SEPARATE OPINION OF JUDGE JIMÉNEZ DE ARÉCHAGA

1. While I have voted for the operative part of the Judgment and am in general agreement with the reasoning by which it is justified, I am, however, unable to concur in one of the conclusions reached by the Court: that it is competent to pronounce on appeal on the third decision adopted by the Council of ICAO on 29 July 1971 with regard to the "Complaint" filed by Pakistan under Section 1 of Article II of the Transit Agreement.

Since a separate vote was not taken on this question, I voted for the operative provisions of the Judgment considering that, in the context of the present case, the non-appealability of the "Complaint" was not the main issue to be decided. I believe, however, that a question of treaty interpretation which may be of importance in the future is involved and therefore feel constrained to append the present separate opinion, explaining those aspects on which I differ from the Court's decision and reasoning. This will also afford me the occasion of setting forth the reasons which decided my vote on the case as a whole.

I. Non-Appealability of the "Complaint"

2. Article II of the Transit Agreement in two separate and distinct sections establishes one procedure for the adjudication of disagreements and a different one for the disposition of complaints by a contracting State which deems that action by another party is causing injustice or hardship to it. Disagreements relating to the interpretation or application of the Transit Agreement are subject to the same procedure as that which applies to disagreements under Chapter XVIII of the Chicago Convention, thus including a right of appeal to the Court under Article 84 thereof. On the other hand, no direct or indirect reference is made in Section 1 of Article II of the Transit Agreement to an appeal to the Court. Such an omission signifies that the Court has not been conferred appellate jurisdiction with respect to complaints under Section 1 of Article II.

3. The lack of appellate jurisdiction of the Court with respect to complaints is understandable, since adjudication on the basis of international law on the legal rights and duties of the parties would be incompatible with the very nature of the complaint proceedings. These are primarily designed to deal with action by another contracting State which, even falling within its legal rights, may cause injustice or hardship to another party. It would not correspond to the logic of the system and

to the powers and functions of the Court "whose function is to decide in accordance with international law" that an appeal should lie against recommendations and findings addressed by the Council of ICAO to the States concerned. Such recommendations and findings do not need to be based exclusively on the legal rights and duties of the parties, but may take into account considerations of equity and expediency.

4. The foregoing interpretation of the basic texts providing for the Court's jurisdiction is confirmed by the Rules for the Settlement of Differences, adopted by the ICAO Council. The structure of this instrument, adopted after several years of study of the matter and with the help of legal experts is significant It is divided into three parts: I. Disagreements; II. Complaints and III. General Provisions. The introductory Article 1 explains that Parts I and III apply to disagreements relating to the interpretation or application of the Chicago Convention and that Parts II and III apply to complaints submitted under Article II, Section 1, of the Transit Agreement.

Article 18 of the Council's Rules is the only article in the whole Rules which provides for appeals. This Article is included in Part I and therefore does not apply to complaints, while other provisions of Part I are extended to complaints by express reference. Article 18 provides, in its paragraph (2), that "decisions rendered on cases submitted under Article 1 (1) *(a)* and *(b)* are subject to appeal pursuant to Article 84 of the Convention". Thus Article 1 indicates by careful omission that decisions with regard to complaints are not subject to appeal under Article 84. This instrument must be viewed as a carefully considered interpretation by the ICAO Council of the Convention and Transit Agreement concerning the question of appeals, which should not be lightly disregarded.

5. The Council's Rules for the Settlement of Differences require the party bringing a matter to the Council's attention to file an "application" under Article 2 when it asks for a *decision* of the Council on a legal disagreement under Article 84 of the Chicago Convention or Section 2 of Article II of the Transit Agreement, and to file a "complaint" under Article 21 when it asks for a *recommendation* of the Council under Section 1 of Article II of the Transit Agreement. This was done by Pakistan which filed both an "Application" mentioning specifically Article 2 of the Rules (thus invoking Article 84 of the Chicago Convention and Section 2 of Article II of the Transit Agreement) and a "Complaint" mentioning specifically Article 21 of the Rules (thus invoking Section 1 of Article II of the Transit Agreement).

Both according to the Rules and to the interpretation given by the requesting State, the criterion of the distinction between "applications" and "complaints" is whether a party is seeking a *decision* of the Council

on a legal disagreement under Section 2 of Article II of the Transit Agreement, or a *recommendation* under Section 1 of Article II of the same instrument.

