# COUNTER-MEMORIAL SUBMITTED BY THE GOVERNMENT OF PAKISTAN

## INTRODUCTION

1. The Counter-Memorial is submitted to the International Court of Justice by the Government of Pakistan in pursuance of the Order made on 19 January 1972 by the Vice-President, discharging the duties of the President under Article 13 of the Rules of Court.

2. The dispute has arisen because the Government of India has thought fit to challenge the jurisdiction of the Council of the International Civil Aviation Organization to consider the "Application" and the "Complaint" presented by the Government of Pakistan, wherein Pakistan challenged the decision of the Government of India to suspend overflights of all Pakistan aircraft over the territory of India as from 4 February 1971. The said decision of the Government of India was in breach of its obligations under the Convention on International Civil Aviation (1944) and the International Air Services Transit Agreement (1944).

3. The Counter-Memorial has been divided into various parts and largely follows the scheme of the Memorial submitted on 22 December 1971 by the Agent for the Government of India.

4. Consequently, the Counter-Memorial is divided into the following Parts:

Part I. Statement of the case.

Part II. Exposition of relevant facts and the history of the dispute, supplementing and correcting the exposition given in the Memorial of the Government of India.

Part III. Jurisdiction of the Court.

Part IV. The submissions to the Court regarding the principles and rules of law applicable to the issues in the Appeal.

Part V. Submissions.

## PART I

## STATEMENT OF THE CASE

### *A. Unilateral Suspension of Overflights by India in Breach of Its Obligations*

5. Pakistan and India are both Parties to the Convention on International Civil Aviation (hereinafter referred to as the Convention) and the International Air Services Transit Agreement (hereinafter referred to as the Transit Agreement). Under Article I of the Transit Agreement, India has granted to Pakistan the following freedoms of the air in respect of scheduled international air services:

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

By virtue of Article 5 of the Convention, Pakistan and India have agreed that aircraft of either Party not engaged in scheduled international air services, shall have the right to overfly the territory of the other Party or make technical landings therein without the necessity of obtaining prior permission. Both Pakistan and India had been enjoying the privileges and rights under the Transit Agreement and the Convention till 3 February 1971 when India, by a Note dated 4 February 1971, informed Pakistan of its unilateral decision to suspend with immediate effect, all Pakistani flights over its territory. In doing so India acted unilaterally and arbitrarily; violated the provisions of the Convention and the Transit Agreement and committed a breach of its obligations thereunder. The decision of the Government of India is also *per se* discriminatory in that aircraft of other States continue to make flights over Indian territory and is contrary to the principle of *pacta sunt servanda* in respect of the treaty obligations. The decision of the Government of India has resulted in a considerable increase in the cost of operations of Pakistan International Airlines, inconvenience to passengers, immense loss and injury to Pakistan.

### *B. Pakistan Approached the ICAO Council Against the Decision of India*

6. Pakistan made repeated efforts to settle the dispute with India by peaceful negotiations as is evident from the diplomatic correspondence that was exchanged between the two countries but unfortunately these efforts proved fruitless [1]. In the circumstances, Pakistan had no other alternative but to file the Application and the Complaint with the Council in March 1971 [2]. The Council, while considering the said Application and Complaint at its meeting held on 8 April 1971, decided to invite India to present its counter-memorial and also invited the Parties to negotiate directly for the purpose of settling the dispute or narrowing the issues [3]. India, instead of submitting its

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[1] Annexes to the Memorial of the Government of India (hereinafter referred to as I.M.), pp. 77-79, *supra*.
[2] I.M., Annex A at p. 63 and Annex B at p. 92, *supra*.
[3] Annex I, *infra*.

counter-memorial; filed Preliminary Objections challenging the jurisdiction of the Council to handle the matters presented in Pakistan's Application and Complaint. In the Preliminary Objections, India dealt with the merits of the dispute and referred to the events and circumstances which are extraneous to the present dispute [1]. Pakistan in its written reply, refuted all the contentions which India had sought to raise in the Preliminary Objections. The Council after hearing both Pakistan and India on 27-28 July 1971 decided not to accept the Preliminary Objections filed by India and called upon India to submit her counter-memorial by 8 August 1971 [2]. Thereafter on 30 August 1971 the Government of India submitted an Application to the International Court of Justice appealing against the aforesaid decisions of the Council.

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[1] I.M., Annex C, pp. 98-121, *supra*.
[2] Annex II, *infra*.

## PART II

## EXPOSITION OF RELEVANT FACTS AND HISTORY OF THE DISPUTE

### *A. Pakistan Aircraft Have the Right to Overfly Across India Under the Convention and the Transit Agreement*

7. Pakistan and India are Parties to the Convention and the Transit Agreement and the Bilateral Air Services Agreement of 1948. Under Article I of the Transit Agreement, Pakistan has the following freedoms of the air in respect of scheduled international air services:

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

By virtue of Article 5 of the Convention, Pakistan aircraft not engaged in scheduled international air services have the right to make flights into or in transit non-stop across Indian territory and to make stops for non-traffic purposes in that territory without the necessity of obtaining prior permission and subject to the right of India to require landing. Pakistan had been enjoying the aforesaid freedoms and rights till 3 February 1971, when India, by a Note dated 4 February 1971[1], informed Pakistan of its unilateral decision to suspend, with immediate effect, the overflights of all Pakistan aircraft over its territory. India thus violated the provisions of the Convention and the Transit Agreement and committed a breach of its obligations thereunder.

### *B. The Bilateral Air Services Agreement of 1948*

8. Pakistan and India entered into a Bilateral Air Services Agreement on 23 June 1948[2]. The purpose of this Bilateral Agreement, like all similar Bilateral Air Services Agreements, is to establish and regulate commercial air services between the two countries.

It is submitted that even after the conclusion of the Bilateral Agreement, the Convention and the Transit Agreement continue to govern the rights of the Parties in respect of non-scheduled air services and the first two freedoms in respect of scheduled air services. The said Bilateral Agreement is supplementary to and not incompatible with the Convention and the Transit Agreement. This is clear from the preamble thereof, which reads as follows:

> "The Government of Pakistan and the Government of India, hereinafter described as the Contracting Parties, being Parties to the Convention on International Civil Aviation and the International Air Services Transit Agreement, both opened for signature at Chicago on the 7th day of December, 1944, and desiring to conclude an Agreement for the purpose of establishing and operating air services between and beyond the territories of Pakistan and India."

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[1] Annex IV, *infra*.
[2] I.M., p. 110, *supra*.

Secondly, in addition to re-affirming, as a right, the privileges to overfly and to land for non-traffic purposes set out in the Transit Agreement, the Bilateral Agreement also provides for commercial air traffic between and beyond the two countries.

9. In any event, India is estopped by its conduct from asserting that the Bilateral Agreement of 1948 supersedes its obligations under the Convention and the Transit Agreement in as much as India continued to act vis-à-vis Pakistan on the basis of the Convention and the Transit Agreement.

10. In 1952, India herself accepted the jurisdiction of the Council and lodged a complaint with that body charging Pakistan with acts violating Articles 5, 6 and 9 of the Convention and with violations of the Transit Agreement [1]. In its complaint, India submitted the following:

> "A disagreement has arisen between the Government of India and the Government of Pakistan relating to the interpretation and application of the provisions of the Convention on International Civil Aviation signed at Chicago on December 7, 1944, particularly Articles 5, 6 and 9 thereof and as to the interpretation and application of the International Air Services Transit Agreement. The Government of India consider that the action of the Government of Pakistan purporting to be under that Convention and under that Agreement in the manner hereinafter stated, is causing hardship and injustice to the Government of India. It has, unfortunately, not been possible to settle such disagreement by negotiation between the two Governments."

In that case Pakistan adopted a constructive and co-operative approach and in pursuance of the Council's recommendation, an amicable settlement was reached [2].

