court, even by way of *obiter dictum* which would constitute an encroachment on the Council's jurisdiction. There are in this case special circumstances which make it imperative for the Court to confine itself strictly to the subject-matter of the dispute before it, namely the issue of the jurisdiction of the Council. This Court is in the presence of an appeal from a preliminary decision of the ICAO Council. It is vital therefore that this Court in appeal must be extremely careful to avoid any pronouncement on the merits of the dispute, since trespassing upon them would not only constitute a pre-judgment, but also an irregular indication by the organ of appeal to the body which must pass in first instance on the merits of the disagreement. If the Court were to give, even by way of any anticipation of its views on the slightest aspect of this case regarding the merits, then it would defeat the whole purpose and *raison d'être* of the two degrees of jurisdiction, one of whose essential features is to leave the organ of first instance absolutely free to give an unhampered decision.

13. The legitimate examination which this Court could therefore undertake in its adjudicatory process would be to pronounce exclusively on the question whether the disagreements which were presented to the ICAO Council by Pakistan's Application did or did not relate to the interpretation or application of the Chicago Convention and the Transit Agreement. It needs to be pointed out that the Court appears to be aware of this limitation, and has very rightly expressed it in the Judgment, not only in paragraph 11, but at several other places when, in parentheses, or otherwise, it has been held that a particular contention belongs to the merits of the dispute into which the Court cannot go. In spite of these observations, in its lengthy description of the pleadings of both the Parties, the Court at times gives the impression to run outside the limited field of jurisdictional issue, and to touch the merits, either by way of indicating a fact, or by a phrase suggestive of reasoning, which belongs to the Council. As the case goes back to the Council, it is neither proper nor necessary for me to spell out any details in this connection.

14. The aforesaid has been mentioned for the important reason that the Council on no account should read in the Judgment that the Court is leaning to one or the other side in relation to the substantive issues,

because that aspect stands contrary to the repeatedly expressed desire of the Court itself.

II. The Council's Decision

15. The second vital aspect in this case mentioned earlier, but which has to be considered *in extenso*, relates to the performance of the judicial function by the ICAO Council. It is true the Council is primarily an administrative organ but it has to be repeated that when it is specifically entrusted in certain matters with judicial functions by the Treaties, it cannot be permitted to ignore correct procedures and norms prescribed for a judicial body. The Council has its own Rules for the Settlement of Differences (1957) which, it is noteworthy, have been largely based on the Rules of the International Court of Justice.

16. It is necessary, therefore, for these administrative bodies, when required to perform a judicial function, to maintain standards similar to those prescribed for judicial tribunals. The performance of the Council with a view to determining whether or not the mandatory requirements of a judicial decision have been followed in this case can best be studied from the records of the proceedings of the ICAO Council, which reveal the following facts:

(i) At the very outset it is clear from the resolution of the Council of 29 July 1971 that no decision was taken by the Council on issues of jurisdiction. Only propositions were put to vote by the President of the Council. Again, what is striking is that even these propositions were negatively formulated and thus involved a clear unwarranted presumption of jurisdiction for which there can be no legal basis.

It was obviously for Pakistan, as the applicant State before the Council, to discharge the burden of establishing the jurisdiction of the Council conclusively (see joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice in *South West Africa* cases, *I.C.J. Reports 1962*, p. 470). Notwithstanding this requirement which goes to the root of jurisdiction of the ICAO Council, the Council formulated the propositions which were put to vote in a negative manner instead of formulating them in a positive manner. The propositions therefore shifted the burden of proof to the respondent State instead of requiring the applicant State to prove conclusively the jurisdiction of the Council. The President of the Council himself repeatedly stated that "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." (See Memorial of India, Annex E, *(e)*, Discussion, para. 62.) The basis on which the President of the Council formulated the questions is in direct contravention of the settled principles concerning

burden of proof, and as such any decision reached by any judicial tribunal on the basis of these propositions should be considered as invalid in law.

On the whole, therefore, there can be no doubt that the Council did not proceed according to its true role as a judicial, or even as a quasi-judicial organ, which is definitely expected of it under the ICAO Convention. As has been pointed out, the Council viewed the preliminary objection like an appeal against the ruling of the chairman of a political organ. Such appeals are put to vote and the chairman's ruling stands "unless over-ruled by majority" (see in this connection Rules 73 and 114 of the Rules of the General Assembly of the United Nations). It must, therefore, be emphasized that the conclusion reached by the Council did not conform with the procedures prescribed by Article 52 of the Convention and Article 5, paragraph 4, of the Rules for the Settlement of Differences.

