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International Court of Justice | **Cour internationale de Justice**

THE HAGUE | **LA HAYE**

YEAR 2000 | **ANNEE 2000**

Public sitting | **Audience publique**

held on Tuesday 4 April 2000, at 10 a.m., at the Peace Palace, | **tenue le mardi 4 avril 2000, à 10 heures, au Palais de la Paix,**

President Guillaume, presiding | **sous la présidence de M. Guillaume, président**

in the case concerning Aerial Incident of 10 August 1999 (Pakistan v. India) | **en l'affaire de l'Incident aérien du 10 août 1999 (Pakistan c. Inde)**

VERBATIM RECORD | **COMPTE RENDU**

Present: President Guillaume
Vice-President Shi
Judges Oda
Bedjaoui
Ranjeva
Herczegh
Fleischhauer
Koroma
Vereshchetin
Higgins
Parra-Aranguren
Kooijmans
Al-Khasawneh
Buergenthal
Judges *ad hoc* Pirzada
Reddy
Registrar Couvreur

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

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

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

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;

H.E. Mr. Aziz A. Munshi, Attorney General for Pakistan and Minister of Law,

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,

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,

comme coagent;

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

comme agent adjoint;

S. Exc. M. Aziz A. Munshi, *Attorney General* du Pakistan et Ministre de la justice,

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,

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

comme conseils;

Mlle Norah Gallagher, *Solicitor*,

The Government of the Republic of India is represented by:

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as Agent;

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

as Co-Agent and Advocate;

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

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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 Dumée, Temporary Research and Teaching Assistant, University of Paris X-Nanterre, Paris,

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

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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 (Ire 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 Dumée, attachée temporaire d'enseignement et de recherche à l'Université de Paris X-Nanterre, Paris,

comme assistante de recherches.

The PRESIDENT: Veuillez-vous asseoir. L'audience est ouverte. The Republic of India will have the floor this morning to make its oral presentation of the case, and I shall thus give the floor to the Agent for the Republic of India, Ambassador Menon.

Mr. MENON: Mr. President, honourable Members of the International Court of Justice, it is a privilege for me to appear before the Court as the Agent of the Government of India in the case concerning the *Aerial Incident of 10 August 1999 (Pakistan* v. *India)*. I take this opportunity of conveying the greetings of the Government of India and my own greetings to the honourable Court.

I would like to begin by introducing the members of the Indian delegation. Dr. P. S. Rao is the Legal Adviser of the Ministry of External Affairs, Government of India, and a member of the International Law Commission. He has the honour of appearing before you as the Co-Agent, counsel and advocate in this case. Ms. M. Manimekalai, Counsellor in the Embassy of India in The Hague, appears in this case as the Deputy Agent of India and Adviser.

I take pleasure in introducing the other members of the Indian delegation who are here to participate in the oral hearings on behalf of India. His Excellency Mr. Soli J. Sorabjee, the Attorney General of India, appears before the Court as the chief counsel for India. He is well known not only in India but also internationally for his work in the field of human rights. As chief counsel for India, he will present an overview of the Indian case which requests the Court to adjudge and declare that it has no jurisdiction to consider the Application of the Government of Pakistan, given the objections communicated to the Court by the Government of India. He will also set out the reasons why India rejects the arguments advanced by Pakistan to sustain the jurisdiction of the Court.

The submissions of the chief counsel will be followed by presentations from Mr. Ian Brownlie, Q.C., Professor Alain Pellet and Dr. P. S. Rao in that order. Mr. Brownlie is a member of the English Bar and Emeritus Chichele Professor of Public International Law at the University of Oxford. Professor Alain Pellet is a professor at the University of Paris X-Nanterre. Both are members of the International Law Commission and appear before this Court as counsel and advocates on behalf of India.

I have the honour also to present to the honourable Court Dr. B. S. Murty, Advocate, High Court of Andhra Pradesh, formerly senior fellow at the Yale Law School, and a well-known author on international law. He appears here today as counsel and expert consultant.

I would next like to present Mr. B. Sen, Senior Advocate, Supreme Court of India, and formerly the Secretary General of the Asian-African Legal Consultative Committee. Mr. Sen is a well-known author on international law and is appearing here in his capacity as counsel and expert consultant. May I also present Dr. V. S. Mani, Professor of International Space Law, Jawaharlal Nehru University, New Delhi. Dr. Mani is not new to the Court, having appeared before it as Agent and counsel in the *Phosphate Lands in Nauru* case. He appears before the Court today on behalf of India as counsel and expert consultant. Let me also present Dr. M. Gandhi, Senior Legal Officer in the Legal and Treaties Division of the Ministry of External Affairs, New Delhi, who appears as counsel and expert.

I next introduce two of my distinguished colleagues from the Ministry of External Affairs, New Delhi. Mr. Vivek Katju is Joint Secretary in charge of matters concerning Iran, Pakistan and Afghanistan, and Mr. Dinkar P. Srivastava is Joint Secretary in charge of matters concerning the United Nations. Both are here as advisers to the Indian delegation.

Finally, I would like to introduce Ms. Marie Dumee, Assistant Lecturer, University of Paris X-Nanterre, who is associated with the Indian delegation as research assistant.

Excellencies, in the present case the Government of India has already conveyed its preliminary objections to the jurisdiction of the Court by its letter of 2 November 1999 in response to the Application of the Government of Pakistan dated 21 September 1999. Further, India has submitted its comments by way of a Counter-Memorial dated 28 February 2000 on the observations submitted by Pakistan in its Memorial dated 7 January 2000, in respect of the objections presented by India.

Mr. President, honourable Members of the Court, I thank you for your attention, and would like to request the President of the Court to call upon the Attorney General of India, His Excellency Mr. Soli Sorabjee, to address the Court. Thank you, Sir.

Le PRESIDENT: Merci beaucoup, Votre Excellence. Now I give the floor to His Excellency Mr. Soli Sorabjee, Attorney General of India.

Mr. SORABJEE: Mr. President and honourable Members of the Court, it is indeed a privilege and I am greatly honoured to have this first opportunity to address this distinguished Court on behalf of India.

Before I begin, may I, on behalf of India and myself, offer warm felicitations to you, Mr. President, and to you, Mr. Vice-President, on your elections to the distinguished positions you occupy, and also to the new Members of the Court, Judge Al-Khasawneh and Judge Buergenthal. May I also convey our best wishes to the *ad hoc* judges, Judge Sharif Uddin Pirzada and Judge B. P. Jeevan Reddy.

Mr. President, at the outset I reiterate my country's policy of promotion of peaceful settlement of international disputes. May I also reaffirm my country's deep respect for this honourable Court and its judgments and orders. This is reflected in India's continued acceptance of the Court's compulsory jurisdiction in accordance with the terms of its declaration. In view of the specific terms of this honourable Court's Order dated 19 November 1999, whereunder the question of jurisdiction to entertain Pakistan's Application "shall first be addressed", my learned friends and I will make submissions exclusively focusing on the legal issues concerning jurisdiction. We do not propose to circumvent the Court Order by attempting to make submissions on merits. We shall refrain from making statements of purely political nature, as that would reduce the high level of proceedings before this honourable Court to a partisan political debate and would be a clear abuse of the judicial process.

Mr. President, it is necessary to remove a certain misconception.

Plea of lack of jurisdiction cannot imply lack of good faith, nor lead to the inference that a country who raises that plea has something to hide. If that were a correct proposition, every country which has the right to raise a plea of lack of jurisdiction would incur the odium of acting in bad faith; and judging by the judgments of this Court, the number would be quite sizeable. This submission made on behalf of Pakistan is an argument *in terrorem* and indicates weakness of its case in meeting the plea of lack of jurisdiction.

However, I take this occasion to deny all allegations made by Pakistan with regard to the aerial incident of 10 August 1999 which took place in western India in the Kutch region in the State of Gujarat. Pakistan is solely responsible for the incident and must bear the consequences of its own acts.

May I now proceed to refer to certain principles of international law which are deeply embedded in the jurisdiction of this honourable Court and that of the Permanent Court of International Justice of which you well aware, but may be useful to restate them very briefly. I will not trouble the Court with citations in support of my submissions, which will be found in the transcript. The submissions, in brief, are that:

I.

> *(a)* In the case of all contentious disputes the principle of consent plays an essential and fundamental role. "The consent of States parties to a dispute, is the basis of a Court's jurisdiction in contentious cases" (*I.C.J. Reports 1950*, p. 71).
>
> *(b)* The Court can exercise jurisdiction over a State only with its consent (*Anglo-Iranian Oil Co.*, *I.C.J. Reports 1952*, pp. 102-103; *Ambatielos*, *I.C.J. Reports 1953*, p. 19; *Certain Phosphate Lands in Nauru*, *I.C.J. Reports 1992*, p. 260; *East Timor (Portugal* v. *Australia)*, *I.C.J. Reports 1995*, p. 101).
>
> *(c)* Numerous judgments show the Court as "bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the Respondent and only exists in so far as this consent has been given" (Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London, 1958), p. 91).
>
> *(d)* "Declarations of acceptance of a 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." (*Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua* v. *United States of America*), *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1984*, p. 418, para. 59.)
>
> *(e)* States enjoy a wide liberty in formulating, limiting, modifying and terminating their declarations of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute (*Fisheries Jurisdiction* (*Spain* v. *Canada), Judgment, I.C.J. Reports 1998*, para. 44).

(f) It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: "The jurisdiction only exists within the limits within which it has been accepted" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 23).

(g) In accepting the jurisdiction of the Court governments are free to "limit its jurisdiction in a *drastic manner*". This has been well established in various citations which I will find in the transcript. (Judge Lauterpacht, in his separate opinion in *Certain Norwegian Loans I.C.J. Reports 1957*, p. 46.)

Mr. President, now I turn to the question of reservations. I have four submissions to make.

II. Reservations

(a) The reservations do not by their terms derogate from a wider acceptance already given. They operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court.

(b) A reservation is an integral part of a declaration accepting jurisdiction. All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout. Declarations and reservations are to be read as a whole (*Fisheries Jurisdiction* (*Spain* v. *Canada*), *Judgment, I.C.J. Reports 1998*, paras. 44 and 47).

(c) The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served (*ibid*., para. 49).

(d) A reservation to a declaration of acceptance of the compulsory jurisdiction of the Court is to be interpreted in a natural and reasonable way, with appropriate regard for the intentions of the reserving State and the purpose of the reservation and should be interpreted in a manner compatible with the effect sought by the reserving State (*ibid*., paras. 52 and 54). This is well brought out in the case concerning *Fisheries Jurisdiction* (*Spain* v. *Canada).*

III. The validity of the reservation of India concerning Commonwealth

The third topic is about the validity of the Commonwealth reservation. In our respectful submission Mr. President, the Commonwealth reservation is not contrary to any of the provisions of the Charter, nor is it repugnant to Article 36, paragraph 3, or any other Article of the Statute as contended by Pakistan. The argument that the Commonwealth reservation has become obsolete is, with respect, far-fetched. It has no legal basis. Despite changes in the Commonwealth, the Commonwealth exists and the reservation remains intact and cannot be wished away. These aspects and the legal infirmities in Pakistan's submissions will be pointed out and elaborated by my distinguished learned friend Mr. Ian Brownlie, Q.C.

IV. Question of severability

Mr. President, may I now address the Court on the important question of severability? Pakistan's contention that the Court should ignore the reservation because of its alleged invalidity and still hold jurisdiction on the basis of its declaration under Article 36, paragraph 2, of the Statute is unacceptable because a reservation made cannot be isolated from the declaration itself. There is a close and necessary link between the declaration and the reservation. Together they constitute an integral whole, a unity, reflecting the intention of the party regarding the limits within which the jurisdiction of the Court is accepted.

It is our respectful submission that to ignore the reservation 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 (*Certain Norwegian Loans, I.C.J. Reports 1957*, pp. 57-58). As Rosenne has noted, "to read a declaration as if an incompatible reservation simply did not exist would thwart the intention of the State making the declaration, acting unilaterally" (Shabtai Rosenne, *The Law and Practice of the International Court*, *1920-1996*, Vol. II, *Jurisdiction*, 1997, fn. 91, p. 770).

Mr. President, the doctrine of severability in its application to statutes has been the subject of consideration in India, and in other countries. In our respectful submission, the principles enunciated in that behalf are relevant and applicable in considering the question of severability of the reservation from the declaration as evidence of a general

principle of law in accordance with Article 38, paragraph 1 *(c)*, of the Statute of the Court.

The underlying principle is that the test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the Statute was invalid. If the valid and the invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety *(RMDC* v. *Union of India,* 1957 SCR 930 at 950-951).

Applying this test, it is beyond doubt that India would not have made the declaration accepting compulsory jurisdiction without the reservation. It is manifest that India regarded the Commonwealth reservation as crucial as evidenced by its repeated making of the reservation with full consciousness. Its acceptance of the obligations under the optional clause of Article 36 was inextricably linked with the Commonwealth reservation. Thus this reservation is an integral and inseverable part of the declaration. It is not possible to sever the reservation from the declaration. If the reservation has withered away as argued by Pakistan, then so has the declaration of which it is an inextricable part. The declaration and the reservation stand or fall together. Pakistan cannot selectively invoke the declaration and at the same time conveniently ignore the reservation on any one or more of the grounds urged by it. Mr. President, if I may be permitted to express this thought in a homely proverb, Pakistan cannot have its cake and eat it too.

V. General Act of 1928

Now, may I deal with the General Act of 1928. The Government of India's position that it was at no stage bound since Independence by the General Act of 1928 is well known and which has been communicated to this Court by a letter dated 4 June 1973, in the context of an earlier case, the *Trial of Pakistani Prisoners of War*.

In brief my submissions are as follows:

(a) The General Act was a political agreement and was therefore not transmissible under general international law.

(b) Neither India nor Pakistan could automatically succeed nor have they succeeded to the General Act of 1928.

(c) The Indian Independence (International Arrangements) Order 1947 did not and, indeed, could not provide for the devolution of treaty rights and obligations which were not capable of being succeeded to by a part of a country, which is severed from the parent State and established as an independent sovereign Power, according to the practice of States. This is the view of the Pakistan Supreme Court dealing with a case relating to Pakistan's obligations in its Judgment in the case of *Yangtze (London) Limited* v. *Barlas Brothers (Karachi) and Co.*, Judgment of 6 June 1961 (Civil Appeal No. 139 of 1960). (See United Nations *Legislative Series*, *Materials on Succession of States*, UN ST/LEG/SER.B/14, pp. 133-141, at p. 137.)

(d) With the termination of the League of Nations the General Act of 1928 has lost its legal efficacy.

(e) Pakistan was never a Member of the League of Nations and has not succeeded to British India as a Member of the League or otherwise. It is thus debarred from becoming a party to the General Act by virtue of Article 43 of that Act.

