International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2000

Public sitting

held on Monday 3 April 2000, at 10 a.m., at the Peace Palace,

President Guillaume, presiding

in the case concerning Aerial Incident of 10 August 1999 (Pakistan v. India)

VERBATIM RECORD

ANNEE 2000

Audience publique

tenue le lundi 3 avril 2000, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

en l'affaire de l'Incident aérien du 10 août 1999 (Pakistan c. Inde)

COMPTE RENDU

Present:		*Présents :*	
President	Guillaume	M.	Guillaume, président
Vice-President	Shi	M.	Shi, vice-président
Judges	Oda	MM.	Oda
	Bedjaoui		Bedjaoui
	Ranjeva		Ranjeva
	Herczegh		Herczegh
	Fleischhauer		Fleischhauer
	Koroma		Koroma
	Vereshchetin		Vereshchetin
	Higgins	Mme	Higgins
	Parra-Aranguren	MM.	Parra-Aranguren
	Kooijmans		Kooijmans
	Al-Khasawneh		Al-Khasawneh
	Buergenthal		Buergenthal, juges
Judges *ad hoc*	Pirzada	MM.	Pirzada
	Reddy		Reddy, juges *ad hoc*
Registrar	Couvreur	M.	Couvreur, greffier

The Government of the Islamic Republic of Pakistan is represented by:

Mr. Amir A. Shadani, Chargé d'affaires a.i., Embassy of Pakistan, The Hague,

as Acting Agent;

Mr. Jamshed A. Hamid, Legal Adviser, Ministry of Foreign Affairs, Islamabad,

as Co-Agent;

Mr. Moazzam A. Khan, First Secretary, Embassy of Pakistan, The Hague,

as Deputy Agent;

Mr. Aziz A. Munshi, Attorney General of Pakistan,

as Chief Counsel;

Professor Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, and Member of the Institute of International Law,

Dr. Fathi Kemicha, Doctor of Law of Paris University, *avocat* at the Paris Bar,

Mr. Zahid Said, Barrister-at-Law, Ministry of Law, Justice and Human Rights,

Mr. Ross Masud, Deputy Legal Adviser, Ministry of Foreign Affairs, Islamabad,

Mr. Shair Bahadur Khan, Deputy Legal Adviser, Ministry of Foreign Affairs, Islamabad,

as Counsel;

Miss Norah Gallagher, Solicitor,

as Associate Counsel.

Le Gouvernement de la République islamique du Pakistan est représenté par :

M. Amir A. Shadani, chargé d'affaires par intérim à l'ambassade du Pakistan aux Pays-Bas,

faisant fonction d'agent;

M. Jamshed A. Hamid, conseiller juridique au ministère des affaires étrangères à Islamabad,

c*omme coagent;*

M. Moazzam A. Khan, premier secrétaire à l'ambassade du Pakistan aux Pays-Bas,

comme agent adjoint;

M. Aziz A. Munshi, *Attorney General* du Pakistan,

comme conseil principal;

Sir Elihu Lauterpacht, C.B.E., Q.C., professeur honoraire de droit international à l'Université de Cambridge et membre de l'Institut de droit international,

M. Fathi Kemicha, docteur en droit de l'Université de Paris, avocat au barreau de Paris,

M. Zahid Said, avocat, ministère du droit, de la justice et des droits de l'homme,

M. Ross Masud, conseiller juridique adjoint au ministère des affaires étrangères à Islamabad,

M. Shair Bahadur Khan, conseiller juridique adjoint au ministère des affaires étrangères à Islamabad,

c*omme conseils*;

Mlle Norah Gallagoher, *Solicitor*,

c*omme conseil adjoint.*

The Government of the Republic of India is represented by:

H.E. Mr. Prabhakar Menon, Ambassador of the Republic of India to the Netherlands, The Hague,

as Agent;

Le Gouvernement de la République de l'Inde est représenté par :

S. Exc. M. Prabhakar Menon, ambassadeur de la République de l'Inde aux Pays-Bas,

comme agent;

Dr. P. S. Rao, Joint Secretary (Legal & Treaties) and Legal Adviser, Ministry of External Affairs, New Delhi,

as Co-Agent and Advocate;

Ms M. Manimekalai, Counsellor (Political), Embassy of India, The Hague,

as Deputy Agent;

H.E. Mr. Soli J. Sorabjee, Attorney General of India,

as Chief Counsel and Advocate;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, Member of the English Bar, Emeritus Chichele Professor of Public International Law, University of Oxford,

Mr. Alain Pellet, Professor, University of Paris X-Nanterre and Institute of Political Studies, Paris,

as Counsel and Advocates;

Dr. B. S. Murty, Formerly Professor and Dean of Law, Andhra and Osmania Universities, Advocate, Hyderabad,

Mr. B. Sen, Senior Advocate, Supreme Court of India, New Delhi,

Dr. V. S. Mani, Professor of International Space Law, Jawaharlal Nehru University, New Delhi,

Dr. M. Gandhi, Legal Officer (Grade I), Ministry of External Affairs, New Delhi,

as Counsel and Experts;

Mr. Vivek Katju, Joint Secretary (IPA), Ministry of External Affairs, New Delhi,

Mr. D. P. Srivastava, Joint Secretary (UNP), Ministry of External Affairs, New Delhi,

as Advisers;

Ms Marie Dumee, Assistant Lecturer, University of Paris X-Nanterre, Paris,

M. P. S. Rao, secrétaire adjoint (affaires juridiques et traités) et conseiller juridique du ministère des affaires extérieures à New Delhi,

comme coagent et avocat;

Mme M. Manimekalai, conseiller (affaires politiques) à l'ambassade de l'Inde aux Pays-Bas,

comme agent adjoint;

S. Exc. M. Soli J. Sorabjee, *Attorney General* de l'Inde,

comme conseil principal et avocat;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., membre de la Commission du droit international, membre du barreau d'Angleterre, professeur émérite de droit international public (chaire Chichele) à l'Université d'Oxford,

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre et à l'Institut d'études politiques de Paris,

comme conseils et avocats;

M. B. S. Murty, ancien professeur et doyen de la faculté de droit, Universités d'Andhra et Osmania, avocat, Hyderabad,

M. B. Sen, avocat principal à la Cour suprême de l'Inde, New Delhi,

M. V. S. Mani, professeur de droit international de l'espace, Université Jawaharlal Nehru, New Delhi,

M. M. Gandhi, juriste (I^{re} classe), au ministère des affaires extérieures, New Delhi,

comme conseils et experts;

M. Vivek Katju, secrétaire (IPA), au ministère des affaires extérieures, New Delhi,

M. D. P. Srivastava, secrétaire (UNP), au ministère des affaires extérieures, New Delhi,

comme conseillers;

Mme Marie Dumee, allocataire de recherches à l'Université de Paris X-

as Research Assistant. Nanterre, Paris,

comme assistante de recherches.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit aujourd'hui, en application des dispositions des articles 43 et suivants de son Statut, pour entendre les Parties en leurs plaidoiries sur la question de sa compétence pour connaître de l'affaire de l'*Incident aérien du 10 août 1999 (Pakistan c. Inde)*. Toutefois M. Francisco Rezek, pour des raisons dont il m'a fait part, ne pourra être présent à La Haye cette semaine.

Avant de rappeler les principales étapes de la procédure en l'espèce, il échet de parachever la composition de la Cour. A compter du 6 février 2000, M. Al-Khasawneh est devenu membre de la Cour, après avoir été élu par l'Assemblée générale et le Conseil de sécurité des Nations Unies. En même temps, trois de nos collègues, M. Raymond Ranjeva, Mme Rosalyn Higgins et M. Gonzalo Parra-Aranguren ont été réélus, avec moi-même, pour un nouveau terme. En outre, M. Stephen M. Schwebel ayant démissionné de ses fonctions à compter du 29 février 2000, l'Assemblée générale et le Conseil de sécurité ont élu, le 2 mars 2000, M. Buergenthal pour achever le mandat de M. Schwebel, qui viendra à expiration le 5 février 2006. Nous félicitons aussi bien nos nouveaux collègues que nos collègues réélus et sommes très heureux de pouvoir bénéficier de leur participation à l'oeuvre de la Cour.

Par ailleurs, chacune des Parties à la présente affaire, la République islamique du Pakistan et la République de l'Inde, a usé de la faculté qui leur est conférée par l'article 31 du Statut de la Cour de désigner un juge *ad hoc*. Le Pakistan a désigné M. Syed Sharif Uddin Pirzada et l'Inde M. B. P. Jeevan Reddy pour siéger en l'affaire. Il est heureux pour la Cour que le choix des Parties se soit porté sur d'aussi éminentes personnalités.

L'article 20 du Statut de la Cour dispose que «Tout membre de la Cour doit, avant d'entrer en fonction, en séance publique, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience.» Ainsi qu'il est précisé au paragraphe 3 de l'article 4 du Règlement, cette disposition ne concerne pas les membres de la Cour poursuivant leurs fonctions après réélection. En revanche, elle est applicable aux juges *ad hoc*, en vertu du paragraphe 6 de l'article 31 du Statut. Je vais donc dire maintenant quelques mots de la carrière des quatre juges qui vont faire la déclaration solennelle requise. Je les inviterai ensuite, suivant l'ordre de préséance, à faire cette déclaration.

M. Awn Shawkat Al-Khasawneh, de nationalité jordanienne, a fait ses études supérieures en histoire et en droit à l'Université de Cambridge (Queens' College). Il a commencé sa brillante carrière dans la diplomatie jordanienne à New York et a dirigé, de 1980 à 1985, le département juridique du ministère des affaires étrangères. Il a ensuite été détaché auprès de la Cour royale, qu'il a dirigée de 1996 à 1998. Il a représenté la Jordanie à de multiples conférences internationales et à la Sixième Commission de l'Assemblée générale des Nations Unies. Il a été membre puis président de la Sous-Commission des droits de l'homme chargée de la lutte contre les mesures discriminatoires et la protection des minorités. Au moment de son élection à la Cour, il était depuis treize ans membre de la Commission du droit international des Nations Unies.

M. Thomas Buergenthal, de nationalité américaine, a fait ses études supérieures en droit à l'Université de New York et à la Harvard Law School. Il a accompli une carrière éminente dans les domaines du droit international et des droits de l'homme tant comme professeur que comme expert ou représentant de son pays, notamment dans le cadre de l'Unesco. Il a en outre été membre du comité des droits de l'homme de l'Organisation des Nations Unies de 1995 à 1999. Enfin son expérience judiciaire est également des plus marquantes, puisqu'il a siégé à la Cour interaméricaine des droits de l'homme de 1979 à 1991 et en a assuré la vice-présidence, puis la présidence.

M. Syed Sharif Uddin Pirzada a été désigné en qualité de juge *ad hoc* par le Pakistan. De nationalité pakistanaise, il a occupé de très hautes fonctions ministérielles dans son pays, en particulier comme

Attorney General et ministre des affaires étrangères. Il a également été membre de la Commission du droit international des Nations Unies. Enfin, il n'est pas étranger à la Cour, puisqu'il y est apparu à plusieurs reprises dans le passé comme conseil.

M. B. P. Jeevan Reddy, de nationalité indienne, a été désigné en qualité de juge *ad hoc* par l'Inde. A l'issue d'une longue carrière judiciaire, il a présidé la Haute Cour d'Allahabad, puis il a été nommé juge à la Cour suprême de l'Inde. Il est depuis lors devenu président du Comité juridique de l'Inde et à ce titre a proposé à son gouvernement plusieurs réformes législatives d'importance.

Je vais maintenant inviter chacun de ces juges à prendre l'engagement solennel prescrit par le Statut et je demande à toutes les personnes présentes à l'audience de bien vouloir se lever. Monsieur Al-Khasawneh.

M. AL-KHASAWNEH : "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : Monsieur Buergenthal.

M. BUERGENTHAL : "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : Monsieur Pirzada.

M. PIRZADA : "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : Monsieur Reddy.

M. REDDY : "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : Veuillez vous asseoir. Je prends acte des déclarations solennelles faites par MM. Al-Khasawneh et Buergenthal, et les déclare dûment installés comme membres de la Cour.

Je prends acte également des déclarations solennelles faites par MM. Pirzada et Reddy, et les déclare dûment installés en qualité de juges *ad hoc* en l'affaire de l'*Incident aérien du 10 août 1999 (Pakistan c. Inde)*.

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Le 21 septembre 1999, la République islamique du Pakistan a déposé au Greffe de la Cour une requête introduisant une instance contre la République de l'Inde au sujet d'un différend relatif à la destruction, le 10 août 1999, d'un avion pakistanais.

Dans sa requête, le Pakistan fondait la compétence de la Cour sur les paragraphes 1 et 2 de l'article 36 du Statut, ainsi que sur les déclarations par lesquelles les deux Parties ont reconnu la juridiction obligatoire de la Cour.

Conformément au paragraphe 2 de l'article 40 du Statut, le greffier a immédiatement communiqué la requête au Gouvernement indien.

Par lettre du 2 novembre 1999, l'Inde a fait savoir à la Cour qu'elle «souhait[ait] présenter des exceptions préliminaires à la compétence de la Cour ... pour connaître de la requête du Pakistan». Ces exceptions étaient formulées dans une note jointe à la lettre.

Au cours d'une réunion que le président de la Cour a tenue avec les représentants des Parties le 10 novembre 1999, conformément à l'article 31 du Règlement, les Parties sont provisoirement convenues de demander qu'il soit statué séparément, avant toute procédure sur le fond, sur la question de la compétence de la

Cour en l'espèce, étant entendu que le Pakistan présenterait d'abord un mémoire consacré à cette seule question et que l'Inde pourrait lui répondre dans un contre-mémoire limité à la même question. Par des lettres du 12 novembre 1999 et du 25 novembre 1999, respectivement, le Pakistan et l'Inde ont confirmé l'accord sur la procédure donné *ad referendum* le 10 novembre 1999.

Par une ordonnance du 19 novembre 1999, la Cour a décidé que les pièces de procédure écrite porteraient d'abord sur la question de la compétence de la Cour pour connaître de la requête. Elle a fixé au 10 janvier 2000 et au 28 février 2000, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire du Pakistan et d'un contre-mémoire de l'Inde sur cette question. Ces pièces ont été dûment déposées dans les délais ainsi prescrits, et l'affaire était dès lors en état pour ce qui est de la question de la compétence.

