

DISSENTING OPINION OF JUDGE MOROZOV

I voted in favour of paragraph 1 of the operative part of the Judgment in which the Court "finds that it has jurisdiction to entertain India's appeal". I voted against paragraph 2 of the Judgment in which the Court "holds the Council of the International Civil Aviation Organization to be competent to entertain the Application and Complaint laid before it by the Government of Pakistan on 3 March 1971; and in consequence, rejects the appeal made to the Court by the Government of India against the decision of the Council assuming jurisdiction in those respects".

My reasons are the following:

I consider that the Judgment now delivered by the International Court of Justice, acting for the first time in its history as a court of appeal, creates a misleading and regrettable precedent for the future activity of the Court in this field.

The Judgment ignores the violations of the Convention on International Civil Aviation of 7 December 1944, the International Air Services Transit Agreement of the same date, the Rules for the Settlement of Differences and the Rules of the ICAO Council which were committed by the Council in the process of deliberation on the question of its jurisdiction in the case *Pakistan v. India*.

Taking into account also that this was the first time in its history that the ICAO Council was called upon to consider the question of its jurisdiction, thus to ignore these violations could create a misleading and regrettable precedent for the future activity of the Council when it acts as a judicial body for the peaceful settlement of disputes between the member States of ICAO.

At the meeting of 29 July 1971, the ICAO Council completed its deliberations on the question of its jurisdiction by taking a vote in an improper way on certain questions put before it by its President, but as will be shown below, *no draft decision was, as a matter of fact, the subject of this voting. Consequently, the ICAO Council never delivered any written decision on the matter which could make manifest the basis of and reasons for the statement which was made by its President at the meeting of the Council on 29 July 1971 to the effect that it was competent to consider the Application and Complaint.*

In these circumstances, the only possible course for the Court was *to send the case back to the ICAO Council for a new consideration and settlement of the question of its jurisdiction on the basis of, and in conformity with, the provisions of the Chicago Convention, the Transit Agree-*

ment, and its own Rules for the Settlement of Differences, as well as the Rules of Procedure of the Council.

Instead of adopting that course of action and despite the absence of any arguments and reasons of the ICAO Council which could provide a court of appeal with the material necessary for the implementation of its rights of supervision, the Court, by delivering its present Judgment, *has in effect acted as if it was the ICAO Council itself*, and touched on a number of problems related to the merits which were closely connected with the question of jurisdiction of the Council.

It is necessary to emphasize that some of these problems were, to a certain extent, related to settlement of the question of the jurisdiction of the ICAO, *but the point is that they should be considered from the very beginning, and in the first instance by the ICAO Council itself. It is not for a court of appeal to substitute its own activity for the proper activity of the lower court.*

There is also a lack of consistency in the Court's approach to its role as a court of appeal. In paragraphs 44 and 45, reference is made to India's contention that the Council's decision assuming jurisdiction was vitiated by various procedural irregularities, and should therefore be declared null and void. But the Court mentions the matter only to declare that it "does not deem it necessary or even appropriate to go into" it. Yet in the same breath, the Court reaches the conclusion that "the *alleged* irregularities do not prejudice in any fundamental way the requirements of a just procedure" (emphasis added). This conclusion was reached without any attempt to carry out a point-by-point examination of the Indian arguments on the matter, and without even enumerating the irregularities complained of. The Court was obliged to do this because it was faced with the fact that the quantitative accumulation of the irregularities had a qualitative effect and as a consequence of this distorted all the Council's deliberations on the question of its competence.

The statement in the Judgment that "The Court's task in the present proceedings is to give a ruling as to whether the Council has jurisdiction in the case. This is an objective question of law, the answer to which cannot depend on what occurred before the Council", adds nothing to the Court's previous arguments. It is, from my point of view, not a correct legal analysis of the role of a court of appeal, but only new evidence of attempts by the higher court to substitute its own activity for the proper activity of the lower court.

There follows the statement that "Since the Court holds that the Council *did and does have jurisdiction*, then *if there were in fact procedural irregularities*, the position would be that the Council would have reached the right conclusion in the wrong way. Nevertheless it would have reached the right conclusion." (Emphasis added.)

The first part of this statement is evidence that the Judgment as a matter of fact could not deny the existence of some "irregularities", but

ignored them, on the basis of the wrong assumption that the activity of the Court itself could replace the proper activity of the Council. So ultimately the only ground advanced in the Judgment to justify refraining from going into details of the irregularities is this same incorrect assumption, which begs the whole question. The latter part of this statement, to the effect that "the position would be that the Council would have reached the right conclusion in the wrong way" but that "nevertheless it would have reached the right conclusion", to my mind goes too near saying that "the end justifies the means" to be a proper legal argument for a court to use. The case is that the *right judicial* decision can never be reached by the wrong way. It is not possible to make such a distinction between the conclusion reached, and the way in which it is reached and the form in which it is embodied; as I have already stated, no valid decision of the Council, against which appeal lies to this Court, ever came into existence.