Another serious objection is that it may be possible, even if there was no absolute majority of members in favour of recognizing the existence of any jurisdiction, to assert jurisdiction on the basis of the rejection of the negative question. In fact the negative formulation is *ab initio* defective in law irrespective of what the result may or may not have been if the question was put positively.

(ii) Again, Article 52 of the Chicago Convention stipulates that "decisions of the Council shall require approval by a majority of its members". On 29 July 1971, the Council consisted of 27 members and therefore any valid decision of the Council required a minimum of 14 votes. That this is the correct legal position under the Chicago Convention has been repeatedly stressed by the President of the Council (see Reply, Annex E) and also by the Secretary General of the International Civil Aviation Organization (*ibid.*, Annex D). I would like to refer in this connection to the following passage in the memorandum of 10 August 1971 submitted by the Secretary General of ICAO:

> "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." (Reply, Annex D.)

The result of the voting on the proposition that the Council had no jurisdiction as regards Pakistan's Complaint was, one in favour and 13 against and 3 abstentions. Having regard to the majority of 14 required for the adoption of a decision, I conclude that the Council did not reach any decision in respect of India's preliminary objection on Pakistan's Complaint.

Whatever may be the finding of the Court in respect of the nature and character of the "irregularities of the Council" which I have held to be illegalities, there is one aspect in the Court's Judgment which merits

to be pointed out with some emphasis. The Court in appeal has entertained for consideration both the Application and Complaint made by Pakistan before the Council. As far as the Complaint is concerned, there can be no doubt that the decision of the Council was null and void. The observation of the Court, therefore, in paragraph 45 of the Judgment, that these "irregularities do not prejudice the requirement of a just procedure", would appear to be unfounded in relation to the decision of the Council on the aforesaid Complaint of Pakistan. What is disturbing is that the Court comes to that conclusion without undertaking any examination of the irregularities as such. It needs to be reiterated that, as indicated above, when the Council's membership consisted of 27 members, and a majority decision required the minimum of 14 votes, the Council could give no decision on the basis of 13 votes. In spite of this lack of required majority a decision was declared to have been adopted by the Council, in clear contradiction of Article 52 of the Chicago Convention. Such a decision can only be held to be a nullity.

(iii) Moreover, an extraordinary feature is that no reasons whatsoever were given by the Council for its decision, although required by Article 15 of the Rules for the Settlement of Differences. It may be mentioned that Articles 5 and 15 are both applicable, which are similar to Articles 62 and 74 of the Rules of Court. It is surely not for this Court to search for reasons for the decision of the Council of 29 July 1971, from the explanations of votes or from the record of the deliberations. The provisions of Article 15 (2) (v) are mandatory and require, *inter alia*, that the decision of the Council should contain "the conclusions of the Council together with its reasons for reaching them". Notwithstanding this obligatory requirement, which, I would hold, is indeed basic to any judicial decision which has to be backed by reasons for its finding, the Council came to a decision without giving any reasons at all. It may be that reasons are not required in the form of a judgment when we are dealing with a quasi-judicial organ like the ICAO Council, but some reasons must be given somewhere, either in the resolution itself or in the statement made by the President, but to leave a decision unbacked by any reasoning whatsoever is not acceptable in law. Thus the Council not only violated its own procedural rules, but also the fundamental principle in the discharging of judicial function.

(iv) The Council also committed the following serious irregularities which resulted in miscarriage of justice:

(a) Neither the applicant and the respondent States nor the members of the Council were informed that the Council meetings beginning 27 July 1971 were convened to take a decision on India's preliminary objections. At the Vienna meeting of the Council on 12 June 1971, the Council decided to meet in Montreal on 27 July 1971 "to hear the parties on the preliminary objections filed by India". Consequently, when the Council met from 27 to 29 July 1971, several representatives of the Council had no idea that decisions would be

taken at that meeting. This is clear from the statement made by the President of the Council at the meeting of 28 July 1971, which reads as follows:

> "It was simply agreed that the Council would meet on 27 July to hear the parties on the preliminary objection. We did not say more than that. So perhaps some people thought that we were going to take a decision and others did not." (Memorial of India, Annex E, *(d)*, Discussion, para. 129.)