Dans son mémoire, le Pakistan, après avoir procédé à un rappel des faits exposés dans la requête, a présenté les divers moyens qui fondent selon lui la compétence de la Cour en l'espèce. Dans son contre-mémoire, l'Inde a rejeté les allégations du Pakistan concernant les faits tels qu'exposés par le demandeur, puis a développé son argumentation à l'appui de son exception d'incompétence.

J'ajoute que la Cour, s'étant renseignée auprès des Parties, a décidé, en application du paragraphe 2 de l'article 53 de son Règlement, que des exemplaires des pièces de procédure et des documents annexés seraient rendus accessibles au public à l'ouverture de la procédure orale.

I note the presence at the hearing of the Agents, Advisers and Counsels of both Parties. In accordance with the arrangements on the organization of the procedure which have been accepted by the Parties, Pakistan will make its oral statement first, at the present session, and India will make its statement tomorrow. Thus, I shall now give the floor to Mr. Jamshed Hamid, Co-Agent of the Islamic Republic of Pakistan.

Mr. HAMID: Mr. President and distinguished Members of the Court,

I consider it a great privilege and honour for me to appear in this august tribunal in my capacity as the Co-Agent of the Government of the Islamic Republic of Pakistan.

Pakistan has always endeavoured to ensure that all disputes should be settled through peaceful means. Our record during the past more than 50 years of its existence as an independent State bears testimony to these endeavours. It is in the same spirit and tradition that the Government of Pakistan is moving the International Court of Justice to adjudicate on the dispute between India and Pakistan regarding the *Aerial Incident of 10 August 1999 (Pakistan* v. *India)*.

The case of the Government of Pakistan will be presented in these hearings by Mr. Aziz A. Munshi, Attorney General of Pakistan as Chief Counsel; Professor Sir Lauterpacht, Q.C., Honorary Professor of International Law, University of Cambridge, and Member of the Institute of International Law as Counsel; and Mr. Fathi Kemicha, Doctor of Law of Paris University, *avocat* at the Paris Bar as Counsel.

Also present and assisting are Mr. Amir Shadani, Acting Agent; Zahid Said, Barrister-at-Law, Associate Counsel; Mr. Ross Masud and Mr. Shair Bahadur Khan, Deputy Legal Advisers of the Ministry of Foreign Affairs; Mr. Moazzam Khan, Deputy Agent; Miss Norah Gallagher, Solicitor.

Mr. President, may I request you kindly to call upon Mr. Aziz A. Munshi, Attorney General and Minister for Law, Justice, Parliamentary Affairs and Human Rights to open the submissions on behalf of the Government of Pakistan.

The PRESIDENT: Thank you very much, Mr. Hamid. I give the floor now to Mr. Aziz A. Munshi, Attorney General and Minister of Law of Pakistan. Mr. Attorney General, you have the floor.

Mr. MUNSHI: I thank you, Sir. Mr. President and Members of this honourable Court:

1. You may kindly allow me, Sir, first to say that it is an honour and privilege for me to appear, as the Attorney General and Law Minister of Pakistan, before this International Court of Justice, which is the principal judicial organ of the United Nations. The fact that Pakistan has submitted this case to the International Court signifies Pakistan's staunch commitment to the purposes and principles of the Charter of the United Nations and its

respect for the obligations resting on the Member countries of the United Nations for peaceful settlement of disputes in accordance with Article 33 of the United Nations Charter.

2. I feel bound in this opening submission to draw the Court's attention to the extraordinary circumstances in which India has raised objections to the jurisdiction of the Court in this case. The Court will no doubt recognize that this is entirely a suitable case to be brought before it - the model, if I may call it, of a truly justiciable issue.

3. Pakistan submits that India's reluctance to the impartial consideration of the dispute is both unwarranted and unjustified. Pakistan further submits that the dispute as set out in the complaint and the Memorial submitted by Pakistan should be resolved quickly if it is not to remain as an irritant and impediment in the relations between India and Pakistan. If India has nothing to hide, it should welcome the opportunity of establishing the truth. If India has something to hide, the attitude that is has so far adopted serves only to confirm that India is responsible for the deliberate shooting down of the unarmed Pakistani aircraft *Atlantique* on the morning of 10 August 1999 within Pakistan's territory and airspace.

4. Mr. President, at the very outset I would like to emphasize that this is by no means an exercise in propaganda, as India claims. It is appalling for India to suggest that firstly they shot down our Pakistani aircraft which was unarmed and killed 16 young men of Pakistan on board, within Pakistani territory, and then they expect that Pakistan should not raise their complaint before this highest international judicial forum. It is like hitting a man, putting him on the ground and not even allowing him to claim his legal right of complaint. This attitude is that of a person in ordinary life who has no respect for the rule of law. Pakistan cannot and will not accept such aggression from India. Instead, consistent with its obligations for the peaceful settlement of disputes under the United Nations Charter and the Statute, Pakistan has resorted to the civilized option to approach this august judicial body for settlement. The facts of the incident would indicate that a grave international delict was perpetrated by India, which was an uncivilized violation of international norms. The Government of Pakistan states that it has a legal right to seek reparation for this wanton breach of international law before this highest judicial forum.

5. I believe that it may be helpful to the Court to be informed of the background of the present proceedings.

6. The Court will, of course, be aware that for over half a century a dispute has existed between India and Pakistan regarding the State of Jammu and Kashmir and for the implementation of United Nations resolutions which guaranteed to the people of Jammu and Kashmir their right of self-determination. India has regrettably not implemented the United Nations resolutions which it had agreed to at all material times. On the other hand, India has throttled the democratic process of self-determination for nearly 52 years and occupied the territory of the State by force, keeping 700,000 military and paramilitary personnel in the State to suppress the people. This has inevitably led to a natural struggle for freedom in Jammu and Kashmir. In this background, and despite agreements made between the two countries, and I emphasize this - at Simla on 2 July 1972 and at Lahore on 21 February 1999 - there have been periods of tension and even hostilities along the line of control in the disputed State of Jammu and Kashmir. The months of March to June 1999 witnessed fighting between Indian and Kashmiri freedom fighters, in which the Indian forces suffered heavy casualties, heightening tension in the region. In order to save themselves from public opinion on the eve of general elections in India which were due in September 1999, the then caretaker Government of India adopted an unjustified militant posture culminating in the present aerial incident. The Indian Government, in order to gain domestic political advantage, sacrificed propriety and international norms and deliberately caused the present aerial incident.

7. Thus, on 10 August 1999, a Pakistani unarmed aircraft on a training mission within Pakistani airspace was shot down, without warning, by an air-to-air missile fired by an Indian fighter aircraft. A total of 16 young naval officers on board perished. The hostile military action was wholly unjustified, for which Pakistan holds India fully responsible.

8. When an aircraft as slow as the *Atlantique* is shot down by an explosive missile, the wreckage falls vertically to the ground. The wreckage of the destroyed plane fell 2 kilometres inside Pakistani territory. In the interval between the shooting down of the aircraft and the finding of the wreckage by Pakistani helicopters, Indian helicopters - knowing exactly where the destruction had occurred - surreptitiously entered Pakistan territory and removed to the Indian side of the border some of the debris. This was intentionally done to give a false impression that the Pakistan aircraft had been overflying Indian territory at the time that it was shot down. However, the debris of the aircraft fell in Pakistan, and there exists conclusive evidence of this and the site of

the crash is within Pakistan territory and under its control, which India cannot deny.

9. Immediately after the incident on 10 August, Pakistan informed the President of the Security Council and the Secretary-General of the United Nations. Sensitive to the dangers inherent in the situation, the Secretary-General, on the same day, issued the following statement:

> "The Secretary-General regrets the loss of life following the downing of the Pakistani aircraft by the Indian Air Force. He is increasingly concerned at repeated incidents between India and Pakistan and urges that the differences between them be resolved by peaceful means. He calls on both countries to exercise maximum restraint. The Secretary-General looks forward to an early resumption of the bilateral dialogue between the two countries in the spirit of the Lahore Declaration."

10. It may be noted that the Secretary-General seemingly had no doubts about the identity of the wrongdoer when he said: "The Secretary-General regrets the loss of life following the downing of Pakistan's aircraft by the Indian Air Force". How else can that be read other than as an assessment by the Secretary-General - an authority who is always most careful in his statements - that it was India, and no one else, that had shot down the Pakistani aircraft. Indeed, this is a fact which India has admitted on more than one occasion.

11. In the wake of this event, there followed two weeks of careful consideration of this issue within the Government of Pakistan, because of the high state of tension then prevailing between the two countries and the restraint of the Pakistan Government from doing anything which could lead to a spiral of reprisals which could defeat a peaceful settlement. In a letter dated 25 August 1999 from the Foreign Minister of Pakistan to the United Nations Secretary-General (Annex A to the Memorial), Pakistan requested the Secretary-General to send a "fact-finding mission" to the region to ascertain facts about the incident. Pakistan also made a direct demand to the Government of India on 30 August (Annex C to the Memorial), to pay compensation for the destruction of the aircraft and for the loss of 16 innocent lives. The Government of India, without bothering to even consider the demand, publicly rejected Pakistan's claim and closed all doors for settlement on the next stage (Annex D to the Memorial).

12. The Secretary-General responded on 3 September (Annex B to the Memorial). He conveyed that he had consulted the Indian Government, who had replied that "it does not see the need" - and I emphasize this - that "it does not see the need for - and thus rejects any kind of third party investigation into the incident". This Court will no doubt be anxious to hear from India why it should have replied in such negative terms to Pakistan's request, which was as reasonable and constructive a request as could have been made in the circumstances. Pakistan was in the circumstances left with no alternative but to approach this august Court. What else could it do? And now India seeks to prevent this Court from hearing this case. Pakistan is naturally concerned as to why India is so resistant to impartial consideration of the dispute. It is one which should be conclusively resolved quickly if it is not to remain as an irritant in relations between India and Pakistan. If India has nothing to hide, it should welcome the opportunity of establishing its innocence. If India has something to hide, the attitude that it has so far adopted serves only to confirm the fact that it is responsible for what has occurred. It is Pakistan's earnest hope that this honourable Court will now exercise jurisdiction that Pakistan firmly believes the Parties have conferred on it.

PAKISTAN'S SUBMISSION ON JURISDICTION

13. I shall now present Pakistan's submissions on jurisdiction in a summary form.

14. Pakistan has invoked the jurisdiction of the Court on two bases. As set out in our Memorial, the first was the General Act for the Pacific Settlement of Disputes, 1928; and the second was Article 36, paragraph 2, of the optional clause of the Court's Statute.

15. It will be convenient in these hearings to reverse the order of the presentation and to take the optional clause first and the General Act second.

16. As to the optional clause, India has invoked two reservations which it says exclude the Court's jurisdiction.

17. The first reservation excludes disputes between States that are or have been members of the

Commonwealth - the so-called "Commonwealth reservation".

18. The second reservation invoked by India is the so-called "multilateral treaties" reservation. This permits the Court to exercise jurisdiction in a case involving the application of a multilateral treaty only if all the parties to the treaty are parties to the case.

19. Pakistan denies the applicability and efficacy of both these reservations.

COMMONWEALTH RESERVATION

20. As to the first, the Commonwealth reservation, Pakistan has two principal submissions.

(a) The first, which I submit most respectfully on behalf of Pakistan, is that the Commonwealth reservation which India claims to invoke, lies outside the range of reservations which are permitted by Article 36, paragraph 3, of the Statute. The language of this paragraph is clear. Declarations shall be made either unconditionally or upon two possible conditions: reciprocity or for a certain time. I shall refer to reservations which fall outside the permitted scope as "extra-statutory". I shall submit that an extra-statutory reservation made by a defendant State may be applied by the Court against a plaintiff State only if there is something in the case which allows the Court to conclude, and I emphasize to conclude, that the plaintiff has accepted the reservation. Such acceptance can be inferred in two situations. One is where the plaintiff State has itself made the same or a comparable reservation. The other is when the plaintiff, being confronted by the invocation of the reservation by the defendant State, has shown itself willing to join issue on the interpretation of the content of the reservation, without challenging its opposability to itself. But if the plaintiff challenges the applicability of the reservation, and I emphasize this, but if the plaintiff challenges the applicability of this reservation, then the Court must decide, by reference to its content and the circumstances, whether it is applicable or opposable as against the plaintiff.

(b) Pakistan's next contention relating to the Commonwealth reservation is that it is in any event inapplicable, not because it is extra-statutory and unopposable to Pakistan but because it is obsolete. The reservation was introduced in 1929 at a time when the British Commonwealth of Nations was much smaller, existing under the titular Imperial Head of the United Kingdom and the relationship between its members was much closer than it is today. A body which had then six members now has 54, most of these with independent Heads of State. Whereas in 1929 international law was not thought to be applicable to relations between members, today it is evident that international law applies between them in the same way as it does to relations between other independent States. It is Pakistan's contention that the attempt by India to maintain a reservation which has no contemporary justification is really aimed at Pakistan, and Pakistan alone. As such it is an abuse of the process of this Court and India should not be permitted by this devise to prevent impartial adjudication of Pakistan's complaint.

(c) India abuses the process of the Court and the rights of Pakistan in another respect. It entirely disregards the obligation that it solemnly accepted in relation to Pakistan by its commitment in the Simla Accord of 1972 to settle differences with Pakistan "by any means mutually agreed upon between them" (Pakistan Memorial, Annex H). The optional clause relationship had already long been operative between India and Pakistan before 2 July 1972, the date of the Simla Accord. Pakistan finds it impossible to believe that India, once it had specifically agreed to settle differences with Pakistan by any means mutually agreed upon between them would circumvent the operation of the optional clause by invoking the Commonwealth reservation against Pakistan. That is simply an act of bad faith.

(d) India also argues that the Court does not have jurisdiction by reason of the multilateral treaties reservation. India asserts that the Court cannot deal with those aspects of the case that rest upon the United Nations Charter. As to this, the position is effectively covered by what the Court had to say on the subject in the Nicaragua case. The breaches of international law which Pakistan says that India committed are essentially of customary law. The Indian reservation, therefore, cannot prevent the Court dealing with them.