6. According to the Court's Judgment, however, it would appear that the question whether a right of appeal lies does not depend on this objective criterion—the legal provisions invoked by the requesting State and the powers to be exercised by the Council—but on the substance of the grievances put forward by the contracting party. A decision subject to appeal would exist if a State complains of a violation of its legal rights by another party, even if that State has filed a "complaint" invoking Section 1 of Article II; action under Section 1, not subject to appeal, would only exist if the grievance "is not of illegal action, not of alleged breaches of the Treaty, but of action lawful, yet prejudicial".

This is supported by the consideration that "in so far as a 'complaint' exceeds the bounds of the type of allegation contemplated by Section 1, and relates not to lawful action causing hardship or injustice, but to illegal action involving breaches of the Treaties, it becomes assimilable to the case of an 'application' for the purposes of its appealability to the Court" (para. 21).

7. I can find nothing in the language of Article II, Section 1, which compels or even suggests these bounds or limitations. There is nothing in Section 1 that precludes a contracting party suffering injustice or hardship because of unlawful action from bringing a "complaint". Past practice in the application of the Transit Agreement and the opinion of commentators lead to the conclusion that "the facts justifying the submission of a complaint could include questions relating to the interpretation or application of the Agreements [1]", and that furthermore "an injustice or hardship may be caused by action on the part of a contracting State which is in violation of the Agreements, but it is not limited thereto [2]". In such a case, the injured party may have a choice between filing a complaint or instituting an application, or it may set in motion both procedures, filing both an application and a complaint on the same or similar grounds. There may be powerful reasons for so doing: a contracting State may wish to obtain a recommendation solving a pressing problem in an expeditious way and also to get a binding decision which, after a longer procedure, will afford compensation for past damages.

8. In this case, Pakistan resorted to both procedures and while in the "Application" it asked for a decision awarding compensation and indemnity for the losses and injury suffered by the suspension of overflights, a request for monetary compensation does not appear in the "Complaint", where only recommendations and findings of corrective action for the future are sought. This, in my view, is sufficient to give

[1] Buergenthal, *Law Making in the Civil Aviation Organization*, 1969, p. 159.
[2] *Ibid.*, p. 160.

a separate identity to each instrument and exclude the possibility of their assimilation, since they may follow different roads in the future, even if the language, the charges of breaches of treaties and the other heads of redress coincide.

9. The fact that a party may have chosen to submit as a complaint all or part of the same grievances which had been submitted as an application cannot alter the legal situation.

If a party asks on the same grounds for both a decision of the Council and a recommendation, it is simultaneously following two different paths, but it cannot by this procedure accumulate or combine the reliefs and the legal protection to which it is entitled under each procedure. If the requesting party obtains a decision, that decision, while binding, is subject to appeal. If it obtains a recommendation, this does not involve a binding obligation nor allow an appeal to the Court or to an arbitral tribunal.

This must apply equally to the requesting and the respondent State. To admit that the decision of the Council regarding this "Complaint" is now subject to appeal by the Respondent, carries the necessary implication that any future pronouncement on the merits of this same "Complaint" may come back to the Court by way of appeal at the initiative of the unsuccessful Party.

10. The argument invoked in support of the conclusion reached in the Judgment is the paradox that would exist if the Court finds the Council not competent to deal with certain breaches alleged in an "application" but the same Council could nevertheless pronounce on these same issues when entertaining a non-appealable "complaint".

If account is taken of the powers to be exercised by the Council under Section 1 of Article II of the Transit Agreement and the form which its action under this provision must take, I am unable to find any paradox in this situation. By that negative decision of the Court on an appeal concerning an "application", the Council would naturally be prevented from arriving at a binding decision on the breaches complained of in such "application". But why should such a hypothetical decision of the Court prevent the Council from making recommendations when dealing with a "complaint", not on the breaches as such, but on the corrective action to be taken with respect to the resulting injustices and hardships?

If the Council is empowered to make recommendations, even if the respondent State has acted entirely within its legal rights, as everybody admits, it should *a fortiori* be allowed to make similar recommendations when the question of alleged breaches of treaties has been determined by the Court to be outside the Council's jurisdiction under Article 84.

11. In paragraph 24 of the Judgment the Court holds that the decision

assuming jurisdiction in respect of Pakistan's Complaint is appealable "in so far as it covers the same ground as the Application". In my view the jurisdictional decisions regarding the Complaint and the Application do not cover the same ground because the scope of jurisdiction of the ICAO Council under Section 1 of Article II is much broader than that attributed under Section 2, to the point that it may be said that there are no legal standards to apply in order to review a decision of the ICAO Council incorporating a "complaint" in its agenda.