### *C. The Convention and the Transit Agreement Were in Operation Between Pakistan and India at the Time of Arbitrary Suspension of Overflights by India*

11. In 1948, pursuant to the resolution of the United Nations Security Council, Pakistan and India, through an exchange of Notes entered into a Bilateral Agreement under which both the parties accepted the obligation of determining the future of the State of Jammu and Kashmir in accordance with the wishes of the people of the State to be ascertained through a fair and impartial plebiscite. However, since the signing of this Agreement, India has persistently refused to carry out her international obligations under this treaty and has indulged in a policy of repression against the people of Jammu and Kashmir, who have steadfastly stood for a plebiscite to determine their future. In August 1965 repressive measures by India led to an uprising in the disputed State resulting in tension across the ceasefire line in Kashmir. On 6 September 1965 India resorted to an unprovoked attack across the International frontier of Pakistan. The armed conflict lasted for 17 days, after which the parties agreed to a ceasefire in accordance with the Security Council resolution of 20 September 1965 (S/Res/211 (1965)).

12. On 10 January 1966 the then Prime Minister of India and the President of Pakistan signed the Tashkent Declaration [3]. By Article 6 thereof the Prime

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[1] Annex III, *infra*. See also ICAO Doc. C-WP/1169 (1952).

[2] Report of the ICAO Council, 1952: ICAO Doc. 7367 (A 7-p/1), pp. 74-76; ICAO Council Doc. (18th Session) 7361 (C/858), pp. 15-26 (1953); 164 *UNTS*, 3 (1953).

[3] I.M., p. 352, *supra*.

Minister of India and the President of Pakistan agreed "to take measures to implement the existing agreements between India and Pakistan".

13. On 3 February 1966 the Prime Minister of India wrote to the President of Pakistan as follows:

> "Our Foreign Minister and Defence Minister, on their return from Tashkent, informed us of your desire for the early resumption of over-flights of Pakistani and Indian aircraft across each other's territory. We had thought that this matter would be settled at a meeting between the Ministers of both countries within a few days along with other problems connected with the restoration of communications. As it appears that such a meeting might take some time, we would be agreeable to an immediate resumption of over-flights across each other's territory on the same basis as that prior to 1st August 1965. Instructions are being issued to our civil and military authorities accordingly.
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> I very much hope that in both our countries emphasis will be placed on the positive aspects of the Tashkent Declaration, such as early normalisation of relations and the initiation of various processes of co-operation between our two countries in mutually beneficial fields [1]."

In reply, the President of Pakistan, *inter alia*, stated, "I am glad to learn of your constructive decision in a matter which is of high benefit to India and Pakistan. I am also issuing immediate instructions to our Civil and Military authorities to permit the resumption of air flights of Indian and Pakistani planes across each other's territories on the same basis at that prior to the First of August 1965 [1]."

It is thus clear that in view of the decision at the highest level, overflights across each other's territory were resumed on the basis of the Convention and the Transit Agreement which even by India's own admission were in operation between the Parties prior to 1 August 1965.

14. Moreover the conduct of India, subsequent to the armed conflict of 1965, shows that the Convention and the Transit Agreement continued to be in operation between the two countries. Two events may be particularly mentioned.

*(a)* In 1969, an Indian aircraft met with an accident in East Pakistan. In accordance with the provisions of the Convention, Pakistan investigated the accident. Invoking Annex 13 to the Convention, India nominated its representative on the enquiry and requested Pakistan to grant the necessary facilities to the Indian representative and advisers. Pakistan afforded full facilities to India in accordance with the Convention and Annex 13. During the course of the investigation, the Pakistan Inspector examined the Duty Air Traffic Controller of Calcutta Airport in order to ascertain whether the provisions of ICAO Document 4444 had been complied with by them.

*(b)* During the Middle East/South East Asia Regional Air Navigation Meeting held in Manila in November-December 1968, an informal meeting took place between the representatives of Pakistan and India on 21 November 1968 under the Chairmanship of the President of the ICAO Council to resolve the matter concerning the boundary between Lahore and Delhi Flight Information Regions. It was agreed that the Civil

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[1] I.M., p. 354, *supra*.

Aviation Administrations of the two countries should meet under the auspices of ICAO to resolve the matter. The matter involved was the implementation of recommendations of the Limited Regional Air Navigation Meeting held in Geneva in 1965. A meeting was accordingly held in Bangkok in 1970.

### *D. Pakistan's Efforts to Improve Relations with India Failed*

15. After the Tashkent Declaration attempts were made to normalize relations and towards that end telecommunications were revived. The Indus Water Treaty of 1960 was implemented. The dispute over the Rann of Kutch was referred to an International Arbitration Tribunal and was resolved. Overflights were resumed on the same basis as that prior to 1 August 1965. The Government of India had agreed in February 1966 to forego their alleged right to demand prior settlement of outstanding issues and consented to resume mutual overflights. However, in spite of all the possible efforts by Pakistan, relations did not fully improve because of India's intransigence and its refusal to resolve the Kashmir dispute which is the basic cause of tension between the two countries. Pakistan has always been ready and willing to settle peacefully all disputes with India through the accepted international procedures of negotiation, mediation and arbitration. Pakistan had also proposed the establishment of a self-executing machinery for the resolution of all outstanding disputes but the Government of India rejected it.

### *E. Pakistan Had no Connection with or Responsibility for the Hijacking of the Indian Aircraft*

16. Pakistan categorically denies that it had any connection whatsoever with the hijacking of the Indian aircraft which was hijacked when in the airspace of the disputed State of Jammu and Kashmir. The allegations of the Government of India to implicate the Government of Pakistan therewith, are baseless and unjustified.

As early as 1 September 1970 the Government of Pakistan reminded the Government of India that when the Pakistan High Commissioner in India was informed of the conspiracy of the hijacking of an Indian plane, the High Commissioner immediately asked the Indian Government to indicate in what manner Pakistan could help and requested details of the so-called conspiracy to enable the Government of Pakistan to take the necessary action. On the Government of India's refusal to disclose any details, the High Commissioner advised the Government of India to bring the facts to the notice of INTERPOL if it felt any hesitation in taking the Government of Pakistan into its confidence in this matter. It is, therefore, surprising that the Government of India should hold Pakistan responsible for the hijacking incident of January 1971[1].

17. A Commission of Enquiry headed by a Senior Judge of the High Court of Pakistan examined the two hijackers and other witnesses and took into consideration the statements made by Sheikh Abdullah and other Kashmiri leaders and came to the conclusions, *inter alia*:

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

Mohammad Hashim Qureshi, who is a known agent of the Indian

[1] I.M., p. 86, para. 6, *supra*.

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

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

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

Pakistan cannot therefore be fixed with any responsibility for the hijacking incident.

18. The two hijackers and their accomplices are being tried by a Special Court headed by a Judge of the Supreme Court of Pakistan.

19. As regards the hijacking incident the correct position is as follows:

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

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

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

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

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

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

*(g)* The Director General of Civil Aviation, India, requested permission for a relief flight to Lahore to transport the crew and the passengers of the hijacked aircraft back to India. The permission was immediately granted. However, before the proposed aircraft could take off from Delhi, the law and order situation had deteriorated due to a large crowd having gathered at the Lahore Airport. The Indian Director General of Civil

Aviation was informed accordingly and advised that the relief flight should not take off for Lahore until further advice.

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

Any attempt to disarm or arrest one would have surely blown up the aircraft as the two had threatened to do.

20. Pakistan is a signatory both to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963, and the Convention on the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970. Pakistan has always condemned hijacking and is a party to the resolutions adopted by the International Civil Aviation Organization, particularly those adopted at the 17th (Extraordinary) Session held in Montreal in June 1970. Pakistan has also subscribed to all the United Nations resolutions on aerial hijacking. In connection with the hijacking incident in question, Pakistan took all possible measures in accordance with international law and practice. It arranged for the safe return of the passengers and crew of the plane at the first available opportunity.