(e) There then follows the second basis on which Pakistan rests the jurisdiction of this Court. This is the General Act of 1928. Both Pakistan and India are parties. The issue here is whether the General Act is still in force and still binds India. Pakistan's contention is that the General Act survived the demise of the League of Nations and is a treaty that devolved upon both India and Pakistan at the time of independence. Pakistan

maintains that nothing has happened since independence to terminate the operation of the General Act. Pakistan attaches great importance to the significant joint dissenting opinion of Judges Aréchaga, Dillard, Onyeama and Waldock in the *Nuclear Tests* case in 1974. Although it is called a dissenting opinion, it does not in respect of these matters disagree with anything said by the Court because the Court did not deal with the applicability of the General Act. The opinion is therefore an uncontradicted judicial statement of the highest authority. Pakistan will deal with this matter by responding to four questions;

(i) What was the legal condition of the General Act in 1947?

(ii) What effect did independence then have on India's position?

(iii) What effect did independence have on the position of Pakistan in relation to the Act?

(iv) What effect, if any, did events subsequent to 1947 have upon the position of the two countries?

THE INAPPLICABILITY OR NON-OPPOSABILITY TO PAKISTAN OF INDIA'S EXTRA-STATUTORY RESERVATIONS

21. I would now like to deal in greater detail with the first part of Pakistan's argument. It relates to India's recourse to the so-called "Commonwealth reservation" and the "multilateral treaties" reservation as its first line of response to Pakistan's invocation of India's optional clause declaration.

22. Pakistan's first contention is that this reservation is inconsistent with the terms of the Statute and, therefore, cannot be invoked by India against Pakistan. Any other State which wishes to recognize it may do so. But so far as Pakistan is concerned I submit, most respectfully, that in this case Pakistan is entitled to reject it as being incompatible with the terms of Article 36, paragraph 3. The Indian reservation goes beyond the range of reservations permitted by that paragraph and therefore is not opposable to any State that does not, in one way or another, accept it. Pakistan does not accept it.

23. The proposition may, at first sight, appear surprising. It appears to run against a considerable current of State practice as evidenced by the broad range of declarations made by a number of States. It also runs against assumptions, widely held and not infrequently expressed, that a State is free to make virtually any reservation it wishes in its original optional clause declaration. But as I will elaborate in just a moment, the Court has only upheld or applied a reservation going beyond the scope of Article 36, paragraph 3, if its validity has not been challenged in a given case or where the two parties have effectively agreed that the Court should treat the reservation as valid. This agreement has been derived from the special facts of each case, principally from the fact that the reservation has been the claimant State's reservations and has been invoked by the defendant State on the basis of reciprocity. Or it may be that the defendant State has chosen to contest the substance of the reservation without questioning its applicability. The Court has been willing, perhaps even anxious, to forego consideration of the question of applicability where neither side has raised that question and both have by their conduct manifested a willingness to treat the reservation as operative within its terms. But, so far as I am aware, there has never been a case like the present one, where the claimant State is directly challenging the applicability of the respondent State's reservation and does not manifest in any way an inclination to agree to the reservation.

24. The steps in my argument are the following:

25. The Statute expressly lays down in Article 36, paragraph 3, that declarations may be made either unconditionally or under two conditions. The first is, on condition of reciprocity on the part of several or certain States; the second, for a certain time. If the maxim of interpretation that *inclusio est exclusio alterius* has any meaning, it must be that the statement of two specific conditions carries with it the exclusion of other conditions.

26. Now the Commonwealth reservation in India's declaration clearly does not satisfy either of these conditions. So how can it be justified?

27. The obvious answer - an answer Pakistan is now challenging - is that the State practice has modified the express terms of Article 36, paragraph 3, and people generally have come to believe that any kind of

reservation is permissible with the possible exception, perhaps, of reservations which seek to deprive the Court of the right to determine questions relating to its own jurisdiction - the so-called automatic reservations.

28. The first comment to be made on this is that the number of States concerned is limited. One hundred and eighty-five States are parties to the Statute of the Court. Sixty States are parties to the optional clause. Of these, 23 have signed without any extra-statutory reservations. Of the 37 who have signed with reservations that fall outside the range of Article 36, paragraph 3, 14 have made these reservations relating either to matters of domestic jurisdiction, which hardly amounts to a reservation in the real sense, or have excluded disputes for which other means of settlement exist. So the number of States with real extra-statutory reservations seems to amount to no more than 23 (the same number as those who have not made extra-statutory reservations). Those 23 represent only about 38 per cent of the signatories of the parties to the Statute. It would not seem proper, therefore, to allow so unrepresentative a number of States to have the power of amending the clear text of Article 36, paragraph 3, of the Statute.

29. Moreover, it must be recalled that there is no procedure for examining the acceptability of a reservation at the time it is made, and this is important, whether at the instance of the Court, of the reserving State or of any other interested State. Thus, any reservation made stands unchallenged until it is invoked in a particular case; and the reservation will be applied unless its applicability is challenged. True, there have been instances in which States have expressed doubts about the applicability, even the validity, of certain reservations, other than in the context of an actual case but the Court has always found it possible to avoid confronting the case directly.

30. It may be helpful to the Court if I mention a couple of the most recent relevant cases in reverse chronological order. I shall be looking at only those cases in which the Court's jurisdiction was invoked on the basis of Article 36, paragraph 2, of the Statute and the Respondent raised an objection based on a reservation to the declaration. Needless to say, not every case involving the application of Article 36, paragraph 2, of the Statute involves the present problem.

31. The Court's most recent case of reliance upon an extra-statutory reservation is the *Fisheries Jurisdiction (Spain* v. *Canada)* case *(I.C.J. Reports 1998)*. In that case, the Court gave effect to a Canadian reservation to the optional clause focusing specifically on conservation and management measures in relation to fishery matters. The reservation quite evidently fell outside the scope of the reservations permitted by Article 36, paragraph 3. In paragraph 40 of the Judgment, the Court described Spain's position regarding the relevant reservation as follows:

> "Spain appears at times to contend that Canada's reservation is invalid or inoperative by reason of incompatibility with the Court's Statute, the Charter of the United Nations and with international law. However, Spain's position mainly appears to be that these claimed incompatibilities require an interpretation to be given to paragraph 2 *(d)* of the declaration different from that advanced by Canada."

The Court referred to passages in the Spanish arguments which appear to show that Spain's main dispute with Canada related to the interpretation of the reservation. The Court therefore reached the following conclusion in paragraph 41 of the Judgment:

> "Accordingly, the Court concludes that Spain contends that the *'interpretation'* of paragraph 2 *(d)* of its declaration sought for by Canada would not only be an anti-statutory interpretation, but also an anti-Charter interpretation and an anti-general international law interpretation, and thus should not be accepted. The issue for the Court is consequently to *determine whether the meaning* to be accorded to the Canadian reservation allows the Court to declare that it has jurisdiction to adjudicate upon the dispute brought before it by Spain's Application." (Emphasis supplied.)

32. In short, the Court relieved itself of the need to examine the validity or applicability of the Canadian reservation by identifying a recognition by both parties of the possession of States of "a wide liberty in formulating their declarations". The Court took it that Spain was not pressing its assertion that the Canadian reservation was invalid or inapplicable. The Court did not thereby state that the Canadian reservation was objectively valid or applicable - but only that the Court did not need to pass judgment on that question.

33. And, with the greatest respect, I submit that every case in which the Court has had to deal with reservations

under the optional clause is susceptible to this kind of analysis, or something similar to it, to lead to the conclusion that the Court has never had to pass judgment upon the applicability of a reservation even in a case where a plaintiff State has raised the issue of applicability.

34. If we move backwards to the Nauru case (case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), I.C.J. Reports 1992*, p. 240), we find that Australia, as defendant, invoked the terms of its own reservation excluding disputes "in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement". That was a reservation evidently outside the terms of Article 36, paragraph 3. Nevertheless, the Court considered the argument on its merits, though it rejected the argument on the ground that no relevant alternative existed.

35. Although this case at first sight appears to run against Pakistan's contention, in fact it does not do so because the Court noted that Nauru's declaration, the declaration of the plaintiff, also contained a similar reservation. The Court was thus in a position to assume a willingness on the part of the parties to treat their declarations as unaffected by this kind of extra-statutory reservation.

36. And so the catalogue may continue. In each case in which the Court has been confronted by reservations falling outside the scope of Article 36, paragraph 3, it has been able to consider the reservation on its merits because the plaintiff did not challenge the applicability of the defendant's reservation.

37. The next case, moving backwards, which calls for mention is the Nicaragua case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, p. 392). Though it was not a case in which there was any debate about the applicability of a reservation, it is one to which India will no doubt make reference. I would prefer to anticipate that reference so that it may not be thought that I have overlooked the words concerned.

38. In paragraph 59 of the Judgment the Court said:

> "Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations."

39. This is the kind of statement which may be used to support the claim of unlimited freedom to make reservations. However, it is a statement that must be read in conjunction with the next sentence following in the same Judgment:

> "In particular, it may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it."

Here the Court, in particularizing the kind of reservations that may be made, appears to have deliberately limited the examples which it gave to ones which fall clearly within the range permitted by Article 36, paragraph 3. All the examples relate to the temporal aspect of reservations. So one cannot deduce from this statement of the Court a blanket approval for any and all reservations, but only for those that fall within Article 36, paragraph 3, of the Statute.

40. There is an additional item to be taken from this Judgment, in the very next paragraph, which has a direct bearing on the general point I am making. In paragraph 60 the Court says:

> "In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional Clause system, the principle of good faith plays an important role."

41. The phrases of what I have just quoted on which I lay emphasis are the references to "a series of bilateral engagements" and "this network of arrangements". The optional clause operates only when it is invoked in a

particular case. In that event, it does so in terms of the declarations and reservations that are operative between the two parties. The fact that a party has made reservations that go beyond the scope of Article 36, paragraph 3, affects only the reserving State and those States that accept it. The reserving State is obviously bound by its own declaration and its own extra-statutory reservation. But if the reserving State is a defendant, as in the present case, the plaintiff State is not bound by the defendant's extra-statutory reservation unless the plaintiff State agrees. If the plaintiff chooses not to make an issue of the applicability of the defendant's reservation, then the plaintiff is to be seen as agreeing to the reservation. But if the plaintiff for good reasons objects to the reservation on the ground, for example, that it falls outside the range of matters covered by Article 36, paragraph 3, then the plaintiff is entitled to do so. The Court must then assess the compatibility of the reservation with the terms of Article 36, paragraph 3. That is what Pakistan is asking the Court to do in this case.

42. Mr. President and honourable Members of this Court, this brings me to the end of my opening submissions. I should be grateful if you would now call upon Professor Lauterpacht to continue the argument on behalf of Pakistan subject to what I may have to say on Wednesday.

43. May I again convey at the end of my opening address that Pakistan is most anxious to conclude this dispute gracefully and peacefully in accordance with the norms of international law and justice. Thank you.

The PRESIDENT: Thank you very much, Mr. Attorney General. I give the floor now to Professor Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT: Mr. President and Members of the Court, as always it is my privilege and great pleasure to appear before you. On this occasion, may I be permitted to offer you, Mr. President, and you, Mr. Vice-President, my congratulations on your elections to your most distinguished positions, as well as my congratulations and warm good wishes to the new Members of the Court, Judge Al-Khasawneh and Judge Buergenthal. I also offer my respectful good wishes to the *ad hoc* judges who have been nominated by the Parties.

1. Mr. President, the Court has heard the Attorney General of Pakistan address what is logically the first issue in this part of the case - the question of the opposability to Pakistan of India's Commonwealth reservation. The Attorney General has submitted that as between India and Pakistan the Indian reservation is not opposable to Pakistan. It is Pakistan's right to insist as against India that India's reservation comply with the terms of Article 36, paragraph 3.

2. It is my task now to address the Court on two further grounds for the inapplicability of the Commonwealth reservation. I shall submit that the reservation is inapplicable because it is obsolete and the use of it is an abuse on the part of India. I shall point to the historical origins of the so-called "Commonwealth reservation". I shall indicate that it grew out of a conception of what was then called "the British Commonwealth of Nations". This was based on the idea that international law was not applicable in relations between the Commonwealth members. The idea was called the "*inter se* doctrine". The Commonwealth was a close-knit family. Disputes between its members were not governed by international law and were not appropriate for settlement in an international court. They were intended to be dealt with in other "family tribunals" which, in fact, never came into existence.

3. I must then draw the attention of the Court to the manner in which the Commonwealth has evolved since 1929, the date on which the Commonwealth reservation was first introduced as part of the optional clause declaration of the Commonwealth members. I shall indicate to the Court how the original idea of the *inter se* doctrine has withered away, and how the Commonwealth members, including India, have come to regard each other as ordinary States between whom the normal rules of international law apply and between whom litigation may take place upon an international level, in the ordinary way.

4. This change in the character of the Commonwealth has totally undermined the basis on which the Commonwealth reservations were made. Their existence represents a mode of thought that is now quite out of date. They are infected by that weakness. They can no longer be operative. The mere fact that they still appear in six declarations made by Commonwealth members does not make them universally applicable. What matters is that these reservations do not appear in the declarations of the 11 other members of the Commonwealth, which have signed the optional clause. It is true that the reservation still appears in the British declaration, but it

has done so since 1969 only in a severely limited form. It is applicable only to situations or facts existing before 1 January 1969. This is to safeguard Britain from any actions by its former colonies that might call in question its conduct during the period before they became independent members of the Commonwealth. It could never be used in a case like the present, which relates to facts of immediacy, but the very fact that the alteration was made by Britain is itself significant evidence of the change in Commonwealth conditions. More than 30 years ago Britain, as the leader of the Commonwealth, took the view that the Commonwealth reservation had passed its - if I may use a colloquialism - "use by" date, and should be dropped in relation to any new disputes that might have regard to events thereafter. The reservation has completely disappeared also from the declarations of Australia, New Zealand and Pakistan. Furthermore, the reservation has not been included at all in nine Commonwealth declarations made subsequently: Botswana, Cameroon, Cyprus, Malawi, Nauru, Chad, Nigeria, Swaziland and Uganda.

