International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2000

Public sitting

held on Wednesday 5 April 2000, at 10 a.m., at the Peace Palace,

President Guillaume and Vice-President Shi presiding, successively,

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

VERBATIM RECORD

ANNEE 2000

Audience publique

tenue le mercredi 5 avril 2000, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président, puis de M. Shi, vice-président

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

COMPTE RENDU

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

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Le PRESIDENT : Veuillez-vous asseoir. La séance est ouverte. Cette audience marque le début du deuxième tour de plaidoiries orales et la parole sera ce matin à la République islamique du Pakistan. I now give the floor to Sir Elihu Lauterpacht for Pakistan.

Sir Elihu LAUTERPACHT: Thank you, Mr. President.

Mr. President and Members of the Court, it is my task to attempt to reply to the case that has been put by the Government of India. I thank you, Mr. President, for having recalled yesterday the terms of Article 60, paragraph 1, of the Rules. I certainly intend, or will attempt to comply with that prescription.

As the Court will realize, in the manner in which these hearings have been organized, with no whole day between the presentation of the Indian case or the opportunity for Pakistan to reply to it, I have had to work under considerable pressure to prepare myself. I should say this is emphatically *not* a pre-prepared reply. I apologize to the Court for a presentation which may, as a result, be a little less than smooth, because there is no fully prepared text. I must also apologize to the interpreters and ask for their patience and tolerance, because I have not been able to provide them with a text on what I am about to say.

There is one opening comment that I am bound to make on the Indian approach. My expectation was that yesterday India would have replied to Pakistan's opening statement. In fact, India did not reply to Pakistan's opening statement. Pakistan's arguments — and I put this as being a central point — about the Commonwealth reservation were almost entirely disregarded. And any reply thereto was oblique — oblique and incidental — rather than direct. The Pakistan argument that the Commonwealth reservation was inapplicable or unopposable to Pakistan was never discussed, nor was the argument that the inapplicability or inopposability avoided the need to discuss the question of severability. These were just left aside.

Perhaps the Court may take it that India has no answer to make to these Pakistan arguments. However, the possibility has to be foreseen that India may be saving its real reply to these arguments for its rejoinder tomorrow. In anticipation of that possibility, may I say that Pakistan would take the gravest exception to such a course. If India had answered yesterday what Pakistan had said on Monday, then Pakistan would have had the opportunity of responding today to what India might have said yesterday. But if India answers tomorrow, Pakistan will not have that opportunity, unless the Court recognizes the inequality flowing from such a course of argument and gives Pakistan the opportunity to reply to any new points that India may then make. In that event, I would find it necessary to ask the Court to consider a further sitting, at whatever might be a moment convenient to the Court, in order to allow Pakistan to redress the balance.

Mr. President and Members of the Court, in order to provide a framework for this reply, let me very briefly recall the two main grounds on which Pakistan rests jurisdiction: (i) the optional clause; (ii) the General Act. I will not pursue the argument that the Court has jurisdiction under Article 36, paragraph 1, as the case specially provided for in the Charter. Within the optional clause there are two main issues: the first on the effect of the Commonwealth reservation; the second on the effect of the multilateral treaty reservation. I can say straight away that I need not take the Court's time in relation to the multilateral treaty reservation. In no way does Pakistan abandon the case which it has put on the multilateral treaty reservation, but Pakistan does not need to invoke the Charter as the substantive basis for its case, which really rests on considerations of customary international law. The fact that customary international law is embodied in the Charter does not weaken the strength of Pakistan's case.

Pakistan is not arguing that the multilateral treaty reservation is void or inapplicable, or not opposable to it. It does not need to. The multilateral treaty reservation is simply irrelevant and Pakistan relies, as it said earlier, on the view that the Court took of the multilateral treaty reservation in the *Nicaragua* case. So I shall, Mr. President, concentrate on the Commonwealth reservation.

Now there appears to be some misunderstanding on the part of India. Pakistan is not now arguing that the Commonwealth reservation is void, notwithstanding the fact that the Indian arguments were essentially directed to the question of whether or not the Commonwealth reservation is invalid. All India's arguments about the wide freedom enjoyed by States to make reservations is not to the point. Pakistan does not contest that States may make what we have chosen to call in our opening speeches "extra-statutory reservations", that is to say, reservations that go beyond the scope permitted by Article 36, paragraph 3, of the Statute.