(f) The conduct of India and Pakistan together with other evidence demonstrates that neither country has considered itself bound by the General Act of 1928. The instances of this conduct, *inter alia*, can be deduced from the following :

(i) In 1947, a list of treaties to which the Indian Independence (International Arrangements) Order 1947 was to apply was prepared by "Expert Committee No. 9 on Foreign Relations". Its report is contained in *Partition Proceedings*, Volume III, pages 217 to 276. The list comprises *627 treaties* in force in 1947. The 1928 General Act is not included in that list. The report was signed by the representatives of India and Pakistan.

(ii) In several differences or disputes between India and Pakistan before 1973 the General Act of 1928 was not relied upon nor cited either by India or by Pakistan.

(iii) The Government of India in its letter to the Secretary-General of the United Nations received by him on 18 September 1974, *inter alia*, unequivocally stated that "India has never been and is not a party" to the General Act of 1928. It is significant that Pakistan never objected to this well known position adopted and made known by India.

Mr. President, my respectful submission is that it is immaterial whether the Indian communication of 18 September 1974 is a formal denunciation or not. The crux of the matter is that the communication evinces India's clear intention and there was no objection by Pakistan.

Reliance has been placed by Pakistan on the General Act of 1928 for conferral of jurisdiction in this honourable Court; it is misconceived for several reasons which will be pointed out and elaborated upon by my distinguished learned friend Professor Alain Pellet.

VI. Simla Agreement

Next I turn to the Simla Agreement. This Agreement on Bilateral Relations of 1972, popularly known as the Simla Agreement, affords no legal basis for invoking this honourable Court's jurisdiction in respect of the subject-matter of dispute. It is submitted that the Agreement on Bilateral Relations does not contain a compromissory clause and is not concerned with the judicial settlement of disputes. The emphasis in the Simla Agreement is on the bilateral approach to the resolution of the differences between India and Pakistan. The general purpose of the agreement was to promote confidence-building measures. The phrase in the Simla Agreement "or by any other peaceful means mutually agreed upon between them", only refers to those other choice of means of settlement of differences other than bilateral negotiations, as may be expressly agreed upon between India and Pakistan in future. It may be noted that the Simla Agreement does not refer to the General Act nor can it be interpreted to mean to include the same.

It is also not without significance that the Simla Agreement does not appear in the chronological list of instruments notified to the Registry which is published in the *Yearbook* of the Court (*I.C.J. Yearbook 1996-1997*, p. 126 at p. 140).

VII. Applicability of the Vienna Convention on the Law of Treaties, 1969

Mr. President, my next submission is about the applicability of the Vienna Convention on the Law of Treaties of 1969. In brief, Pakistan's submissions in this behalf are contrary to the well-settled principles of interpretation of declarations under the optional clause and are contrary to the Judgment of this honourable Court in *Spain* v. *Canada*. I do not want to take up any more time on that, the issue is settled by *Spain* v. *Canada.*

VIII.

Mr. President, other remaining issues like estoppel, implied residual jurisdiction based on the United Nations Charter will be addressed by my learned friend Dr. P. S. Rao.

IX. The "multilateral convention reservation" invoked by India

My next topic is the multilateral convention reservation. It may be recalled that this is a reservation which both India and Pakistan have made in their respective declarations. As both India and Pakistan maintain this reservation, Pakistan cannot object to that reservation. Detailed submissions will be made on this aspect by my distinguished learned friend Mr. Ian Brownlie, Q.C.

X. Conclusion

In conclusion, Mr. President and Members of the Court, may I reiterate that where jurisdiction is sought to be derived from the consent of the parties jurisdiction "must be proved to the hilt" (Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London, 1958), p. 91). Jurisdiction cannot be squeezed out by tortuous and far-fetched interpretations of the provisions of the United Nations Charter or the Statute of the Court.

It is India's respectful submission that this honourable Court should adjudge and declare that it does not have any jurisdiction to deal with the present Application and the same may be dismissed.

May I sincerely thank the honourable Court for its patient and attentive hearing.

Mr. President, may I request you now to call upon my distinguished learned friend Mr. Ian Brownlie, Q.C., to address the Court.

Le PRESIDENT: Je vous remercie Monsieur l'*Attorney General*. I now give the floor to Professor Ian Brownlie.

Mr. BROWNLIE: Thank you, Mr. President.

Mr. President, distinguished Members of the Court, it is an honour and a privilege to represent the Republic of India in this case.

My tasks are as follows:

Firstly, in the context of Article 36, paragraph 2, of the Statute, to demonstrate that the position of Pakistan is in all respects incompatible with the principle of consent.

Secondly, to reaffirm the validity of the Commonwealth reservation of India.

Thirdly, to reaffirm the validity of the multilateral treaty reservation of India.

And so in the first place the Government of India contends that the Application of Pakistan and its jurisdictional assertions are fundamentally incompatible with the principle of consent.

The truth of the matter, Mr. President, is that the Application of Pakistan is essentially similar in purpose to the Applications of the United Kingdom and the United States in the 1950s which were effectively unilateral proposals of judicial settlement, the legal efficacy of which was contingent upon the respondent State's *ad hoc* consent to appear or conduct producing the effect of *forum prorogatum.*

Two examples are indicated in the transcript. First the *Antarctica* cases:

> *(a) Antarctica (United Kingdom* v. *Argentina), Order of 16 March 1956, I.C.J. Reports 1956*, and *Antarctica (United Kingdom* v. *Chile), Order of 16 March 1956, I.C.J. Reports 1956*; removal from the List. And secondly, the
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> *(b) Aerial Incident of 7 October 1952, Order of 14 March 1956, I.C.J. Reports 1956*, removal from the List.

Of course, the Rules of Court (Article 38, paragraph 5) now provide that such cases do not go into the General List until the necessary conditions have been fulfilled.

The applicant State itself acknowledges the similarity. Thus, in the Memorial (paras. 5 and 6) the Government of Pakistan asks India to submit to the jurisdiction of the Court voluntarily.

Given the difficulties which Pakistan faces, the Court's requirement that the Applicant addresses the issues of jurisdiction first is understandable.

The principle that the basis of jurisdiction is the consent of the parties is universally recognized, and substantial elaboration would be out of place.

Accordingly, I shall confine myself to certain points concerning the modalities of determining the existence of consent.

As a background it is safe to say that the Court has tended to a degree of caution in determining the issue of jurisdiction.

Sir Hersch Lauterpacht confirmed this appreciation of the question in 1958. In his words:

> "The temper of caution exhibited by the Court in its formulation and exposition of the law manifests itself with some persistence in its attitude of restraint in relation to the question of its own jurisdiction. A very substantial number of the decisions of the Court have been concerned with that question. When

appearing before the Court as defendants under a clause giving it obligatory jurisdiction, Governments show no reluctance to plead that they have not in fact conferred upon it jurisdiction in regard to the matter in dispute."

And he continues,

"The Court has examined such pleas with meticulous care. It has emphasized repeatedly the necessity for extreme caution in assuming jurisdiction, which must be proved [as the Attorney-General has said this morning] up to the hilt."

And Lauterpacht continues:

"Numerous Judgments show the Court as 'bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given'." (*The Development of International Law by the International Court*, London, 1958, p. 91; footnote omitted.)

Now strictly speaking, the Court is a *juge d'exception*. Jurisdiction exists within the terms of the grant of jurisdiction by the individual State exercising its political discretion.

As President McNair observed in his separate opinion in the *Anglo-Iranian Oil Co.,* case:

"A State, being free either to make a Declaration or not, is entitled, if it decides to make one, to limit the scope of its Declaration in any way it chooses, subject always to reciprocity." (*I.C.J. Reports 1952*, p. 116.)

And Judge Lauterpacht, in his separate opinion in the case concerning *Certain Norwegian Loans,* (*I.C.J. Reports 1957*, p. 46) expressed the same view. He said:

"In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result, there may be little left in the Acceptance which is subject to the jurisdiction of the Court. This the Governments, as trustees of the interests entrusted to them, are fully entitled to do. Their right to append reservations which are not inconsistent with the Statute is no longer in question."

However, the *juge d'exception* analysis should not be overstressed and it is probably the case that just as there is no presumption of jurisdiction, so also there is no presumption against the existence of consent.

But, Mr. President, one thing is very clear and that is that the practice of making reservations is a part of the system and reservations are compatible with the consensual bond which is the basis of both Article 36, paragraph 1, and paragraph 2, of the Statute. It is worth recalling that the League of Nations actually encouraged the making of reservations in order to "diminish the obstacles which prevent States from committing themselves . . .".

And Dr. Hambro observed in 1948:

"Not only have states made reservations of different kinds, but the Assembly of the League of Nations discussed the reservations at different times and definitely adopted the point of view that exceptions should be permitted so as to facilitate acceptance of the 'optional clause'." (*British Year Book*, Vol. 25 (1948), p. 143; footnote omitted.)

This policy was adopted by the Fifth Assembly of the League in 1924 and by the Ninth Assembly in 1928: the history is conveniently presented in Hudson, *The Permanent Court of International Justice 1920-1942*, New York, 1943, pp. 452-453 (para. 450).

At the San Francisco Conference the practice of making reservations was considered to be so well established as to make it "unnecessary to modify paragraph 3 in order to make express reference to the right of States to make such reservations". (See *UNCIO*, Vol. XIII, pp. 391-392; and Hambro, *op. cit.*, *supra*, p. 143.)

When all is said and done, the test of the expression of consent is intention as manifested in the relevant declaration of acceptance and, in certain cases, as evidenced by conduct.

As Dr. Shabtai Rosenne points out,

> "the Court will look at the underlying intention of the State making the declaration, the declaration itself being the expression of a unilateral act of policy to accept the jurisdiction of the Court for disputes coming within its scope" (Rosenne, *The Law and Practice of the International Court, 1920-1996*, 3rd ed., 1997, Vol. II, p. 812).

As Rosenne emphasizes (pp. 812-814), the Court makes considerable effort to explore the intentions of the declarant State.

Thus, in the *Phosphates in Morocco* case, the Permanent Court observed:

> "The principal duty of the Court is to examine the conditions which determine whether the objection submitted by the French Government is well-founded. The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case. However, in answering these questions it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance." (*P.C.I.J., Series A/B*, *No. 74*, p. 24.)

The present Court stressed the importance of the intention of the declarant State in the *Anglo-Iranian Oil Co.,* case. As the Court stated:

> "But the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court." (*I.C.J. Reports 1952*, p. 104.)

And in the same Judgment the Court referred to: "the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties" (*ibid.*, p. 103). This approach has been consistently followed by the Court.

Thus in 1978 in its Judgment in the *Aegean Sea* case the Court confirmed the jurisprudence of the Permanent Court and the Anglo-Iranian Judgment (*I.C.J. Reports 1978*, pp. 28-29, para. 69).

And, of course, more recently in 1998 the principles were reiterated by this Court in the *Fisheries Jurisdiction* case. In the words of the Judgment:

> "Spain and Canada have both recognized that States enjoy a wide liberty in formulating, limiting, modifying and terminating their declarations of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. They equally both agree that a reservation is an integral part of a declaration accepting jurisdiction." (Para. 42.)

After summarizing the views of the Parties the Court observed further:

> "The Court recalls that the interpretation of declarations made under Article 36, paragraph 2, of the Statute, and of any reservations they contain, is directed to establishing whether mutual consent has been given to the jurisdiction of the Court.
>
> It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: 'This jurisdiction only exists within the limits within which it has been accepted' (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 23)."

The Court continued in 1998:

> "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively. All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant

State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout." (Para. 44.)

And thus at this stage, Mr. President, it is appropriate to apply the criterion of intention to the Commonwealth reservation of India. Since the time of Independence there have been four declarations by India in force which included the Commonwealth reservation. After Independence in 1947 the declaration of 1940 was maintained.

Subsequently, in a letter dated 7 January 1956 addressed to the Secretary-General, the Indian Government gave notice of the termination of its declaration of 1940 and by an instrument of the same date the Government accepted the compulsory jurisdiction of the Court in all legal disputes arising after a certain date but excluding: "(ii) disputes with the Government of any country which on the date of this Declaration is a member of the Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; . . ." (*I.C.J. Yearbook*, *1955–1956*, pp. 186-187).

This declaration was terminated by a notice of 8 February 1957 and in 1959 India deposited a new declaration containing a modified version of the reservation of before. This referred to: "(2) Disputes with the Government of any State which, on the date of this Declaration, is a Member of the Commonwealth of Nations" (*I.C.J. Yearbook*, *1959–1960*, p. 242). And finally, in the current Indian declaration deposited in 1974, there is a slightly modified formula, namely: "(2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations;" (*I.C.J. Yearbook*, *1974–1975*, p. 59).

Mr. President, distinguished Members of the Court, the intention of the Government of India could not be clearer. The post-Independence reservations originate in the declaration of 1940. Since Independence it has appeared in three successive declarations. Moreover, the variations in the formula confirm that on each occasion the reservation was specifically reviewed. More especially in 1974 the formulation was carefully extended in scope.

In face of the realities, including the fact that reservations form part of the expression of the will of the parties, and the clarity of that expression in this case, the applicant State has had no alternative but to propose the invalidity of the Commonwealth reservation. After all, the reservation is clear and an assertion of invalidity was the only means of attack.

In its Memorial, Pakistan argues that the reservation is contrary to the provisions of Articles 92 and 93 of the Charter (pp. 13-14 and 18). In the key passage (p. 13), Pakistan argues that a State which is a party to the Charter and the Statute is automatically a party to the compulsory jurisdiction. This argument is distinguished only by its ambition. As Rosenne wrote in 1965:

> "By making a declaration a State, already subject to the obligations and enjoying the rights of the Charter and Statute, *takes upon itself further obligations which otherwise it would only assume by virtue of treaties and conventions in force for it* -- obligations for the judicial settlement of disputes defined generically with parties defined generically" (*Law and Practice of the International Court, 1965,* Leyden, p. 412; second revised edition, Dordrecht, 1985, pp. 412-413) (emphasis added).

The argument of Pakistan ignores the fact that a State being a party to the Statute of the Court does not create a basis of jurisdiction: if that were so, then the optional clause system would not be necessary.

The Statute of the Court forms "an integral part of the Charter". It must follow that a reservation which is accepted as valid for the purposes of the Statute is compatible also with the provisions of the Charter.

The Statute is the only standard of legality in practice, although in theory reservations might appear which would be repugnant to human rights standards.

There is no issue of validity here. As individual Members of the Court have pointed out, reservations should not be repugnant to the Statute. The references will appear in the transcript. (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 43-45, separate opinion of Judge Lauterpacht; *ibid.*, pp. 68-70, dissenting opinion of Judge Guerrero; *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, pp. 54-59, separate opinion of Judge Spender; *ibid.*, pp. 76-78, dissenting opinion of Judge Klaestad; *ibid.*, pp. 90-94, dissenting opinion of Judge Armand-Ugon; *ibid.*, pp. 101-119, dissenting opinion of Judge Lauterpacht.) The cases involved were *Certain Norwegian Loans* and *Interhandel*.