1. Legal relevance of obsolescence: impact on good faith; abuse of process

5. However, before proceeding to a more detailed demonstration of the fact that the Commonwealth reservation has ceased to have any legitimate basis and is, therefore, not to be applied by the Court, I should briefly submit to the Court that, as a matter of law, obsolescence is a legitimate matter to be considered in relation to the applicability - even the validity - of a reservation. It is not necessary for me to enter into the difficult question of the obsolescence of treaties generally. There, much depends upon identifying elements which reveal the common consent of the parties to the withering away of the treaty. Rather, at this moment, I wish to emphasize the unilateral quality of a declaration under the optional clause and of the reservations made to it. Even though the declaration creates a treaty relationship, the survival of such a declaration or of a reservation forming part of it, does not depend upon the common consent of these parties in a manner identical to that of a treaty. Because the content of the declaration is an expression of the will of only one State, the declarant State, the only factors that control the status and analysis of the declaration are ones which affect that State alone, or as part of a group of States. If, therefore, it can be shown that the background to the making of the declaration or reservation has changed fundamentally in the time since it was first made, then that factor alone will be sufficient to weaken the reservation to the point of disappearance. Or, to put the matter another way, that consideration - of the present irrelevance of the reservation - will suggest the absence of the good faith that must always be present in its use. Or, to put the point in yet another way, the use of the reservation in such changed circumstances becomes an abuse - an abuse of right or an abuse of process - to which the Court must not lend, or be seen to be lending, its support.

6. This idea of the possible obsolescence of a reservation and of its consequential ineffectiveness is not an idea which Pakistan has generated to meet the needs of this case. It has a most respectable and authoritative judicial original. Judge Ago specifically mentioned it in one paragraph of his dissenting opinion in the *Nauru* case (*I.C.J. Reports 1992*, p. 240, at p. 327, para. 5). He there considered, amongst other things, the question of whether Nauru should have begun proceedings not only against Australia but also against the United Kingdom and New Zealand. In this connection, he evidently gave thought to the extent to which the optional clause declaration of the United Kingdom could have been invoked by it against Nauru. This declaration, it will be remembered, contained the limited Commonwealth reservation, events prior to 1969, which could have been applicable in the circumstances of the *Nauru* case. But Judge Ago had this to say:

> "It is therefore most likely that it [the United Kingdom] would not, by itself, have raised insurmountable obstacles. Particularly since the clause excluding from the acceptance of the compulsory jurisdiction of the International Court of Justice disputes with States Members of the Commonwealth - a clause originally inserted in the declaration in anticipation of the establishment of a special court for the Commonwealth - could easily have been regarded as obsolete, since that expectation has never been fulfilled."

2. Elements of abuse

(a) Covert exclusion of Pakistan

7. As can readily be seen, Mr. President, the true function of the Indian "Commonwealth reservation" is not to exclude disputes with other Commonwealth countries generally, but only with one Commonwealth country in particular - namely the plaintiff in this case, Pakistan. The reservation amounts to a covert exclusion of jurisdiction in relation to one country and one country only. Of course, it will be said: no, not at all. Disputes

are known to exist with one other Commonwealth country, Sri Lanka, so the reservation could be aimed at Sri Lanka also. Disputes could also arise with Bangladesh. But that suggestion cannot survive the recollection of two facts: one is that neither Sri Lanka nor Bangladesh is at present a party to the optional clause; the other is that, if either were ever to become a party, the disputes that are likely still to arise between them and India are all covered by other, more general reservations in the Indian declaration. One such reservation is No. 3, relating to matters of domestic jurisdiction. Another is No. 5, which excludes a dispute in which the other party has accepted the jurisdiction of the Court *(a)* exclusively for the purposes of that dispute or *(b)* less than 12 months prior to the filing of the application. Another reservation is No. 10, relating to territorial and maritime disputes. It would, I suggest, be difficult for India to identify a possible dispute with Sri Lanka and Bangladesh, that would not be covered by India's manifold reservations. And if India cannot identify such a dispute, the force of my submission that the Commonwealth reservation is maintained by India only as a bar to actions by Pakistan remains unaffected.

8. This discrimination against Pakistan in India's acceptance of the optional clause really amounts to an abuse of right - a concept with which international law and this Court is familiar. India is, in effect, inviting the Court to lend its support to an extreme case of the exclusion of a potential defendant. India is asking the Court to accept India's right to exclude the Court's jurisdiction in a case in which India knows, and the Court must know, that no defence is open to India on the merits of the case - India has virtually admitted as much.

(b) India's non-use of its territorial reservation

9. I venture to draw to the Court's attention another feature of the present proceedings. India's refusal to allow the merits of this case to be adjudicated does not flow from any reasonable doubt on the part of India regarding the merits of Pakistan's claim. Either the Pakistani aircraft was shot down over Pakistani territory or it was shot down over Indian territory. If it was the first, India is manifestly liable. If the aircraft was not shot down over Pakistan territory it could only have been shot down over the territory of India. That is the stark alternative. Yet, if that were so then surely the logic of India's position would have required it, in order to avoid judicial scrutiny of its behaviour, to have invoked its reservation No. 10, paragraph *(d)*, which excludes "disputes with India concerning or *relating to* (and I emphasize "relating to") the airspace superjacent to its land and maritime territory". If the aircraft had been flying over India and was shot down there, then the dispute would have been one "relating to" the airspace superjacent to India. India could have invoked the reservation. But India has not done so. Could there be a clearer acknowledgement - no doubt unintended - that the shooting down did not occur in India's airspace? And from this it follows that it could only have been done in Pakistan's airspace - a fact upon which Pakistan's case and India's responsibility both rest.

10. I may say, in passing, that in inviting the Court to take notice of India's implied admission regarding the location of the aircraft at the time of the shooting down, Pakistan is not asking the Court to pronounce upon any aspect of the merits at this stage. But this does not mean that the Court is precluded from bearing that point in mind when considering the degree of abuse involved in India's resort to the Commonwealth declaration. To admit the liability for shooting down a plane and then to refuse to accept adjudication is, it must respectfully be suggested, pretty abusive.

Mr. President, I am entirely at your disposition as to when you would wish to take the break. I can break here, or I can break a bit later as you would prefer.

Le PRESIDENT: Vous pouvez encore continuer pendant un dizaine de minutes. I am sorry, you may continue for another ten minutes.

Professor LAUTERPACHT: Thank you very much, Sir.

(c) India's willingness to accept compulsory jurisdiction in other cases

11. The abusive nature of India's attempt to remove this case from the Court is further demonstrated by the fact that India has been ready to invoke the compulsory jurisdiction of this Court against Pakistan when it has suited India's interests to do so. This was in the case brought by India in 1972 and decided under the name of *Appeal Relating to the Jurisdiction of the ICAO Council (I.C.J. Reports 1972*, p. 46). Admittedly, the jurisdiction invoked by India was not under the optional clause but under Article II of the International Air Services Transit Agreement 1944 between India and Pakistan and Article 84 of the International Civil Aviation Convention of

1944. Nonetheless, it was a remedy which was open to India under international law and India was, in its relations with Pakistan, ready to make use of it.

12. There is, of course, a formal difference invoking the jurisdiction of the Court under a specific treaty and invoking it under the optional clause. But even so, one is entitled to suggest that India abuses its position when, on the one hand, it proceeds against Pakistan in this Court by way of an appeal against the exercise of jurisdiction by the ICAO Council and yet refuses to accept Pakistan as an opponent in the same court when it is a case of Pakistan complaining of the destruction by India of an unarmed aircraft.

(d) Simla Agreement 1972

13. Lastly, as a further illustration of the abusive character of India's action, Pakistan refers to the Simla Agreement or the Simla Accord of 1972 on bilateral relations between the Government of India and the Government of Pakistan. The operation of this Agreement was confirmed in the Lahore Declaration of 1999, where the two sides reiterated their determination to implement the Simla Agreement in letter and spirit. The Simla Agreement contains an express provision in Article 1, subparagraph (ii), "that the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means agreed upon between them . . .". Pakistan understands the words "or by any other peaceful means agreed upon between them" as including the means agreed by their common participation in the system of the optional clause. But the Simla Agreement imports something additional into the optional clause relationship. It serves to negate any force that might otherwise attach to the application of India's Commonwealth reservation. For India to continue to be able, after the Simla Agreement, to invoke the Commonwealth reservation against Pakistan would make nonsense of the Simla commitment. For India to disregard this aspect of the Simla Agreement would amount to bad faith, both in relation to compliance with the Simla Agreement and in relation to the operation of India's optional clause declaration.

Indeed one can go even a step further. One cannot simply disregard the legal relevance of the Simla Accord. When India signs an agreement saying that it will settle disputes by other peaceful means agreed between it and Pakistan, one may certainly assert that India is estopped from interposing the barrier of the Commonwealth reservation against the very State with which it has made that agreement.

3. India's Commonwealth reservation is out of keeping with the times

14. It is now necessary for me, Mr. President and Members of the Court, to retrace my steps and present to the Court in more detail the considerations which make India's Commonwealth reservation anomalous to such an extent as to render it inapplicable to any dispute arising in this year 2000.

(a) The Commonwealth in 1926

15. The Commonwealth reservation first appeared in the declarations of acceptance of the optional clause made in 1929 by Great Britain and the British Dominions - at that time, Australia, Canada, New Zealand, South Africa and India.

16. The position at that time of Great Britain and the Dominions has been authoritatively described in the report of the Inter-Imperial Relations Committee to the Imperial Conference of 1926:

> "They are autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

17. It was on this basis that there rested the idea that the Dominions were parts of a family, relations between which were not governed by international law - the so-called *inter se* doctrine. A leading authority on the history of the Commonwealth, the late Dr. Duncan Hall, described the doctrine as follows:

> "It held that members of the Commonwealth were not foreign States in relation to each other, that international obligations did not bind them *inter se*, and that an agreement made between them was not an international treaty. The ultimate basis of the doctrine was the common allegiance to the

King." (*A History of the British Commonwealth of Nations* (1927), p. 662. See also R. R. Wilson, "The Commonwealth and the Law of Nations in Mansergh and Others", *Commercial Perspectives* (1958), pp. 74-79.)

(b) The 1929 optional clause declarations

18. The implications of the *inter se* doctrine were the subject of much discussion between Britain and the Dominions in 1929, when consideration was being given to the question of the acceptance of the optional clause. The discussion is described in this same history by Dr. Duncan Hall to which I have just referred. He records the following:

> "Sir Cecil Hurst [whom Members of the Court will recall was the first British Member of this august body], when asked by a Committee of Jurists on the Court Statute held in Geneva in March 1929 whether the constitution of the British Empire prevented a dispute between two of its members being brought before the Court, replied that this was the case. Article 14 of the Covenant gave the Court jurisdiction only in regard to international disputes and relations between the units of the Empire were not international." (Duncan Hall's footnote refers to the Minutes of the Committee of Jurists on the Statute of the Permanent Court, 16 March 1929, League of Nations document, C.166 M.56, 1929 V.)

19. The outcome of the discussion was the declaration made by Great Britain on 19 September 1929 accepting the jurisdiction of the Court under Article 36, paragraph 2, with the first of what have become called "Commonwealth reservations", namely, excluding "Disputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree". It is this last phrase which led Judge Ago to observe in the *Nauru* case that inter-Dominion disputes would be settled in some other tribunal. The Dominions and India all signed in terms identical with those used by Britain. The only exception was the Irish Free State, which made no reservations.

20. The explanatory Memorandum presented by the Foreign Secretary to the British Parliament at that time contained the following statement:

> "Disputes with other members of the British Commonwealth of Nations are excluded because the members of the Commonwealth, though international units individually in the fullest sense of the term, are united by their common allegiance to the Crown. Disputes between them should, therefore, be dealt with by some other mode of settlement, and for this provision is made in the exclusion clause."

21. So it can be quite clearly seen that the *fons et origo* of the reservation was recognition of the fact that members of the British Commonwealth were united by a common allegiance to the Crown. If they had not been, there would have been no Commonwealth reservation. Towards the end of the Memorandum, it was said that the agreement amongst the governments of the Dominions "concerning the vital question of international arbitration marks a further step in the acceptance of common principles for the conduct of foreign policy". Together with a reference to "the common allegiance to the Crown" this was a further indication of the factors leading to the Commonwealth reservation. Mr. President, that is a convenient point for your leave.

Mr. PRESIDENT: Thank you very much. The Court will adjourn for 10 minutes.

The Court adjourned from 11.25 a.m. to 11.35 a.m.

Le PRESIDENT: Veuillez vous asseoir. L'audience est reprise. Sir Elihu, you have the floor.

Sir Elihu LAUTERPACHT: Mr. President, thank you. Before the break I was dealing with the situation arising from the 1929 optional clause declarations. I must now turn to the question of the post-1929 changes in the Commonwealth.

(c) Post-1929 changes in the Commonwealth

22. What has happened since 1929 to change the situation?

23. The short answer is that the character of the Commonwealth has changed totally since the conception of the Commonwealth reservation in 1929. From a grouping of seven States in 1929, it has grown to an association of some 54 States in the year 2000. It has long outgrown the idea that its members are linked by a common allegiance to the Crown. In fact, 33 of the members, including both India and Pakistan, are Republics with their own Head of State. In addition, five of them have their own national monarchs. No longer is it even remotely true that they accept common principles for the conduct of foreign policy. Each of them is a fully independent State; each is a separate Member of the United Nations; to the relationships of each of them between themselves international law applies with full force and effect. The way in which the Commonwealth describes itself now, in the so-called Fancourt Declaration of November 1999, is as "an association of diverse sovereign nations reflecting different stages of development and united by common values".

24. As I have already pointed out, it has occurred to only six members of the present enlarged Commonwealth to include the Commonwealth reservation in their acceptance of the optional clause. Eleven do not include it. The United Kingdom, Australia and New Zealand have dropped it. The remainder have not made optional clause declarations.

25. But even those six members of the Commonwealth that include Commonwealth reservations in their declarations have accepted compulsory international adjudication without reserve in other international instruments. Like both India and Pakistan, they are bound (with the exception of Canada as yet) by the dispute settlement provisions of the 1982 Convention on the Law of the Sea under which, in the absence of any indication of preference for the Law of the Sea Tribunal or for this Court, they are bound to accept the compulsory jurisdiction of an arbitral tribunal. Thus, if the Pakistan aircraft had been shot down by India while it was over the territorial sea of Pakistan, or even the territorial sea of India, proceedings could have been instituted by Pakistan against India invoking the provisions of the Law of the Sea Convention. Equally, India has accepted the application of the World Trade Organization's Understanding and Rules and Procedures Governing the Settlement of Disputes, which creates a compulsory jurisdiction in the WTO system in relation to disputes of immense significance.