However, the Council meeting convened to hear the parties was continued, and decisions were taken without calling a separate meeting despite the objections raised by the Alternate Representative for India who said:

> "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 27 July" (*ibid.*, para. 134, *in fine*).

This procedure adopted by the Council is in direct contravention of Article 15, paragraph 4, of the Rules for the Settlement of Differences, which states that "the decisions 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". Any *decision* of the Council must invoke Article 15 whenever or wherever such a decision is taken.

(b) Some members of the Council wanted time to consult their administrations on points of law involved in the arguments advanced by the applicant and the respondent States before participating in the decision-making process. The President of the Council himself said that "If Representatives cannot decide by themselves, I suppose they will have to check with their own administrations". (Memorial of India, Annex E, *(e)*, Discussion, para. 19.) Nevertheless, the members of the Council were not given time after the oral hearings had concluded in which new points were raised and they were therefore unable to participate in the decision. The refusal of the Council to give time seriously interfered with the functioning of the judicial process which must precede any decision. It is an essential requirement for the functioning of any organ that time is granted to members to either study the problem or seek instructions or obtain legal advice and in this case members asked for seven to eight days time, and this too was refused, which gives the impression that there was an element of unreasonableness which hit the proceedings adversely. The statements made by the representatives of the United Kingdom, USSR and Czecholsovakia are reproduced below to indicate the

damage done by this unfortunate ruling not to give time:

> "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..." (Air Vice Marshal Russell (United Kingdom).)

> "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." (Mr. Svoboda (Czechoslovakia).)

> "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." (Mr. Borisov (USSR).)

(c) Even the move for adjournment to give time to the members of the Council to study and seek advice or instructions was turned down, although supported by eight members, with none against, because it was treated as a regular resolution of the Council requiring an absolute majority, whereas in the United Nations and its specialized agencies, request for time to study is normally granted, without putting the matter to a regular vote unless there are strong exceptional circumstances. The statements made by the representatives in the Council meeting, when making their demand for a short adjournment, are indeed most revealing and deserve to be quoted to indicate the seriousness of the entire matter arising out of the handling of the case by the Council:

> "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." (Air Vice Marshal Russell (United Kingdom).)

> "I should like to express almost the same view as the Representative of the United Kingdom has expressed . . . 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." (Mr. Svoboda (Czechoslovakia).)

"Of course, Mr. President, I was not saying I would not participate . . . The essential point to me is that this is a legal question . . . the expression of a view on the substance of the preliminary objection turns entirely on matters of law . . . 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." (Air Vice Marshal Russell (United Kingdom).)

"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 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." (Mr. Agésilas (France).)

"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 . . . 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 administration' 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 what-

> ever, 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." (Dr. Cucci (Italy).)
>
> "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." (Mr. Pirson (Belgium).)

It would follow from the aforesaid proceedings of the Council that an important number of members representing the United Kingdom, Belgium, USSR, Italy, France, etc., felt that they had not got the opportunity to apply their minds to the oral hearings made by the Parties, and they had been required to vote to take a decision without getting proper legal aid to come to a finding.

If any conclusion is reached in any sphere of life, let alone judicial, which indicates beyond doubt, as in this case, that those required to decide were not geared to take a decision, and there was a clear expression of inability to do so at that time, such a finding if forcibly made to reach could only be void in law. Again, law cannot be indifferent to the importance which *form* must take in such a case irrespective of the result even if it is held to be accidentally right because there must be some barest legal minimum of a norm in respect of *form* which must be maintained.

The conclusion is therefore irresistible that the Council voted for a resolution without having evaluated the basic problem before it, and in the circumstances it must be necessary for this Court to judge what judicial value or even administrative value can be attached to such a decision, which was embodied in the resolution of 29 July 1971. It cannot be argued that the Council had six months' time to appreciate and understand the issues, because the representatives wanted to inform their governments of the latest position arising out of the oral hearings, which aspect is very clearly brought out by the representative of Italy—(*vide* his statement as quoted above). It is but reasonable and necessary for members to have consultations on the fresh points resulting from the oral pleadings.