In passing it may be noted that the issue of compatibility with the Statute in these cases concerned Article 36,

paragraph 6. No such issue arises in the present case. The Commonwealth reservation is not repugnant to the Statute and it is not repugnant to Article 36, paragraph 6.

Mr. President, there is no sound principle of legal policy according to which the validity of the Commonwealth reservation could be called into question. Seven States other than India currently have declarations which include versions of the Commonwealth reservation. They are: Barbados, Canada, Gambia, Kenya, Malta, Mauritius and the United Kingdom.

In relation of the Statute of the Court, Pakistan relies in particular upon Article 36, paragraph 3.

The argument in the Memorial is as follows:

> "D (1) Declarations under Article 36, paragraph 2, of the Statute can be made unconditionally or under specified conditions. The permissible conditions have exhaustively been set out in Article 36, paragraph 3, as (i) on condition of reciprocity on the part of several or certain States, or (ii) for a certain time. The reservation of the Government of India excluding all disputes with 'Any State which is or has been a member of the Commonwealth of Nations' is in excess of the conditions permitted under Article 36, paragraph 3, of the Statute which is a binding obligation between India and Pakistan and indeed between all Commonwealth members. This condition, being *ultra vires* of Article 36, paragraph 3, has no legal effect. However, to the extent that the Declaration of the Government of India is in accordance with Article 36, paragraph 3, it stands and confers compulsory jurisdiction on the Court."

Mr. President, Members of the Court, there is no evidence whatsoever that the reservation is *ultra vires* Article 36, paragraph 3.

The fact is that it has for long been recognized that within the system of the optional clause a State can select its partners. The definitive statement can be found in Hudson's famous treatise:

Hudson says,

> "Paragraph 3 of Article 36 states expressly that a declaration 'may be made unconditionally (in French, *purement et simplement*) or on condition of reciprocity on the part of several or certain Members or States'. This seems to contemplate not a limitation of the jurisdiction accepted but a condition as to the operation of the declaration itself; its effect is illustrated in Brazil's declaration of November 1, 1921, the operation of which was to begin only when compulsory jurisdiction had been recognized by at least two of the States permanently represented on the Council of the League of Nations. Yet paragraph 3 raises a question as to the possibility of a declarant's excluding disputes with a particular State or States. Though paragraph 2 envisages a recognition of jurisdiction 'in relation to any other Member or State', each of the members of the British Commonwealth of Nations except Ireland excluded '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 may have agreed or shall agree'. Iraq excluded from its declaration 'disputes with the Government of any other Arab State, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree'. Rumania recognized the Court's jurisdiction 'in respect of the Governments recognized by Rumania', and Yugoslavia made a somewhat similar declaration. Poland's declaration excluded disputes with States which refuse to establish or to maintain normal relations with Poland. Such action by so many States may be taken to have established the possibility of a State's making its declaration to apply only to certain other States." (Hudson, The Permanent Court of International Justice, 1920-1942, New York, 1943, pp. 466-467.)

The distinguished commentator Hugh Thirlway after a careful examination of the *travaux préparatoires* concludes that Article 36, paragraph 3, contemplates a principle of reciprocity in the form of a choice of partners (see *Netherlands Yearbook of International Law*, Vol. XV (1984), pp. 103-107).

And so, in the Report of the Third Committee to the League Assembly in 1930, the effect of Article 36 as finally adopted was described as follows:

> "It gives power to choose compulsory jurisdiction either in all the questions enumerated in the Article or only in certain of these questions. Further, it makes it possible to specify the States (or members of the

League of Nations) in relation to which each Government is willing to agree to a more extended jurisdiction."

A number of jurists have referred to this application of Article 36, paragraph 3, without offering any criticism. The jurists include the following: Dr. Edvard Hambro, *British Year Book*, Volume 25 (1948), p. 133 at page 151; Sir Humphrey Waldock, *British Year Book*, Volume 32 (1955-1956), page 244 at page 248; Professor Herbert Briggs, *Recueil des Cours*, 1958, at page 302. The doctrine is unanimous. Over a time span of 50 years nine jurists who have examined the reservation make no suggestion that it is of questionable validity. The references will appear in the transcript. The jurists include two former Members of the Court, Sir Hersch Lauterpacht and Mr. Sette-Camara, the French authority, Professor Charles Rousseau and Dr. Shabtai Rosenne. Sir Hersch Lauterpacht, (ed.) of Oppenheim's International Law, Vol. II, (London, 7th ed., 1948), p. 60; Professor R. P. Anand, *Studies in International Adjudication* (Delhi, 1969), pp. 43-45; Professor J. G. Merrills, *British Year Book of International Law,* Vol. 50 (1979), p. 87, at pp. 103-104; Professor Renata Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (Dordrecht, 1993), pp. 45, 50, 56-57; Professor J. G. Merrills, *British Year Book of International Law,* Vol. 64 (1993) p. 197 at pp. 221-222; Dr. Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996,* Vol. II: Jurisdiction, The Hague, 1997, p. 802; Professor Charles Rousseau, *Droit International Public,* Vol. V, Paris, 1983, pp. 455-456; Judge Sette-Camara, in Bedjaoui (ed.) *International Law: Achievements and Prospects,* Dordrecht, 1991, p. 536; Professor I. A. Shearer, *Starke's International Law,* 11th ed., London, 1994, p. 454; Stanimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, 1995, p. 120; Professor Malcolm N. Shaw, *International Law,* 4th ed., Cambridge, 1997, p. 762.

To this evidence of the views of jurists may be added evidence of recent State practice. The earliest declaration still in force is that of Kenya (1965). The two most recent declarations are those of Barbados (1980) and Canada (1994). The declarant States concerned involve all the regions of the world except Australasia and the Pacific. And no State has challenged the validity of the reservation in proceedings before this Court, or otherwise in communications to the Secretary-General, that is, until the appearance of Pakistan's Memorial in these proceedings.

In summary, there is no legal basis for challenging the validity of the Commonwealth reservation of India. It is a classical reservation *ratione personae*. It is stated in unambiguous terms. It involves no subversion of Article 36, paragraph 6, or any other provision of the Statute.

That is the position of the Republic of India and in my submission my distinguished opponent Sir Elihu Lauterpacht has not produced any convincing arguments to the contrary.

In his submission, the Commonwealth reservation is "obsolete" and therefore, apparently, invalid (CR 2000/1, p. 27, para. 5). Counsel for Pakistan heaped criticism on this reservation. He said, it is "unprincipled" (p. 38), it was obsolete, inexplicable and abusive (p. 40). And elsewhere in the same passages, it is described as artificial and abusive and highly arbitrary.

My learned colleague described the use of this reservation, and of course eight States still employ it, as "abusive" with a frequency which itself was virtually an abuse.

This argument on behalf of Pakistan can only be described as fanciful. If the obsolescence is so clear and the result so legally offensive, why then was no reference made to these matters in the recent Memorial of Pakistan?

Sir Elihu made reference to the opinions of writers, and specifically referred to Professors Merrills and Macdonald. But none of the writers asserts that the reservation is invalid on the ground of obsolescence or on any other basis.

I have cited nine jurists covering a span of 50 years. None of these jurists offers a legal opinion similar to that now offered on behalf of Pakistan. And this includes the jurists writing in the last decade, Dr. Rosenne, Professor Shearer, Professor Shaw and Judge Sette-Camara. No expert has suggested that the reservation is invalid.

My next observation is this. If I may say so, the legal argument was not clearly articulated, there was a great deal of history and assertions of fact, but the legal argument was not clear. It was sometimes placed in the context of unilateral acts and it was sometimes in the context of the law of treaties. Moreover, the nebulous concept of opposability was invoked but its precise relevance was not explained.

Mr. President, it will not do simply to assert that the reservation is obsolete. There must be an applicable law which constitutes the framework of the analysis. In my submission, the actual subject-matter is that of a unilateral act, and

therefore the applicable law is not that of the law of treaties. Counsel for Pakistan referred to the *Nicaragua* case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Preliminary Objections*, *I.C.J. Reports 1984*, p. 418, paras. 59-60). There the Court applied the law of treaties by analogy (pp. 419-421) in order to decide whether a declarant could modify its declaration.

But this comparison does not help the argument based on obsolescence. The declaration accepting jurisdiction remains a unilateral act, as the Court emphasized in *Nicaragua*.

The subject-matter to which the argument of Pakistan applies is the declaration of India, which is a single expression of intention. The subject-matter of the argument is not the reservation isolated and it is not the consensual bond resulting from the filing of an Application. It is the declaration of India as a whole to which the argument must apply and this constitutes the subject-matter of the argument, if there is an argument.

There is no general law of unilateral acts, as there is a general law of treaties and acceptances of jurisdiction form a very specialized type of unilateral act, with their own applicable law.

Now, of course, the applicable law is the law of the Court's Statute as interpreted in the jurisprudence of the Court, such as the *Fisheries Jurisdiction* case.

Even if a principle of obsolescence were applicable, for the sake of argument, it could only apply to:

(a) the expression of intention; and

(b) the expression of intention in the form of the declaration as a whole, including the reservation.

But, Mr. President, the expression of intention only dates back to 1974 and the Government of India could replace its 1974 acceptance at any time. The legal tests of applicability are the ambit of intention as expressed in the instrument as a whole and its compatibility with the Statute. There is no question of obsolescence on the facts.

Counsel for Pakistan has, in my submission, not produced an analysis which is even on the margins of an effective argument based upon obsolescence, even if the applicable law recognized such a doctrine, which is extremely doubtful. I may, if its considered necessary, follow that question up in the second round.

I must now advance to my third task this morning, which is to respond to the arguments of Pakistan relating to the multilateral convention reservation.

The relevant passages in the preliminary objections of India will appear in the transcript:

> "iii) The Government of India also submits that sub-paragraph 7 of paragraph 1 of its Declaration of 15 September, 1974 bars Pakistan from invoking the jurisdiction of this Court against India concerning any dispute arising from the interpretation or application of a multilateral treaty, unless at the same time all the parties to such a treaty are also joined as parties to the case before the Court. The reference to the UN Charter, which is a multilateral treaty, in the Application of Pakistan as a basis for its claim would clearly fall within the ambit of this reservation. India further asserts that it has not provided any consent or concluded any special agreement with Pakistan which waives this requirement.

3. In view of the above, the Government of India respectfully requests the Court:

. . . .

> ii) to adjudge and declare that Pakistan cannot invoke the jurisdiction of the Court in respect of any claims concerning various provisions of the UN Charter, particularly Article 2(4) as it is evident that all the States parties to the Charter have not been joined in the Application and that, under the circumstances, the reservation made by India in sub-paragraph 7 of paragraph 1 of its Declaration would bar the jurisdiction of this Court." (Letter dated 2 November 1999 from the Ambassador of India to the Netherlands: Pakistan's Application dated 21 September 1999 before the International Court of Justice: Preliminary Objections of the Government of India to jurisdiction.)

This multilateral convention reservation is based upon an objective condition and India has not waived the requirement set forth in the reservation.

A similar reservation has been made by Malta (1966), the Philippines (1972), the United States (1946), and Pakistan. Pakistan has included the reservation in declarations of 1948, 1957 and 1960.

The reservation is clearly accepted as valid by the applicant State in view of its own adoption of the reservation in three successive declarations. Such acceptance of the validity of this type of reservation surely debars the applicant State from challenging the Indian reservation. The two reservations are in essentially identical terms. The reservation forms part of a unilateral declaration which becomes part of a consensual bond when an application is filed.

The Court has affirmed that legal obligations may arise from unilateral acts if in the circumstances the unilateral mode would be regarded as the normal way of creating a legal obligation. And the Chamber made an observation on this point in the *Frontier Dispute* case and that will appear in the transcript.

> "In order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred. For example, in the *Nuclear Tests* cases, the Court took the view that since the applicant States were not the only ones concerned at the possible continuance of atmospheric testing by the French Government, that Government's unilateral declarations had 'conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests' (*I.C.J. Reports 1974,* p. 269, para. 51; p. 474, para. 53). In the particular circumstances of those cases, the French Government could not express an intention to be bound otherwise than by unilateral declarations. It is difficult to see how it could have accepted the terms of a negotiated solution with each of the applicants without thereby jeopardizing its contention that its conduct was lawful." (*Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, p. 574, para. 40.)

The making of a declaration within the system of the optional clause is essentially similar in character. The maker of the offer is creating an obligation which is in origin unilateral. It is potentially consensual in effect *precisely* because it is, in the first place, binding as a unilateral act.

In these circumstances Pakistan cannot both rely on its own declaration (which includes a replica of the Indian reservation) and assert the invalidity of India's reservation. The position of Pakistan in this respect is incompatible with the principle of good faith and contrary to the equitable doctrine of approbation and reprobation, which doctrine is, in essence, a restatement of the principle of consistency.

A substantial number of authorities refer to this reservation without any suggestion that the reservation is invalid. The list of authorities will appear in the transcript: Hersch Lauterpacht (editor), Oppenheim, International Law, Vol. II, 7th ed., London, 1948, p. 63; B. S. Murty, in Sorensen (ed.), *Manual of Public International Law*, London, 1968, p. 709; D. P. O'Connell, *International Law*, Vol. II, London, 1970, p. 1085; J. G. Merrills, *British Year Book*, Vol. 50 (1979), p. 107; J. G. Merills, *British Year Book*, Vol. 64 (1993), pp. 230-232; Bengt Broms, *The United Nations*, Helsinki, 1990, p. 780, fn. 14; Shabtai Rosenne, *The Law and Practice of the International Court*, second revised edition, Dordrecht, 1985, p. 404; Stanimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, 1995, pp. 112-119; Shabtai Rosenne, *The Law and Practice of the International Court 1920-1996*, The Hague, 1997, pp. 803-804.

The version of the reservation filed by the United States along with its declaration was interpreted and applied by the Court in the *Nicaragua* case, (*Merits, I.C.J. Reports 1986,* pp. 29-38). The Court did not seek to question the validity of the reservation. However, there was a difference between the then United States reservation and the present Indian reservation. While the reservation made by the United States excluded from its acceptance of jurisdiction "disputes arising under a multilateral treaty unless (1) all parties to the treaty *affected by the decision* are also parties to the case before the Court" (emphasis added), paragraph 7 of the Indian declaration is more general and excludes from the Court's jurisdiction "any dispute arising from the interpretation or the application of a multilateral treaty, unless at the same time *all the parties to the treaties* are also joined to the case before the Court" (emphasis added).

This difference in the drafting of both declarations has no bearing on their respective validity, but it makes a difference as to the stage of the proceedings when the Court must take it into consideration. In the *Nicaragua* case, the Court, without questioning its validity, declared "that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance [did] not possess, in the circumstances of the case, an exclusively

preliminary character" (*I.C.J. Reports 1984*, p. 425). But it did so solely because of the "ambiguities" of the phrase "all parties to the treaty affected by the decision" which was, the Court said, "at the centre of the present doubts", while it expressly noted that "certain other declarations of acceptance, such as *those of India,* El Salvador and the Philippines, refer clearly to 'all parties' to the treaties" (*id.*, p. 424) and, therefore, did not raise the same doubts as to their scope. In contrast to the United States reservation, the reservation of India refers to an objective condition that requires to be fulfilled and has nothing to do with arguments on the merits, as Pakistan has attempted to allege.