Pakistan's point is more subtle. True, it starts from the proposition that the Commonwealth reservation is not in

accordance with Article 36, paragraph 3 — it falls outside the scope of the items identified there; I need not repeat the supporting arguments. But the consequence is not that the Commonwealth reservation is void. It is only that it cannot be invoked against Pakistan. It is not opposable to Pakistan, and that is because, as Pakistan explained in its opening speeches, an extra-statutory reservation can only be invoked against a State that in some way or another has exhibited its agreement to the presence of the extra-statutory reservation. One reason may be that the applicant State itself has a comparable reservation and is therefore precluded from denying the opposability of a similar reservation introduced by the defendant. Or it may be that the applicant State chooses to meet the reservation on its substance. You will recall that the Court had to consider some aspects of this matter in the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*. Ultimately, the Court approached the matter in terms of finding that Spain's arguments were about the interpretation of the Canadian reservation, not about its validity, so the Court did not consider the question of the validity or opposability of the Canadian reservation.

So I am suggesting, Mr. President, or stating, that Pakistan's arguments relating to the Commonwealth reservation are not that it is void ¾ it is only that it is not opposable to Pakistan. India has been saying that Pakistan's arguments are bold, novel ¾ this is in relation to the assumption that the argument is about validity. The argument is not about validity. But in so far as there is an element of novelty, this does not make the Pakistan argument wrong. Courts are always being confronted by new points of law, new arguments, in relation to what had previously been thought to have been settled or comprehensive jurisdiction. If the law consisted only of old points, then there would be nothing for courts to do. In other words, I am urging that the Court should approach this matter with an open mind, as I am sure it does. The fact that the argument has in it an element of novelty, that it suggests a way for the Court to approach the resolution of this problem, does not ¾ if I may respectfully say so ¾ weaken or invalidate the argument. Pakistan has been submitting a way in which the Court can escape from the limitations of a reservation, which I have argued earlier, is obsolete. It really has no place in the contemporary scene.

India has made no reply to Pakistan's demonstration that India does not in general have a problem with compulsory jurisdiction in certain situations, or that India accepts the applicability of international law in its relations with Pakistan. Not a word has been said by India in response to the mention of the Rann of Kutch case, the ICAO proceedings in this Court, the compulsory effect of the provisions in the United Nations Convention on the Law of the Sea of 1982, or the dispute settlement understanding of the World Trade Organization. Why is no reference made to those? Why does India not try to distinguish them from what Pakistan is urging is the position in this case, namely a position of compulsory jurisdiction? I would respectfully suggest, Mr. President, that India does not do so because it is shaming that a State should accept that degree of exposure to litigation in the situations I have just mentioned and yet decline to come to this Court in the circumstances of the present case.

What Pakistan has built up is a case showing that India's recourse to the Commonwealth reservation is simply an arbitrary way of excluding proceedings by Pakistan and not anyone else. Pakistan says that this is not a good faith way of operating. In this connection, it refers to the Simla Accord, not as itself being uniquely a direct source of the jurisdiction of the Court, but as supportive of the denial to India of the right to use the Commonwealth reservation to exclude jurisdiction in this case. How can one seriously undertake, as India has done in the Simla Accord, to settle disputes by peaceful means, and then interpose the Commonwealth reservation in the circumstances of this case. I am urging the Court, Mr. President, to look at the facts of this case, of the special relationship between India and Pakistan established by the Simla Accord. India cannot on the one hand in that Agreement hold out the hand of friendship and say "we will settle disputes by peaceful means to be agreed" and then, when Pakistan invokes those peaceful means, which pre-existed the Simla Accord and existed after it too. India cannot therefore say "No, we are going to adhere to the strict terms of our reservation".

To this line of argument, Mr. President, India has offered no reply, and I submit that it is not entitled to return to these matters at this stage of the hearing. Because India has stuck to a pre-prepared position on the Commonwealth reservation, it has produced nothing new in response to Pakistan on this point. Mr. President, in taking heed of your admonition, I will avoid unnecessary repetition. If, however, I should prove wrong in identifying the areas which I may properly omit from this reply, I should be most grateful if any Member of the Court who is troubled by that omission would put to me any question that they consider necessary.

The argument which was advanced on behalf of India that there is no limit to the reservations that a State may make and that it is a good thing that reservations should be allowed; that, I would submit, is a highly debatable opposition. There is little evidence that optional clause declarations have been a significant source of jurisdiction for the Court, except in the sense that the Court has been given plenty of work considering preliminary objections. Is this a good thing? Is the course of judicial settlement advanced by such an approach? But more important, the question of the liberty to make reservations has always been considered against the background of the prospective invalidity of an extra-statutory reservation. Pakistan's proposition, however, is not so far reaching. Pakistan does not seek to prevent

the making of extra-statutory reservations. It acknowledges that they may operate when the respondent State shows that it accepts them. All that Pakistan is saying is that an extra-statutory reservation is not opposable to a State that does not accept it.