21. Pakistan has also adhered to and acted in accordance with the objective of the Convention and the Transit Agreement. It has taken and continues to take all possible measures to ensure safety of flights in its airspace. This is substantiated by the fact that the air services of 23 international airlines and other international non-scheduled air services operate to and across the territory of Pakistan with complete safety of operation. The Indian aircraft have also been overflying the territory of Pakistan for the last 23 years until 4 February 1971, when India herself stopped overflights of her aircraft over Pakistan territory, not for reasons of safety, as India has alleged, but as a prelude to her arbitrary decision to ban the overflights of Pakistan aircraft. Pakistan has not imposed any ban on Indian aircraft overflying Pakistan territory or on making technical landings. If India did not wish to avail itself of the privileges and rights it has under the Transit Agreement and the Convention, the privileges and rights do not become theoretical. Therefore, India's allegations that Pakistan's conduct has militated against the objectives of the Convention, are unjustified and baseless.

### *F. There Has Been no Special Agreement or Régime in 1966, Between Pakistan and India as Alleged by India*

21. Pakistan maintains that overflights across each other's territory were restored and resumed on the same basis as that prior to 1 August 1965. It is denied that the overflights were restored on a provisional basis or on the basis of reciprocity or were subject to special permission as alleged by India. The signals exchanged between the Civil Aviation authorities of Pakistan and India were merely of administrative character for implementation of the decision of the two Governments to resume overflights. By these signals flight schedules in respect of overflights were filed with the Civil Aviation authorities in accordance with the practice prevalent all over as was also being done prior to 1 August 1965. The combined effect of Articles 82 and 83

of the Convention is that there cannot be any special agreement or arrangement regarding rights and privileges of non-scheduled and scheduled flights respectively which is inconsistent with the provisions of the Convention and the Transit Agreement.

## PART III

## JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

22. The Government of India has sought to found the jurisdiction of the Court on Articles 36 and 37 of the Statute read with Article 84 of the Convention and Article II, Sections 1 and 2, of the Transit Agreement.

23. The Appeal of the Government of India against the decision of the Council in respect of the Application of Pakistan could be founded, if at all, on the following provisions:

*(a)* Article 37 of the Statute;
*(b)* Article 84 of the Convention; and
*(c)* Article II, Section 2, of the Transit Agreement.

24. The Respondent contends that the reference by the Government of India to Article 36 on page 28 of her Memorial, is irrelevant and misconceived. The said Article does not apply to the Appeal of the Government of India on the following, among other, grounds:

(A) Article 36 (1) relates to the original jurisdiction of the Court and comprises "all cases which the parties refer to it". The Parties have not referred any case to the Court in its original jurisdiction under this provision.

(B) Although Pakistan has made a Declaration accepting as compulsory the jurisdiction of the Court in disputes of a legal nature, she relies on the reservation in the Declaration of the Government of India which excludes the jurisdiction of the Court under Article 36, paragraph 2, in the following disputes:

> "Disputes with the Government of any State which, on the date of this Declaration, is a member of the Commonwealth of Nations."

Though Pakistan has recently left the Commonwealth, on the date of India's Declaration, i.e., 14 September 1959, she was a member of the Commonwealth. In view of the above, Article 36 (2) of the Statute cannot be invoked. That the Respondent can rely on the reservation of the Applicant is well established. In the case of *Certain Norwegian Loans* (*France* v. *Norway*), the International Court of Justice in its judgment of 6 July 1957 noted that its jurisdiction depended upon the Declarations made by the parties on conditions of reciprocity; and that since two unilateral Declarations were involved, such jurisdiction was conferred upon the Court only to the extent to which the Declarations coincided in conferring it. Consequently, the common will of the parties, which was the basis of the Court's jurisdiction, existed within the narrower limits indicated by the French reservation.

25. It is submitted that the Appeal of the Government of India in respect of the decision of the Council in Pakistan's Complaint is incompetent and not maintainable on the following grounds:

(A) Article II of the Transit Agreement has two Sections. Under Section 1, a contracting State, in the circumstances mentioned therein, can request the Council to examine the situation. The Rules for the Settlement of Differences approved by the Council provide for filing of a Complaint in respect thereof. Under Section 2, in the event of disagreement between two contracting States

relating to the "interpretation" or "application" of the Agreement, provisions of Chapter XVIII of the Convention have been made applicable. It will be noticed that Chapter XVIII has not been made applicable to Complaints that are filed under Section 1. The reference to Chapter XVIII of the Convention in Section 2 and the omission of such reference in Section 1, is deliberate. The maxim *expressio unius est exclusio alterius* (express mention of one is the exclusion of another) is clearly attracted.

(B) In dealing with Complaints, the ICAO Council and its Committees act very much like fact-finding and conciliation bodies. In fact, while dealing with Complaints, the Council has limited powers and can only make appropriate findings and recommendations to the contracting States concerned. The decisions of the Council in respect thereof, are not subject to appeal.

## PART IV

## THE SUBMISSIONS TO THE COURT REGARDING THE PRINCIPLES AND RULES OF LAW APPLICABLE TO THE ISSUES IN THE APPEAL

### *A. There Is a Legal Obligation to Observe Treaties in Good Faith*

26. Article 26 of the Vienna Convention on the Law of Treaties 1969, which reflects customary international law, provides that a State is bound to carry out in good faith its treaty obligations. This is a fundamental principle of the law of treaties [1].

The preamble to the Charter of the United Nations affirms the determination of the peoples of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties... can be maintained". Paragraph 2 of Article 2 thereof expressly provides that Members "shall fulfil in good faith the obligations assumed by them in accordance with the Charter".

27. International tribunals have also affirmed the principle of good faith in the performance of treaty obligations. In the *North Atlantic Coast Fisheries* case, a tribunal of the Permanent Court of Arbitration declared: "Every State has to execute the obligations incurred by treaty bona fide...[2]" A former judge and distinguished commentator on the Permanent Court observed: "The assumption runs throughout its jurisprudence that States will in good faith observe and carry out the obligations which they have undertaken [3]."

In the case of *Certain Norwegian Loans*, Judge Lauterpacht stated:

> "Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of International Law [4]."

Sir Gerald Fitzmaurice, commenting on this statement observed:

> "Action in good faith is an International Law obligation... and accordingly action not in good faith must be considered as a breach of International Law... [5]"

28. It therefore follows that India has an obligation to implement the Convention and the Transit Agreement in good faith.

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[1] Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, *GA, OR*, 21st Session, Supplement No. 9, p. 42.

[2] UN, *Reports of International Arbitral Awards*, Vol. XI, p. 186.

[3] M. O. Hudson, *The Permanent Court of International Justice 1920-1942* (1943), p. 636.

[4] *I.C.J. Reports 1957*, p. 53.

[5] "Hersch Lauterpacht—The Scholar as Judge: Part II", 38 *British Year Book of International Law* 9 (1962).

*B. The Convention and the Transit Agreement Were not Suspended During the Armed Conflict of September 1965 and Were in Operation Between the Parties at the Time of Unilateral Suspension of Flights by India*

29. It is submitted that the Convention and the Transit Agreement do not provide for suspension even in the event of war or national emergency but only give freedom of action to any contracting State in relation to its rights as a belligerent or neutral.

Article 89 reads:

> "In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council."

This means that when a State ceases to exercise its rights as a belligerent or neutral or when it revokes its national emergency, its freedom of action no longer exists and the Convention has to be fully implemented.

30. The Transit Agreement is also not suspended as a result of war or national emergency. Article I, Section 2, of the Transit Agreement provides that the exercise of the two privileges is subject to the provisions of the Convention, which would include Article 89 thereof. Further, Section 1 of Article I of the Transit Agreement provides as under:

> "... In areas of active hostilities or of military occupation and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities."