Under Article 84 of the Chicago Convention and Section 2 of Article II of the Transit Agreement, the jurisdictional clause is precise and capable of judicial review, as the Judgment itself shows. But the terms in Section 1 of Article II providing for the Council's jurisdiction to receive and consider "complaints" are drafted in such a way that it is obvious it was never intended to subject such a decision to judicial review. According to those terms, any contracting party is entitled to submit a request to the Council whenever, in its subjective appreciation, it *deems* that action by another State causes injustice or hardship to it. The provision goes on to state that "the Council shall *thereupon* inquire into the matter". These words require the Council to place the request automatically in its agenda and therefore set no legal limits or restraints on the scope of the Council's jurisdiction to receive and consider a "complaint".

II. Competence of the Appeal with Regard to the Application

12. I fully agree with the conclusion reached in the Judgment that the Court is competent to entertain the appeal against decisions Nos. 1 and 2 of the Council of ICAO, concerning Pakistan's Application.

Article 84 of the Chicago Convention provides that an appeal shall lie "from the decision of the Council" on "*any* disagreement between two or more contracting States relating to the interpretation or application of this Convention . . ." (emphasis added).

Each one of the two above-mentioned decisions of the ICAO Council constituted the decision on a disagreement between India and Pakistan relating to the interpretation or application of Article 84 of the Convention. India contended that the ICAO Council had no jurisdiction, on the ground that "suspension" and "termination" are not covered by the words "interpretation" or "application" and that a bilateral special régime, and not the Convention, was in force between the Parties; Pakistan opposed both contentions.

13. On the particular disagreement as to whether the Council of ICAO had power to act and should exercise it, there were attempts at negotiation without avail.

When the Council of ICAO adopted its decisions on 29 July 1971 it

had cognizance of letters exchanged between the parties and communications made to the Council from which it transpired that the jurisdictional issue had become an obstacle to the negotiations on the merits which the parties had been asked to undertake by the Council's resolution of 8 April 1971. According to that information, while India was prepared to hold "bilateral talks with Pakistan", it added that such talks should take place "without third-party interference", alluding to the Council of ICAO (Memorial of India, Annex E, *(b)*, Verbatim Record of the Third Meeting, 27 July 1971, Discussion, paras. 69 to 78).

In view of that refusal to negotiate on the jurisdictional issue, or to negotiate on the merits until the jurisdictional question was eliminated, the Council of ICAO was perfectly justified in making its implicit determination that the particular disagreement concerning the Council's jurisdiction could not be settled by negotiations between the parties.

14. The dispute as to the jurisdiction of the ICAO Council was brought to the Council's attention by India when it filed its preliminary objections; this document constituted, within the meaning of Article 84 of the Chicago Convention, the application of the State concerned. In the context of the Convention, and particularly of its Article 85, only the parties to the disagreement may exercise the right of appeal: the appellant in this case was a party to the dispute. In consequence, all conditions required by Article 84 were met and in the circumstances it would be unjustified to refuse the appeal as incompetent, as contended by Pakistan in the oral proceedings, advancing a restrictive interpretation of the Rules of the Council for the Settlement of Differences.

15. The question of the competence of the appeal must be determined on the exclusive basis of the treaty provisions establishing the Court's jurisdiction, examined in the light of the basic principles of international law on jurisdictional matters, indicated in paragraph 18 of the Judgment.

The Rules for the Settlement of Differences adopted by the Council of ICAO cannot have the effect of ousting the Court's jurisdiction, if it exists on the basis of the relevant treaty provisions. A regulation adopted by the organ of first instance cannot add to or detract from the appellate jurisdiction possessed by the Court under provisions which have been agreed to by the contracting States, on whose consent that jurisdiction is grounded.

16. In any case, it was not the object of these Rules to affect or diminish the Court's jurisdiction, but only to regulate the procedures within the ICAO Council itself.

The restrictive inferences which were drawn by counsel for Pakistan in the oral proceedings do not, moreover, appear to be justified.

A reading of these Rules conveys the opposite impression. Inspired as they are by the Rules of Procedure of the Court, they intend, and in fact succeed, in setting out, as independent and separate decisions, those pronouncements which the Council must adopt on the question of its own jurisdiction. This independence assigned to jurisdictional decisions

cannot be explained otherwise than as a recognition of the basic principles of international law and of good administration of justice, which require both a preliminary and a conclusive determination of the existence of jurisdiction before the adjudicating organ may embark upon the merits of a case. This can only be accomplished if, as declared in the Court's Judgment, an independent appeal is allowed on the decision concerning jurisdiction, so that this question is conclusively settled "before any further steps are taken under these Rules" (Art. 5, para. 4, of the Rules).