26. Nor are India and Pakistan strangers to one another in international tribunals. In 1965 the two States agreed to refer to arbitration the question of the boundary in the Rann of Kutch. An extended arbitration took place which led in due course, by the straightforward application of international law, to a major award in 1968.

27. India has even had recourse to the present Court against Pakistan in the *ICAO* case as I have already mentioned; true, under the jurisdictional provisions of the ICAO Convention. But that does not diminish the significance of the fact that if it suits India to begin proceedings in this Court, it will not allow considerations of Commonwealth association to limit its freedom of action.

28. Equally, in its major dispute with Pakistan over Kashmir, India has not contended that, because the matter arises between members of the Commonwealth, the dispute falls outside the application of international law. Professor Fawcett, who has written about the *inter se* doctrine, has had this to say:

> "It may be observed that neither party argued that the situation or dispute was not of an international concern, or that the Security Council was not competent to deal with it, or that the courses it took of mediation by the President, and in appointing and directing the work of a United Nations Commission, were inappropriate, as involving two members of the Commonwealth." (Fawcett, *op. cit.*; p. 36.)

29. Sir Ivor Jennings - not to be confused with the former President of this Court, Sir Robert Jennings - Sir Ivor Jennings, the most distinguished British constitutional lawyer of his day, who flourished in the period from 1930 to 1960 approximately, wrote to *The Times* newspaper on 5 March 1957 about the Kashmir dispute and concluded that "This question also could be decided by the International Court". He evidently did not think of a Commonwealth dispute as being inappropriate for the application of international law or for consideration by this Court. (Quoted in Wilson, "Some Questions of Legal Relations between Commonwealth Members" in *51 American Journal of International Law*, 611 at 614.) Nor was India averse, I should add, in principle, in 1949, to the proposal that there should be recourse to this Court in connection with the treatment by South Africa, another Commonwealth country at that time, of Indians in that territory.

30. So we have here clear indications, not only of the willingness of India in certain circumstances to litigate internationally with Pakistan in the form of the Rann of Kutch and ICAO. We have indications of India's acceptance of compulsory jurisdiction in the form of the law of the sea, and the WTO dispute settlement procedures. We have indications of the clear acknowledgement by India of the applicability of international law in its relations with other Commonwealth countries. And, finally, I may make reference to two representative academic writers who have commented on the Commonwealth reservations: one British, one Canadian. The British academic writer is Professor Merrills who wrote in the *British Yearbook of International Law* of 1993 on the optional clause revisited. I will just read a couple of quotations from that:

> "However, as the Commonwealth expanded in the next two decades [that is. the two decades following 1930], and the justification for the reservation [that is, the Commonwealth reservation] was increasingly questioned, the situation changed." (p. 87.)

He then refers to the various Commonwealth reservation modifications. He continues later:

> "The United Kingdom may be thought to have some justification for retaining a reservation which, even in its modified form, prevents the litigation of disputes arising from the days of Empire. As regards the other Commonwealth States, however, this reservation must be taken to have outlived its usefulness. There is no prospect of referring Commonwealth disputes to a distinct Commonwealth tribunal as was once mooted, and there is equally no special relationship which could justify thinking of such disputes as different from those between Commonwealth and non-Commonwealth States."

And he then goes on a little bit later and says, referring to the *Nauru* case:

> "This litigation, which would not have been possible 20 years ago, underlines the reduced significance of the Commonwealth reservation which, now that its *raison d'être* has disappeared, is likely to diminish further in the future."

And I respectfully echo that hope.

I will refer now to an article by a distinguished Canadian international lawyer, Professor Ronald McDonald, which appears in the *Canadian Yearbook of International Law* for 1970, under the title of "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the ICJ". At page 31, he refers to two reasons for the Commonwealth declaration: "In the first place, Commonwealth countries united by their common allegiance to the Crown, were reluctant to submit their differences to an outside tribunal." And then he goes on and says in the second place, "it was expected that a Commonwealth tribunal, perhaps a variation of the Judicial Committee or the Privy Council, would be created to settle disputes between the Commonwealth members". Then he goes on: "neither of these reasons seems to be sufficient to justify the retention of the reservation at the present time" - and note, this is a Canadian Professor commenting critically and adversely upon the retention by Canada of the Commonwealth reservation - "neither of these reasons seems to be sufficient to justify the retention of the reservation at the present time. Since the Second World War, a multi-racial empire has been transformed into a multinational Commonwealth whose independent members, often more closely associated with non-Commonwealth than with Commonwealth States are unwilling to accept loyalties associated with a colonial past. No tribunal for the settlement of *inter se* disputes has been established and there is no serious intention of creating such machinery." Then he continues later: "The reservation, excluding the Commonwealth disputes, thus leads to results contrary to the intention that initially inspired it." Judicial settlement is more readily available as regards foreign States than as regards Commonwealth members. It follows, that this particular reservation is from another day and should be withdrawn by a new Canadian declaration. Commonwealth relations can probably be strengthened and not weakened by referring to the Court more rather than fewer international disputes.

31. So, Mr. President and Members of the Court, you can see that the Indian exclusion of Commonwealth disputes is tainted by a number of significant faults:

(1) The reservation is a hangover from Imperial days when disputes between British Dominions were considered to be outside the scope of international law. Evidently, they are not so any longer.

(2) It reflects the days when the Dominions were united by a common allegiance to the Crown. They are not any longer.

(3) It represents the then wish of the British Government that the Dominions should adhere to common principles of foreign policy. They do not do so now.

(4) It does not represent India's general position vis-à-vis Pakistan. India has accepted that international law applies to Indian-Pakistani relations. India has accepted the use of international tribunals to resolve disputes between itself and Pakistan: Rann of Kutch; the ICAO cases and prospectively the Agreement establishing the WTO dispute under settlement procedures and the Law of the Sea Convention.

(5) Even within the limited framework of this optional clause system, the role of the Commonwealth reservation is highly arbitrary. In practical terms, Pakistan is the only State against which it can be, and no doubt is intended, to operate. By reason of the breadth of India's other reservations there is, in any event, only a very small range of issues which could be left for exclusion from the Court's jurisdiction.

(6) Therefore, the reservation is unprincipled and out of keeping with our time. Moreover, if, notwithstanding all these defects, it should be thought still to be in force, recourse to it in present circumstances constitutes an abuse of rights or of the Court's procedures.

(7) The Court is being asked to validate and support a reservation which in its operation is artificial and abusive.

(d) Severability of the Commonwealth reservation

32. So I come now, Mr. President, to the question of whether the Commonwealth reservation can be severed from the declaration on which it forms part - so that the rest of the declaration can stand as a valid basis for the Court's jurisdiction. But in truth there is a prior question: does the issue of severability need to be examined at all? The Court will recall that severability was considered at length in Sir Hersch Lauterpacht's separate opinion in the *Norwegian Loans* case. He took the view that the French automatic reservation was invalid by reason of its inconsistency with Article 36, paragraph 6, of the Statute. It formed, he concluded, so essential a part of the French declaration that it could not be severed from that declaration and accordingly, as in his view, the reservation was void, so was the declaration and the Court was for that reason without jurisdiction.

33. However, his discussion of severability proceeded on the basis of the *invalidity* of the automatic reservation - that is to say it was to be treated as legally non-existent. In the present case, however, Pakistan is not saying that India's Commonwealth declaration is legally non-existent but only that it is *not opposable* to Pakistan. If proceedings were commenced against India by a Commonwealth country which also had a Commonwealth reservation, then the Court - as the Attorney General has explained - might treat the reservation as operative between that country and India. It is only where the plaintiff State has not accepted the extra-statutory reservation as operative between itself and the defendant that the Court may treat the reservation as being unopposable to the plaintiff.

34. This is the situation in which we find ourselves here. The Indian reservation exists. It is simply inapplicable as between India and Pakistan. There is, therefore, no occasion for considering whether the remainder of the Indian declaration remains valid because there is no material tainted by invalidity which may infect the main declaration. There is only a part of the main declaration - the Commonwealth reservation - which, as between India and Pakistan, cannot be applied.

35. That is my first point on the question of severability. It is a question that does not arise. However, should Pakistan be wrong in this first submission then its alternative submission is that severance is possible and proper.

36. In approaching this question it is appropriate to take as one's starting point the observation of the Court in the *Nicaragua* case where it said that an acceptance of the compulsory jurisdiction of the Court is "governed in many respects by the principles of treaty law" (*I.C.J. Reports 1984*, p. 420).

(i) *Severability in treaty law*

37. The concept of severability is fully recognized in treaty law. The subject is dealt with in Article 54 of the Vienna Convention on the Law of Treaties. That Article, though stating a basic rule that a ground for invalidating a treaty may be invoked only with respect to the whole treaty, recognizes that if the ground relates solely to particular clauses, it may be invoked only with respect to those clauses, where:

> "*(a)* the said clauses are separable from the remainder of the treaty with regard to their application;
>
> *(b)* it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
>
> *(c)* continued performance of the remainder of the treaty would not be unjust".

38. This provision may be applied, Mr. President, to the issue now before the Court as follows: As to *(a)*, it is evident that the Commonwealth disputes reservation is severable from the rest of the Indian declaration with regard to its application. The rest of the declaration can certainly stand without this reservation.

39. As to *(b)* - whether the presence of the reservation is an essential basis of India's declaration - it would require a prodigious feat of imagination to suggest that India was prepared to make its declaration only because it contained the Commonwealth dispute reservation applicable to Pakistan. If the United Kingdom and 11 other Commonwealth countries see the reservation as irrelevant to today's conditions, what reason would there be for India and, admittedly, six other Commonwealth countries, to see the reservation as being essential? The only plausible explanation of the continuance of this anomalous reservation is that it was a respectful, but insufficiently considered, repetition of an old Commonwealth theme.

40. As to *(c)*, that the continued performance of the remainder of the declaration would not be unjust, one must ask, where can one identify any element of injustice in holding India to its basic pledge to accept the jurisdiction of the Court to determine questions of international law, and to its pledge in a similar court, repeated in the Lahore Declaration, to settle disputes by peaceful means?

(ii) *India's views on severability refuted*

41. India has rejected the idea of severability, first because of a *dictum* of this Court in the recent *Fisheries Jurisdiction* case between Spain and Canada, "All elements in a declaration under Article 36, paragraph 2, of the Statue which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity" *(I.C.J. Reports 1998, Jurisdiction,* para. 44; Counter-Memorial of India, para. 67).

42. Pakistan submits that there nothing in the sentence just quoted to indicate that an obsolete, inapplicable, abusive or invalid reservation cannot be severed from the declaration of which it forms part. All that the Court appears to have been saying in that paragraph is that all elements in a declaration, the qualifying or limiting elements as well as the positive elements, are to be read as a unity. There is no contradiction here. It is not saying that they have to be read as a unity and are inseparable, only that they should be read as a unity when it comes to interpreting their overall effect.

43. India relies further on the separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case to which I have already referred (Counter-Memorial of India, para. 68). It is perhaps a mark of the concern which India feels on this point that it should have presented a rather inaccurate image of what Sir Hersch said.

44. Here is what India says that Sir Hersch said:

> "While expressing the view that a certain reservation made by a Party was not valid, he pointed out that such a reservation cannot be separated from the rest of the Declaration to maintain the jurisdiction of the Court. He noted that the declarant State regarded the impugned reservation as one of the crucial limitations - perhaps *the* crucial limitation - of the obligations undertaken by the acceptance of the optional clause of Article 36 of the Statute. As such, he observed, 'to ignore that clause and to maintain the binding force of the declaration as a whole would be to ignore an essential and deliberate condition of the acceptance as a whole'".

The Indian Counter-Memorial referred to two specific pages in the opinion, pages 57 and 58.

45. Now the passages in Sir Hersch Lauterpacht's opinion which has here been misleadingly condensed by India is too long for me now to read to the Court. However, if the Court will permit, I will attach it as a footnote to this line of my speech so it may appear in the record[1].

[1 What Sir Hersch really said was:

"However, I consider that it is not open to the Court in the present case to sever the invalid condition from the Acceptance as a whole. For the principle of severance applies only to provisions and conditions which are not of the essence of the undertaking. Now an examination of the history of this particular form of the reservation of national jurisdiction shows that the unilateral right of determining whether the dispute is essentially within domestic jurisdiction has been regarded by the declaring State as one of the crucial limitations -- perhaps the crucial limitation -- of the obligation undertaken by the acceptance of the Optional Clause of Article 36 of the Statute. As is well known, that particular limitation is, substantially, a repetition of the formula adopted, after considerable discussion, by the Senate of the United States of America in giving its consent and advice to the acceptance, in 1946, of the Optional Clause by that country. That instrument is not before the Court and it would not be proper for me to comment upon it except to the extent of noting that the reservation in question was included therein having regard to the decisive importance attached to it and notwithstanding the doubts, expressed in various quarters, as to its consistency with the Statute. It will also be noted that some governments, such as those of India and the Union of South Africa, have attributed so much importance to that particular formulation of the reservation that they cancelled their previous acceptance of the Optional Clause in order to insert, in a substituted Declaration of Acceptance, a clause reserving for themselves the right of unilateral determination. To ignore that clause and to maintain the binding force of the Declaration as a whole would be to ignore an essential and deliberate condition of the Acceptance.

From the point of view of the Government concerned there were weighty reasons why, anxious to frame its acceptance of the Optional Clause and its reservations thereto in such a manner as to preserve full freedom of national decision in the matter of submission of future disputes to the Court, it attached importance to formulating this particular reservation. In a significant passage, cited in paragraph 25 of the Preliminary Objections of Norway, the Rapporteur of the Committee for Foreign Affairs of the French Chamber said in relation to the reservation in question: 'The French sovereignty is not put in issue and its rights are safeguarded in all spheres and in all circumstances.' In fact, as is suggested in another part of this Opinion, there are only few disputes which cannot, without giving rise to an irrefutable imputation of bad faith, be brought within the orbit of the assertion that they pertain to a matter essentially within the domestic jurisdiction of the State concerned. Similarly, as already stated, there is but little substance in the view that the freedom of determination by the State interested is effectively limited for the reason that it must be exercised in good faith and that the Court is the judge whether it has been so exercised. The Court is therefore confronted with the decisive fact that the Government in question was not prepared to subscribe or to renew its commitment of compulsory judicial settlement unless it safeguarded in that particular way its freedom of action. That particular formulation of the reservation is an essential condition of the Acceptance as a whole. It is not severable from it. The phrase 'as understood by the Government of the French Republic' must be regarded as being of the very essence of the undertaking in question. It is not a collateral condition which can be separated, ignored and left on one side while all others are given effect. The Acceptance stands and falls with that particular reservation and that particular formulation of the reservation. Without these words the Government which made that reservation would not have been willing to accept the commitments of the compulsory jurisdiction of this Court."]