31. It is therefore clear that in spite of the armed conflict in September 1965, the Convention and the Transit Agreement were not suspended. During that period, at the most, the parties were entitled to freedom of action to the extent indicated above.

32. On 10 January 1966 the Prime Minister of India and the President of Pakistan signed the Tashkent Declaration and in Article VI thereof agreed "to take measures to implement the existing agreements between India and Pakistan [1]". In order to take measures to implement the existing agreements relating to overflights, letters were exchanged between the Prime Minister of India and the President of Pakistan on 3 February 1966 and 7 February 1966, respectively, in which they decided to immediately resume overflights across each other's territory "on the same basis as that prior to the First of August 1965 [2]". The plain meaning of the words "on the same basis as that prior to 1st of August 1965" is that overflights were to be resumed on the basis of the Convention and the Transit Agreement, which, by India's own admission, were in operation between the Parties before the conflict of September 1965.

33. India by its conduct subsequent to the armed conflict of September 1965, mentioned in paragraph 14 of Part II of the Counter-Memorial, acquiesced in the continuance of the Convention and the Transit Agreement. In any event India is estopped from denying that the aforementioned treaties were in operation.

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[1] I.M., p. 353, *supra*.

[2] *Ibid.*, p. 354, *supra*.

### *C. The So-Called Special Agreement of 1966 Was Merely a Measure to Implement the Convention and the Transit Agreement and not an Agreement Intended to Replace the Latter Agreements*

34. Pursuant to Article VI of the Tashkent Declaration the Prime Minister of India and the President of Pakistan exchanged letters on 3 February 1966 and 7 February 1966 respectively, to restore overflights "on the same basis as that prior to the 1st of August 1965".

35. Any domestic legislation of the Government of India whereby Pakistan's right to overfly was made subject to permission in each case is irrelevant. It is a well-established principle of international law that no State may invoke the provisions of its internal laws as justification for its failure to perform its obligations under treaties. Article 27 of the Vienna Convention on the Law of Treaties reflects customary international law and states as follows:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . ."

36. Under Article 82 of the Convention the contracting parties have undertaken not to enter into any obligations or understandings which are inconsistent with the Convention. Article 83 of the Convention provides that any contracting State may make an arrangement, not inconsistent with the provisions of the Convention, and that any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible. The position taken by the Government of India that the measures taken in 1966 constitute a special treaty replacing the Convention and the Transit Agreement is incorrect. In the first place it is not permissible to have any arrangement or treaty which would be inconsistent with the provisions of the Convention. In the second place, if it were a separate arrangement or treaty, it would have been registered with the Council and also with the Secretariat of the United Nations.

### *D. The Right to Suspend or Terminate a Treaty on Account of Material Breach by the Other Party as Recognized in Article 60 of the Vienna Convention on the Law of Treaties Is a Qualified Right and not Applicable in the Circumstances of the Case*

37. The principles of international law regarding termination or suspension of the operation of treaties have been largely codified in Part V of the Vienna Convention on the Law of Treaties 1969. Article 54 of the Vienna Convention provides that the termination of a treaty or withdrawal of a party may take place:

*(a)* in conformity with the provisions of the treaty; or
*(b)* at any time by consent of all the parties after consultation with the other contracting States.

38. Article 60 of the Vienna Convention deals with the termination or suspension of a treaty. Paragraph 4 of the said Article provides that such a right is without prejudice to any provision in a treaty applicable in the event of the breach. Secondly, the right of unilateral termination or suspension of a treaty exists only in the case of its material breach by the other party. Thirdly, if one party claims suspension or termination of a treaty on the alleged grounds of material breach and the other party objects thereto, then the party alleging material breach cannot act as a judge in its own cause and unilaterally suspend

the treaty; the issue must be settled either by the consent of the parties or must be resolved through third-party settlement. And fourthly, such a right is subject to the doctrine of proportionate and/or disproportionate reprisal.

39. Article 95 of the Convention, and Article III of the Transit Agreement, expressly provide the procedure for denunciation and the method by which a party may withdraw therefrom. India cannot thus unilaterally denounce, terminate or suspend the Convention and the Transit Agreement save in conformity with the provisions of the aforementioned agreements.

40. The Respondent contends that the allegations of the Government of India in relation to the hijacking incident, quite apart from the fact that these are false, do not relate to the breach of the Convention or the Transit Agreement, let alone any "material breach" thereof. No question therefore arises regarding the suspension of the Convention or Transit Agreement on the grounds of "material breach". It is not open to India to arbitrarily suspend the operation of these agreements on the basis of a bare and unjustified assertion which, in reality, has no bearing on the obligations under the Convention and the Transit Agreement. In the events that have happened it is clear that India has not acted in good faith.

41. As submitted above, when one party claims suspension of the treaty on the grounds of "material breach" and the other party objects thereto, the former is obliged to settle the issue by consent of the parties or by resort to third-party settlement. In the instant case, India cannot act as a judge in its own cause and arbitrarily suspend the agreements in question. The principle *nemo judex in re sua* is a general principle of law recognized in the jurisprudence of the Court. Thus in the Advisory Opinion on the *Interpretation of the Treaty of Lausanne* the Permanent Court of International Justice found that, notwithstanding the comprehensive language of the Covenant to the contrary, this principle applied generally to the interpretation of the Covenant and that in determining unanimity of members of the Council the votes of the parties to the dispute would not be counted [1]. It may be noted that the International Law Commission in its Commentary stated as follows:

> "paragraph 1 provides that a 'material breach' of a bilateral treaty by one party entitles the other to 'invoke' the breach as a ground for terminating the treaty or suspending its operation in whole or in part. The formula 'invoke as a ground' is intended to underline that the right arising under the Article is not a right arbitrarily to pronounce the treaty terminated. If the other party contests the breach or its character as a 'material breach' there will be a 'difference' between the parties with regard to which the normal obligations incumbent upon the parties under UN Charter and under general international law to seek a solution of the question through pacific means will apply [2]."

42. The Respondent also contends that when Pakistan denied that any breach of the agreements had taken place, India could not unilaterally suspend the agreements since a remedy under Article II, Section 2, of the Transit Agreement, and Article 84 of the Convention, is available. Any question relating to the breach of an agreement or its suspension is a question of its application and interpretation and would fall within the jurisdiction of the Council under the aforementioned provisions.

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[1] *P.C.I.J., Series B, No. 12.*

[2] Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session 1966 (p. 83).

43. It is further submitted that the principle set out in Article 60 of the Vienna Convention is subject to Article 45 of the Convention which recognizes that a State may no longer invoke a ground for terminating or suspending the operation of a treaty, if it has, by reason of its conduct, acquiesced in the operation of the treaty. After the hijacking incident, the Government of India sent a letter to the ICAO Council on 4 February 1971 which was circulated by the President to all Council Members.

The communication stated:

> "The Government of India would like to reiterate its declared policy of condemning and curbing acts of unlawful seizure of aircraft and unlawful interference with civil aviation. It deplores the detention of passengers and crew members in Pakistan for a period of two days and the destruction of the hijacked aircraft. This is contrary to the principles of the Chicago Convention and other international conventions, Article 11 of the Convention on Offences and Certain Other Acts committed on Board Aircraft, signed at Tokyo on 14th September 1963, Article 9 of the Convention for the Suppression of Unlawful Seizure of Aircraft adopted at The Hague on 16th December 1970 [1]."

So even on 4 February 1971, when India purported to suspend the overflights of Pakistan aircraft, she approached the Council and made various allegations against Pakistan, one of which was that the action of Pakistan was contrary to the principles of the Chicago Convention and other international conventions. This shows that India proceeded on the basis that the Convention and the Transit Agreement were in force and in operation. In accordance with the principle embodied in Article 45 of the Vienna Convention the conduct of India shows that there was no suspension or termination of the Convention and the Transit Agreement.