As indicated above, Pakistan is not in a position to mount a credible attack on the validity of this reservation, because the applicant State uses the same reservation. Nevertheless, the other party claims that the reservation is *ultra vires* Article 36, paragraph 3, of the Statute, together with Article 38 (Memorial of Pakistan, para. H (4)). The considerations set forth in that paragraph, in so far as they are comprehensible, are irrelevant.

There is, however, a second objection advanced by Pakistan (Memorial of Pakistan, para. H (1)). This is to the effect that the multilateral treaty reservation cannot exclude the application of the principles of customary or general international law, when such principles "have been enshrined in the Charter of the United Nations". In this formulation the applicant State recognizes that the governing norm is the Charter, which incorporates the principles of customary law.

Mr. President, in this context it is clear that the view of the applicant State coincides with that of India, which view is that the intention of the governments concerned was to exclude jurisdiction in respect of causes of action which, in the final analysis, are based upon the United Nations Charter.

As my colleagues will now demonstrate, there is no basis of jurisdiction to be found in any other Article and, in particular, in Article 36, paragraph 1, and Article 37 of the Statute.

Mr. President, it has been a special pleasure for me to appear in front of you in your new office. I would thank you and your colleagues for your customary patience, and ask you to give the floor to my colleague, Professor Pellet.

The PRESIDENT: Thank you very much, Professor Brownlie. I think the Court will suspend for 15 minutes before giving the floor to Professor Pellet.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne la parole au professeur Alain Pellet.

M. PELLET : Merci, Monsieur le président. Monsieur le président, Madame et Messieurs les juges,

C'est toujours un grand honneur et un plaisir de se présenter devant vous. Permettez-moi, Monsieur le président, de dire que ce l'est tout spécialement aujourd'hui.

Il m'incombe, en réponse à ce qu'ont dit hier M. Kemicha et sir Elihu Lauterpacht, d'établir que la Cour n'a pas compétence pour se prononcer sur la requête du Pakistan en vertu de l'Acte général d'arbitrage du 26 septembre 1928.

Selon le Pakistan, la Cour aurait en la présente espèce compétence pour se prononcer sur le fondement de l'article 17 de l'Acte général de 1928 pour le règlement pacifique des différends internationaux, lu conjointement avec les articles 36, paragraphe 1, et 37 du Statut.

Je relève du reste au passage que le Pakistan croit pouvoir dénier à l'Inde "any procedural right to amend, alter or supplement its preliminary objections to the Jurisdiction of the Court or to invoke any new grounds in an attempt to oust the jurisdiction of the Court" (mémoire, p. 21, par. 7). Mais en même temps, ce pays n'a pas hésité, pour sa part, à amender sa propre requête, qui ne prétendait, à l'origine, fonder la compétence de la Cour que sur les dispositions des paragraphes 1 et 2 de l'article 36 du Statut (requête du 21 septembre 1999, p. 3), sans faire la moindre allusion à l'Acte général d'arbitrage.

Outre que l'on voit mal pourquoi le Pakistan pourrait s'arroger un droit d'amendement qu'il ne concède pas à l'Inde, il faut croire que la base de compétence qu'il prétend fonder sur l'Acte général d'arbitrage ne lui était pas apparue avec la clarté de l'évidence lorsque la requête a été rédigée.

Comme on le comprend, Monsieur le président ! Non seulement on peut avoir plus que des doutes sur la validité et,

en tout cas, le maintien de «l'efficacité» de l'Acte général de 1928, mais encore et de toutes manières, il est clair que, fût-il toujours en vigueur, cet acte ne lierait pas l'Inde indépendante. Elle n'y est jamais devenue partie; le Pakistan non plus : il n'a pu ni y succéder à l'Inde britannique ni y accéder. Au surplus, et si l'on admettait pour les seuls besoins de la discussion, que l'une ou l'autre des Parties devait être considérée comme un Etat successeur de l'Inde britannique en tant que partie à l'Acte général, les réserves formulées en 1931 par le Gouvernement de l'Inde britannique excluraient, de toutes manières, la compétence de la Cour en la présente affaire.

Si vous le voulez bien, Monsieur le président, je vais revenir sur les deux premiers de ces points et je n'évoquerai le troisième que pour mémoire, puisque, dans ses plaidoiries d'hier, le Pakistan n'a pas cru devoir aborder. Je m'emploierai donc à montrer, dans un premier temps, qu'il est pour le moins douteux que l'Acte général d'arbitrage de 1928 soit «un traité ou une convention en vigueur» au sens des articles 36, paragraphe 1, et 37 du Statut de la Cour. Puis, dans un second temps, j'établirai qu'en admettant qu'il soit en vigueur, il ne l'est certainement pas dans les relations entre l'Inde et le Pakistan.

I. L'Acte général d'arbitrage de 1928 n'est pas «un traité ou une convention en vigueur» au sens des articles 36, paragraphe 1, et 37 du Statut

Monsieur le président,

Il existe, pour le moins, des indices convergents qui donnent à penser que l'Acte général d'arbitrage de 1928 n'est plus en vigueur et que, le serait-il, il ne saurait être efficacement invoqué pour fonder la compétence de la Cour.

L'Acte général de 1928 a été adopté dans le contexte bien particulier, de la Société des Nations de la fin des années vingt, et il comportait de multiples liens avec l'Organisation disparue.

Comme l'a rappelé le juge Morozov dans l'affaire du *Plateau continental de la mer Egée* «l'analyse du texte de l'Acte montre qu'il était, par sa nature et son contenu, un élément inséparable de la structure et des mécanismes de la Société des Nations et, celle-ci une fois disparue, il a perdu toute validité» (*C.I.J. Recueil 1978*, p. 54; voir aussi l'opinion individuelle du Juge Tarazi, *ibid.*, p. 55). Si vous le voulez bien, Monsieur le président, je m'abstiendrai de donner les références de mes citations, je suis sûr que conformément à ses bonnes habitudes le Greffe y pourvoira dans les comptes rendus et je l'en remercie par avance. Même les auteurs de l'opinion dissidente commune jointe aux arrêts de 1974 dans les affaires des *Essais nucléaires* et sur laquelle M. Kemicha s'est exclusivement fondé hier matin, en conviennent, alors même qu'ils défendent l'applicabilité de ce traité contre la majorité de la Cour :

> «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.» (Opinion dissidente commune de MM. Onyeama, Dillard, Jiménez de Aréchaga et sir Humphrey Waldock, *C.I.J. Recueil 1974*, p. 331.)

Par ailleurs, s'il est vrai que les mécanismes de l'Acte général ne sont pas intégrés dans le système de la SdN, celle-ci n'y est pas moins mentionnée à de très nombreuses reprises (cf. les articles 6 et 7, 9, et 43 à 47) sans même parler de la Cour permanente, dont il est loin d'être certain que toutes les fonctions qui lui sont dévolues, par l'acte, à elle ou à son président, aient pu passer à la Cour actuelle. Et, comme l'ont relevé les juges dissidents de 1974 cités par M. Kemicha (CR 2000/1, p. 51, par. 21), l'un des effets de la disparition de la SdN a été de fermer à jamais le cercle des Etats parties puisque l'article 43 limitait la participation à l'Acte général de 1928 aux seuls Etats Membres de la Société ou à ceux que l'Assemblée de la SdN avait invités à y accéder.

Cette particularité a été relevée aussi bien par la France que par la Turquie lorsqu'elles ont, l'une et l'autre, fait l'objet de requêtes prétendument fondées sur l'article 17 de l'ancien Acte général. Dans sa communication en date du 10 octobre 1978, le Gouvernement turc écrivait :

> «L'Acte général faisait partie intégrante du système de la Société des Nations. Elaboré en son sein, adopté par son Assemblée, il n'était ouvert qu'à ses Membres et aux Etats invités par son Conseil. Il était son œuvre et la Société ne l'avait conçu qu'en vue des buts définis par le Pacte, soit la paix, le désarmement et la sécurité. Il a toutefois reçu un accueil très réservé, vingt-trois adhésions de 1929 à 1935, et aucune autre depuis lors. Il mettait en place des mécanismes qui faisaient constamment appel aux organes de la Société et qui n'ont pas été employés une seule fois en cinquante ans.» [Soixante douze à la date d'aujourd'hui] (Affaire du *Plateau continental de la mer Egée*, *C.I.J. Mémoires, plaidoiries et documents*, t. 149, p. 597; voir aussi l'annexe à la lettre de l'ambassadeur de France au greffier de la Cour du 16 mai 1973, affaire des *Essais nucléaires*, *ibid.*, t. 147, p. 349.)

Ces liens sont encore accrus par le fait que plusieurs Parties avaient expressément subordonné leur acceptation des mécanismes de l'Acte général et, en particulier, de l'article 17, à l'attente d'une décision du Conseil de la SdN. Tel avait été le cas du Royaume-Uni, du Canada, de l'Australie, de la Nouvelle-Zélande, de l'Italie ou de l'Inde britannique (cf. *Traités multilatéraux déposés auprès du Secrétaire général*, Etat au 30 avril 1999, ST/LEG/SER.E/17, n° de vente F.99.V.5, p. 1015-1018). J'y reviendrai en ce qui concerne ce dernier pays; ce qui nous intéresse pour l'instant, ce sont les liens intimes qui en résultent entre le système du Pacte d'un côté et celui de l'Acte général de l'autre.

Il n'est donc pas étonnant que, suite à une initiative belge (cf. doc. A/AC.18/18/Add.1), l'Assemblée générale ait entrepris, en 1948, de «restituer à l'Acte général du 26 septembre 1928» «son efficacité première», pour reprendre les termes de la résolution 268 A (III). Pour ce faire, l'Assemblée générale substitue systématiquement les Nations Unies et leurs organes à la Société des Nations et ses organes, la Cour internationale de Justice à la Cour permanente.

Il est clair que de telles modifications n'auraient pas été nécessaires si, de l'avis des quarante-cinq Etats Membres qui ont voté cette résolution, l'Acte général de 1928 était toujours en vigueur, pour ne rien dire des six voix contre. Les auteurs de l'opinion dissidente commune de 1974 dont le Pakistan fait si grand cas (cf. CR 2000/1, p. 49-53) ne sont pas de cet avis et ils ont affirmé que l'«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 de 1928 comme en vigueur; personne n'est venu les contredire» (*C.I.J. Recueil 1974*, p. 336, par. 49). Avec tout le respect dû aux juges dissidents, ce n'est pas exact Monsieur le président; non seulement aucun Etat, à ma connaissance n'a dit clairement que l'Acte de 1928 demeurait en vigueur, j'y reviendrai, mais encore six délégations, celles de l'Union soviétique et de ses amis, ont clairement protesté, durant les débats, contre cette tentative de résurrection de cet «instrument périmé» (cf. *Documents officiels de l'Assemblée générale, troisième session*, 199e séance plénière, 28 avril 1949, comptes rendus analytiques, intervention de M. J. Malik, URSS, p. 196).

Telle a du reste été la position sans équivoque de l'Inde dont, à la suite de la précédente tentative du Pakistan pour ressusciter le défunt Acte général, le ministre des affaires étrangères a adressé, le 18 septembre 1974, une communication au Secrétaire général des Nations Unies. Il faisait valoir que :

> "The General Act of 1928 for the Pacific Settlement of International Disputes was a political agreement and was an integral part of the League of Nations system. Its efficacy was impaired by the fact that the organs of the League of Nations to which it refers have now disappeared. It is for these reasons that the General Assembly of the United Nations on 28 April 1949 adopted the revised General Act for the Pacific Settlement of International Disputes." (*Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999*, ST/LEG/SER.E/17, Sales N° E.99.V.5, fn. 11, p. 978.)

Ni l'Inde, ni le Pakistan n'ont, à ce jour, adhéré à ce nouvel Acte général.

Ceci étant, il faut admettre, Monsieur le président, que l'«opération» de 1949 n'est pas allée sans quelque équivoque, que le titre même de la résolution 268 A (III) reflète bien puisque, comme je l'ai dit, il est intitulé «Restitution à l'Acte général du 26 septembre 1928 de son efficacité». Cela pourrait signifier qu'en tant qu'instrument l'Acte général de 1928 n'est pas considéré comme mort. Et il faut reconnaître que les travaux préparatoires de la résolution et le texte même de celle-ci sont ambigus.

En revanche, et sur cela aucun doute n'est possible, ils établissent que, faute d'être mort, l'Acte général est tenu par tous comme, au moins, moribond. Il a, selon tous les intervenants, perdu son «efficacité» du fait de la disparition de la SdN et il faut la lui «restituer».

Cela ressort d'abord de la proposition belge elle-même. Selon la Belgique

> «l'Assemblée générale se bornerait à permettre aux Etats de *rétablir*, de leur propre gré, la validité de l'Acte.
>
> . . . .
>
> De l'avis du représentant de la Belgique, le consentement des parties n'est pas nécessaire puisque, dans sa forme définitive, sa proposition ne supprime ni ne modifie l'Acte général tel qu'il a été établi en 1928, mais au contraire le laisse intact ainsi que, par voie de conséquence, tous les droits que les parties à cet Acte *pourraient encore en tirer*… Grâce à quelques modifications, le nouvel Accord général

restaurerait, au bénéfice des Etats qui y adhéreraient, l'efficacité première du dispositif créé par l'Acte de 1928, Acte qui, bien que toujours théoriquement valide, *est devenu en grande partie inapplicable.*» («Etude des méthodes destinées à favoriser le développement de la coopération internationale dans le domaine politique», doc. A/605, 13 août 1948, par. 46, p. 31 ; les italiques sont de nous; voir aussi le texte de la proposition belge, *ibid.*, p. 37-38.)

Telle a été aussi la position de tous les Etats qui se sont exprimés en faveur de son adoption, au sein de la commission politique spéciale ou de la commission plénière, qu'il s'agisse des Etats-Unis, du Royaume-Uni, de l'Uruguay, (*Documents officiels de l'Assemblée générale, troisième session*, commission politique spéciale, 26e séance, comptes rendus analytiques, p. 306, 308, 319), de l'Equateur (*Documents officiels de l'Assemblée générale, troisième session*, comptes rendus analytiques de la commission plénière, 199e séance plénière, 28 avril 1949, p. 190) ou de la France (*ibid.*, p. 193).

Dans la droite ligne de ces positions, l'Assemblée générale considère

> «que l'efficacité de l'Acte général pour le règlement pacifique des différends internationaux, du 26 septembre 1928, se trouve diminuée du fait que les organes de la Société des Nations et la Cour permanente de Justice internationale, auxquels il se réfère, ont aujourd'hui disparu» (résolution 268 A (III), préambule, al. 2).