As such, the reservation is not void. Its condition does not give rise to the problem of severability. The reservation simply cannot be used against the State that objects to it and has done nothing previously to imply its consent to it. The Court has never had occasion to consider this point and therefore has never excluded it. Pakistan contends that it is an approach that the Court can, and should, in my respectful submission, properly apply.

I turn to another point, Mr. President. My learned friend Professor Brownlie acknowledged at one point that some reservations may be invalid. He did so in guarded terms. He sought to distinguish those cases in which individual judges had pointed out that reservations should not be repugnant to the Statute, but he said that their views had all been related to Article 36, paragraph 6, the paragraph relating to the Court's right to determine its own jurisdiction. He overlooked the mention by Pakistan of the observation of Judge Ago in the *Nauru* case regarding the obsolescence and inapplicability of the British Commonwealth reservation, an observation which ¾ coming from a judge of such experience and standing ¾ is not likely to be disregarded. Yet that by itself does not exclude the application — in other words, that being the relationship between those judges who were opening up the possibility of questioning a reservation and Article 36, paragraph 6. That does not by itself exclude the application of comparable reasoning to reservations incompatible with Article 36, paragraph 3. Professor Brownlie did not suggest any basis on which the two situations might be distinguished. My submission is that if one can question, as Professor Brownlie appears to accept, the compatibility of a reservation with Article 36, paragraph 6, so equally one can question the compatibility of a reservation with Article 36, paragraph 3 ¾ always assuming that the conditions are appropriate. Moreover, I say in passing, his approach to the matter was in terms of invalidity consequential upon incompatibility. Pakistan's suggestion is much less bold ¾ not invalidity, but inapplicability ¾ and is therefore the more readily accepted.

Professor Brownlie then advances an argument to the effect that the concept of obsolescence is admissible at all, is only admissible in relation to the whole declaration of which the obsolete reservation forms part. But apart from the authority of his own statement — and I concede that it is considerable — he has not advanced any objective consideration in support of his position. Even though India may have reasserted its Commonwealth reservation in 1974, that does not prevent it being obsolete even when adopted or reaffirmed. As I suggested to the Court on Monday, the Commonwealth reservation has long since passed its use-by date. The fact that it is still on the shelves does not improve its quality.

Now, Mr. President, permit me please to turn next to the question of the survival of the General Act. I am leaving the optional clause matter behind me, my submission on that is that India's Commonwealth reservation is not applicable to Pakistan and that the Court may properly proceed on that basis.

India's second contention — as an alternative or a supplementary approach — is that jurisdiction of the Court exists under the General Act of 1928. Pakistan contends that the General Act survived the demise of the League of Nations. I am bound to suggest that the relationship, or dependence as some have put it, of the General Act upon the League of Nations has been somewhat exaggerated.

If I may, Mr. President — and I do not propose to spend much time on this — let me just quickly look at the text of the General Act. Chapter I, as the Court will remember, deals with conciliation and the only reference in that Chapter to the League of Nations is in Article 9, which says that in the absence of agreement to the contrary between the parties the Conciliation Commission shall meet at the seat of the League of Nations; hardly a major element of dependency upon the existence of the League.

Let us turn to Chapter II, Judicial Settlement, which is the Chapter invoked by Pakistan. There is not a word in Chapter II about the League of Nations. Nor is there in Chapter III about arbitration. So one then turns to Chapter IV, General Provisions, and it is only in Article 43 that there is mention of the League of Nations. Article 43 says that

> "The present General Act shall be open to accession by all the Heads of States or other competent authorities of the Members of the League of Nations and the non-Member States to which the Council of the League of Nations has communicated a copy for this purpose".

I will come later to the question of closed membership, but that is the reference to the League in Article 43 and then in Article 44, there is a reference to the "Act [coming] into force on the ninetieth day following receipt by the

Secretary-General of the League of Nations of the accession of not less than two Contracting Parties", which is obviously an item that has been overtaken by events; and then in Article 45 there is the provision about denunciation, to be effected by a written notification addressed to the Secretary-General of the League; and in Article 46, a copy of the present act shall be deposited in the archives of the League; and in Article 47, the reference to registration by the Secretary-General of the League.

I mean no disrespect to Judge Morozov, whose views were quoted by India, but with the greatest of respect to him, the text which I have just shown to the Court does not really bear out his proposition that the existence and operation of the General Act is so closely tied to the League of Nations, that its survival is dependent upon the continuation of the League. Moreover, as the Court will be aware, the functions of the League, of the kind that are referred to in the General Act, were transferred to the United Nations by corresponding resolutions of both the last League of Nations Assembly and of the first General Assembly of the United Nations. The relevant resolution is General Assembly resolution 24/1 of 12 February 1946. I need only read you four short extracts:

> "*The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below."