To my regret the practical effect of the passage I have quoted could be to encourage the ICAO Council to repeat all the improper methods of deliberation on the question of its competence, which India has rightly criticized, and thereby weaken the guarantees afforded to member States by Article 84 of the Chicago Convention, the Rules for the Settlement of Differences, and the Council's Rules of Procedure.

It is not necessary to add that the final sentence in paragraph 45 of the Judgment, which reads: "If, on the other hand, the Court had held that there was and is no jurisdiction, then, even in the absence of any irregularities, the Council's decision to assume it would have stood reversed", also adds nothing to the Court's previous arguments, because, in fact, it is based on the same incorrect assumption that the court of appeal but not the lower court should settle the matter first, and should adopt a written decision with the relevant reasoning.

I should say that to my regret the approach which was adopted in the Judgment might be understood by the ICAO Council as involving some pre-judgment of matters to be decided in the future by the Council.

There is no need to describe in detail what happened at the meeting of the ICAO Council held on 29 July 1971. It will be enough to mention the most important infringements of the relevant instruments which were committed by the Council in the course of the deliberations on the question of its jurisdiction.

In this connection it is necessary to recall some of the provisions of the Chicago Convention of 1944 and its Annexes, as well as the Rules of Procedure of the Council.

Article 51 of the Chicago Convention, which describes the rights of the President of the Council, does not include the right to present his own draft of a decision for voting in the Council.

The right to present a draft decision belongs to the members of the

Council and to them alone. This is confirmed by Rules 41 and 46 of the ICAO Rules of Procedure:

“Any Member of the Council may introduce a motion or amendment thereto, subject to the following rules:

1. . . . no motion or amendment shall be discussed unless it has been seconded . . .” (para. 1, Rule 41);

“. . . no motion or amendment shall be voted on, unless it has been seconded” (Rule 46).

There is no trace in the records of the meeting of the Council on 29 July 1971 of any draft of the decision on the question of its jurisdiction having been presented by any member of the Council. It was the President of the Council who, contrary to the provisions of Articles 41 and 46, devised and formulated orally the motions which were subsequently put to the vote at that meeting.

All the motions were presented in negative form, namely:

“(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.

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 (iv) The Council has no jurisdiction to consider the complaint of Pakistan” (Minutes, subjects discussed and action taken, para. 2).

It should be observed that the procedure of voting laid down by the President of the Council was so distorted that “*those who agree that the Council has no jurisdiction have to say ‘Yes’, those who consider that the Council has jurisdiction have to say ‘No’*” (Memorial of India, Minutes of the meeting of the Council, 29 July 1971, Annex E, (e), Discussion, para. 87).

It is clear that this curious procedure could operate so as to impede the proper application of the provision of the Chicago Convention as to the statutory majority required for a decision to be adopted by the Council.

Again, at the time of the voting on case No. 2 (paras. 135-139 of the Minutes of the Meeting of the Council on 29 July 1971) the President said, “I will ask those who think that the Council has no jurisdiction to consider Pakistan’s Complaint to so indicate by saying ‘Yes’ and those who disagree with that to say ‘No’, as in the vote we took before”.

The statutory majority for adoption of every decision of the Council was of course 14 votes (Art. 52 of the Chicago Convention). At the meeting

on 29 July 1971, the President announced in respect of case No. 2 that, "There was one vote in favour, 13 votes against, and 3 abstentions". (Minutes, para. 137, emphasis added.)

The President went on to announce: "... of course, the contention that the Council has no jurisdiction has not passed and therefore we are where we were, in other words, we shall continue considering that the Council has jurisdiction ..."

It should be emphasized that the President of the Council also stated that the procedure adopted "*applies to this case and would apply of course to the substance of the case in the future*" (*ibid.*, para. 66).

It should be recalled that the protest of the representative of India against this procedure was rejected by the President, on the ground that "... the Council so far had been proceeding on the assumption that it did have jurisdiction; India had challenged its jurisdiction; the Council accordingly had now decided on the challenge ...". Some representatives supported the President's formulation, maintaining that the purpose of the vote was to determine whether the challenge was upheld, *not whether the Council had jurisdiction* (emphasis added). (Minutes of the Meeting of the Council, 29 July 1971, Subjects discussed and action taken, para. 2.)

The arguments employed by the President in his attempt to justify this procedure, namely that an "objection" against jurisdiction for the purpose of the settlement of that question should be considered as a "challenge" is unacceptable and his assertion that the Council had acted before on the assumption that it had jurisdiction is unsupported by the record.