46. Thus, quite contrary to the inference that India invites the Court to draw from Sir Hersch's view, he did not in any general way point out that "such a reservation cannot be separated from the rest of the Declaration". Rather he started from the proposition that in certain circumstances a reservation could be severed from the declaration of which it formed a part. However, upon examination of that particular declaration and, I emphasize this, and reviewing the evidence of the views of the French Government in that particular declaration, he concluded that the Court was "confronted with the decisive fact that the Government in question was not prepared to subscribe or to renew its commitment of compulsory judicial settlement unless it safeguarded in that particular way its freedom of action" (*ibid*, p. 58).

47. Now at this point, I venture to draw the Court's attention to a significant feature of India's argument. Evidently India has studied the pages of Sir Hersch's opinion from which it has quoted. That study must have revealed to India the fact that Sir Hersch analysed in detail the "weighty reasons", as he put it, why France had framed its reservation in the way it had. In fact, he specifically referred to a "significant" passage in the Report of the Committee for Foreign Affairs of the French Chamber.

48. It could not have been by oversight that India's Counter-Memorial makes no attempt to produce any comparable evidence - or indeed any evidence at all - to suggest that the Commonwealth reservation had a comparable significance for India. The inescapable inference to be drawn from India's silence on this point is

that it has no evidence to offer on this point. And, indeed, one may ask, how could it pretend that the resolution was of central importance to its declaration when over the years the reservation had come to occupy a smaller and smaller place in the overall pattern of India's declaration?

49. Nor is India's recourse to Ambassador Rosenne's view any more complete. It omitted from its quotation the important opening sentence: "The question of severability has not been authoritatively decided", thus giving the quoted parts of Ambassador Rosenne's book the appearance of being founded upon some decision of the Court. That is certainly not the case; but although Professor Rosenne's views are entitled to respect as emanating from a major authority, on this particular point - which Professor Rosenne thought only to be appropriate for a footnote - Pakistan respectfully prefers the view of Sir Hersch Lauterpacht.

4. Multilateral treaty reservation

50. I now turn, Mr. President to the second reservation, the multilateral treaty reservation. This is expressed in the Indian declaration as the exclusion of "disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court . . .". This can be dealt with relatively briefly.

51. The basis on which India resorts to this reservation is the fact that Pakistan has adduced violation of the United Nations Charter as one of the reasons why India's conduct has breached Pakistan's right. As the Court will have observed, the facts relied upon by Pakistan in this connection were, as stated in its Application, "India's unprovoked and blatant use of force against an unarmed Pakistani aircraft over Pakistani territorial airspace".

52. Pakistan recalls that the same facts invoked by it in this connection are also relied upon as amounting to breaches of customary international law. There can, indeed, be no doubt that the facts of the incident involve a violation of Pakistan's sovereignty, a trespass to its territory and airspace, an injury to its nationals and the destruction of Pakistan State-owned property - all of which give rise to India's responsibility under customary international law and to the payment of damages. The amount claimed is US$ 60 million. (See Pakistan's letter to India of 30 August 1999; Pakistan's Memorial on Jurisdiction, Ann. C.)

53. Accordingly, even if India were entitled to rely in principle on the "multilateral treaty" reservation in relation to claims under the United Nations Charter, it would give India no comfort. Pakistan could rely on customary international law alone - and is quite content to do so.

54. That said, however, Pakistan does not abandon the contention that reference may properly be made to the United Nations Charter, and particularly to Article 4, paragraph 2, as a confirmation and crystallization of the general rules of customary international law on the substantive issues raised by the facts in the present case. Pakistan recalls generally in this connection the following passage from the Judgment of the Court in the *Nicaragua* case in 1984. The Court said there, discussing the effect of a comparable reservation in the United States declaration:

> "It may first be noted that the multilateral treaty reservation could not bar adjudication by the Court of all Nicaragua's claims, because Nicaragua, in its Application, does not confine those claims only to violations of the four multilateral conventions referred to above (para. 68). On the contrary, Nicaragua invokes a number of principles of customary and general international law that, according to the Application, have been violated by the United States. The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary [international] law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated. Therefore, since the claim before the Court in this case is not confined to violation of the multilateral conventional provisions invoked, it would not in any event be barred by the multilateral treaty reservation in the United States 1946

Declaration." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 424-425, para. 73.)

55. There is really nothing more that needs to be said on this point.

THE GENERAL ACT

56. This brings Pakistan, Mr. President and Members of the Court, to the second main part of its argument. The first main part dealt with the operation of the optional clause. And in this second main part, we shall be dealing with sustaining our contention that the Court possesses jurisdiction under the General Act for the Pacific Settlement of Disputes of 1928.

57. His Excellency the Attorney General has already indicated the four questions by reference to which the application of the General Act can conveniently be discussed. The first of these is the question of what was the legal condition of the General Act in 1947; the date at which India and Pakistan separated? To deal with this question, Mr. President, I would respectfully ask you to call upon Dr. Kemicha to continue our argument. Then, with your leave, after he has dealt with that aspect of the matter, I would like to return. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Sir Elihu. Je donne maintenant la parole à M. Fathi Kemicha.

M. KEMICHA: Monsieur le Président,

Madame et Messieurs les Membres de la Cour,

1. J'ai l'honneur et le privilège de me présenter devant votre haute juridiction pour la première fois.

Ma tâche consiste à vous exposer la position de la République islamique du Pakistan selon laquelle votre Cour est compétente pour connaître du litige qui lui est soumis, et ce, en vertu de l'Acte général pour le règlement pacifique des différends internationaux du 28 septembre 1928, revisé par l'Assemblée générale des Nations Unies en 1949.

2. Je souhaite, avec la permission de la Cour, consacrer le temps qui m'est imparti à l'examen de la première des quatre questions qui vous ont été exposées dans l'exposé introductif de S. Exc. M. Munshi, à savoir quel était le statut juridique de l'Acte général en 1947 date à laquelle l'Inde et le Pakistan ont déclaré leur indépendance.

A. Le statut juridique de l'Acte général en 1947

3. L'inde s'emploie à démontrer que l'Acte général de 1928 aurait été partie intégrante du système de la Société des Nations. De ce fait, la dissolution de cette dernière, de même que celle des organes la constituant, serait une cause d'extinction ou de désuétude de l'Acte.

Cet argument contenu dans la lettre adressée par l'Inde au Secrétaire général des Nations Unies, et reçue par ce dernier le 18 septembre 1974 (voir exceptions préliminaires, annexe B7, p. 6, par. 3.1).

4. Il est en réalité impossible, à ce stade de la procédure et à la seule lecture du mémoire indien, de savoir si sa position de l'Inde, aujourd'hui, consiste à affirmer que l'Acte général de1928 a cessé d'être en vigueur à l'issue de la disparition de la Société des Nations, ou si elle tend plutôt à démontrer qu'elle a cessé d'être partie à l'Acte à la date de son indépendance. Cette deuxième hypothèse sera examinée, avec votre permission, ultérieurement par sir Elihu Lauterpacht.

5. Mais si l'Inde persistait à considérer que l'Acte a cessé d'être en vigueur à compter de 1946, cette position deviendrait incohérente. Elle le serait d'une part avec l'opinion exprimée par M. Basdevant dans l'affaire des *Emprunts norvégiens* et par MM. Oneyeama, Jiménez de Aréchaga, Dillard et sir Humphrey Waldock dans l'affaire des *Essais nucléaires* auxquelles je me référerai dans quelques minutes. Elle serait également incohérente avec la «pratique» d'Etats comme la France et le Royaume-Uni qui ont formellement dénoncé

l'Acte général à des dates bien postérieures à 1946.

6. Par ailleurs, ils est aisé d'observer que la décision de l'Inde de considérer que l'Acte général se serait éteint avec la disparition de la Société des Nations a coïncidé curieusement avec ses objections relatives à la compétence de la Cour dans l'affaire des *Prisonniers de guerre pakistanais* en 1973...

L'Inde avait alors dénoncé la diminution de l'efficacité (« *the impairment of the efficacy* ») de l'Acte général de 1928, tout en reconnaissant par ailleurs que cet Acte, quoique inefficace et inutile *(*« *inefficacious and deadwood* »*)* pouvait peut-être servir à quelque chose mais seulement sur la base d'un commun accord entre les parties.

La Cour a certainement encore à l'esprit les discussions suscitées par la question de savoir si l'Acte général avait survécu à la disparition de la Société des Nations.

7. Le Pakistan soutient aujourd'hui que l'Acte est resté en vigueur.

Est-il besoin de rappeler que cette honorable Cour a eu l'occasion d'examiner cette question à trois reprises :

- en 1957 à l'occasion de l'affaire relative à *Certains emprunts norvégiens* opposant la France à la Norvège (*C.I.J. Recueil 1957*, p. 25);

- en 1974 à l'occasion de l'affaire des *Essais nucléaires* opposant la France à l'Australie et à la Nouvelle-Zélande (*C.I.J. Recueil 1974*, p. 272);

- et enfin en 1978 à l'occasion de l'affaire du *Plateau continental de la mer Egée* opposant la Grèce à la Turquie (*C.I.J. Recueil 1978*, p. 3).

8. Dans l'affaire des *Emprunts norvégiens*, l'Acte général a été invoqué par la France mais pas dans des termes suffisamment explicites qui auraient permis à la Cour de retenir sa compétence sur son fondement (*C.I.J. Recueil 1957*, p. 9, par. 25).

Dans son opinion dissidente, M. Basdevant estime toutefois que :

> «En matière de juridiction obligatoire, la France et la Norvège ne sont pas liées seulement par les déclarations qu'elles ont souscrites sur la base de l'article36, paragraphe 2, du Statut de la Cour. Elles le sont également par l'Acte général du 28 septembre 1928 auquel elles ont l'une et l'autre adhéré. Cet acte est entre elles un de ces «traités et conventions en vigueur» qui établissent la compétence de la Cour et que vise l'article 36, paragraphe 1, du Statut; pour l'application de cet acte, l'article 37 du Statut a substitué la Cour internationale de Justice à la Cour permanente de Justice internationale. Cet acte a été mentionné dans les observations du Gouvernement français, puis expressément invoqué, à l'audience du 14 mai, par l'agent de ce gouvernement; il a été mentionné, à l'audience du 21 mai, par le conseil du Gouvernement norvégien. A aucun moment, il n'a été mis en doute que cet acte fit droit entre la France et la Norvège.
>
> Rien ne permet de penser que cet Acte général doive échapper à l'attention de la Cour. A aucun moment il n'est apparu que le Gouvernement français ait renoncé à s'en prévaloir. Eût-il gardé sur lui le silence que la Cour «dont la mission est de régler conformément au droit international les différends qui lui sont soumis» ne saurait l'ignorer.» (*C.I.J. Recueil 1957*, p. 74.)

9. Dans l'affaire des *Essais nucléaires*, l'Acte général était cette fois invoqué par l'Australie et la Nouvelle-Zélande, et son application rejetée par la France au motif qu'il serait tombé en «*désuétude*».

Dans l'ordonnance sur les mesures conservatoires en date du 22 juin 1973, la Cour avait estimé que «les éléments soumis ... l'amènent à conclure ... que les dispositions invoquées par le demandeur se présentent comme constituant *prima facie* une base sur laquelle la compétence de la Cour pourrait être fondée» (*C.I.J. Recueil 1973*, p. 102, par. 17).

La Cour avait ensuite estimé, dans son arrêt du 20 décembre 1974, qu'en raison des déclarations unilatérales faites par la France «la demande n'a plus d'objet et qu'il n'y a pas à statuer».

10. Dans l'affaire du *Plateau continental de la mer Egée*, le Gouvernement grec avait invoqué l'article 17 de l'Acte général de 1928. La Turquie avait indiqué pour sa part que, indépendamment du point de savoir si l'Acte général était réputé demeurer en vigueur, l'instrument d'adhésion de la Grèce en date du 17 septembre 1931 comportait une réserve *b)* qui excluait la compétence de la Cour (par. 39).

La Cour a en définitive estimé «que le différend a «trait au statut territorial de la Grèce» au sens de la réserve *b)*» et «que l'invocation de [cette] réserve par la Turquie a l'effet ... d'exclure le différend de l'application de l'article 17 de l'Acte général» (*C.I.J. Recueil 1978*, p. 37, par. 90).

11. Il apparaît ainsi que, dans les trois affaires qui viennent d'être citées, la Cour n'a pas estimé devoir trancher la question de savoir si l'Acte général demeurait toujours en vigueur.

Le débat reste donc ouvert.

Monsieur le président, Madame et Messieurs les Membres de la Cour,

12. Le Pakistan souhaite avec votre permission, présenter à l'appui de sa thèse, outre l'opinion de M. Basdevant déjà citée, l'opinion exprimée avec autorité et formulée conjointement par MM. Oneyeama, Jiménez de Aréchaga, Dillard et sir Humphrey Waldock dans l'affaire des *Essais nucléaires*.

Il n'échappera pas à la Cour que ces quatre éminents juges se sont éloignés de la majorité uniquement parce que celle-ci avait considéré que les déclarations de la France en cours de procédure rendaient l'affaire sans objet.

Le Pakistan fait sien le raisonnement suivi par les quatre juges, tel que développé dans les paragraphes 36 à 47 de leur opinion, et invite respectueusement la Cour à se reporter à celle-ci.