44. It is also submitted that even by lodging an Appeal under Article 84 of the Convention, Article II of the Transit Agreement and Article 37 of the Statute of the Court, India has acquiesced in the continued operation of the said Agreements.

### *E. The Advisory Opinion of the International Court of Justice in the Reference regarding Namibia*

45. The Respondent submits that the Advisory Opinion of the International Court of Justice in the Reference regarding *Namibia* has no bearing on the present case. In the said Reference which has been relied upon by India the question was whether the Mandate of South Africa over Namibia was terminated by the United Nations General Assembly with the concurrence of the Security Council, for material breach of obligations under the Mandate. The contention of South Africa was that the Mandate was irrevocable as there was no provision for revocation in the Mandate. The Court expressed its opinion on the issue of revocation of the Mandate of South Africa on the basis that the General Assembly and the Security Council possessed supervisory powers, and in that capacity, could terminate the Mandate for breaches of obligations by South Africa. India does not possess any such supervisory powers over Pakistan.

46. India has also referred to and relied upon the statement of the Counsel of the United States in answer to the Court's question on the said Reference.

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[1] I.M., p. 297, *supra*.

*It is submitted that the said statement and the observations of Judge Hardy* C. Dillard, must be read in their proper context.

47. In any case even in the said Reference, the distinction between treating a treaty as terminated and putting an end to it was pointed out by Judge Sir Gerald Fitzmaurice in the following words:

> "There is an important conceptual difference. Strictly speaking, all that one party alleging fundamental breaches by the other can do, is to declare that it no longer considers itself bound to continue performing *its own* part of the contract, which it will regard as terminated. But whether the contract *has*, in the objective sense, come to an end, is another matter and does not necessarily follow (certainly not from the unilateral declaration of that party)—or there would be an all too easy way out of inconvenient contracts[1]."

48. It is therefore clear that the *Convention and the Transit Agreement* cannot come to an end or be otherwise suspended unilaterally or arbitrarily by India.

### *F. Scope and Interpretation of Article 84 of the Convention as Read with Article II, Section 2, of the Transit Agreement*

49. It is an established principle of international law that the provisions of a multilateral treaty which establishes a permanent organization and machinery of permanent character to deal with disputes, ought to receive a broad and liberal interpretation. In the case concerning *Certain Expenses of the United Nations*, Judge Sir Percy Spender observed as under:

> "In the interpretation of a multilateral treaty ... which establishes a permanent international ... organization to accomplish certain stated purposes there are particular considerations to which regard should ... be had. [The Charter's] provisions were of necessity expressed in broad and general terms. It attempts to provide against the unknown ... Its text reveals that it was intended—subject to ... amendments ... to endure ... for all time ... Its provisions were intended to adjust themselves to the ever changing pattern of international existence. It established international machinery to accomplish its stated purposes ... its particular provisions should receive a broad and liberal interpretation unless the context of any particular provision requires, or there is to be found elsewhere in the Charter, something to compel a narrower and restricted interpretation[2]."

50. The Convention and the Transit Agreement must, therefore, receive a wide and liberal interpretation and should not be construed in any narrow sense as has been suggested by India. In this matter Pakistan relies on the principle of effective interpretation which has largely been followed in practice by international tribunals while interpreting treaties.

51. The language of Article 84, especially the expressions "any disagreement", "interpretation" and "application" are wide enough to cover a dispute as to application or non-application or suspension or termination. In this connection reference may be made to some of the decisions of the Permanent Court of International Justice and the International Court of Justice.

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[1] *I.C.J. Reports 1971*, p. 266.
[2] *I.C.J. Reports 1962*, p. 185.

In the case concerning the *Interpretation of Peace Treaties*, the Court said:

> "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence . . .[1]
>
> . . . . . .
>
> Inasmuch as the disputes relate to the question of the performance or non-performance of the obligations provided in the articles dealing with human rights and fundamental freedoms, they are clearly disputes concerning the interpretation or execution of the Peace Treaties[2]."

In the case concerning *Mavrommatis Palestine Concessions*, the expressions "dispute" and "disagreement" were interpreted as follows:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. The present suit between Great Britain and Greece certainly possesses these characteristics. The latter Power is asserting its own rights by claiming from His Britannic Majesty's Government an indemnity on the ground that . . . one of its subjects has been treated by the Palestine or British authorities in a manner incompatible with certain international obligations which they are bound to observe.
>
> . . . . . .
>
> The fact that Great Britain and Greece are the opposing parties to the dispute . . . is sufficient to make it a dispute between the two States[3]."

In the case concerning the *Factory at Chorzów*, the provision conferring jurisdiction on the Permanent Court of International Justice was Article 23, paragraph 1, of the Geneva Convention of 15 May 1922, which stated:

> "Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted to the Permanent Court of International Justice[4]."

The Court in Judgment No. 7, exercised jurisdiction on the basis of this clause for alleged breaches of the Convention by Poland. In Judgment No. 8 the Court, in an effective interpretation of the above jurisdictional clause, further held that by implication the Court also had jurisdiction to determine compensation for breach of the treaty. The Court observed:

> "It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation . . . The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure.

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[1] *I.C.J. Reports 1950*, p. 74.
[2] *Ibid.*, p. 75.
[3] (1924), *P.C.I.J., Series A, No. 2*, p. 12.
[4] (1927), *P.C.I.J., Series A, No. 9.*

. . . . . .

. . . the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgment No. 8 . . . the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself[1]."

In the *South West Africa* case (1962), the International Court of Justice held:

"The question which calls for the Court's consideration is whether the dispute is a 'dispute' as envisaged in Article 7 of the Mandate and within the meaning of Article 36 of the Statute of the Court.

The Respondent's contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate, which mentions 'any dispute whatever' arising between the Mandatory and another Member of the League of Nations 'relating to the interpretation or the application of the provisions of the Mandate'. The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to 'the provisions' of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory and toward the League of Nations and its Members[2]."

52. Even in municipal law, a dispute as to whether a breach of contract by one party had operated to discharge the other, or whether the contract had been frustrated, is a dispute arising out of the contract. In the case of *Heyman* v. *Darwin*, Lord Wright had observed:

"I see no objection to the submission of the question whether there ever was a contract at all or whether, if there was, it had been avoided or ended. In general, however, the submission is limited to questions arising upon or under or out of a contract which would prima facie include questions whether it has been ended[3]."

53. B. P. Sinha an Indian author, in his book *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party* (1966), has pointed out that one party to a treaty might accuse another of committing breaches of obligations in order to release itself from its obligations. The other party might retort by charging the denouncing party with "mala fides". The author adds:

"A complaining or denouncing party may refuse to accept the bona fides of the accused party and vice versa. Consequently a situation may be foreseen where a dispute may arise from a divergence of opinion between

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1 (1928), *P.C.I.J., Series A, No. 17*, pp. 27 and 29.
2 *I.C.J. Reports 1962*, p. 343.
3 A.C. 356, 1942, p. 385.

the parties related to interpretation or application or treaty obligations ... Thus the question posed is not only the law of unilateral denunciation but also of the determination of the occurrence and effects of a violation of a treaty obligation [1]."

54. The Respondent contends that the principle of effective interpretation applies also to jurisdictional clauses. Hersch Lauterpacht states that the principle of restrictive interpretation, which has sometimes been referred to by the Court, has been resorted to only if all other methods of interpretation have failed [2]. On the other hand the practice of the International Court, and its predecessor the Permanent Court of International Justice shows that jurisdictional clauses have been so interpreted as to give them full effectiveness.