C'est dire clairement que l'Assemblée estime que l'article 37 du Statut de la Cour ne suffit pas à redonner vie aux dispositions de l'Acte général de 1928 qui donnaient compétence à la Cour permanente. Et cela est confirmé par l'alinéa suivant du préambule aux termes duquel : «les amendements indiqués ci-après [ils portent, je l'ai dit, sur toutes les dispositions visant soit la Société des Nations soit la Cour permanente de Justice internationale, y compris l'article 17] sont de nature à restituer à l'Acte général son efficacité première», étant entendu que

> «ces amendements ne joueront qu'entre les Etats ayant adhéré à l'Acte général ainsi revisé et, partant, ne porteront pas atteinte aux droits des Etats qui, parties à l'Acte tel qu'il a été établi le 26 septembre 1928, entendraient s'en prévaloir *dans la mesure où il pourrait encore jouer*» (les italiques sont de nous).

Qu'en déduire ? Au moins deux choses :

> 1) que l'Assemblée générale a des doutes sérieux sur le maintien en vigueur continu de l'ancien Acte général qui, de toutes manières, a «perdu son efficacité première» du fait de la disparition de la SdN et de la CPJI; et,
>
> 2) que cette «inefficacité» est le fait de l'ensemble des dispositions de l'Acte de 1928 renvoyant à ces deux instances.

Il s'en déduit aussi, *a contrario* mais nécessairement, que les parties à l'ancien Acte général qui n'ont pas ratifié le nouveau ne peuvent s'en prévaloir que «dans la mesure où il pourrait encore jouer», c'est-à-dire dans la mesure – et seulement dans la mesure – où les dispositions modifiées ne sont pas en cause. Or, je le répète, l'article 17 qui confère compétence à la CPJI fait partie des dispositions qui ont été modifiées et ni l'Inde, ni le Pakistan ne sont devenus parties au véritable «Lazare juridique» qu'est l'Acte général de 1949. Ni l'une, ni l'autre ne peuvent donc, en tout état de cause, se prévaloir de la clause de juridiction de l'article 17.

Ceci est du reste confirmé par le fait que, contrairement à l'Acte général revisé de 1949, celui de 1928 n'est pas mentionné dans la «Liste chronologique des autres instruments régissant la compétence de la Cour» figurant dans l'*Annuaire* de la Cour internationale de Justice (cf. l'*Annuaire 1996-1997*, p. 134 et 137).

Certes, comme l'écrivent les juges dissidents de 1974, dans l'un des rares passages de l'opinion que Me Kemicha n'a pas cru devoir citer hier, «la première liste de traités multilatéraux, pour lesquels le Secrétaire général exerce les fonctions de dépositaire, publiée par lui en 1949, mentionnait l'Acte général (*Signatures, ratifications, acceptations, adhésions, etc., aux conventions et accords pour lesquels le Secrétaire général exerce les fonctions de dépositaire*, publications des Nations Unies, 1949, vol. 9)» (*C.I.J. Recueil 1974*, p. 333). Mais il est très révélateur qu'après l'adoption de l'Acte revisé de 1949, l'acte de 1928 disparaît de la liste et il ne fera sa réapparition qu'après 1973. Ce n'est en effet qu'après l'affaire des *Essais nucléaires*, que l'acte de 1928 est à nouveau mentionné dans la précieuse publication intitulée *Traités multilatéraux déposés auprès du Secrétaire général*, état au 30 avril 1974 (ST/LEG/SER.D/8, p. 530; n° de vente F.75.V.9). Il est clair qu'auparavant le Secrétaire général, comme c'est

toujours le cas du Greffe, estimait que l'Acte de 1928 n'était plus en vigueur et avait été remplacé par celui de 1949.

Il est vrai, Monsieur le président, que, depuis lors, quelques Etats, mentionnés hier par Me Kemicha (CR 2000/1, p. 47-48, par. 8-10), se sont employés, de temps à autre, à tenter de ressusciter notre Lazare en liaison toujours avec des affaires portées devant votre Cour, mais jamais ces Etats n'ont obtenu de la Cour le «Lève-toi et marche» qui eût conforté leur position en matière de compétence.

Dans l'affaire relative à *Certains emprunts norvégiens* de 1957 la France avait mentionné, sans s'y arrêter, l'Acte général de 1928 comme constituant une base possible de compétence de la Cour (voir *Certains emprunts norvégiens*, *C.I.J. Mémoires, plaidoiries et documents,* 1955, vol. I, p. 172, 173 et 180 et vol. II, p. 60). L'arrêt du 6 juillet 1957 n'y fait même pas allusion.

Nouvelle tentative, de l'Australie et de la Nouvelle-Zélande cette fois, à l'occasion des affaires des *Essais nucléaires*. Et même silence de la Cour qui, dans ses ordonnances du 22 juin 1973, ne s'estime pas en mesure «d'aboutir à une conclusion définitive», au stade des mesures conservatoires, sur l'applicabilité de l'Acte général (*C.I.J. Recueil 1973*, p. 103 et 139) -- radicalement écarté comme base de compétence possible par le juge Ignacio-Pinto (*C.I.J. Recueil 1973,* opinion dissidente, p. 129). Dans ses arrêts du 20 décembre 1974, la Cour n'aborde pas la question.

De même, ni dans son ordonnance du 11 septembre 1976 sur les mesures conservatoires, ni dans son arrêt du 19 décembre 1978 relatifs à l'affaire du *Plateau continental de la mer Egée*, la Cour ne se prononce sur la validité ou «l'efficacité» de l'Acte général de 1928. Dans l'ordonnance, la Cour se borne à considérer qu'il ne lui est pas nécessaire d'aboutir «à une conclusion définitive en la phase actuelle de la procédure au sujet des questions … soulevées relativement à l'applicabilité de l'Acte de 1928…» (*C.I.J. Recueil 1976*, p. 8). Et, dans son arrêt de 1978, elle constate qu'une réserve grecque invoquée par la Turquie au titre de la réciprocité avait pour l'effet d'exclure le différend de l'application de l'article 17 de l'Acte général (*C.I.J. Recueil 1978*, p. 37), si bien qu'il ne lui était «plus indispensable de dire si l'Acte est actuellement en vigueur avant de pouvoir statuer sur la compétence de la Cour pour connaître de la requête» (*ibid.*, p. 17). Elle s'en est, en effet, abstenue.

De plus, le Pakistan a, lui aussi, tenté d'invoquer, une première fois, l'Acte général de 1928 dans l'affaire des *Prisonniers de guerre* avant de se désister de sa requête. A cette occasion, l'Inde a réagi avec netteté en faisant valoir que:

> "The General Act of 1928 is either not in force or, in any case, its efficacy is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared" (Statement of the Government of India in Continuation of its Statement of 28 May 1973 and in Answer to Pakistan's Letter of 25 May 1973, affaire relative au *Procès des prisonniers de guerre pakistanais*, *C.I.J. Mémoires, plaidoiries et documents*, vol. 146, p. 143).

Telle est aussi, Monsieur le président, la position de l'Inde en la présente instance.

Ainsi, depuis 1945,

- *aucune* affaire n'a été soumise à la Cour avec succès sur la base de l'article 17 de l'Acte général de 1928;
- en admettant que celui-ci soit, résiduellement, toujours en vigueur, ce ne pourrait être que pour ce qui est de ses dispositions ne renvoyant ni à la SdN, ni à la CPJI; et,
- s'il n'est pas tombé en désuétude, le moins qu'on puisse dire, Monsieur le président, est qu'il est «tombé en incertitude».

Votre Cour, Madame et Messieurs les juges, a cependant toujours évité de lever cette incertitude. La présente affaire pourrait être l'occasion de le faire une fois pour toutes. Mais ce n'est pas inéluctable. Vous pouvez aussi, comme dans l'affaire du *Plateau continental de la mer Egée*, prendre la question autrement et constater votre incompétence pour d'autres motifs, qui vous dispenseraient de trancher, d'une manière générale, les questions de la validité et de l'efficacité de l'Acte de 1928.

Il vous suffit pour cela de constater, sans qu'il soit besoin de s'interroger sur la question de savoir si et dans quelle mesure l'Acte général d'arbitrage constitue, *in abstracto*, un traité ou une convention en vigueur au sens des articles 36, paragraphe 1, et 37 du Statut, il ne l'est en tout cas pas dans les relations entre l'Inde et le Pakistan.

II. L'Acte général d'arbitrage de 1928 n'est pas un traité ou une convention en vigueur entre l'Inde et le Pakistan

Monsieur le président, pour que la Cour soit compétente sur le fondement d'une clause de juridiction, il faut non seulement que cette disposition figure dans un traité en vigueur, mais encore qu'il le soit entre les deux Parties au différend. Ce n'est pas le cas ici, pour de très nombreuses raisons.

Avant de les exposer, je souhaite toutefois introduire un élément de clarification. Selon la définition généralement admise, «l'expression «succession d'Etats» s'entend de la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire» (art. 2, par. 1 *b)*) commun aux conventions de Vienne de 1978 et 1983).

En 1947, deux phénomènes de succession d'Etats, simultanés mais distincts, se sont produits. En premier lieu, devenant indépendante, l'Inde s'est substituée à l'Inde britannique, en ce sens, elle lui a «succédé». En second lieu, le Pakistan s'est détaché de l'Inde pour devenir, lui aussi, un Etat indépendant ce qui a donné lieu à un autre phénomène de succession d'Etats, du Pakistan par rapport à l'Inde, cette fois.

A ces deux phénomènes de succession d'Etats, s'appliquent des règles différentes codifiées d'ailleurs dans des parties distinctes de la convention de 1978 sur la succession d'Etats en matière de traités. Cette convention est entrée en vigueur le 6 novembre 1996, elle n'a été ratifiée ni par l'Inde, ni par le Pakistan, même si celui-ci l'a signée en 1979. Il n'en reste pas moins que, par exemple, dans l'affaire du *Différend frontalier*, la Chambre de la Cour y a vu une «convention de codification» (arrêt du 22 décembre 1986, *C.I.J. Recueil 1986*, p. 563, par. 17) et que, dans son arrêt du 25 septembre 1997, la Cour a considéré que certaines de ses dispositions reflétaient des règles de nature coutumière (voir *C.I.J. Recueil 1997*, p. 72, par. 123).

Au sens de cette convention, l'Inde est, en 1947, un «Etat nouvellement indépendant», qui hérite de la personnalité de l'Inde britannique; le Pakistan, pour sa part, se sépare de l'Inde et son accession à l'indépendance pose d'autres problèmes, régis par d'autres règles, codifiées par les articles 31 et suivants de la même convention. En d'autres termes, alors que l'Inde est l'Etat continuateur de l'Inde britannique, ce n'est pas le cas de la Partie pakistanaise, qui se détache *de l'Inde* et hérite *d'elle*. Telle a d'ailleurs été aussi la position du conseiller juridique des Nations Unies dans un avis de 1947 sur lequel je reviendrai tout à l'heure (Nations Unies, communiqué de presse, PM/473, 12 août 1947, reproduit *in* «La succession d'Etats et la qualité de Membre des Nations Unies», mémorandum publié par le Secrétariat, *Annuaire de la Commission du droit international*, 1962, vol. II, p. 119).

Il faut donc examiner séparément les deux aspects du problème, Inde, d'une part, Pakistan, d'autre part.

A. L'Inde n'est pas et n'a jamais été liée par l'Acte général

En ce qui concerne l'Inde d'abord, il convient d'appliquer les règles générales de la succession d'Etats en matière de traités et, en particulier, celles codifiées par les articles 16 et 17 de la convention de 1978. Aux termes de l'article 16 :

> «Un Etat nouvellement indépendant n'est pas tenu de maintenir un traité en vigueur ni d'y devenir partie du seul fait qu'à la date de la succession d'Etats le traité était en vigueur à l'égard du territoire auquel se rapporte la succession d'Etats.»

Par conséquent, aucun automatisme. L'Etat nouvellement indépendant peut établir, en principe, sa qualité de partie, mais uniquement par une notification de succession comme le précise le premier paragraphe de l'article 17.

Ces deux dispositions (art. 16 et 17) reflètent sans aucun doute le droit coutumier. Je me permets, Madame et Messieurs de la Cour, de vous renvoyer à cet égard aux démonstrations, très argumentées, du rapporteur spécial de la Commission du droit international, sir Humphrey Waldock, sur les projets d'articles 6 et 7 qu'il proposait (troisième rapport sur la succession en matière de traités, *Annuaire de la Commission du droit international*, 1970, vol. II, p. 34-47) et au commentaire des projets d'articles 15 et 16 de la Commission elle-même (devenus respectivement les articles 16 et 17 de la convention) (*Annuaire de la Commission du droit international*, 1974, vol. II, première partie, p. 217-225).

L'Inde n'a jamais fait la notification de succession expressément prévue par la règle rappelée au paragraphe 1 de l'article 17 et réglementée par l'article 22 de la convention. Davantage même : par sa communication du 18 septembre 1974 au Secrétaire général des Nations Unies, le ministre indien des relations extérieures déclarait :

> "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." (*Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999*, ST/LEG/SER.E/17, Sales N° E.99.V.5, fn. 10, p. 977.)

On peut vraiment difficilement être plus clair.

Sir Elihu Lauterpacht a soutenu hier que la constatation ainsi faite par l'Inde était erronée : "So far as India was concerned, there was no succession; there was continuity" (CR 2000/1, p. 55, par. 8). Oui, l'Inde est le continuateur de l'Inde britannique. Elle hérite de sa personnalité. Elle continue sa participation aux organisations internationales dont celle-ci était membre. Mais ceci dans le cadre des règles de la succession d'Etats, dont je viens de montrer qu'elles n'impliquent aucune automaticité (sauf s'agissant des traités à portée territoriale), faute de quoi c'est la souveraineté même de l'Etat nouvellement indépendant qui se trouverait hypothéquée.

Mais il y a plus. Non seulement l'Inde, en l'espèce, n'a pas notifié son intention de continuer à être liée par l'Acte général, non seulement elle a clairement indiqué qu'elle ne s'était jamais considérée comme ayant été liée depuis son indépendance, mais encore, même si elle l'avait voulu, elle n'aurait pas *pu* être liée.

L'Acte général relève en effet de la catégorie générale des traités intransmissibles; de ceux qui ne sont pas susceptibles de passer à un Etat successeur par la voie de la succession d'Etats du fait de leur objet et de leur but. Hypothèse qui est du reste expressément réservée par le paragraphe 2 de l'article 17 de la convention de 1978.