17. As to Articles 36 and 37 of the Statute of the Court, it would be difficult to conceive that the Court might find that the Chicago Convention and the Transit Agreement, ratified or adhered to by 120 and 79 States respectively, including both Parties in the case, are not treaties or conventions "in force".

This is so even in the relations between the Parties in this case. What has been claimed by India before the Court is that it has suspended those treaties vis-à-vis Pakistan. The suspension of a multilateral treaty between two of its parties, while it affects temporarily the operation of the treaty as between them, does not affect the maintenance in force of the treaty, among all the parties and even in the relations of these two parties *inter se*. This is confirmed by various provisions of the Vienna Convention on the Law of Treaties concerning "suspension of operation" of treaties, such as Articles 72 and 45. The latter provision, in particular, in its final part, distinguishes between invalidity and termination, on the one hand, affecting the "maintenance in force" of a treaty, and suspension, on the other hand, only affecting the "maintenance in operation" of a treaty.

III. Jurisdiction of the ICAO Council

18. Two alternative grounds of objection have been raised by India against the jurisdiction of the ICAO Council:

(1) The allegation that Pakistan by its conduct with respect to an act of hijacking of an Indian aircraft diverted to Lahore has committed a material breach of the Chicago Convention and the Transit Agreement and therefore India is entitled to consider those treaties as suspended. In India's contention, questions arising from the "termination" or "suspension" of the treaties do not come within the purview of the jurisdictional clause in Article 84 of the Chicago Convention, which refers to disagreements relating to the "interpretation or application" of the treaty.

(2) The allegation that since 1966 the Chicago Convention and the Transit Agreement have been superseded in the relations between India and Pakistan by a special régime of a bilateral character, not comprising landing rights and allowing overflights only on a provisional basis, on the condition of reciprocity and subject to the permission of the State to be overflown. This special régime would exclude the

jurisdiction of the Council of ICAO on a different ground than that indicated in (1) above; because that jurisdiction only comprises disagreements relating to the interpretation or application of the Chicago Convention and the Transit Agreement, and not disagreements arising from bilateral arrangements.

1. The Allegation of Material Breach

19. The first ground of objection advanced by India, and the position taken by Pakistan, make it necessary to examine the relationship existing between the alleged breach of a treaty and its possible effects with regard to a jurisdictional clause such as that appearing in Article 84.

When a breach of a treaty is alleged to have occurred, several options are available to the party which claims to have been injured by such breach. One of them is to make a claim demanding resumption of performance and asking for reparation for the damage resulting from the breach. Thus Pakistan submitted an application to the Council of ICAO requesting that India should be directed to perform its obligations under the Chicago Convention and the Transit Agreement and to pay compensation for the damage which had resulted from such breach.

20. The jurisprudence of the present Court and that of its predecessor have established that, if a jurisdictional clause comprises all or any disagreements relating to the interpretation or application (or the execution) of a treaty, the organ provided for in that clause would possess jurisdiction to examine the questions concerning the performance or non-performance of the obligations resulting from the treaty as well as the claim for reparation resulting from the alleged breach.

21. The first proposition was established in the Advisory Opinion on *Interpretation of Peace Treaties* where the Court found that disputes which "relate to the question of the performance or non-performance of the obligations provided in" a treaty, "are clearly disputes concerning the interpretation or execution" of the treaties in question (*I.C.J. Reports 1950*, p. 75) [1].

The second proposition, namely that the jurisdiction of an organ empowered to consider any dispute relating to the interpretation or application of the provisions of a treaty also extends to claims for reparation for failure of performance of those provisions, was established by the Permanent Court which held that "differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application" (*Chorzów Factory (Jurisdiction) case, P.C.I.J., Series A, No. 9*, p. 21).

[1] In that case the jurisdictional clause referred to the "execution" and not to the "application" of the treaty. But this difference is here immaterial since " 'application' is a wider, more elastic and less rigid term than 'execution' " (*P.C.I.J., Series A, No. 5*, p. 48).

22. In the case of a material breach of a treaty, the State claiming to be injured by the alleged violation, instead of asking for resumption of performance and damages (as Pakistan has done) may invoke the right to consider the treaty or some of its provisions as suspended or terminated. This is what India stated before the Court that it had done in the present case.