In the case concerning *Factory at Chorzów, Jurisdiction, Judgment No. 8,* (Second Phase) the Court held that jurisdiction given to it in the matter of the interpretation and application of the Convention gave it jurisdiction to decree and assess reparations in respect of the disregard of the obligations of the Convention. As reparation, it considered, was an indispensable complement of a failure to apply a treaty, it was not necessary that jurisdiction in respect of such reparation should be specifically provided for. Only an express provision to the contrary could have excluded that jurisdiction [3].

In the *Free Zones* case the Permanent Court of International Justice expressed the opinion that "in case of doubt the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effect [4]".

The International Court of Justice held in the *Corfu Channel* case that the jurisdiction to determine the question whether there is any duty to pay compensation implied the competence to assess the amount of compensation. Accordingly, the Court held that the jurisdiction to decide what kind of "satisfaction" was due to Albania included the jurisdiction to decide the "amount of compensation" due to the United Kingdom [5].

55. The question of suspension of a treaty on the basis of an alleged material breach by one of the parties is not a question *de hors* the treaty but is a question arising out of the treaty and relates to its application. It also involves a question of interpretation of the treaty. In the instant case, India is claiming that the Convention and the Transit Agreement have been suspended or terminated by it. On the other hand Pakistan maintains that the Convention and the Transit Agreement continue to be operative between the Parties and India cannot unilaterally suspend or terminate the treaties. The assertion of India and the denial by Pakistan is certainly a disagreement and raises the question of application or non-application or interpretation of the Provisions of these agreements.

*G. Scope of Section 1, Article II, of the Transit Agreement*

56. Section 1 of Article II of the Transit Agreement reads:

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[1] B. P. Sinha, *op. cit.*, p. 2.

[2] Hersch Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", *British Year Book of International Law*, Vol. XXVI, p. 61.

[3] *P.C.I.J., Series A, No. 9*, p. 23.

[4] *P.C.I.J., Series A, No. 22*, p. 13.

[5] *I.C.J. Reports 1949*, p. 26.

"A contracting State which deems that action by another contracting State under this Agreement is causing injustice or hardship to it, may request the Council to examine the situation. The Council shall thereupon inquire into the matter, and shall call the States concerned into consultation. Should such consultation fail to resolve the difficulty, the Council may make appropriate findings and recommendations to the contracting States concerned. If thereafter a contracting State concerned shall in the opinion of the Council unreasonably fail to take suitable corrective action, the Council may recommend to the Assembly of the above-mentioned Organization that such contracting State be suspended from its rights and privileges under this Agreement until such action has been taken. The Assembly by a two-thirds vote may so suspend such contracting State for such period of time as it may deem proper or until the Council shall find that corrective action has been taken by such State."

57. Thomas Buergenthal, in his study *Law Making in the International Civil Aviation Organization* (1969) gives the following interpretation of the provisions:

"A State which 'deems that action by another contracting State under this (Transit or Transport) Agreement is causing injustice or hardship to it may request the council to examine the situation'. That is to say, it may file a complaint. The facts justifying the submission of the complaint could include questions relating to the interpretation or application of the Agreements... In other words, 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. An 'injustice or hardship' may encompass measures which, while otherwise permissible are in a particular case, improper or inequitable because of the effect they have or because of the manner in which they are applied [1]."

58. The use of the word "deems" in the above article indicates that it is a matter of subjective satisfaction of the aggrieved State that action by the other State is causing injustice or hardship to it. Further the word "action" does not mean only positive action; it would include an omission on the part of the contracting State to carry out its obligations under the Agreement. India's decision to suspend the overflights of Pakistan aircraft is both an action as well as an omission. Therefore, Pakistan's complaint is not incompetent as alleged by India.

### *H. The Manner and Method Employed by the Council in Reaching Its Decisions Are Proper, Fair and Valid*

59. Pakistan emphatically denies the allegations made by the Government of India that the manner and the method employed by the Council in reaching its decisions, rendered the decisions improper, unfair and prejudicial to India and bad in law. The manner and method employed by the Council in reaching its decisions are proper, fair and valid as:

1. The propositions were framed in a manner which was consistent with the Preliminary Objections filed by India and were not in any way against the practice of the Council. In any case, the manner of formulation of the

[1] Buergenthal, *op. cit.*, pp. 159-160.

propositions did not affect the result of the vote or the validity of the decisions.

2. The decision of the Council as regards the Complaint was in accordance with the Transit Agreement, the Convention and the Rules for the Settlement of Differences approved by the Council. It may be pointed out that Article 52 of the Convention is subject to Article 66 *(b)* of the Convention whereunder Members of the Council who have not accepted the Transit Agreement were not entitled to vote on the Complaint. The decision on the Complaint was supported by the requisite majority. The manner in which the propositions were framed did not result in any miscarriage of justice. It is not correct to say that the decision of the Council would have been in favour of India if the propositions had been framed in any other manner.
3. The decisions of the Council were not vitiated on the alleged ground of want of reasonable time or non-availability of records or otherwise. India had been attempting to delay the proceedings. The Members of the Council heard the arguments of the Parties, deliberated, applied their minds and decided the questions raised in the propositions in a regular and proper manner and in accordance with the rules and practice of the Council.
4. In any case it is submitted that any alleged irregularity in the manner and method employed by the Council in reaching the decisions does not affect the validity of the decisions.
5. The circumstances in which the Council reached the decisions may be set out hereunder:

A. The Government of India submitted its Preliminary Objections dated 28 May 1971 to the Council of the International Civil Aviation Organization challenging the jurisdiction of the Council to handle the matters presented by Pakistan in its Application and Complaint. The Council met on 27-29 July 1971 to consider the Preliminary Objections and heard the arguments of both the parties.

B. During the deliberations, the Council members felt that the arguments by both the parties having been concluded, they should arrive at a decision without delay in accordance with Rule 5 (4) of the Rules for the Settlement of Differences [1]. Moreover, the representatives of the United States of America and Australia pointed out that the Council was Council of States and not of individuals and, therefore, the Member States must have arrived at a decision after going through the Preliminary Objections, the reply of Pakistan thereto and the arguments of both the Parties. The representative of the Peoples Republic of Congo stated:

> "that the objections and the reply by India and Pakistan were the basic documents which the Member States had received quite long ago and the arguments before the Council were only an elaboration of those documents."

He further said:

> "I would like to say that although I have not had the benefit of the brilliant argumentation here yesterday, I am ready to take decision that has to be taken, because, as many speakers have said, the problem has been with us since Vienna and we have had time to think about it. Obviously, it can be said that to take a decision without having heard

[1] I.M., pp. 330-336, *supra.*

the parties is perhaps unjust, but in a certain way the problem is objective. It is a matter of knowing whether the Council is competent or not. It is a legal problem that does not depend on the arguments of one party or the other and in my opinion it is a problem that presents itself in a rather simple way. It is claimed that we need to have in writing all the argumentation presented here. Well, I heard a good part of it and without being a great lawyer I can say immediately that many of the arguments were foreseeable and imaginable and therefore we have already taken them into account in our reasoning."

C. Most of the Council Members took the view that the question should be decided at once and that there was no need for deferment of the decision to a later date. The verbatim record of the Council will show that the views expressed by the representative of India regarding the formulation of the questions were not accepted by the President and most of the Members of the Council. The President explained that the Council had so far been proceeding on the assumption that it did have jurisdiction. India challenged its jurisdiction. The Council had now to decide on the challenge. A number of representatives spoke in support of the President's formulation of the questions maintaining that the purpose of the vote was to determine whether the challenge was to be upheld and not whether the Council had jurisdiction. It would be appropriate to quote what the representative of Canada said:

"It would seem clear . . . that by adopting this resolution [resolution of the Council of 8 April] the Council was acting as if it had jurisdiction in this case. If we now have a challenge to that jurisdiction, it would be, we would submit, a question which would have to be upheld by the Council by a statutory majority, because the Council has already, in adopting this resolution, [resolution of 8 April] acted as if it had jurisdiction and now we have a challenge to the jurisdiction. So in my view, there is no question that the statutory majority required is to uphold the challenge to the jurisdiction rather than to affirm the fact that the Council does have jurisdiction."