Telle est la position, par exemple, du grand spécialiste du droit de la succession d'Etats qu'était le professeur O'Connell, qui précise que les traités de ce type ne sont pas transmissibles en donnant expressément l'exemple de l'Acte général de 1928 ("Independence and Succession of States", *BYBIL* 1962, p. 132; voir aussi, du même auteur, *State Succession in Municipal Law and International Law*, vol. 2, *International Relations*, Cambridge U.P., 1967, p. 213). D'autres auteurs et non des moindres, comme Castren ou sir Robert Jennings et sir Arthur Watts, prennent la même position en ce qui concerne les traités d'arbitrage (E. J. S. Castren, «Aspects récents de la succession d'Etats», *RCADI* 1951-1, vol. 78, p. 435 ou sir Robert Jennings et sir Arthur Watts, *Oppenheim's International Law*, précis, p. 211).

Il est du reste frappant qu'*aucun* Etat nouvellement indépendant n'a *jamais* fait de notification de succession concernant l'Acte général. En revanche, comme celui de l'Inde, le Gouvernement dominicain a adressé au Secrétaire général des Nations Unies, le 24 novembre 1987, une communication à son sujet. Par celle-ci, il déclarait que, «en tout état de cause, l'Etat libre associé de la Dominique ne se considère pas lié par cet Acte depuis son accession à l'indépendance» (*Traités multilatéraux déposés auprès du Secrétaire général*, état au 30 avril 1999, ST/LEG/SER.E/17, n° de vente F.99.V.5, p. 1019).

Il y a là une «dénonciation de précaution» comparable à celles de la France, du Royaume-Uni ou de la Turquie, qui ne sauraient, assurément, démontrer que ces Etats considéraient que l'Acte général était en vigueur à la date à laquelle ils ont adressé leur communication au Secrétaire général des Nations Unies, contrairement à ce qu'a prétendu hier M. Kemicha (CR 2000/1, p. 46, par. 5). Le Royaume-Uni précise que sa notification de dénonciation ne préjuge pas ses vues «quant au maintien en vigueur de l'Acte général» (*Traités multilatéraux déposés auprès du Secrétaire général*, état au 30 avril 1999, ST/LEG/SER.E/17, n° de vente F.99.V.5, p. 1020). Quant aux Gouvernements français et turc, ils réaffirment la ferme position qu'ils avaient prise respectivement durant les affaires des *Essais nucléaires* et du *Plateau continental de la mer Egée* (*ibid.*, p. 1019 et 1021).

Selon mon contradicteur et ami sir Elihu, la notification de l'Inde serait de nature différente en ce sens qu'elle ne pourrait s'analyser en une dénonciation de l'Acte général (CR 2000/1, p. 54, par. 6). C'est faire preuve d'un formalisme très excessif. Nous sommes en droit international public, dont l'une des caractéristiques, soulignée à l'envie par la jurisprudence et la doctrine est justement, son absence de formalisme (cf. arrêt du 19 décembre 1978, affaire du *Plateau continental de la mer Egée*, *C.I.J. Recueil 1978*, p. 39, par. 95 ou arrêt du 1er juillet 1994, affaire de la *Délimitation maritime et des questions territoriales entre Qatar et Bahreïn*, *C.I.J. Recueil 1994*, p. 120 ou P. Reuter, *Introduction au droit des traités*, 3e éd. par Ph. Cahier, PUF, Paris, 1995, p. 27 ou *Oppenheim's International Law*, précis, p. 1207). L'intention, seule, compte. Du reste, si l'article 45 de l'Acte général prévoit que sa dénonciation «se fera par notification écrite adressée» au dépositaire, il n'impose à cette notification aucune forme particulière. L'Inde a adressé une telle notification au Secrétaire général des Nations Unies; elle va plus loin qu'une simple dénonciation mais il n'est pas raisonnable de ne pas reconnaître qu'elle est au moins cela.

Voici donc où nous en sommes, Monsieur le président:

1) l'Acte général n'est plus en vigueur ou, à tout le moins, il a perdu toute «efficacité judiciaire» depuis la disparition de la SdN et de la Cour permanente;

2) il n'a pu passer à l'Inde indépendante par voie de succession car, traité d'arbitrage, il relève d'une catégorie de traités dont la doctrine s'accorde à penser que, par nature, ils ne sont pas transmissibles, ce que confirme la pratique en ce qui concerne précisément l'Acte général;

3) quand bien même il n'en irait pas ainsi, ce que je n'admets que pour les besoins de la discussion, il ne saurait être question de succession automatique en l'absence de toute notification de succession de la part de l'Inde indépendante, qui, certes, «continue» la personnalité juridique de l'Inde britannique, mais n'en est pas moins un «Etat nouvellement indépendant» auquel s'appliquent les règles générales de la succession d'Etats;

4) l'Inde a, au surplus, clairement déclaré en 1974 qu'elle ne s'était jamais considérée comme étant liée; et,

5) à titre subsidiaire, cette déclaration peut, en tout état de cause, s'analyser comme une dénonciation parfaitement valide au regard de l'article 45 de l'Acte de 1928.

A cette liste, assez impressionnante, de raisons qui chacune excluent que l'Acte soit en vigueur à l'égard de l'Inde, s'en ajoute une autre ou, plutôt, une série d'autres, que le Pakistan a soigneusement passé sous silence dans ses plaidoiries d'hier, alors pourtant que l'Inde les a fait valoir clairement dans son contre-mémoire (p. 11-12, par. 25-28). Ces raisons tiennent aux réserves formulées par le Gouvernement de l'Inde britannique au moment de son adhésion à l'Acte général, en 1931. Nous aurions beaucoup aimé, Monsieur le président, de ce côté-ci de la barre, savoir ce que la Partie pakistanaise avait à dire à ce sujet. Nous avons été frustrés et je ne peux guère que résumer ce que l'Inde a écrit et vous prier, Madame et Messieurs de la Cour, de bien vouloir vous y référer.

Trois de ces réserves de 1931 présentent une importance particulière en ce qui nous concerne :

- celle du paragraphe 1 iii) de l'instrument de l'adhésion de l'Inde britannique portant sur

  > "Disputes between the Government of India and 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 a manner as the parties have agreed or shall agree";

  cette réserve exclurait donc la compétence de la Cour pour tout différend opposant l'Inde au Pakistan, membre du Commonwealth;

- deuxième réserve pertinente, celle contenue dans le paragraphe 1 v) qui concernait:

  > "Disputes with any Party to the General Act who is not a Member of the League of Nations" (*Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999*, ST/LEG/SER.E/17, Sales N° E.99.V.5, p. 975),

  cette réserve exclurait donc aussi la compétence de la Cour à l'égard du Pakistan qui n'était pas et qui n'est pas devenu membre de la SdN (j'en redirai quelques mots sous un autre angle);

- et, troisième condition, celle qui est posée au paragraphe 2 de l'acte d'adhésion, par laquelle le Gouvernement de l'Inde britannique se réservait de suspendre l'application de l'article 17 à l'égard des différends dont le Conseil de la SdN était saisi – condition qui est devenue inopérante depuis la disparition de la Société des Nations, mais qui était une condition de l'adhésion de l'Inde britannique à l'Acte général, ce qui confirme, si besoin était, que l'Acte de 1928 n'est plus en vigueur à l'égard de l'Inde depuis lors.

J'ai dit, en commençant cette digression relative aux réserves de l'Inde britannique, que nos contradicteurs ne les avaient pas évoquées hier matin. Ce n'est pas tout à fait exact, Monsieur le président. A vrai dire, sir Elihu y a fait une allusion puisqu'il a affirmé que dans un geste de générosité (a "liberal gesture", CR 2000/1, p. 60, par. 27), le Pakistan y avait renoncé en 1974… Je ne suis pas vraiment sûr que cette renonciation soit aussi désintéressée que l'on veut vous le faire croire… Mais indépendamment de ceci, l'interprétation que le Pakistan donne à son «geste» est tout à fait intéressante puisque, et je cite à nouveau son conseil, cette «renonciation» aurait signifié: "we don't need to adhere to the reservations, we don't want *to limit the efficacy of the General Act* as thus inherited" (*ibid.,* les

italiques sont de nous). C'est un aveu, Monsieur le président: les réserves de 1931 seraient passées aux très hypothétiques Etats successeurs (si succession il y avait) et ces réserves «limitent» votre compétence — mais sir Elihu est britannique et donc maître de l'*understatement*; cette «limite» constitue ici, purement et simplement, l'exclusion de la compétence de la Cour.

Au demeurant, Monsieur le président, il va de soi que l'Inde n'invoque les réserves de 1931 qu'à titre subsidiaire puisqu'à ses yeux elle n'est pas, et n'a jamais été, liée par l'Acte général depuis son accession à l'indépendance. Il n'en reste pas moins que si elle avait hérité de l'Inde britannique, elle l'aurait fait avec les réserves de 1931 et, a elle seule, *chacune* de ces réserves suffirait, s'il en était besoin, pour écarter la compétence de la Cour en la présente espèce.

B. Le Pakistan n'est pas et n'a jamais été lié par l'Acte général

Il est tout aussi évident que le seul fait que l'article 17 ne puisse être invoqué par le Pakistan à l'encontre de l'Inde suffit, Madame et Messieurs les juges, à exclure votre juridiction. Ce n'est donc que pour surplus de droit que je vais examiner maintenant la situation du Pakistan cette fois, à l'égard de l'Acte général de 1928. Cet examen conduit du reste à une constatation similaire: en admettant que l'Acte général demeure en vigueur, *quod non*, le Pakistan n'y est, de toutes manières, pas non plus partie. Mais pour des raisons qui pour l'essentiel sont différentes.

L'une, il est vrai, est commune. Il s'agit de celle qui tient au caractère intransmissible de l'Acte général lui-même. L'Inde ne pouvait, pour cette raison y succéder, le Pakistan, à fortiori, ne le peut pas non plus.

Pour le reste, le problème se présente différemment. Alors que l'Inde continue la personnalité juridique de l'Inde britannique ce que semblent admettre nos contradicteurs (CR 2000/1, p. 55, par. 8), le Pakistan, lui, s'en sépare. Comme l'a relevé le Secrétaire général adjoint des Nations Unies chargé des affaires juridiques dans un avis du 8 août 1947 approuvé et rendu public par le Secrétaire général (que sir Elihu a cité très partiellement hier, *ibid.*) :

> «Du point de vue du droit international, on se trouve en présence d'un cas où une partie d'un Etat se détache de lui et devient un nouvel Etat. Sous cet angle, il n'y a pas de changement dans le statut international de l'Inde; elle demeure un Etat et conserve tous les droits et toutes les obligations découlant des traités… Le territoire qui se détache, le Pakistan, sera un nouvel Etat, qui n'aura pas les droits et obligations conventionnels de l'ancien Etat…» (Nations Unies, communiqué de presse, PM/473, 12 août 1947, reproduit *in* «La succession d'Etats et la qualité de Membre des Nations Unies», mémorandum publié par le Secrétariat, *Annuaire de la Commission du droit international*, 1962, vol. II, p. 119.)

La Cour suprême du Pakistan s'en est d'ailleurs montrée bien d'accord dans l'arrêt du 6 juin 1961 rendu dans l'affaire *Yangtze (London) Ltd. v. Barlas Brothers (Karachi) and Co.* que Monsieur l'*Attorney General* de l'Inde a mentionné tout à l'heure. Selon cet arrêt (je suis désolé, je vais être amené à faire d'assez longues citations en anglais),

> "the Indian Independence (International Arrangements) Order 1947 did not and, indeed, could not provide for the devolution of treaty rights and obligations which were not capable of being succeeded to by a part of a country which is severed from the parent state and established as an independent sovereign power, according to the practice of States . . . [A]s far as it can be gathered, the consensus of opinion amongst international jurists seems to be in favour of the view that as a general rule a new State so formed will succeed to rights and obligations arising only under treaties specifically relating to territories, e.g., treaties relating to its boundaries or regulating the navigation of rivers or providing for guarantees or concessions but not to rights and obligations under treaties, affecting the State, as such, or its subjects, e.g., treaties of alliance, *arbitration* or commerce. An examination of the said Order also reveals no intention to depart from this principle." (Documentation concernant la succession d'Etats, *Série législative des Nations Unies*, 1967, ST/LEG/SER.B/14, p. 137-138; les italiques sont de nous.)

Cette constatation faite, la Cour suprême cite l'annexe à l'*Order* de 1947 et elle en déduit :

> "Under these provisions it is significant that Pakistan . . . did not automatically become a member of the United Nations nor did she succeed to the rights and obligations which attached to India by reason of her membership of the League of Nations at Geneva or the United Nations. It is difficult therefore, to appreciate how clause 4 of the said Order can be said to be applicable to all kinds of international agreements or that it intended to provide for the succession to rights and obligations of the parent State which did not normally devolve upon a State established by succession from the parent State under the

rules of International Law or which attached to the parent State as a consequence of her membership of an international organisation." (*Ibid.*, p. 138.)

Et la Cour suprême de conclure que, dès lors, le Pakistan ne pouvait accéder à la convention de 1927 pour l'exécution des sentences arbitrales étrangères ratifiée par l'Inde britannique en 1938 :

"The ratification could thus be made by only a member State [of the League of Nations] and had to be deposited with the Secretary-General of the League of Nations. In the circumstances if Pakistan could not under the Indian Independence (International Arrangements) Order succeed to the rights and obligations acquired by British India by virtue of her membership of the League of Nations or its successor organisation – the United Nations – it follows that Pakistan could not be deemed to have succeeded to the right of ratification that British India possessed as a member of the League of Nations and the ratification of the Protocol by British India could not enure to the benefit of Pakistan." (*Ibid.*, p. 139.)

Ce raisonnement est en tous points transposable à l'Acte général de 1928.

Celui-ci, il faut le rappeler, est un traité fermé, auquel, en vertu de l'article 43, paragraphe 1, seuls peuvent adhérer les Membres de la Société des Nations et les «Etats non membres à qui le Conseil de la Société des Nations aura, à cet effet, communiqué une copie.» Comme l'ont fait remarquer les auteurs de l'opinion dissidente commune de 1974, si séduisante aux yeux des conseils du Pakistan et qui est soucieuse de faire produire à l'ancien Acte général des effets particulièrement étendus :

«l'Acte de 1928 n'a eu qu'un nombre limité de parties et il n'a été ouvert à l'adhésion que d'un groupe restreint et bien défini d'autres Etats, alors que l'Acte général revisé est ouvert à l'adhésion d'un groupe d'Etats beaucoup plus vaste et qui continue à s'élargir» (affaire des *Essais nucléaires*, *C.I.J. Recueil 1974*, p. 339, par. 58).

Contrairement à l'Inde, le Pakistan n'était pas membre de la SdN et, comme l'a bien très bien montrée la Cour suprême pakistanaise, il n'a pas succédé à l'Inde à cette qualité, pas davantage qu'il n'a succédé aux traités que l'Inde a conclus à titre de Membre de la SdN. L'Acte général n'est donc pas opposable au Pakistan et il n'a pas vocation à y devenir partie. Sa communication du 30 mai 1974 ne peut donc être considérée ni comme une notification de succession, ni comme une adhésion; celle-ci ne lui était pas ouverte.

