

SEPARATE OPINION OF JUDGE ONYEAMA

I regret that I find myself unable to concur in the decision that the Court is competent to entertain India's appeal.

The jurisdiction of the Court is derived from the combined effect of Article 36 (1) of the Statute of the Court, Article 84 of the Convention on International Civil Aviation (the Convention) and Article 37 of the Statute of the Court. Article 36 (1) of the Statute of the Court confers jurisdiction on the Court in "all cases which the parties refer to it"; Article 84 of the Convention, in the relevant part, provides that "any contracting State may . . . appeal from the decision of the Council . . . to the Permanent Court of International Justice"; and Article 37 of the Statute of the Court provides that "whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice".

The International Court of Justice is not, in the Charter of the United Nations of which the Statute of the Court is an integral part, designated a court of appeal, and its competence to hear an appeal from some other tribunal depends entirely on the terms of the agreement of the parties to refer a case to it by way of appeal from the decision of the tribunal concerned. Whether the Court can entertain a particular appeal is therefore a matter to be settled in the light of the intention of the parties as evidenced by the express terms of the agreement, and is not, in my view, based on considerations of principle or doctrine.

In the present appeal the relevant provision of the Convention for construction, in order to determine whether the Court is competent to hear it, is Article 84 which is in the following terms:

"If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

The relevant portions have been italicized. The Council referred to is the Council of the International Civil Aviation Organization (hereinafter referred to as the Council).

This provision of the Convention is the only source of the jurisdiction of the Court to hear the instant appeal from the Council, and if it is not clear from it that the parties to the Convention intended that appeals from a decision of the Council on its jurisdiction to adjudicate on a disagreement put before it should lie to the Court, the Court must decline jurisdiction.

In approaching the text of Article 84 it is well to bear in mind that the States, parties to the Convention, were concerned with the development of international aviation, and a desire to avoid friction and to promote co-operation between nations and peoples. To this end, they agreed on certain principles and arrangements "in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically". (See the Preamble to the Convention.)

In the attempt to ascertain what the parties meant by the words used in Article 84 of the Convention, their objectives may furnish a useful guide.

It seems to me that the first requirement of Article 84 is that a disagreement between contracting States should first be negotiated. This requirement fully accords with the expressed desire to avoid friction. What is to be negotiated is a disagreement relating to the interpretation or application of the Convention; that is to say, a difference of opinion as to the meaning of some provision of the Convention, or as to how such a provision should be applied between contracting States in the field of civil aviation. It is only when negotiations have failed that any State concerned in the disagreement may, by application, call upon the Council to decide it. It seems to me that this part of Article 84 is concerned with some disagreement arising in the course of the application of the Convention to the operation of civil aircraft.

I do not apprehend that the intention of the authors of the Convention was to include among the matters for negotiation a disagreement on a hypothetical question of the jurisdiction of the Council, unconnected with any real substantive dispute on a concrete case.

The purpose of the Convention seems to me to make it clear beyond doubt that the Council was expected, and intended, to decide disagreements on substantial questions concerning civil aviation which may arise between the contracting States and which cannot be settled by negotiation.

The jurisdiction conferred on this Court by Article 84 of the Convention to hear an appeal from a decision of the Council is, in my view, confined to an appeal from a decision of the Council on a disagreement on a substantive issue of merits placed before it by the application of a

State concerned in the disagreement.

Although Article 84 of the Convention (read with Article 54 (b)) constitutes the Council a tribunal to decide on the type of disagreements therein set out, yet in adjudicating on the question of its jurisdiction to entertain an application made to it or, indeed, the limits of its jurisdiction, the Council, in common with other international tribunals, derives power from general international law.

No doubt, in deciding on a preliminary objection to its jurisdiction to entertain an application, the Council would have to decide on a disagreement "relating to the interpretation or application of the Convention and its Annexes" between the contending States, since the Convention defines the limits of the Council's jurisdiction (*Nottebohm* case, *I.C.J. Reports 1953*, p. 111)¹, but the tenor of Article 84 does not, in my view, lend any weight to the suggestion that the authors of the Convention intended to include in the jurisdictional and the appeal clauses anything but the merits of the disagreement. I call attention, once again, to the requirement to *negotiate* the disagreement. I do so because the jurisdiction of the Council is a matter of law not, in my view, susceptible of negotiation. Furthermore, the disagreement on which the Council is to decide is referred to the Council by Application, as to which the Rules for the Settlement of Differences (approved by the Council on 9 April 1957) provide:

Article 2

"Any Contracting State submitting a disagreement to the Council for settlement (hereinafter referred to as 'the applicant') shall file an application to which shall be attached a memorial containing:

- (a) The name of the applicant and the name of any Contracting State with which the disagreement exists (the latter hereinafter referred to as 'the respondent');
- (b) The name of an agent authorized to act for the applicant in the proceedings, together with his address, at the seat of the Organization, to which all communications relating to the case, including notice of the date of any meeting, should be sent;
- (c) A statement of relevant facts;
- (d) Supporting data related to the facts;
- (e) A statement of law;
- (f) The relief desired by action of Council on the specific points submitted;

¹ "Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction" (*ibid.*, p. 119).