When one party had already resorted to the organ provided for in the treaty, it would seem difficult to accept, as a matter of principle, that the jurisdiction thus invoked might be ousted by the other party's allegation of a breach and claim that it constituted a ground for terminating the treaty or suspending its operation in whole or in part. That would signify that a party might be able, by its unilateral action, to put an end to the exercise of jurisdiction by an organ whose functions are provided for on the basis of the consent of all parties. Such a thesis would also signify that the organ in question would lose its power to act precisely with regard to the most serious cases of non-performance: when it is alleged that a material breach of the treaty has been committed.

23. A more detailed analysis of the matter confirms the initial appreciation of principle made above. The determination that a breach of a treaty has occurred and that it is of such significance as to entitle one of the parties to invoke it as a ground for terminating the treaty or suspending its operation, presupposes and requires an interpretation of the treaty in question. It is necessary first of all to determine whether the conduct of the party is actually incompatible with or contrary to the terms of the treaty or is excluded by necessary intendment thereof. It is then indispensable to determine whether there has been a material breach, since only such a type of breach would justify termination or suspension. In Article 60 of the Vienna Convention on the Law of Treaties, which the Court has found in this respect to codify existing customary law (*I.C.J. Reports 1971*, p. 47) a material breach is defined as the violation of a provision essential to the accomplishment of the object and purpose of the treaty. The determination of the existence of a material breach necessarily requires the interpretation of the provisions of the treaty, including its preamble.

24. The need for such an interpretation of the treaty in question is even more necessary when, as it occurs in the present case, the allegedly defaulting State denies either the fact of the violation, or its responsibility for it, or the material character of the breach. In such an event, differences arise between the parties which must be regarded as disagreements relating to the interpretation or application of the treaties, since they cannot be solved without reference to the instruments themselves.

25. In the present case, the Chicago Convention contains several provisions which are relevant to a legal appreciation of some of the contested facts which lie at the root of the disagreement and which have a direct bearing on the problems concerning safety of international civil aviation arising from hijacking incidents.

The Institute of International Law, when it examined in its Zagreb session, on 3 September 1971, the rules of international law which apply *de lege lata* to acts of "Unlawful diversion of Aircraft" concluded that:

> "1. Under the general rules of international air law, as expressed especially in the Chicago Convention of 7 December 1944, State are required to ensure the safety, regularity and efficiency of international air navigation and to collaborate with each other to this end.
> 2. Under the general rules of international law which find particular expression in Articles 25 and 37 of the Chicago Convention of 1944, States are required to render assistance to aircraft in distress in their territory and to permit, subject to control by their own authorities, the owners of the aircraft or authority of the States in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances."

These provisions correspond to the object and purpose of the treaty, as defined in its preamble: to set up "certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner".

26. In fulfilment of this purpose, the international organization created by the Chicago Convention, ICAO, was assigned certain aims and objectives (Art. 44 of the Convention), *inter alia*, to "insure the safe and orderly growth of international civil aviation throughout the world", "avoid discrimination between contracting States" and "promote safety of flight in international air navigation". In execution of these aims and objectives this specialized agency of the United Nations has shown its concern for acts of violence against international civil air transport, sponsoring the Tokyo and Hague Conventions designed to cope with this problem. The General Assembly of the United Nations has recognized this special concern, urging full support for these efforts (resolutions 2551 (XXIV), para. 3 and 2645 (XXV), para. 8).

27. The issues in dispute between the Parties require the interpretation of various of the above-mentioned provisions and a careful consideration of the basic purposes and objectives of the organization created by the Chicago Convention. Among those objectives, not only safety of international air navigation may be of relevance but also that objective which requires this specialized agency to organize and co-ordinate, in an orderly manner and on a multilateral and world-wide basis, civil international air navigation.

Thus, the various allegations and counter-allegations of the Parties on this aspect of the case not only constitute disagreements which relate to the interpretation and application of the Chicago Convention and

the Transit Agreement, but at the same time they concern the basic objectives and aims of ICAO and some of its most important functions.

2. The Special Régime

28. The second ground of objection raised by India against the jurisdiction of the ICAO Council is its contention that since 1965 overflights of Indian and Pakistani aircraft had been governed by a "special régime" which had repalced in the relations of the Parties *inter se* the Chicago Convention and the Transit Agreement.

In support of this contention two notifications issued by India were invoked; the first, dated 6 September 1965, directed that no Pakistani aircraft 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".