Le Pakistan ne figure d'ailleurs pas dans la liste des Etats qui «peuvent adhérer» dressée par le Secrétaire général des Nations Unies (voir *Traités multilatéraux déposés auprès du Secrétaire général*, état au 30 avril 1999, ST/LEG/SER.E/17, n° de vente F.99.V.5, p. 1018).

Et, bien entendu, l'«accord de dévolution» constitué par l'accord indo-pakistanais intitulé *Agreement as to the Devolution of International Rights and Obligations upon the Dominions of India and Pakistan*, annexé à l'*Indian Independence (International Agreements) Order* du 4 août 1947, cet accord de dévolution ne change rien à l'affaire. Comme l'a bien vu la Cour suprême du Pakistan, il illustre, au contraire, les situations, bien différentes, dans lesquelles se trouvent les deux Etats.

D'une part, comme cela ressort de l'article 8 de la convention de 1978 :

«1. Les obligations ou les droits d'un Etat prédécesseur découlant de traités en vigueur à l'égard d'un territoire à la date de la succession d'Etats ne deviennent pas les obligations ou les droits de l'Etat successeur vis-à-vis d'autres Etats parties à ces traités du seul fait que l'Etat prédécesseur et l'Etat successeur ont conclu un accord stipulant que lesdites obligations ou lesdits droits sont dévolus à l'Etat successeur.

2. Nonobstant la conclusion d'un tel accord, les effets d'une succession d'Etats sur les traités qui, à la date de cette succession d'Etats, étaient en vigueur à l'égard du territoire en question sont régis par la présente convention.»

Et cette thèse, approuvée par une doctrine unanime qui comprend d'ailleurs les meilleurs esprits, y inclus mon savant contradicteur (E. Lauterpacht, "State Succession and Agreements for the Inheritence of Treaties", *ICLQ*, vol. 7, 1958, p. 527; voir aussi M. G. Marcoff, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, éditions universitaires, Fribourg, 1969, p. 322-342; Z. Mériboute, *La codification de la succession*

d'Etats aux traités — Décolonisation, sécession, unification, PUF, Paris, 1984, p. 104 ou sir Robert Jennings et sir Arthur Watts, *Oppenheim's International Law*, 9th. ed., vol. I, *Peace*, Longman, Londres, 1992, p. 231), correspond en effet à la pratique des Etats comme le montrent les auteurs qui se sont penchés sur la question *(ibid.)* et les travaux préparatoires au sein de la Commission du droit international (voir notamment le deuxième rapport de sir Humphrey Waldock, *Annuaire de la Commission du droit international*, 1969, vol. II, p. 54-62 et le commentaire final du projet d'article 8 par la Commission, *Annuaire de la Commission du droit international,* 1974, vol. II, première partie, p. 187-193). Du reste, lors de la première partie de la conférence de Vienne, en 1977, les représentants et de l'Inde et du Pakistan ont approuvé la rédaction retenue (conférence de Vienne sur la succession d'Etats en matière de traités, *Comptes rendus analytiques des séances plénières et des séances de la commission plénière*, *première session*, Vienne, 4 avril-6 mai 1977, vol. I, A/CONF.80/16, pp. 84 et 87).

D'autre part et de toutes manières, l'Inde ne pouvait pas «partager» avec le Pakistan quelque chose qu'elle n'avait pas. Elle ne pouvait partager que ce qu'elle avait. Plus «scientifiquement», l'accord de dévolution (conclu, je le rappelle, *entre l'Inde et le Pakistan - pas entre le Royaume-Uni et le Pakistan* – ce qui est naturel puisque c'est *à l'Inde* que le Pakistan succède) - cet accord de dévolution ne pouvait, évidemment porter que sur les traités auxquels l'Inde elle-même avait succédé à l'Inde britannique. Or, comme je l'ai montré tout à l'heure, ce n'était pas le cas de l'Acte général de 1928.

Et c'est pourquoi, Monsieur le président, l'*Expert Committee N° 9 on Foreign Relations*, composé d'experts indiens et pakistanais, qui a préparé la déjà fameuse annexe 4 à l'*Order* de 1947 n'a pas inclus l'Acte général dans la liste des traités susceptibles d'être maintenus en vigueur à la suite de la partition.

Monsieur le président, permettez-moi, d'ouvrir une brève parenthèse à ce sujet pour rassurer la Partie pakistanaise. Sir Elihu nous a dit hier que "[r]egrettably Pakistan cannot find its copy of this volume of the Partition Proceedings" (CR 2000/1, p. 57, par. 18). C'est regrettable, en effet, mais le Pakistan ne peut certainement pas reprocher à l'Inde de lui avoir caché quelque chose qu'il aurait ignoré comme son conseil l'a fait à mots à peine couverts à plusieurs reprises hier (*ibid.*, p. 58, par. 22 et p. 61, par. 33) : le Pakistan en avait (au moins) une copie; il l'a perdue; et, en 1973, son *Chief Counsel*, M. Bakhtiar, n'a pas éprouvé de difficulté à commenter les travaux de ce comité n° 9, en relation avec une question que lui avait posée sir Humphrey Waldock à ce sujet (*C.I.J. Mémoires, plaidoiries et documents* – Affaire relative au *Procès des prisonniers de guerre pakistanais*, 1976, p. 83). Mais enfin, puisque, entre temps, le Pakistan a égaré ce document, M. l'agent de l'Inde se fera, avec votre autorisation, Monsieur le président, un plaisir et un devoir de lui en faire parvenir une copie par l'intermédiaire du greffier. En même temps, nous nous proposons d'en déposer une autre copie pour les membres de la Cour dans l'hypothèse, pas invraisemblable où il serait difficile de se le procurer à La Haye. Voici qui devrait rassurer sir Elihu, ce document n'a rien de secret; il existe – je l'ai rencontré : il est ici !

Bien. Les experts des deux Parties ont donc entrepris, dans le cadre de ce comité n° 9, de dresser la liste nominale "of Treaties Conventions, Agreements etc., Affecting India or Applicable to India to Which She Is a Party" (*Partition Proceedings*, vol. III, précis, p. 217). Ils en ont dénombré six cent vingt-sept qu'ils ont répartis en trois catégories : l'une concerne les traités "of exclusive interest to the rest of India"; une autre ceux "of exclusive interest to Pakistan"; et la dernière les traités "of common interest". L'Acte général d'arbitrage de 1928 ne figure dans aucune d'entre elles (cf. *Partition Proceedings*, vol. III, p. 217-276).

Certes, l'accord de dévolution ne renvoie pas à cette liste, sur laquelle les négociateurs des deux Parties étaient d'accord, alors qu'ils divergeaient sur d'autres aspects. Elle n'en a pas moins constitué la base sur laquelle l'accord a été négocié. Elle constitue l'élément essentiel des travaux préparatoires et témoigne de l'accord des négociateurs sur le sort des traités cités. Elle établit aussi qu'à leurs yeux l'Acte général ne relevait pas de la succession.

Le Pakistan a, à nouveau, témoigné de cette conviction lorsque sa mission permanente auprès des Nations Unies

> «a fait savoir au Secrétaire général qu'en raison des dispositions de l'article 4 de l'annexe à l'ordonnance de 1947 relative à l'indépendance de l'Inde (accords internationaux) les droits et obligations assumés aux termes des accords ci-après énumérés ont été transmis au Pakistan et que, «en conséquence, le Pakistan se considère partie à ces accords»» («La succession d'Etats et les conventions multilatérales générales dont le Secrétaire général est dépositaire», Mémorandum préparé par le Secrétariat, A/CN.4/150, *Annuaire de la Commission du droit international* 1962, vol. II, p. 128, par. 16; voir aussi le paragraphe 18, *ibid.*).

L'Acte général ne figure pas parmi «ces accords».

Et il y a, je l'ai montré, de bonnes raisons à cela, à commencer par la nature même de l'Acte général. Du reste, commentant l'accord de dévolution de 1947, le professeur Oscar Schachter écrivait, dès 1948 : "it has been clear that no succession occurs in regard to rights and duties of the old State which arise from its political treaties such as treaties of alliance *or of pacific settlement*" ("The Development of International Law Through Legal Opinions of the United Nations Secretariat", *BYBIL*, 1948, p. 91). Telle a été aussi, assurément, la ferme conviction du Pakistan jusqu'en 1973, date à laquelle il a, brusquement, changé d'avis pour les besoins de sa cause -- contre l'Inde déjà ! -- dans l'affaire des *Prisonniers de guerre*.

Quant à prétendre, comme le fait le Pakistan (mémoire, p. 8), que l'accord de Simla aurait, en quelque sorte, «verrouillé» la base de compétence soi-disant constituée par l'Acte général, il s'agit là d'une idée originale mais très singulière. Il faudrait, pour cela, non seulement que cet Acte fût, à l'époque, en vigueur entre les Parties -- et j'ai montré que ce n'était pas le cas -- , mais il faudrait aussi que cet accord puisse, raisonnablement, être interprété ainsi, ce que ni son texte, ni son contexte, ni ses travaux préparatoires ne permettent. M. Rao va y revenir dans un seconde. Au surplus, si l'on imagine un instant le contraire, l'Inde et le Pakistan n'auraient, à cette date, été liés que moyennant les conditions résultant des réserves de l'Inde britannique de 1931 -- elles excluaient que l'article 17 de l'Acte général pût s'appliquer dans les relations entre les deux Etats.

Pour résumer, Monsieur le président, et j'en ai presque fini, même en admettant pour les seuls besoins de la discussion, que l'Acte général de 1928 serait toujours en vigueur, le Pakistan n'y est pas davantage partie que l'Inde elle-même :

1) l'Acte de 1928 est un traité fermé qui, par sa nature, ne se prête pas à une succession d'Etats;

2) en tout état de cause, le Pakistan, comme l'a constaté sa Cour suprême, n'est pas le continuateur de l'Inde britannique et ne remplit pas les conditions pour adhérer à l'Acte générale fixées par l'article 43;

3) de toutes manières, la succession à l'Acte général ne saurait être automatique et l'accord de dévolution de 1947 n'a pas opéré *ipso facto* une telle succession; et

4) l'Accord de Simla de 1972 est sans pertinence aucune en la matière.

De quelque manière que l'on envisage la prétendue base de compétence que constituerait l'article 17 de l'ancien Acte général, les choses sont claires, Monsieur le président : une telle base n'existe pas :

- l'Acte de 1928 n'est plus; en tout cas, il n'a plus d'«efficacité judiciaire»;
- ni l'Inde, ni le Pakistan, n'y sont parties et (ni n'y ont jamais été parties); et
- de toutes manières, les réserves faites par l'Inde britannique en 1931 excluraient la compétence de la Cour.

Madame et Messieurs de la Cour, je vous remercie très vivement de votre attention et je vous prie, Monsieur le président, de bien vouloir donner la parole à mon collègue et ami M. P. S. Rao, coagent, conseil et avocat de la République de l'Inde.

Le PRESIDENT: Je vous remercie, Professeur Pellet. I now give the floor to Dr. P. S. Rao, Legal Adviser of the Ministry of External Affairs of India. Dr. Rao, you have the floor.

Dr. RAO: Mr. President and Members of the honourable Court,

1. It is a great honour and privilege for me to appear before the Court as a Co-Agent, counsel and advocate of the Government of India. My distinguished colleagues have already demonstrated that jurisdiction of the Court is not available to Pakistan on account of Article 36, paragraph 2, of the Statute of the Court or the General Act of 1928.

2. I shall now submit that Pakistan cannot invoke the jurisdiction of Court on the basis of (i) the United Nations Charter, (ii) Article 36, paragraph 1, of the Statute of the Court, or (iii) the Simla Agreement of 1972, and in this connection, I shall show that Pakistan cannot rely upon the principles of estoppel, preclusion, or acquiescence.

3. Pakistan contended at paragraph 6 (B) of the Memorial and I shall not quote it, but it will appear in the transcript:

> "B. The jurisdiction of the International Court of Justice is also founded on the provision contained in Article 36, paragraph 1, of the Statute of the Court which states, 'The jurisdiction of the Court comprises all cases which the parties refer to it *and all matters specially provided for in the Charter of the United*

> *Nations* or in treaties and conventions in force.' The said Article of the Statute is to be read with Article 1, paragraph 1; Article 2, paragraphs 3 & 4; Article 33; Article 36, paragraph 3, and Article 92 of the United Nations Charter. The obligations undertaken under Article 1 of the agreement on bilateral relations between India and Pakistan of 2 July 1972, reaffirms this basis of jurisdiction in Article 1, which states that "The principles and purposes of the United Nations Charter shall govern the relations between the two countries." (Memorial of Pakistan, pp. 9-13, para. 6 (B).)

4. The basis of the jurisdiction referring to Article 36, paragraph 1, of the Statute, and referring to a number of Articles of the United Nations Charter. It puts special emphasis on the words "all matters specially provided for in the Charter of the United Nations" referred to in Article 36, paragraph 1. I will first deal with the meaning and scope of the words "all matters specifically provided for in the Charter of the United Nations" which is referred to in Article 36, paragraph 1, of the Statute. Reference to the United Nations Charter separately from other "treaties and conventions in force" in Article 36, paragraph 1, of the Statute may, Shabtai Rosenne remarks, at first sight appear to be an error in drafting (see Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996, Vol. 2: Jurisdiction (1997),* p. 692). However, he explains, having regard to the drafting history, it appears to have been retained initially in the expectation that some matters within the scope of the Charter would fall within the jurisdiction of the Court. At the end of the San Francisco Conference, as this expectation was not met, the reference to the Charter in effect remained without any meaning. There was an effort at the San Francisco Conference to require the Security Council to refer "justiciable" disputes to the Court. However, this effort was not successful, as was a related attempt to make the Court's jurisdiction compulsory. The Dumbarton Oaks text was revised "to make it absolutely clear that the Council itself could not refer a dispute to the Court, but could only recommend this procedure to the parties" (see Goodrich, Hambro and Simons, *Charter of the United Nations: Commentary and Documents, 1969,* p. 282). The draft of Article 36, paragraph 1, of the Statute was left as it was, having no practical effect.

5. Kelsen examined this question and he did not consider it possible to read into Article 36, paragraph 3, of the United Nations Charter, being the only provision which could come into consideration in terms of Article 36, paragraph 1, of the Statute of the Court, any compulsory jurisdiction of the Court. (Hans Kelsen, *The Law of the United Nations (1951),* p. 517.) Mr. President, with your permission, I will not read the citations but they will appear in the transcript, to save time. A separate opinion of seven judges of the International Court of Justice in the *Corfu Channel* case between the United Kingdom and Albania -- the only instance in which the Security Council had recommended that the dispute be referred to the Court -- observed:

> "The arguments presented on behalf of the United Kingdom to establish that this was a new case of compulsory jurisdiction–which arguments the Agent and Counsel for the Albanian Government sought to refute -- have not convinced us. In particular, having regard (1) to the normal meaning of the word recommendation, a meaning which this word has retained in diplomatic language, as is borne out by the practice of the Pan-American Conference, of the League of Nations, of the International Labour Organisation, etc., (2) to the general structure of the Charter and of the Statute which founds the jurisdiction of the Court on the consent of States, and (3) to the terms used in Article 36, paragraph 3, of the Charter and to its object which is to remind the Security Council that legal disputes should normally be decided by judicial methods",

and after giving a lengthy explanation, they came to the conclusion that:

> "it appears impossible to us to accept an interpretation according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction." (*I.C.J. Reports 1948*, pp. 31-32.)