Logically this statement should mean that the decision on the "assumption" referred to had been taken at some earlier date. But in the records of the Council there is no trace of anything to show that such an "assumption" was adopted at any time by a decision of the Council.

Reference was made to the fact that on 8 April 1971, the Council had taken a decision fixing a time-limit for the presentation of the Counter-Memorial of India (Minutes, para. 67). But this cannot be considered as an affirmation by the Council of its jurisdiction, because it is a routine procedural act which could not be considered by a judicial body as an action amounting to a preliminary decision in favour of jurisdiction. The Rules for the Settlement of Differences provide special proceedings for consideration of questions of jurisdiction. Article 5 of those Rules provides that:

"(1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection.

.....

(4) If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue

before any further steps are taken under these Rules.” (Emphasis added.)

Thus a preliminary objection to the jurisdiction is only a *starting point* for the special procedure which should be concluded by a decision on the question. It is beyond argument that the word “question” used in Article 5 means the question whether the Council has jurisdiction.

Furthermore, the word “decision” in Article 5 has the same meaning as the word “decision” in Article 15 of the Rules. It is impossible to conceive that Article 15 refers only to the final decision on the merits of the dispute and not to the decision on the question of jurisdiction. Therefore, the decision on the question of jurisdiction must include the elements mentioned in Article 15.

In this connection, I would like to refer to the conclusion reached in paragraph 18 of the Judgment:

“In consequence, the Court considers that for the purposes of the jurisdictional clauses of the Treaties, final decisions of the Council as to its competence should not be distinguished from final decisions on the merits.”

What I should like to stress now is that the *decision* which is to be taken by the Council in accordance with Article 5 after hearing the Parties *should include all the elements enumerated in Article 15*, and in particular:

“(2) The decision of the Council shall be in writing and shall contain:

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- (iv) a summary of the proceedings;
- (v) the conclusions of the Council together with its reasons for reaching them;

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- (vii) a statement of the voting in Council showing whether the conclusions were unanimous or by a majority vote, and if by a majority, giving the number of Members of the Council who voted in favour of the conclusions and the number of those who voted against or abstained.

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(4) The decision of the Council shall be rendered at a meeting of the Council called for that purpose which shall be held as soon as practicable after the close of the proceedings.”

Instead of following this normal procedure, the ICAO Council has in effect suggested that the “outcome” of its meeting held on 29 July 1971 in the form of the voting which then took place, should be treated as a substitute for the decision which it was bound to take.

It should be pointed out that the word “decision” used in Article 5 of the Rules is not equivalent for the word “voting”, just as the word

“question”, used in the same Article, is not equivalent for the word “objections”.

A draft of the decision of the Council can be considered as the decision only after voting, but the voting itself does not produce a decision (within the meaning of Article 5 in combination with Article 15 of the Rules) unless a draft of the decision (in written form) suggested by a member or members of the Council, has been put to the vote.

In the case of *Pakistan v. India* in the ICAO Council, any member or members of the Council who considered that the Council had jurisdiction was under the obligation to present an appropriate draft. It was only such a draft (or of course a draft of some other kind of decision) which the President of the Council had a right to put to the vote.

The lack of reasons for the decision was another infringement of the Rules. One could of course argue that the statements made in the course of the debate may be viewed as such reasons. However a reader of these statements is bound to find that they were conflicting and mutually exclusive and therefore could hardly serve as a basis for reasoning by the Council as a whole.

In this connection I should like to refer to a statement in the Judgment (sub-para. (c), para. 18):

“At the same time, many cases before the Court have shown that although a decision on jurisdiction can never directly decide any question of merits, the issues involved may be by no means divorced from the merits. *A jurisdictional decision may often have to touch upon the latter or at least involve some consideration of them.*” (Emphasis added.)

This statement is correct, but unfortunately the reasoning in the Judgment—in the section headed “Jurisdiction of the Council of ICAO to entertain the merits of the case”—is not in accord with it. Logically, provisions which are valid for the deliberations on the question of jurisdiction in the court of appeal should be observed to the same extent by the lower court when it is dealing with the question of jurisdiction.

I am thus unable to agree with operative clause 2 of the Judgment and I have expressed my reasons in this dissenting opinion, because to my mind the questions to which I have drawn attention are important, both for the settlement of the present case, and with a view to the due observance in the future by the ICAO Council of the provisions of the Chicago Convention, the Transit Agreement, its Rules of Procedure and the Rules for the Settlement of Differences, which is necessary to ensure confidence in the judicial activity of the Council as a means of peaceful settlement of disputes between member States of ICAO.

(Signed) Platon MOROZOV.