India asserts that there is a complete inconsistency between the Chicago Convention and the Transit Agreement, on the one hand, and the 1966 notification on the other, since the essence of the multilateral treaties consists in the unseverable rights to overfly and make non-traffic landings in another State's territory without that State's prior permission.

29. Pakistan, for its part, asserts that the suspension of overflights in 1965 was based on Article 89 of the Chicago Convention which establishes that in case of war the provisions of the Convention shall not affect the freedom of action of the parties, subject to a notification of the emergency to the ICAO Council, which notification, it states, was given by India on 9 September 1965. By the Tashkent Declaration, the Parties agreed "to take measures to implement the existing agreements" and in a further exchange of letters, on 3 and 7 February 1966, agreement was expressed "to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1 August 1965", these terms indicating, in Pakistan's view, that far from envisaging the setting up of a new or special régime, the Parties referred to the resumption and implementation of the "existing agreements".

30. The preceding confrontation of views of the Parties reveals disagreements between them on the following questions, among others:

(1) Whether the Tashkent Declaration and subsequent exchanges resulted in the effective application of the Chicago Convention and the Transit Agreement, as contended by Pakistan, or merely signified that measures would be taken thereafter to implement the existing agreements, as contended by India.
(2) Whether the action taken by India in 1965 and the subsequent practice of the Parties had resulted in the establishment of a special régime in lieu of the Chicago Convention and the Transit Agreement, as contended by India, or was merely an application of the Convention to special circumstances, in exercise of the freedom of action re-

cognized by its Article 89 or in accordance with safeguards contained in other provisions of the Convention, as contended by Pakistan.

31. It suffices to contrast these views of the Parties to reach the conclusion that, whatever their respective merits, these opposing contentions constitute disagreements relating to the application and the interpretation of the Chicago Convention and the Transit Agreement, thus attracting the provisions of Chapter XVIII of the Convention and establishing the jurisdiction of the ICAO Council to examine and pronounce in first instance upon them.

One of the Parties asserts and the other denies the existence of the special régime, the latter invoking various provisions of the Convention as an explanation of the practice followed and also claiming that a divergent bilateral régime would not be permissible under Articles 82 and 83 of the Convention itself.

Whether there is in fact a special agreement divergent from the treaties or a practice pursuant to them, and whether the former could legally exist as between States parties to the Chicago Convention are both questions which cannot but relate to the interpretation and application of the Chicago Convention and the Transit Agreement. In other words: there may be a special régime, as contended by India, but the determination of its very existence and its legality requires the prior interpretation and application of the Chicago Convention and the Transit Agreement.

32. A more detailed examination of the issues debated by the Parties before the ICAO Council and the Court confirms the foregoing conclusion. The Judgment indicates, in paragraphs 41 and 42, the conflicting interpretations of Article 89 advanced by the Parties before the Court.

Even more conclusive as to the need for an interpretation of Article 89 in order to pronounce on the basic issues of this case was, in my view, another statement made by counsel for India before the Council of ICAO.

He advanced there the following interpretation of Article 89: "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" (Memorial of India, Annex E, *(a)*, Verbatim Record of the Second Meeting, 27 July 1971, Discussion, para. 59).

It is legitimate for the Court to take into account this statement, which raises fundamental questions of interpretation of that provision, because the Court must pronounce on appeal on whether the Council of ICAO, *on the basis of the record of the discussion which had taken place before it*, was right in assuming jurisdiction over this disagreement.

3. The Prior Permissions

33. In its Reply, India indicated certain examples designed to demonstrate that the requirement of prior permission was consistently followed in practice, so as to prove that in fact the multilateral treaties had been superseded by the "special régime". During the oral proceedings before the Court, new documents were deposited as additional evidence in support of the same contention.

These allegations and documents might have been held to constitute facts presented *ex novo*, since they had not been introduced or argued before the organ of first instance.

One of the limitations resulting from the circumstance that the Court is exercising an appellate jurisdiction is that it must examine the decision of the ICAO Council as a court of appeal would do. It is therefore unable to take new facts and subsequent developments into account and must appreciate the decisions of the ICAO Council in the light of the facts and arguments of law as they existed at the end of July 1971 and were then submitted to the Council's attention.

34. However, the conflicting contentions of the Parties on the permissions sought or granted for overflights and landings, both for scheduled and non-scheduled air services, do not really concern the facts of the case. The Parties are not at odds about the facts themselves, on which both introduced additional evidence, but about the legal characterization and significance of these requests or grants for permission to overfly or to land.