D. The President finally stated that he was glad that discussion had taken place, that was the way he saw the question and the Council Members, as they had spoken, now seemed to agree that that was the way it should be considered. The President then put the following propositions based on the Preliminary Objections to vote—

Case 1: (Applicition of Pakistan under Article 84 of the Convention and Article II, Section 2, of the International Air Services Transit Agreement).

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

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

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

(i) The Council has no jurisdiction to consider the complaint of Pakistan.

In case 1, there was no vote in favour, 20 votes against and 4 abstentions. In case 2, there was 1 vote in favour, 14 votes against and 3 abstentions.

The result of the foregoing votes was the rejection of the propositions and hence the reaffirmation of the Council's competence to consider the Application and Complaint of Pakistan[1].

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[1] I.M., p. 269, *supra*.

## PART V

## PRAYERS FOR REJECTION OF THE APPEAL AND FOR NECESSARY ORDERS

1. In view of the facts and statements presented in the Counter-Memorial, *may it please the Court* to reject the Appeal of the Government of India and to confirm the decisions of the Council of the International Civil Aviation Organization and to *adjudge and declare*:

A. That the question of Pakistan aircraft overflying India and Indian aircraft overflying Pakistan is governed by the Convention and the Transit Agreement.
B. That the contention of the Government of India that the Council has no jurisdiction to handle the matters presented by Pakistan in its Application is misconceived.
C. That the Appeal preferred by the Government of India against the decision of the Council in respect of Pakistan's Complaint is incompetent.
D. That if the answer to the submission in C above is in the negative then the contention of the Government of India that the Council has no jurisdiction to consider the Complaint of Pakistan, is misconceived.
E. That the matter and method employed by the Council in reaching its decisions are proper, fair and valid.
F. That the decisions of the Council in rejecting the Preliminary Objections of the Government of India are correct in law.

2. *May it please the Court* to Order that the cost of these proceedings be paid by the Appellant.

3. The Respondent reserves the right to request the Court to declare and adjudge with respect to such further matters as the Respondent may deem appropriate to present to the Court and to pass such orders as the circumstances may require.

*(Signed)* R. S. CHHATARI
Ambassador of Pakistan at The Hague,
Agent of the Government of Pakistan.

The Hague,
29 February 1972.

## TABLE OF CASES CITED

### A. INTERNATIONAL COURT OF JUSTICE



### B. PERMANENT COURT OF INTERNATIONAL JUSTICE



### C. OTHER

## BOOKS AND ARTICLES

### A. BOOKS

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2. Hudson, *The Permanent Court of International Justice, 1940-1942* (1943).
3. Sinha, B. P., *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*, 1966.
4. Russel, *Arbitration*.

### B. ARTICLES

1. Sir Gerald Fitzmaurice, "Hersch Lauterpacht — The Scholar as Judge: Part II", 38 *British Year Book of International Law*, 1962.
2. Sir Hersch Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", *British Year Book of International Law*, Vol. XXVI, p. 49.

# ANNEXES TO THE COUNTER-MEMORIAL SUBMITTED BY THE GOVERNMENT OF PAKISTAN

## Annex I

RESOLUTION ADOPTED BY THE ICAO *COUNCIL ON 8 APRIL 1971 REGARDING* PAKISTAN'S APPLICATION AND COMPLAINT

"The Council:

*(a)* invites the two parties immediately to negotiate directly for the purpose of settling the dispute or narrowing the issues:

*(b)* decides subject to the consent of the parties concerned, to render any assistance likely to further the negotiations:

*(c)* fixes at eight weeks the period within which India is invited to present its Counter-Memorial."

## Annex II

DECISION OF THE COUNCIL DATED
29 JULY 1971 ON THE PRELIMINARY
OBJECTIONS FILED BY INDIA

*Tel:* 866-2551 *Cables:* ICAO Montreal
Organisation de l'Aviation Civile Internationale
International Civil Aviation Organization

INTERNATIONAL CIVIL AVIATION ORGANIZATION

International Aviation Building
1080 University Street
Montreal 101, P.Q., CANADA
When replying, Please quote, LE 6/1
Référence à rappeler dans la réponse: LE 6/2
Indiquese en la respuesta esta referencia:

30 July 1971.

The Secretary General of the International Civil Aviation Organization presents his compliments and has the honour to refer to the Preliminary Objections, dated 28 May 1971, filed by the Government of India and relating respectively to the Application of the Government of Pakistan, dated 3 March 1971, filed under Article 2 of the Rules for the Settlement of Differences and the Complaint of the Government of Pakistan dated 3 March 1971, filed under Article 21 of the said Rules.

On 29 July 1971, the Council decided not to accept the Preliminary Objections aforesaid.

Accordingly, the time-limit set for delivery of the counter-memorials by the Government of India and which had ceased to run on 1 June 1971, the date on which the Preliminary Objections were filed, began to run again as from 29 July 1971 and will expire on 8 August 1971.

The Secretary General desires, on this occasion, once more to draw your attention to the Council's resolution of 8 April 1971 in which the parties were invited to negotiate.

The Secretary General takes the opportunity of conveying to your Excellency, the assurances of his highest consideration.

*(Signed)* Assad KOTAITE,
Secretary General.

His Excellency M. S. Shaikh,
Chief Agent of Pakistan,
c/o The Pakistan High Commission,
*Suite 606*, "The Drummond-McGregor",
1230 McGregor Street,
Montreal, P.Q.

## Annex III

APPLICATION OF THE GOVERNMENT OF INDIA DATED 19 APRIL 1952 TO THE ICAO COUNCIL

Telegrams:
"*Communications*"

*No. 8-A/37-51.*
Ministry of Communications,
New Delhi.

Government of India

19 April 1952.

From
Shri A.V. Pai, I.C.S.,
Secretary to the Government of India,
Ministry of Communications,
New Delhi.
To
The President of the Council of the
International Civil Aviation Organization,
International Aviation Building,
1080, University Street,
Montreal, *CANADA*.

*Subject: Flight of Indian aircraft between India and Afghanistan in transit non-stop across West Pakistan territory and with stops for non-traffic purposes in that territory*

Sir,

I am directed by the President of India to make this application on behalf of the Government of India to the Council of the International Civil Aviation Organisation.

2. A disagreement has arisen between the Government of India and the Government of Pakistan relating to the interpretation and application of the provisions of the Convention on International Civil Aviation signed at Chicago on December 7, 1944, particularly Articles 5, 6 and 9 thereof and as to the interpretation and application of the International Air Services Transit Agreement. The Government of India consider that the action of the Government of Pakistan purporting to be under that Convention and under that Agreement in the manner hereinafter stated, is causing hardship and injustice to the Government of India. It has, unfortunately, not been possible to settle such disagreement by negotiation between the two Governments.

3. *(a)* The Government of India and the Government of Afghanistan desire and have agreed that scheduled international air services be established between their territories by India.

*(b)* Any practicable air route for the above service involves flight of aircraft across the territory of West Pakistan.

*(c)* The Government of India are entitled, under the International Air Services Transit Agreement, to the privilege of flying their aircraft across the territory of West Pakistan without landing and the privilege of landing the aircraft in that territory for non-traffic purposes.

*(d)* But the Government of Pakistan have denied the aforesaid privileges, particularly in respect of the following routes:

(i) *Delhi-Kabul via Peshawar.* The length of this route is 642 miles. It is the direct and natural route between Delhi and Kabul.

(ii) *Delhi-Karachi-Quetta-Kandhar-Kabul.* This route involves a flight of about 1450 miles. In March, 1950, the Government of Pakistan prescribed this as the only route for flights of foreign aircraft between India and Afghanistan. But in September, 1951 the Government of Pakistan denied India the privilege of transit for an international scheduled air service even on this route.