13. Mais pour l'heure, je sollicite la permission de la Cour de citer de larges extraits de cette opinion que je me propose de regrouper autour de cinq idées :

- premièrement l'Acte général de 1928 est indépendant et essentiellement autonome du système de la Société des Nations ;

- deuxièmement la dissolution des organes de la Société des Nations ne constitue pas une cause d'extinction de l'Acte général ;

- troisièmement, la disparition de certaines dispositions de l'Acte général, ou dans certains cas l'amoindrissement de leur efficacité, n'a cependant pas affecté son application ;

- quatrièmement la revision de l'Acte général n'a pas mis fin au traité initial ; et enfin,

- l'Acte général n'est pas tombé en désuétude.

Chacune de ces idées renverra à des extraits de l'opinion qui seront dans le texte écrit de ma plaidoirie clairement identifiés et rapportés aux paragraphes originaux. Cette méthode est utile pour la compréhension de la thèse et je sollicite d'ores et déjà l'indulgence de la Cour si cela s'avérait fastidieux.

L'acte général de 1928 est indépendant et essentiellement autonome du système de la Société des Nations

Cette autonomie et cette indépendance sont tout d'abord organiques

14.

«Que le texte de l'Acte général de 1928 ait été élaboré et adopté dans le cadre de la Société des Nations n'en fait pas un traité de cette organisation, car même un traité adopté au sein d'une

organisation reste le traité des parties. De plus, les procès-verbaux de l'Assemblée de la Société des Nations révèlent que, de propos délibéré, on s'est refusé à faire de l'Acte général une partie intégrante de la structure de la SdN.» (*C.I.J. Recueil 1974*, p. 329, par. 36.)

Cette autonomie et cette indépendance sont aussi idéologiques

15.

«Nous ne sommes pas davantage convaincus par ce qu'on a appelé «l'intégration idéologique» de l'Acte général au système de la Société des Nations, c'est-à-dire la thèse d'après laquelle il existerait un lien indissociable entre l'Acte et le triptyque : sécurité collective, désarmement et règlement pacifique ... l'idée que l'Acte général s'insérait dans la texture du système de sécurité collective et de désarmement de la Société des Nations au point de devoir disparaître forcément avec lui ne repose sur rien de solide...» (*Ibid.*, p. 330, par. 38.)

«De nombreux autres traités de règlement pacifique de la même période, qui partaient précisément de la même conception idéologique que l'Acte général de 1928, auraient cessé d'exister. Il est pourtant admis sans conteste que ces traités sont restés en vigueur malgré la dissolution de la Société des Nations.» (*Ibid.*, p. 330, par. 39.)

16.

«Il reste que l'Acte général de 1928 était un produit de l'époque de la Société des Nations et il était pratiquement inévitable que les mécanismes de règlement pacifique qu'il instituait portent, à certains égards, la marque de cette origine... Il faut donc examiner si ces différents liens avec la Cour permanente et avec le Conseil de la SdN et son Secrétariat sont d'une nature telle qu'après la dissolution de ces organes en 1946 l'Acte général de 1928 aurait nécessairement cessé d'être viable et serait devenu pratiquement lettre morte.» (*Ibid.*, p. 331, par. 40.)

La dissolution des organes de la Société des Nations ne constitue pas une cause d'extinction de l'Acte général

17.

«la dissolution de la Cour permanente en 1946 était, par elle-même, tout à fait insuffisante pour entraîner la fin de l'Acte. Si l'on n'établit pas l'existence de quelque autre «cause d'extinction» qui empêche de considérer l'Acte comme «un traité ou une convention en vigueur» à la date de la dissolution de la Cour permanente, l'article 37 du Statut a automatiquement pour effet de substituer la Cour actuelle à la Cour permanente quand il s'agit de constituer le tribunal visé à l'article 17 de l'Acte général en vue d'assurer le règlement judiciaire des différends. Or, à notre avis, l'article 37 a aussi pour effet de substituer automatiquement la Cour actuelle à la Cour permanente dans les articles 33, 36, 37 et 41 de l'Acte général.» (*Ibid.*, p. 332-333, par. 42.)

18.

«En septembre 1945, la Société des Nations a établi une *Liste des conventions avec indication des articles pertinents conférant des pouvoirs aux organes de la Société des Nations*, qui avait pour but de faciliter l'examen du transfert des fonctions de la Société des Nations aux Nations Unies dans certains domaines. Sur cette liste figurait l'Acte général de 1928 et il est hors de doute qu'au moment où, en 1946, des résolutions des deux Assemblées ont prévu le transfert des fonctions de dépositaire du Secrétariat de la Société des Nations à celui des Nations Unies, il était admis qu'en principe l'Acte de 1928 était visé par ces résolutions.» (*Ibid.*, p. 333, par. 43.)

19.

«A la disparition de la Société des Nations en 1946, les fonctions de dépositaire confiées au Secrétariat général et au Secrétariat de la Société des Nations par les articles 43 à 47 de l'Acte de 1928 se sont trouvées automatiquement transmises au Secrétariat général et au Secrétariat des

Nations Unies. Il s'ensuit que la disparition de la Société des Nations ne pouvait en aucune manière constituer «une cause d'extinction» de l'Acte général en raison des mentions du Secrétariat de la SdN qui figure dans ces articles.» (*Ibid.*, p. 333, par. 44.)

La disparition de certaines dispositions de l'Acte général, ou dans certains cas l'amoindrissement de leur efficacité, n'a cependant pas affecté son application

20.

«tant en matière de conciliation qu'en matière d'arbitrage, les dispositions prévoyant une intervention des organes de la Société des Nations concernaient des mécanismes de remplacement ou des moyens auxiliaires dont la disparition ne saurait être considérée comme rendant l'Acte inutilisable ou impossible à appliquer dans son ensemble. On ne saurait davantage considérer leur disparition comme un changement fondamental de circonstances pouvant être invoqué comme motif de mettre fin au traité ou de s'en retirer (voir l'article 62 de la convention de Vienne sur le droit des traités). De plus, aucune de ces dispositions ne concernait ni - encore moins - n'atteignait la procédure de règlement judiciaire prévue à l'article 17 de l'Acte de 1928.» (*Ibid.*, p. 334, par. 45.)

21.

«Une autre disposition dont l'efficacité a souffert de la dissolution de la Société des Nations est l'article 43, en vertu duquel le pouvoir d'ouvrir l'Acte général à l'adhésion d'autres Etats appartenait au Conseil de la Société des Nations. La disparition du Conseil a mis fin à cette possibilité d'élargir l'application de l'Acte de 1928 et a nui, par voie de conséquence, à l'instauration d'un système universel de règlement pacifique fondé sur cet Acte. Elle n'a cependant affecté en rien l'application de l'Acte entre les parties.» (*Ibid.*, p. 334, par. 46.)

En conclusion, les auteurs de l'opinion dissidente estiment que :

«L'analyse des dispositions pertinentes de l'Acte général de 1928 suffit donc à établir que ni la dissolution de la Cour permanente de Justice internationale en 1946, ni celle de différents organes de la Société des Nations ne saurait être considérée comme une «cause d'extinction».» (*Ibid.*, p. 334, par. 47.)

La «revision» de l'Acte général et l'application selon laquelle cette revision n'a pas mis fin au traité initial

22.

«S'agissant de l'Acte de 1928, le Gouvernement français affirme que ce qu'on a appelé la revision de l'Acte général, entreprise par l'Assemblée générale en 1948, suppose qu'il était admis que la disparition de la Société des Nations empêchait l'Acte de continuer à pouvoir jouer normalement. Cette interprétation des travaux de l'Assemblée générale et de la Commission intérimaire consacrés à la «revision» de l'Acte ne nous paraît pas défendable.» (*Ibid.*, p. 335, par. 48.)

23.

«On trouve dans les comptes rendus des débats les déclarations d'un certain nombre de délégations qui montrent que celles-ci considéraient alors l'Acte général comme en vigueur; personne n'est venu les contredire.» (*Ibid.*, p. 336, par. 49.)

24.

«De même, le simple fait que l'Assemblée générale ait rédigé et ouvert à l'adhésion un nouvel Acte général revisé ne pouvait avoir pour résultat de mettre fin à l'Acte de 1928, ni d'ébranler sa validité... Il est donc évident que l'Assemblée générale n'entendait pas que l'Acte général revisé mette fin à son prédécesseur, l'Acte de 1928, et elle ne pensait pas non plus que l'adoption du nouvel instrument aurait cette conséquence.» (*Ibid.*, p. 336, par. 50.)

L'Acte général n'est pas tombé en désuétude

Tout d'abord, la dissolution des organes de la Société des Nations n'a pas entraîné la désuétude de l'Acte général

25.

«Nous ne sommes pas convaincus non plus par la thèse ... selon laquelle l'Acte de 1928 ne saurait servir à fonder la compétence de la Cour à cause de «la désuétude dans laquelle il est tombé depuis la disparition du système de la SdN». La désuétude n'est pas mentionnée dans la convention de Vienne sur le droit des traités comme l'un des motifs d'extinction des traités et cette omission est voulue. Ainsi que la Commission du droit international l'a expliqué dans son rapport sur le droit des traités :

> «si la «caducité» ou la «désuétude» peut être une cause effective d'extinction d'un traité, le fondement en droit de cette extinction, lorsqu'elle intervient, est le consentement des parties à renoncer au traité, consentement qui doit ressortir implicitement de leur attitude à l'égard du traité» (*Annuaire de la Commission du droit international*, 1996, vol. II, p. 258)» (*ibid.*, p. 337-338, par. 53).

26. La France, puisque s'est à la France que l'on se réfère dans cette opinion dissidente

«La France s'est donc simplement conformée à l'avis général quand, en 1956 et 1957, elle a fait de l'Acte de 1928 l'une des bases de l'action intentée contre la Norvège devant la Cour en l'affaire de *Certains emprunts norvégiens (C.I.J. Recueil 1957*, p. 9).» (*Ibid.*, p. 341, par. 62.)

«La position prise par la France dans l'affaire de *Certains emprunts norvégiens*, loin de pouvoir s'expliquer uniquement par la conviction que l'Acte était tombé en désuétude, établit de manière on ne peut plus positive que pour la France l'Acte conservait sa validité et son efficacité avant cette date.» (*Ibid.*, p. 342, par. 64.)

La prise de position de certains Etats postérieurement à la dissolution des organes de la Société des Nations n'a pas non plus entraîné la désuétude de l'Acte général

27.

«la conclusion suivant laquelle l'Acte de 1928 était un traité en vigueur entre l'Australie et la France le 9 mai 1973 n'est aucunement affaiblie, selon nous, par le fait que deux autres Etats, l'Inde et le Royaume-Uni, ont pris depuis lors certaines mesures à l'égard de l'Acte. Dans l'affaire relative aux *Procès des prisonniers de guerre pakistanais*, l'Inde a fait savoir à la Cour par lettre du 24 juin 1973 qu'à son avis l'Acte de 1928 avait cessé d'être un traité en vigueur après la disparition des organes de la Société des Nations. Le Pakistan a exprimé un avis contraire et, depuis lors, le premier ministre de ce pays a confirmé par lettre adressée au Secrétaire général de l'Organisation des Nations Unies qu'il considérait l'Acte comme toujours en vigueur. D'autre part, dans une lettre du 6 février 1974, le Royaume-Uni a fait état des doutes qui avaient été exprimés au sujet de la validité de l'Acte et a notifié au Secrétaire général sa dénonciation conformément aux dispositions de l'article 45, paragraphe 2, de cet instrument, mais il a employé à cette occasion des termes qui ne préjugeaient pas la question du maintien en vigueur de l'Acte... Il ne fait donc aucun doute à nos yeux que l'article 17 de l'Acte général, se conjuguant avec l'article 37 du Statut, fournissait à l'Australie une base valable lui permettant de saisir la Cour de l'affaire des *Essais nucléaires* le 9 mai 1973.» (*Ibid.*, p. 344-345, par. 70.)

Ayant ainsi exposé les éléments en faveur du maintien en vigueur de l'Acte général, j'espère qu'il plaira maintenant à la Cour, et à vous Monsieur le président, de bien vouloir appeler à nouveau sir Elihu Lauterpacht afin d'examiner les conséquences qu'a pu avoir l'indépendance sur la position de l'Inde et du Pakistan par rapport à l'Acte de 1928.

J'en arrive donc au terme de ma brève présentation. Il me reste à vous exprimer Monsieur le président, Madame

et Messieurs les Membres de la Cour, ma vive et réelle reconnaissance pour votre patience et indulgence.

Le PRESIDENT : Je vous remercie, M. Kemicha. Now I give the floor again to sir Elihu.

Sir Elihu LAUTERPACHT: Thank you, Mr. President.

1. I now return to continue the examination of the General Act. I think I will need about 25 to 30 minutes, which may take us just a little bit beyond one o'clock. The Court has just been reminded of the powerful argument in the joint dissenting opinion in the *Nuclear Tests* case about the survival of the General Act despite the disappearance of the League.

I now turn to the second question.

B. What effect did independence have upon the position of India in relation to the General Act?

I will come to the position of Pakistan presently.

2. As the Court will see, India's position on the subsequent status of the General Act is not free of obscurity and elements of self-contradiction.

3. For the purpose of this item in the discussion, I will leave aside for the moment the position of Pakistan as a result of independence. Here I respond only to India's contention that it ceased to be bound by the General Act at the date of independence in 1947. This contention appears in India's communication to the Secretary-General of the United Nations, which was received by him on 18 September 1974 (Counter-Memorial of India, Ann. B, p. 5), where the following is said:

> "The Government of India never regarded themselves as bound by the General Act of 1928 since her Independence in 1947, whether by succession or otherwise. Accordingly, India has never been and is not a party to the General Act of 1928 ever since her Independence. I write this to make our position absolutely clear on this point so that there is no doubt in any quarter."

4. Two points may be made about this statement.

5. The first is that it is declaratory - and declaratory only. It is a statement made in 1974 that as from an event in 1947 - that is to say, 27 years previously, India's independence - India was not a party to the General Act "it is not and never has been".

6. The second point follows closely from the first. It is that India's concern to make the position absolutely clear ". . . so that there is no doubt in any quarter", was merely a statement of its own view of the legal position. It was a subjective statement which might or might not have had objective validity (though, in so far as relevant, Pakistan says that it had no objective validity). Moreover, it was not a denunciation of the General Act - and this was so for two reasons. First, in India's view there was no General Act to denounce. Second, even if there was, India did not formally denounce it in the manner provided for in Article 45 of the General Act, which says: "Denunciation shall be effected by a written notification addressed to the Secretary-General of the League of Nations who shall inform all Members of the League and the non-Members referred to in Article 43". Consistent with the logic of its position, India did not use words of denunciation because that would have implied that India regarded itself as committed to the General Act at the time of the denunciation, which it denied. India could have done, if it had wished to denounce the General Act, it could have done as both France and Britain did and denounced the General Act formally, but it chose not to do so.