6. A commentator, who had an occasion to deal with this matter later, said:

> "Evidence thus leads to the conclusion that Article 36, paragraph 3, of the Charter has not been regarded and accepted as an additional basis of the Court's jurisdiction either by the judicial or political organs of the United Nations and the position advanced by the United Kingdom at the time of the *Corfu Channel* case *(Preliminary Objections)* appear somewhat strained." (See Gunter Weissberg, "The role of the International Court of Justice in the United Nations System: The First Quarter Century", in Leo Gross (ed.) *The Future of the International Court of Justice* (New York, 1976), Vol. I, p. 168.)

This is a view also shared by leading authorities on the subject and we refer to them in paragraphs 41 and 42 of our Indian Counter-Memorial of 28 February 2000. Accordingly, it is India's submission, that there are no "matters

specifically provided for in the Charter of the United Nations . . ." relating to the compulsory jurisdiction of the Court.

7. Mr. President, this brings me to take a close look at Article 1, paragraph 1, Article 2, paragraphs 3 and 4, and Articles 33 and 92 of the Charter to consider their effect on the jurisdiction of the Court to see if there is any substance to the claims of Pakistan.

8. Article 1 deals with the purposes of the United Nations. Article 1, paragraph 1, highlights the maintenance of international peace and security as the primary purpose of the United Nations. (See the separate opinion of Sir Gerald Fitzmaurice in the case concerning *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion*, *I.C.J. Reports 1962*, pp. 230-215). To that end, several paths were suggested in that paragraph. One of the paths indicated is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". (See Bruno Simma, *The Charter of the United Nations: A Commentary*, 1995, p. 52; Hans Kelsen, *The Law of the United Nations*, 1951, p. 282.) The language of the Article is necessarily set out in general terms as it is dealing with broad purposes, leaving it for other Articles of the United Nations Charter to provide for their implementation in more specific terms. Articles 2, paragraphs 3 and 4, 24, 33 and Chapters VI, VII, VIII and XIV would be relevant to see how these purposes are elaborated and are to be implemented. (Goodrich, Hambro and Simons, pp. 29 and 42.)

9. Article 2, paragraph 3, of the Charter is a corollary to Article 2, paragraph 4. Article 2, paragraph 3, requires States, as a general principle -- and I may say so, as a matter of fact statement -- to settle their international disputes by peaceful means in such a manner that international peace, security and justice are not endangered. Once again this highlights the concern of the United Nations with maintenance of international peace and security. Reference to "justice" in Article 2, paragraph 3, is to indicate support to the policy of prevention of appeasement at the expense of small States. (Ruth B. Russell, *A History of the United Nations Charter*, 1958, p. 658.) Article 2, paragraph 3, is directly related to Article 33 of the Charter, according to which parties to any dispute are required "first of all" to seek a solution by "peaceful means of their own choice". The main effect of Article 2, paragraph 3, is thus not to impose upon parties to the dispute any compulsory method or means of settlement at the instance of one of the parties. This is well explained by Goodrich, Hambro and Simons:

> "The obligation to settle international disputes by peaceful means does not include the obligation to settle particular kinds of disputes by particular means or to follow any particular order of priority in the choice of methods. . . . it is also stated that in article 36 (3) in making recommendations to the parties the Security Council should take into consideration that legal disputes should 'as a general rule' be referred by the parties to the International Court of Justice. A member is not obligated, however, to submit a legal dispute to the Court except in those cases where it has agreed in advance to do so." (Goodrich, Hambro and Simons, *op. cit., p. 43*).

10. Article 2, paragraph 4, does not require any comment as it only deals with the prohibition of threat or use of force.

11. Article 33 emphasizes that States should settle their disputes by peaceful means of their own choice. The 1970 Principles of International Law Concerning Friendly Relations and Co-operation also highlights this point (United Nations General Assembly resolution 2625 (XXV), 24 October 1970). Several methods of settlement of disputes are provided as part of a menu under Article 33 for the parties to so choose freely. The principle of free choice of means is thus central not only to Article 33, but also to the entire Chapter VI. It is observed that:

> "Article 33 is open to the interpretation that the Council is restricted to calling upon the Parties to seek a solution through peaceful means of their own choice, and that it may not call upon them to resort to a particular procedure" ((i) Goodrich, Hambro and Simons, p. 264; (ii) J. G. Merrills, *International Dispute Settlement (1991),* p. 182; and (iii) Gunter Weissberg in Leo Gross (ed.), p. 132).

The scheme of things as provided for in the Charter and particularly in Article 33, as already noted, does not indicate any system of compulsory jurisdiction which, it is suggested by Simma's commentary, is "foreign" to the Charter of the United Nations (Simma (ed.)*, supra,* p. 512).

12. For these reasons, I submit that there is no strength in the contentions advanced by Pakistan that there is an implied obligation to submit legal disputes as a general rule to the International Court of Justice (Memorial of Pakistan, p. 10). It is therefore incorrect for Pakistan to suggest that

"The spirit and underlying obligations of the United Nations Charter, in any case, raise the presumption of a residual jurisdiction of the International Court of Justice in the case of legal disputes, in circumstances when one party has refused to resort to any of the other peaceful means of settlement enumerated in Article 33 of the Charter." (Memorial of Pakistan, p. 11.)

13. It can also readily be seen that Article 92 equally does not establish any compulsory jurisdiction of the International Court of Justice. The fact that the Statute of the Court is made an integral part of the Charter does not amount to establishing a compulsory jurisdiction. On the other hand, it only states that the Court shall act in accordance with the Statute. This means that the consent-based jurisdiction of the Court is recognized under Article 92. As I have already noted, all efforts to establish compulsory jurisdiction at the San Francisco Conference failed and that it was eventually decided to retain the optional clause in essentially the same form as it appeared in the Statute of the Permanent Court of International Justice. (Goodrich, Hambro and Simons, p. 547.) The fact that the Court was made one of the principal judicial organs of the United Nations and that all Members of the United Nations are *ipso facto* parties to the Statute, did not alter the situation and Leo Gross noted this and said that "the jurisdiction of the Court remained optional" (Leo Gross, *"The International Court of Justice: Consideration of Requirements for enhancing its role in the International Legal Order",* in Leo Gross (ed.), p. 30).

14. There is, however, one specific conclusion to be drawn from making the Statute an integral part of the Charter. That is, "the Statute enjoys the same primacy over international agreements accorded to the Charter itself in Article 103" (Goodrich, Hambro and Simons, p. 552). It is not correct and hence not open to Pakistan to equate the "bilateral relationship" arising out of two unilateral declarations filed under Article 36, paragraph 2, of the Statute with that of an international agreement, with a view to bringing them within the scope of Article 103. (Memorial of Pakistan, p. 8, para. 6 (F).) They relied upon the *Electricity Company of Sofia and Bulgaria* case -- and I submit that that case did not equate such bilateral arrangements to international agreements.

15. This matter was even more correctly stated by the Court itself in the *Fisheries Jurisdiction* case, and I need not bother you with further material on that. (See case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*, Judgment, 4 December 1998, p. 22.)

16. Mr. President permit me now to address the plea of estoppel, preclusion and acquiescence put forward by Pakistan (Memorial of Pakistan, pp. 17-18, para. 6 (E).) I have already indicated that the United Nations Charter does not contain any provision imposing compulsory jurisdiction upon member States, even by implication. Professor Brownlie pointed out that such a compulsory jurisdiction exists vis-à-vis India only within the narrow and strict confines of the declaration of India of 1974 and that the "Commonwealth members" reservation is valid. Under the circumstances, it is elementary to note that the parties to the Simla Agreement can only assume those obligations of the United Nations Charter and the Statute of the Court which they actually stipulate, and the question of India attempting to "oust" the peaceful methods of settlement of disputes in relation to Pakistan, in contravention of the terms of the Simla Agreement, as alleged by Pakistan, does not arise at all (Memorial of Pakistan, p. 17).

17. At this stage I would like to refer to Article 1, subparagraph (ii), of the Simla Agreement:

"The two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any peaceful means mutually agreed upon between them."

The point is worth repeating that this provision of the Simla Agreement is no more than an arrangement between India and Pakistan first to enter into negotiations in case of any difference, and following such negotiations, to refer the matter to any other method of settlement to the extent that there is any further and specific agreement between the parties. Such arrangement under Article 1, subparagraph (ii), is not a compromissory clause, which is a precondition to the reference of a dispute covered by a treaty to arbitration or to the Court. (See B. S. Murty, "Judicial Settlement" in Max Sorensen (ed.), *Manual of Public International Law,* 1968, at pp. 687-688; also R. P. Anand, *International Courts and Contemporary Conflicts,* 1974, p. 209.) This arrangement does not and cannot impose upon India an obligation to conclude an agreement on a particular method of settlement. It would be entirely for the parties to agree upon a particular method of settlement of disputes, having regard to all the circumstances of the case.

18. Pakistan's attempt to read the General Act of 1928 into this text, is contrary to logic and all accepted principles of interpretation of international arrangements and agreements. The words "any other peaceful means mutually agreed upon between them" must be read along with *"bilateral negotiations"*. To equate a multilateral agreement with a bilateral arrangement and to get the latter incorporated into the former will only do violence to the natural and plain reading of the text. Furthermore, the intention of the parties could not have been to effect any such

incorporation. Moreover if they had decided that the obligation of judicial settlement be incorporated, they could have directly referred to the provisions of the Statute of the Court — International Court of Justice — instead of harking back to a multilateral agreement of 1928 which had never been in force for Pakistan or India, as Professor Pellet has so clearly pointed out. The improbability of the parties intending to incorporate the General Act of 1928 into the Simla Agreement of 1972, Mr. President, coupled with the specific language of Article 1, subparagraph (ii), renders the argument of Pakistan totally baseless. It is clear therefore that the plea of estoppel, preclusion or acquiescence made by Pakistan is not only irrelevant but inapplicable to the present question of establishing the jurisdiction of the Court. Particularly, the plea that the Simla Agreement estops India from pleading the Commonwealth reservation as provided in its declaration of 1974, as Sir Elihu Lauterpacht has contended yesterday, does not hold any water.

19. Mr. President, a mere reference to the United Nations Charter or the Statute of the Court to which India is a party, is not sufficient to raise the plea of estoppel, preclusion or acquiescence, particularly if India's conduct is in conformity with the provisions of those instruments. The Chamber of the Court in the *Gulf of Maine* case explained the terms well:

> "The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion. According to one view, preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle. Without engaging at this point on a theoretical debate, which would exceed the bounds of its present concerns, the Chamber merely notes that, since the same facts are relevant to both acquiescence and estoppel, except as regards the existence of detriment, it is able to take the two concepts into consideration as different aspects of one and the same institution" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 305).

It essentially pointed out that "the same facts are relevant to both acquiescence and estoppel, except as regards the existence of detriment, it is able to take the two concepts into consideration as different aspects of one and the same institution". Earlier the Court in the *North Sea Continental Shelf* cases also rejected an argument that the equidistance rule for the delimitation of continental shelves for which provision was made in Article 6 of the 1958 General Convention on the Continental Shelf had become binding on the Federal Republic of Germany by virtue of her conduct, notwithstanding that the Federal Republic of Germany had not become a party to that convention. The Court denied this argument and found that the conduct of Germany did not create any such estoppel:

> "it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention, — that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case" *(I.C.J. Reports 1969*, p. 26, para. 30).

20. The principles involved were examined by authoritative commentators. Bowett explained:

> "the essential elements of estoppel are: *(a)* the statement of fact must be clear and unambiguous; *(b)* the statement of fact must be made voluntarily, unconditionally and must be authorized; *(c)* there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement." (See D. W. Bowett, "Estoppel before International Tribunals and Its Relation to Acquiescence" *British Year Book of International Law,* Vol. 33 (1957), pp. 176-202, at p. 202.)

21. Brownlie commented upon this (see Ian Brownlie, *Principles of Public International Law*, 1998, p. 646 for enumeration of various authorities and other references) and, more recently, after examining the case-law of the Court, Sir Ian Sinclair observed that:

> "This brief survey of the case law of the present Court on estoppel and acquiescence sufficiently bears out the point that there is a close link between these two concepts, and indeed that they must be considered as part of the wider pattern of state conduct which an international tribunal may find to be relevant to the determination of an inter-state dispute. The survey, however, equally demonstrates that

the Court will be reluctant to penalise a state unduly for inconsistency of conduct, and in particular to find that the conduct relied on has created an estoppel in the strict sense." (Sir Ian Sinclair, "Estoppel and acquiescence" in Vaughan Lowe and Malgosia Fitzmaurice, *Fifty years of the International Court of Justice* (1996) pp. 104-120, at p. 120.)

22. Mr. President, it is significant that Pakistan does not specify any instance in which it created a situation which is opposable to India and India remained silent to bring such a conduct within the ambit of the principle of acquiescence; nor does it indicate any instance in which Pakistan relied on a clear and consistent affirmation by India and acted upon it either to its own detriment or to the advantage of India in order for the principle of estoppel to apply.

Mr. President, and honourable Members of the Court,

23. I respectfully submit that Pakistan has failed to found the jurisdiction of this Court on grounds of either:

(i) *the United Nations Charter;* or

(ii) *Article 36, paragraph 1, of the Statute of the Court;* or

(iii) *the Simla Agreement; and in this connection, Pakistan cannot rely upon the principles of estoppel, preclusion and acquiescence.*

I thank you for your patience. I thank you once again.

The PRESIDENT: Thank you very much, Dr. Rao. Ceci clôt notre session de ce matin. Je remercie chacune des Parties pour les exposés de qualité qui nous ont été présentés. La Cour se réunira à nouveau demain à 10 heures et jeudi à 10 heures pour les deuxièmes tours de plaidoiries de la République islamique du Pakistan et de la République de l'Inde. Chacune des Parties disposera à cet effet d'un maximum de trois heures. J'aimerais cependant rappeler que conformément à l'article 60, paragraphe 1, du Règlement de la Cour, les présentations orales doivent être aussi succinctes que possible et j'ajouterais que ce deuxième tour de plaidoiries a pour objet de permettre à chacune des Parties de répondre aux arguments avancés oralement par l'autre Partie. Ce second tour ne doit donc pas constituer une répétition des présentations déjà faites par les Parties et celles-ci ne sont évidemment pas tenues de plaider pendant les trois heures dont elles disposent. Je vous remercie.

L'audience est levée à *13 h 5.*

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