(iii) *India-Karachi-Jiwani-Zahidan-Kabul.* This route is even longer than route (ii) above. But in March, 1951 the Government of Pakistan denied the aforesaid privileges to India by this route also.

4. Under Article 5 of the Convention of International Civil Aviation 1944, Indian aircraft not engaged in scheduled international air services have the right, subject to the observance of the terms of the Convention, but without the necessity of obtaining prior permission, to fly non-stop across, and to make stops for non-traffic purposes in, the territory of West Pakistan on flights between India and Afghanistan. But the Government of Pakistan have denied the exercise of such rights to Indian aircraft.

5. The Government of Pakistan have expressed the view that the privileges specified in Section 1 of Article I of the International Air Services Transit Agreement have been superseded by Article 6 of the Chicago Convention. The Government of India do not agree with this view. The Advisory opinion of the Council of the International Civil Aviation Organisation expressed on the 22nd March, 1951, on a reference made by the Government of Pakistan, is not being followed by Pakistan in relation to the Government of India.

6. The Government of Pakistan have taken the view that they are entitled to withhold the aforesaid privileges from India inasmuch as flights of aircraft between India and Afghanistan would involve flights across an area which Pakistan has declared to be a prohibited area. Such prohibited area, as shown on the enclosed map, extends along the entire length (of approximately 1900 miles) of West Pakistan's Western Frontier, from the Himalayas almost down to the Arabian Sea. The Government of India, however, are of the view that the extent and location of that prohibited area are not reasonable and that the said prohibited area interferes unnecessarily with air navigation. The Government of India are also of the view that the Government of Pakistan are not competent to declare the area as prohibited to the flight of the aircraft because such prohibition is not uniformly made inasmuch as an airline designated by the Government of Iran operates a scheduled international air service, on the sector Zahidan-Karachi. In the circumstances, the Government of India feel reluctantly compelled to conclude that the real intention of the Government of Pakistan is to prevent easy communication between India and Afghanistan by prohibiting flights of aircraft by an easy and direct route on the plea of the said prohibited area.

7. The Government of India, realizing that settlement of the disagreement with regard to the prohibited area of Pakistan would take time and may involve reference of the matter to the Council of the International Civil Aviation Organization, decided, in October 1951, to request the Government of Pakistan to confirm that they would have no objection to the operation of an

India Air Service to Kabul on the route Delhi-Ahmedabad-Karachi-Jiwani (without landing)-Zahidan-Radhu Chah (approximately 39 miles north north-west) of Zahidan-Kandhar-Kabul. They addressed the Government of Pakistan accordingly and expressly stated that there would be no flying over any portion of Pakistan's prohibited area. Nevertheless the Government of Pakistan impeded the flight of an Indian aircraft engaged in a scheduled air service on the above route. On the 21st January 1952 they at last intimated agreement to the operation of the air service on the said route, subject to the further onerous condition that the aircraft before proceeding to Zahidan shall report over Jiwani. This route involves flight to 2080 miles, and the problem of the prohibited area still remains.

8. The Government of India therefore request the Council of the International Civil Aviation Organization—

(i) to declare that the prohibited area in West Pakistan is not reasonable either in extent or in location and that it interferes unnecessarily with air navigation;

(ii) to declare that India has the following freedoms of the air in respect of scheduled international air services between India and Afghanistan—

*(a)* the privilege to fly its aircraft across West Pakistan territory without landing;

*(b)* the privilege to land its aircraft in West Pakistan territory for non-traffic purposes;

(iii) to declare that Indian aircraft have the right, subject to observance of the terms of the Convention on International Civil Aviation, to make flights into, or in transit non-stop across, West Pakistan territory and to make stops for non-traffic purposes in that territory without the necessity of obtaining prior permission, and subject to the right of Pakistan to require landing, at a Pakistan Customs Airport, on non-scheduled flights between India and Afghanistan;

(iv) to declare that the said action taken by Pakistan in respect of the flight of Indian aircraft on scheduled international air services between India and Kabul is causing injustice and hardship to India;

(v) to find that Indian aircraft are entitled to operate scheduled international air services between India and Afghanistan across West Pakistan by the shortest practicable air route;

(vi) to recommend to the Government of Pakistan not to impede in any manner the operation of scheduled international air services by Indian aircraft—

*(a)* between Delhi and Kabul over the Delhi-Peshawar-Kabul route, and

*(b)* on the route between Bombay or Ahmedabad and Kabul via Karachi-Zahidan and Kandhar, and

*(c)* also by any other commercially feasible route;

(vii) to investigate the situation in order to obviate obstacles to the development of international civil aviation and the establishment of air services between India and Afghanistan; and

(viii) to make such other findings, declarations and recommendations as the Council may consider appropriate in the circumstances of the case and

in order to enable air services to be operated economically between India and Afghanistan.

9. I am directed to request that action in the above matter be kindly taken by the Council at a very early date as the matter is very urgent.

Yours faithfully,

*(Signed)* A. V. PAI,

Secretary to the Government of India.

## Annex IV

THE TEXT OF A NOTE OF THE GOVERNMENT OF INDIA
*DATED 3 FEBRUARY 1971 HANDED OVER TO THE PAKISTAN*
HIGH COMMISSIONER ON 4 FEBRUARY 1971

With reference to note dated February 13th, 1971, handed over to High Commission for India in Islamabad by Ministry of Foreign Affairs, Government of Pakistan, Ministry of External Affairs has the honour to state as follows:

2. The Government of India regret to note that instead of making any effort to seek an amicable settlement of situation arising from hijacking and eventual destruction of IAC aircraft on lines suggested in note of February 9th, the Government of Pakistan have again sought to confuse the issue by introducing extraneous and irrelevant matters and by making obviously incorrect statements, e.g., that Indian aircraft continued to overfly Pakistan even after overflights by Pakistani aircraft had been banned. The Government of Pakistan are well aware that overflights of Pakistan by Indian aircraft had completely ceased before ban in question was imposed.

3. The Government of India have already stated their position to the Government of Pakistan. The Government of Pakistan's failure to deal with two hijackers and the manner in which they have dealt with whole matter cannot but be an open encouragement to the repetition of such criminal acts in future.

4. The Government of India wish to remind Government of Pakistan that after Indo-Pakistan conflict of August/September 1965 they would have been well within their right to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalised. However, on a specific request made by the then President of Pakistan the Government of India agreed, in February 1966 to forego their right to demand prior settlement of outstanding issues and consented to resume mutual overflights. Such overflights by scheduled services of civil airlines of one country across the territory of another are, as Government of Pakistan are aware, a matter of privilege. They constitute a facet of normal relation between the countries concerned and the privilege in question is extended in the context of broad and universally accepted objective of fostering better relations and friendliness within the family of nations. In this context Government of India would reiterate that hijacking of IAC aircraft and its destruction were the direct result of policy of confrontation and interference pursued by Government of Pakistan over the years. In the circumstances, the Government of India are constrained to conclude that hostile policy of Government of Pakistan against India and the manner in which they have dealt with the recent hijacking of Indian aircraft pose a direct threat to safety of aviation and air transit and national security of India. The Government of India are therefore perfectly within their right to demand action against hijackers, compensation for the loss and adequate assurance from Government of Pakistan regarding the future.

5. The Government of India take serious objection to slanderous accusations contained in the note under reply and categorically reject them. They

further wish to state that should the Government of Pakistan genuinely desire an amicable settlement of the present question and restoration of normal relations, they should refrain from interfering in our internal affairs. On their part, the Government of India will be willing to receive from the Government of Pakistan directly through normal diplomatic channels any concrete indications of willingness of Government of Pakistan to proceed toward a settlement of the question of compensation for the loss of Indian Airlines Corporation aircraft, punishment of the two criminals who hijacked it and adequate assurances regarding the future.