17. It may be further observed that several of the serious irregularities mentioned above become illegalities when one applies the salutary principle that if power is given to do a certain thing in a certain way, it must be done in that way or not at all (*North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, Judgment, para. 28). This very principle was cited with approval in a case decided much earlier by the Judicial Commit-

tee of the Privy Council in *Nazir Ahmed* v. *King Emperor* (India), where the point at issue related to non-observance of a procedure prescribed in the Criminal Procedure Code of India. This is merely to illustrate that even in respect of procedural matters, there can be illegalities committed which could vitiate the entire decision. If the performance of the Council is to be viewed in the light of a judicial organ, which it was when functioning in relation to this dispute, one would inevitably come to the conclusion that such a decision could not be allowed to stand being void in law.

18. The Court would thus have to send the case back to the ICAO Council, asking them to address themselves to the issues involved in the pleadings of the Parties, on facts and points of law, and to give a reasoned decision as to its jurisdiction in the present case.

19. In view of the conclusions reached above, I do not express any views on the merits of the issue of jurisdiction, such as:

(a) whether the dispute referred to the Council by Pakistan related to performance of the Treaty or whether, as contended by India, it related to suspension;

(b) whether there are inherent limitations on the jurisdiction of the ICAO Council or whether it has plenary powers not only to interpret and apply the Convention but also to rule on the general principles of international law, like the International Court of Justice, which has such powers by virtue of Article 36 of its Statute;

(c) whether on evidence and law the special régime of 1966-1971, as pleaded by India, was established or not;

(d) whether, if it were held that the Convention was applicable on 3 February 1971, India could and did validly suspend the application of the Convention vis-à-vis Pakistan because of its conduct on the hijacking case, and

(e) whether Article 89 is at all relevant to the issue of jurisdiction in this case.

These and other related questions are for the ICAO Council to decide in the first place.

III. Conclusion

1. As far as the decision of the Council in respect of the *Complaint* of Pakistan is concerned, it must be held to be null and void because, as stated earlier, it was reached without the mandatory requirement of a majority vote, namely 13, whereas 14 votes were required out of a total of 27 members of the Council. No decision could thus be reached in violation of Article 52 of the Chicago Convention.

2. As far as the decision of the Council in respect of the *Application*

of Pakistan is concerned, it was in content a "bare-bone" nudity, giving no reasons for its finding, and reached by a negative formulation, contravening its own rules of procedure, and in a manner which made it abundantly clear that several members of the Council had not been allowed to apply their minds to the problem posed before the Council, as the time requested was not granted. As judicial standards must necessarily be applied to even administrative organs performing judicial functions, the conclusion would be warranted that, judged by those standards, the decision of the Council on the Application was also void.

The observation of the Court, therefore, that "alleged irregularities do not prejudice in any fundamental way the requirements of a just procedure" made without going into the irregularities as such (see para. 45 of the Judgment), is both unwarranted and unfounded.

3. The Court, therefore, in appeal, should have referred the case back to the Council to take a decision on the issue of jurisdiction in a proper legal manner.

4. If the Court has declared in its Judgment that it has supervisory powers in respect of merits and jurisdiction (para. 26) it could not but also have supervisory powers in respect of procedural issues. It was, therefore, the duty of the Court when the aforesaid procedural violations were brought to its notice, *to at least* draw the attention of the Council that when the case is again examined by the Council for further adjudication, it must follow its own procedures more carefully, demonstrating to all concerned that justice was being shown to be done. I would therefore consider this omission a lacuna in the Court's Judgment and a reason for my dissent.

5. Lastly, my dissent in conclusion would not be complete if I were not to mention the fact that it was not necessary in its Judgment for this Court to proceed at such great length into the arguments and pleadings of both Parties, and in the process, after solemnly affirming the principle (para. 11 of Judgment) that it would not enter into the merits of the substantive issues raised, since these were exclusively the concern of the Council, appear or even give the impression to digress from this salutary rule.

6. It is important to emphasize, therefore, that when the case goes back to the Council for its consideration, it would be incumbent on the Council to disregard all such observations of this Court which go to the merits of the substantive issues raised, and not to take account of any indications which point to that aspect of the case. The Council would then be acting strictly in accordance with the spirit and letter of the Judgment of the Court wherein this very avowed principle of the Court, not to touch upon substantive issues, has been repeatedly emphasized.

(Signed) NAGENDRA SINGH.