India, while emphasizing the need for prior permission in every case, made a distinction between permissions granted for a period of time, six months for instance, and special or *ad hoc* permission granted for each flight. Pakistan, for its part, pointed out that in accordance with Article 68 of the Chicago Convention and Article I of the Transit Agreement, the routes to be followed by air services had to be submitted to and agreed by the competent authorities: such requests were not, according to its view, permissions inconsistent with the Chicago Convention and Transit Agreement but authorizations to overfly along a prescribed route.

35. Such a diverging characterization of the same facts again raises questions of interpretation and application of the Chicago Convention and the Transit Agreement, and in particular, the *vexata quaestio* of the divergent practice of contracting States with regard to the requirement of prior permission or other authorizations for overflights and non-commercial landings, both for scheduled and non-scheduled air services.

This issue not only relates to the interpretation and application of the multilateral treaties in question, but is one with which the Council of ICAO is particularly experienced to deal.

36. In framing Chapter XVIII of the Chicago Convention, the founders of ICAO clearly intended to entrust functions of peaceful settlement to a body such as the Council, composed of representatives selected by member States on the basis of their experience in the actual operation of the international instruments they had to administer and apply. The Council is empowered, not only to adjudicate on disagreements, but also to mediate in them. In granting such powers, account must have been taken of the influence which may be exerted by a body composed of delegates representing all major geographic areas of the world and including States chosen for their chief importance in air transport or their large contribution to the provision of facilities for international civil air navigation. An appeal to the International Court of Justice or to an *ad hoc* arbitral tribunal was provided for so that when the Council takes a decision on a disagreement, its adjudication is subject to the supervision of an organ competent to determine, on the basis of international law, on the rights and duties of the parties.

IV. The Procedure Followed by the Council

1. Relevance of the Question

37. The Court has not deemed it necessary or even appropriate to go into the question of the alleged procedural irregularities which, according to India, occurred within the ICAO Council.

I have been unable to agree on this view, which I find too limited, of the powers and duties of the Court when functioning as a court of appeal. The right of appeal granted by Article 84 of the Chicago Convention comprises not only the right to obtain a pronouncement from the Court on whether the decision of first instance is correct from the point of view of substantive law but also on whether that decision was validly adopted in accordance with the essential principles of procedure which must govern the quasi-judicial function entrusted to the organ of first instance. This is further supported by the considerations stated in paragraph 26 of the Judgment.

The thesis which could be inferred from the Judgment might prevent the Court from going into questions of procedure even if confronted with a decision of first instance adopted with gross violation of elementary principles and guarantees of procedure: for instance, without hearing one of the parties or allowing only one of them to vote.

Even if a decision adopted in the circumstances described may reach correct conclusions from the point of view of substantive law, it would, in my view, be unjustified to deny the relevance of the procedural issue, or the power of the Court to declare the decision null and void, simply for the logical consideration that the answer to an objective question of law cannot depend on what occurred before the organ of first instance. The fact of being competent cannot give a blanket licence to an organ of

first instance to violate basic guarantees of procedure in reaching the inherently correct decision of asserting its own jurisdiction.

2. *Validity of the Appealable Decisions*

38. I do not believe that in this case the procedural deficiencies alleged by the appellant have enough importance to justify the finding of nullity which it has asked the Court to make.

39. The first observation refers to the form in which the questions put to the vote were framed. This observation, as a general proposition, is a correct one, since by putting a question in the negative it might be possible in a hypothetical case to assert jurisdiction, on the basis of the rejection of the negative question, even if there should be no absolute majority of members in favour of recognizing the existence of such jurisdiction.

However, as a practical proposition with respect to this case, the objection does not affect the validity of those decisions, Nos. 1 and 2, which are, in my view, the only ones subject to appeal. If the questions had been put in an affirmative form, the jurisdiction of the Council to entertain the Application would have been equally asserted by the majority required by Article 52 of the Chicago Convention. This was conceded by the appellant in the oral proceedings (hearing of 23 June 1972).

40. The second objection raised by the appellant is that decision No. 3 concerning the Complaint was not supported by a majority of the members of the Council. For the reasons stated in Part I of the present opinion, I believe that the Court lacks jurisdiction to pronounce on decision No. 3. Therefore, the questions of the validity of this decision or of the majority required for its adoption do not arise, in my view, as issues on which the Court is competent to pronounce by means of the present appeal.