7. Now on what ground can India contend that the General Act, on the basis that it was still in force in the post-League period, came to an end for India at the moment of independence? India appears to be presenting two grounds. One is that India did not succeed under general international law. The other is that it did not succeed by reason of the provisions of the Indian Independence (International Arrangements) Order 1947.

8. With your leave, I will take first the Indian contention that by reason of general international law it did not "succeed" to the General Act. This argument assumes that what happened to India in 1947, as opposed to what

happened to Pakistan, was an ordinary case of succession. In law it was not. As is well known, the manner in which the division of the subcontinent of India into two States was dealt with was that India, for certain purposes, was regarded as continuing the international personality of the previous entity which India has called "British India". That was made plain in India's continuing membership of the United Nations and its participation in the Statute of this Court. India survived the division of India. Pakistan had to apply for membership of the United Nations, not as a new State but because, on the basis of agreement with India, it was the State which did not, in respect of international organizations, automatically succeed to membership. As stated in the handbook on *The Effect of Independence on Treaties*, published in 1965 by the International Law Association under the distinguished editorship of the late Professor O'Connell, "the theory was that India was the same legal person as British India and that, therefore, despite a very real lack of autonomy in foreign affairs treaties made between 1914 and 1947, would remain binding on India in any event" (at p. 92). The United Nations took the view that the Dominion of India "continues as a separate State with all treaty rights and obligations." (*Id.*) In other words, so far as India was concerned, there was no succession. There was continuity.

9. As to the effect of Indian Independence (International Arrangements) Order 1947, that can conveniently be dealt with in the next section where I examine the position of Pakistan, and so I turn to that.

C. What effect did independence have on Pakistan's position in relation to the General Act?

10. Pakistan contends that it is a party to the General Act by virtue of succession to British India. This succession rests on two bases: customary international law and treaty.

11. It will be convenient to take the treaty position first. Pakistan relies on the terms of the Schedule to the Indian Independence (International Arrangements) Order 1947 (Memorial of Pakistan on Jurisdiction, Annex F). Section 2 of the Order provides that the Schedule shall have the effect of an agreement duly made between India and Pakistan. Both States have accepted it as an operative treaty between them.

12. The Schedule is entitled: "Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan". The operative provisions of the agreement fall into three distinct divisions.

13. The first deals with the specific problem of membership of international organizations. In this respect the two States were not treated in the same way. Article 2 prescribes that membership of international organizations would devolve upon India alone. Pakistan will take such steps as may be necessary to apply for membership of such international organizations as it chooses to join. In other respects the States were treated on a footing of equality.

14. The second division deals with the rights and obligations having an exclusive territorial application to the territory either of India or of Pakistan. This section comprises Article 3 which provides that such rights and obligations will devolve upon whichever Dominion includes the areas covered in that territorial application. So that deals exclusively with treaties having territorial application.

15. The third division is the one that relates to the question in the present case. This comprises Article 4. It provides as follows:

> "Subject to Articles 2 and 3 of this Agreement [which we have examined], rights and obligations under all international agreements to which India is a party immediately before the appointed day, will devolve both upon the Dominion of India and upon the Dominion of Pakistan and will, if necessary, be apportioned between the two Dominions."

16. It is quite clear, Mr. President, both from the content of the agreement and its historical context, that it was intended to resolve completely and comprehensively the question of the future of the treaties of British India on a footing of equality between the two sides (with the exception of the membership of international organizations). The Agreement covers in a logical manner all the kinds of treaties to which British India could have been a party. It contains no suggestion that any treaty or category of treaties of British India was intended to be excluded from its coverage.

17. India contends, however, that the scope of this Order was limited by a list of treaties said to have been prepared by "Expert Committee No. 9 on Foreign Relations" - a report which is contained in the Partition

Proceedings, Volume III, pages 217 to 276. India has not produced to the Court either the Partition Proceedings as a whole, or the relevant volume, or any copy of the list, to show the extent to which the list was intended to be comprehensive or to show the terms in which its function was described. We have no idea what other treaties were omitted from the list besides, if we are to take India's assessment of the position, the General Act.

18. Regrettably Pakistan cannot find its copy of this volume of the Partition Proceedings in order to attempt an answer to the questions that I have just raised. And so those questions must remain open for now. However, Pakistan has found a separatum, a copy of the list, and can immediately say that the list is manifestly incomplete. I need give only one example: the Geneva Convention on Prisoners of War and the Treatment of Sick and Wounded of 1929 finds no place in the list. If an agreement of that importance can be omitted from the list, it is scarcely surprising that the General Act could be omitted from the list. I am sure that further research could discover more multilateral treaties that have likewise been omitted. Moreover, the list is inaccurate in other respects because it includes a number of treaties which should not have been included, but these are less important than the omissions.

19. But, Mr. President, let us just suppose that Volume III of the Partition Proceedings were found and was produced to the Court. On what basis could the Court pay any regard to it? No reference is made in the 1947 Agreement to the Partition Proceedings or to the list. If the intention had been at the time that the 1947 Agreement was made - that when the schedule was drawn up to the independence order - that the list should control the devolution of treaties, it would have been very easy to incorporate the list, or even just a reference to it, in the Agreement. All that would have been required in order to have made it fully effective would have been the insertion in Article 4 of the Agreement after the words "agreements to which India is a party immediately before the appointed day" an additional ten words as follows: "as listed in Volume III of the Partition Proceedings, pages 217 to 276". No such words appear in Article 4 of the Agreement.

20. It is not difficult to understand why. Having regard to the appalling pressures associated with the Partition process, which are a matter of public record, no one could have been sure that the list was complete and no one would have wanted to take a chance upon some treaty being omitted. The function of the list, it must be recalled, was not to inform India as to what treaties it would be accepting, for the continuing government in India would in any event be deemed to know and to continue all the treaties to which British India was a party - save for those allocated to Pakistan on a territorial basis. The principal function of the list was to give Pakistan an idea of the treaties that would be devolving on it; and Pakistan would not at that crucial moment in its history have wanted to commit itself to a list that might not be accurate.

21. Can it be argued that the Partition Proceedings list is admissible as evidence of the *travaux préparatoires* leading up to the Agreement? The answer is: no, not at any rate if Article 32 of the Vienna Convention on the Law of Treaties may be taken as being a codification of the relevant law on the subject. Only as a supplementary means of interpretation may recourse be had to the preparatory work of a treaty and the circumstances of its conclusion. Even then such reference is permissible only to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31: *(a)* leaves the meaning ambiguous or obscure; or *(b)* leads to a result which is manifestly absurd or unreasonable.

22. So what does Article 31 dictate? That a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty". How can the words of Article 4 of the 1947 Agreement be interpreted in good faith other than as meaning just what they say - "*all* international agreements to which India is a party immediately before the appointed day will devolve upon both Dominions"? Where in these words is there, to use the words of Article 33 of the Vienna Convention, any ambiguity, obscurity, absurdity or unreasonableness? The answer is: nowhere; and there is no justification for bringing into the proceedings the unknown contents of an unseen text. This consideration is particularly cogent in relation to the position of States not parties to the 1947 Agreement. The world at large, wishing to know what might be Pakistan's position in relation to the treaties concluded by British India, would have been entitled to rely on the words of the 1947 Agreement without having to search through the Partition Proceedings for some meaning that might not accord with the words actually used.

23. In short, Mr. President and Members of the Court, in answer to our third question - What effect did independence have on Pakistan's position in relation to the General Act? - is that the terms of the 1947 Agreement scheduled to the Independence Act operate as between India and Pakistan at the international level

to establish that Pakistan is a party to the General Act until such time, if any, as it might choose formally to denounce it in accordance with Article 45 of the Act.

24. The clarity of the position under the 1947 Agreement being what it is, there is no necessity for Pakistan to enter into a detailed discussion of the position in customary international law. Pakistan abides, however, by the proposition that in all the circumstances in which independence was achieved in British India, there was no reason at all why there should not have been an automatic devolution upon Pakistan of the terms of the General Act. In any event, such a devolution came about as a result of Pakistan's subsequent notification of succession made to the Secretary-General of the United Nations. This is a matter to which I shall come in a moment.

D. What effect, if any, did events subsequent to 1947 have upon the participation of the two countries in the Act?

25. We come to the last relevant question in this connection: what effect, if any, have events subsequent to 1947 had upon the effect of the 1947 Agreement and upon the participation of India and Pakistan in the General Act?

Let us look at each country in turn.

Pakistan

26. It is convenient to begin with Pakistan, since such action as India has taken has been in response to Pakistan's conduct.

27. So far as Pakistan is concerned, nothing was done until 30 May 1974. At that date Pakistan filed a notification of succession to the General Act which contained a declaration (see Memorial of Pakistan, Annex G, p. 10), the terms of which are sufficiently important to bear close scrutiny, and so I read them:

> "When Pakistan became a Member of the United Nations in October 1947, the delegation of India communicated to the Secretary-General the text of the Constitutional arrangements made at the time when India and Pakistan became independent (Document A/C.6/161 of 7 October 1947), with reference to the devolution upon them, as successor States of the former British India, of British India's international rights and obligations.
>
> Among the rights and obligations of former British India were those of the General Act for the Pacific Settlement of International Disputes . . . which was acceded to by British India on 21 May 1931. The Government of Pakistan regards the [General] Act as continuing in force as between parties to the Act as established on 26 September 1928 and all successor States. Article 17 of the said Act is given efficacy by Article 37 of the Statute of the International Court of Justice, as between Members of the United Nations or parties to the Statute of the Court.
>
> As a result of the arrangements mentioned in paragraph 1, Pakistan has been a separate party to the General Act of 1928 from the date of her independence, i.e., 14 August 1947 . . . (Document No. A/C.6/161 of 7 October 1946). Pakistan succeeded to the rights and obligations of British India under all multilateral treaties binding upon her before her partition into the two successor States. By virtue of these arrangements, the Government of Pakistan did not need to take any steps to indicate its consent *de novo* to acceding to multilateral conventions by which British India had been bound. Nevertheless, the Secretary-General of the United Nations was made aware of the situation through the communication referred to above.
>
> However, in order to dispel all doubts in this connection and without prejudice to Pakistan's rights as a successor State to British India, the Government of Pakistan have decided to notify Your Excellency, in your capacity as depository of the General Act of 1928, that the Government of Pakistan continues to be bound by the accession of British India to the General Act of 1928. The Government of Pakistan does not, however, affirm the reservations made by British India."

Here we have Pakistan making it quite clear that it had accepted the devolution upon it from the moment of its independence of the General Act. It confirmed that devolution and then made, if I can put it this way, the liberal

gesture of saying "but we don't need to adhere to the reservations, we don't want to limit the efficacy of the General Act as thus inherited".

28. In short, Pakistan was declaring that the General Act had devolved upon it at the time of independence and it was therefore from that moment a separate party to the Act. As I have just said, it dissociated itself from the reservations that had been made by British India, including of course the Commonwealth disputes reservation that was in the Indian acceptance of the General Act.

29. Now let us look, with your leave Mr. President, at the position of India. India filed a number of observations on this Pakistan notification in a communication to the United Nations Secretary-General received by him on 18 September 1974.

India

30. India summarized these observations as follows

> ". . . the General Act, being an integral part of the League of Nations system, ceased to be a treaty in force upon the disappearance of the organ of the League". This is a point that has been fully met by the joint dissenting opinion in the *Nuclear Tests* case and need not be further discussed now.
>
> 31. "Being a political agreement the General Act could not be transmittable under the law of succession." The validity of this contention is obviously open to debate. For one thing, it should be recalled that the division of British India did not give rise to an ordinary case of succession. Transmission is not a question so as far as India is concerned, India continues the same international personality as it possessed prior to 1947. Consequently, the views on non-transmission of the so-called political treaties are not relevant here. The General Act certainly remained binding on India. A further, but minor, consideration is that it cannot be assumed that the General Act should be classified as a *political* agreement to which uncertainties about the devolution of political treaties may relate. A *political* treaty is one which commits a State to action of a political nature - but not one in which States agree to resolve future disputes by peaceful settlement.

32. "Neither India nor Pakistan have regarded themselves as bound by the General Act since 1947." By the date of the Indian observations in September 1974, this was factually inaccurate since Pakistan had invoked the General Act in May 1973 in the course of argument in the *Trial of Pakistani Prisoners of War* case, before this Court.

33. The General Act was "not listed in the list of 627 agreements to which the Indian independence (International Arrangements) Order 1947 related". I have just submitted to you, there is no evidence that Article 4 of the Schedule to the 1947 Order related to the list of 627 agreements. India has not yet produced the relevant documents to the Court. In any case, the list cannot be taken into account. So it cannot be said that the absence of the 1928 Act from this list has any bearing on the matter.

34. Pakistan and India have not yet acceded to the Revised General Act. This was India's point. This point proves nothing, except that neither country has taken the step that would be manifestly inconsistent with the view that each of them regarded the 1928 Act as continuing to be an effective instrument.

35. In short, nothing in the Indian observations on Pakistan's 1974 notification of succession to the General Act validly limits the efficacy of that notification.

36. Mr. President and Members of the Court, this brings me to the close of Pakistan's opening argument on the jurisdiction of the Court in this case. I shall not attempt to summarize the points which have been put to you. This has already been done by the Attorney General in his opening speech and time does not permit, nor do the circumstances require, a repetition of what he said.

37. It remains for me to thank you, Mr. President and Members of the Court, for the patience with which you have heard Pakistan's case. May it please you in due course to determine that India's objections to the jurisdiction of the Court are unfounded and that the case may proceed to the next stage.

The PRESIDENT: Thank you very much, Sir Elihu. Ceci conclut le premier exposé pour la République islamique du Pakistan. L'audience est levée. La Cour se réunira à nouveau demain à 10 heures pour entendre l'exposé de la République de l'Inde. L'audience est levée.

L'audience est levée à *13 h 10.*

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