- (g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful.”

These Rules also provide in Article 5 for filing a preliminary objection “if the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant”; that is, the matter contained in the application.

The proceedings on a preliminary objection, although emanating from the substantive case on the merits of the disagreement, are quite distinct and self-contained, and, as the Rules for the Settlement of Differences make clear, are governed by different rules from those applicable to the proceedings on the merits of the Application. Indeed, the proceedings on the merits are suspended upon a preliminary objection being filed (see Article 5 (3) of the Rules for the Settlement of Differences).

It seems to me therefore, that if these Rules are any guide to the Council’s understanding of the meaning of Article 84 of the Convention, they show that the Council did not regard preliminary objections to jurisdiction as a disagreement which would be covered by an application. This procedural difference provides further evidence that a disagreement on the Council’s jurisdiction was not intended to come within the scope of Article 84 of the Convention which provides for the application.

The right of appeal from the decision of the Council conferred by Article 84 is not limited to the “States concerned in the disagreement” but is given to “any contracting State”. I can easily understand that contracting States though not concerned in a disagreement would be directly affected by a decision of the Council on the merits of such a disagreement, which decision could well set the pattern for a wider application of a particular, and perhaps unfavourable, interpretation of a provision of the Convention, and that one or more of such States would, therefore, wish to appeal against such a decision; but I find it difficult to suppose or conclude that it was also intended that third-party States, not concerned in a disagreement, could appeal from a decision of the Council affirming or denying its jurisdiction, or making any other interlocutory order.

If an appeal can lie from a decision of the Council on a question of jurisdiction, I can see no reason of principle why it would not also lie from any other preliminary or interlocutory decision.

A decision to admit or reject a document in a case before the Council may have a decisive effect on the case. Is it to be expected that “any contracting State” may appeal from such a decision, or from a decision setting a time-limit in a case which such other “contracting State” considered unjust? Indeed, in the present case, India complained that the Council refused to adjourn the hearing before it in order that members of the Council would have time to consider the submissions made to the

Council. Would this refusal be appealable?

It is not disputed that a decision on an objection to jurisdiction settles a substantial question crucially affecting the position of the parties, and, if it upheld the objection, capable of bringing the whole case to an end. But unless such a decision of the Council falls within Article 84 of the Convention, it is not, in my view, appealable, no matter how desirable it may be that such a right of appeal should be provided for. It is for the contracting States, and not for the Court by judicial interpretation to provide it.

For the reasons which I have set out above, I reached the conclusion that the framers of the Convention had in mind, in Article 84, final decisions of the Council on the merits of disagreements, which would be of concern to all contracting States, and not decisions on preliminary objections, procedural matters or interlocutory applications which concern only the contesting parties. These latter matters the framers of the Convention left to the Council to regulate by its Rules. These Rules deal with these matters in a manner to suggest that decisions on jurisdiction are not appealable (see Article 18 of the Rules for the Settlement of Differences).

As the Convention does not, in terms, provide for an appeal from a decision on a preliminary objection, and the Rules for the Settlement of Differences exclude such a right of appeal, there is, so far as I can see, no provision of law on which the present appeal can be grounded, and considerations of principle and the importance or potential effect of a decision on jurisdiction do not appear to me solid bases on which to construct, for the Court, a jurisdiction which it does not appear otherwise to possess.

The majority of the Court, however, has decided that the Court has jurisdiction to entertain the appeal, and this, in view of Article 36 (6) of the Statute of the Court, settles the matter. I am constrained, therefore, to consider the substance of the appeal.

* * *

It is beyond argument that the Application and the Complaint filed with the Council by Pakistan relate to a disagreement with India, and manifestly raise matters involving the interpretation and application of the Convention.

There is nothing on the face of the Application and the Complaint which suggests that the matters with which they deal fall outside the Convention, or do not come within the area of matters which the Council is competent to decide.

In its so-called preliminary objection, India, it seems to me, does not suggest that the Council would not be competent to handle the matters raised in the Application as made by reason of want of competence or excess of jurisdiction apparent on the face of the Application; it takes

the line that certain facts, which it then introduced in the objection, would, if established, disentitle Pakistan to the reliefs it seeks; this is not, in my view, a ground for the Council to decline jurisdiction; it is for India to establish the facts on which its objection is based at a hearing on the Application.

It is clearly for the Council to consider the allegations in the Application which are *prima facie* within its jurisdiction, and the substance of the objection raised in defence, and come to a decision on them; its jurisdiction to do so cannot be taken away by the assertion of one party to the disagreement that the Council has no jurisdiction on account of certain unilateral action it alleges it had taken, and which is itself a matter of dispute.

I agree with the Court's Judgment on the substance of the issue before it, which is whether the Council has or has not jurisdiction to decide on the disagreements between India and Pakistan presented to it by the Application and the Complaint of Pakistan in purported pursuance of the provisions of the Convention and the International Air Services Transit Agreement.

I concur in the decision that the Council is competent to entertain the Application and Complaint laid before it by the Government of Pakistan. I agree with the reasons given by the Court for this decision on this aspect of the appeal, and have nothing further to add to them.

(Signed) Charles D. ONYEAMA.