41. A third ground of objection is that the Council proceeded to vote despite a request by various members for postponement. Yet the vote taken on a proposal for deferment showed that a majority of members, whether they recorded their abstentions or not, considered themselves in readiness and sufficiently informed to take a decision after what they regarded as an adequate consideration of the arguments of the parties. Some members expressed the view that a postponement long enough to permit the distribution of the records to member States would be unfair to the party suffering from the suspension of overflights and in such a way contrary to Article 28 of the Rules for the Settlement of Differences. The decision of the Council to proceed to the vote in these circumstances, after the President had announced that the vote would be taken at the following meeting (Memorial of India, Annex E, *(d)*, Verbatim Record of the Fifth Meeting, Discussion, para. 135) was therefore in full accordance with the treaty provisions and the Rules of Procedure governing its activities.

42. In its Reply, the appellant observed that the propositions sub-

mitted to the vote were put by the President of the Council of ICAO, who is not a member of the Council, and no-one seconded these propositions.

This objection fails to take into consideration the special position and powers possessed by the President of the Council under the Chicago Convention and under decisions adopted by the Council in accordance with the Convention.

The propositions put to the vote by the President of the Council were not governed by Rules 41 and 46 of the Rules of Procedure but by Rules 30, 35 and 37, which give the President the power to present any recommendations to the Council with respect to any item of the Council's work programme, to put questions to the Council and to make rulings which shall stand unless challenged and over-ruled.

When the questions were put to the vote, no member of the Council (and India was one of them) raised an objection, or challenged the right of the President to act as he did. Therefore, the decisions adopted by the Council on the basis of such propositions cannot be challenged now by the appellant on these grounds. As the Court said in the Advisory Opinion concerning Namibia: "Having failed to raise the question at the appropriate time in the proper forum, it is not open to it to raise it before the Court at this stage" (para. 25, *I.C.J. Reports 1971*, p. 23).

43. A final ground, raised at the stage of the oral proceedings before the Court, is the lack of reasons given for the decision subject to appeal.

There is nothing in the Chicago Convention or in the Rules of Procedure requiring the Council to deliver the decision concerning a preliminary objection in the form of an award or a judgment stating in logical sequence the reasons for the conclusion reached.

In consequence, it does not seem possible to conclude that the decision is invalid because it was not framed in the form of a judgment.

The Court had no difficulty in pronouncing on the appeal because of the form of the decision. In the verbatim record of the Council's discussions and decisions, which was before the Court, there was a complete transcript of the reasons and arguments invoked by the Parties and of the explanations of vote and other statements made by the President and those members of the Council who chose to state the grounds for their vote.

V. Concluding Remarks

44. Different views are advanced in some of the individual opinions as to the scope and future effects of the Judgment delivered by the Court. Taking this into account, I wish to state my own view of paragraph 2 of the operative part of the Judgment.

In my view, this paragraph cannot be understood otherwise than as a final decision on the jurisdictional issue: The Council of ICAO is com-

petent to entertain this disagreement. This question has been settled.

If and when the Council of ICAO deals with the merits of the case, it will have to pronounce on Pakistan's submissions. But when doing so it will have to determine first what is the law applicable to the relations between the Parties.

"The question as to what substantive law can be lawfully applied", the Permanent Court once said "can only arise after the jurisdiction is established [1]." The Permanent Court further stated: "Jurisdiction implies the right to decide what substantive law is applicable in a given case to which the jurisdiction extends [2]."

Thus the ICAO Council, before pronouncing on Pakistan's submissions, would have to determine whether the Chicago Convention and the Transit Agreement apply or not in the relations between the Parties.

In such a way, it may again be faced, in a different context, with some of the arguments which were raised by India to oppose the Council's jurisdiction. Those arguments, while insufficient for the purposes of excluding that jurisdiction, would still remain available for India to invoke as defences on the merits, on the question of the substantive law to be applied.

But the jurisdictional question as such is closed by this decision. In other words, in the hypothesis that the Council should accept India's contentions as to suspension or special régime, this would not result, in my view, in the Council becoming incompetent or devoid of jurisdiction but would result in a rejection of Pakistan's submissions on the merits on the ground that the substantive law invoked in support of those claims would no longer be applicable (in that hypothesis) to the relations between the Parties.

(Signed) E. JIMÉNEZ DE ARÉCHAGA.

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[1] *Advisory Opinion, Jurisdiction of the Courts of Danzig, P.C.I.J., Series B, No. 15,* pp. 24-25.

[2] *Ibid.*, p. 26.