And then later on:

> "These functions include: The receipt of additional signatures and of instruments of ratification, accession and denunciation; receipt of notice of extension of the instruments to colonies or possessions of a party . . .; notification of such acts to other parties . . . Any interruption," the resolution continues, "in the performance of these functions would be contrary to the interests of all the parties."

It continues:

> "*Therefore: The General Assembly* declares that the United Nations is willing to accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations."

And that is all in that Assembly resolution which is really necessary for the purpose of showing how the United Nations was able or was empowered to take over the functions previously performed by the Secretary-General of the League. The performance by the United Nations Secretariat of those functions is evidenced, as the Court will of course know, by this massive volume called multilateral treaties deposited with the Secretary-General, where, in the last section, one will find references to the various treaties concluded under the auspices or within the framework, or in association with, the League of Nations where the functions have been taken over by the United Nations Secretariat.

There is, and I say this parenthetically, one additional provision in that resolution, of which I think the Court may like to be aware. Section C is called *"Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments, Having a Political Character"*.

> "*The General Assembly* will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character."

So far as I am aware, no request of that kind was ever made to the United Nations in respect to the General Act. An absence of a position taken by the parties to the General Act which suggests that they did not think it was an instrument having a political character. And this may be of relevance at some other point in the Court's consideration of this case, when the view is examined that there should be no succession in respect of political treaties. But that is, as I said, Mr. President, just a parenthetical point.

I just want to turn for a moment to the suggestion that the closed circle of States parties to the General Act excludes the participation of Pakistan. Mr. President, my submission is — and I will support it in significant detail in a moment — that this contention cannot affect Pakistan because Pakistan succeeded to the participation of a previously undivided India. Pakistan was *not* a new party, it was *not* excluded from participation in the General Act because it was *not* seeking to become a new party. It was a party by reason of India's original membership.

And now, Mr. President, I come to a rather important set of considerations: the nature of the succession that took place in India in 1947. My learned friend, Professor Pellet, referred to the 1978 Vienna Convention on Succession of States in respect of Treaties. It is not a very important point, but I must make it, that that Treaty, that Convention, by its own terms only applies to succession occurring after entry into force, not to events that occurred 30 years earlier. Nor does the possibility that some provisions of that Convention may be held to fall within the range of matters of customary international law extend to the rather technical approach that that Convention adopted in relation to other matters of State succession, so I mentioned that just to put it aside.

However, what really matters in this case are the facts, and the general approach of India to the question of succession does not tally with the facts. It is a very important point, my emphasis is on the facts, as I shall presently demonstrate.

Professor Pellet classified the position of India as a newly independent State which inherits the personality of British India. In his view, Pakistan, for its part, was separated from India and its succession poses other problems. What was the true position? For this, Mr. President, Members of the Court, we must look afresh at the third volume of the Partition Proceedings. I must say that I did not see a copy of this volume until yesterday, when it was very kindly provided to us by India. Professor Pellet was at pains to indicate that India had not deliberately suppressed the volume, and I certainly had not intended to suggest that there had been an element of deliberate suppression, though I may point out, that in accordance with the Rules of Court, India should have filed with the Court at the time of its Counter-Memorial the volume to which it was referring. Anyway, I am grateful to India for having provided us with a copy and presumably it also provided the Court with a copy, and I have handed to the interpreters a truncated copy which contains, I hope, all the pages to which I am about to refer.

The position that appears from the Partition Proceedings is somewhat different from the position as set out by India previously. Forgive me, Mr. President, for reading rather a lot, but it is a rather interesting study ¾ and in parts almost makes one feel that one is like a detective unravelling a mystery. Also, it is the only way that I have of conveying to the Court the subtleties of the situation. I have in my hand, Mr. President, a photograph provided by India of the Partition Proceedings, Volume III. The title page shows that it was printed in India by the Manager of the Government of India Press, New Delhi, in 1948. As background to the study of this volume, the Court must bear in mind the terms of the Indian Independence Act of 1947, which entered into force on 18 July 1947. There are two provisions that I must specifically mention, as indicative of the fact that India and Pakistan were intended to be created as two dominions on a footing of equality; there is no question of some superiority being accorded to India by virtue of its pre-existing international personality, and some subordination of Pakistan, by virtue of its separation from India.

The Act conveys the philosophy that we are dealing here with two equal and independent States, and that philosophy is reflected in two provisions; Section 1, paragraph 1, as from 15 August 1947, two independent dominions shall be set up in India to be known respectively as India and Pakistan. The second provision ¾ of which one should be aware ¾ is that in Section 9, which gave to the Governor General the power to make orders considered by him to be necessary or expedient for a variety of purposes. It was this section, pursuant to which the Indian Independence (International Arrangement) Order of 1947, was made — made on 14 August 1947, before Independence on 15 August. So the division ¾ to which I shall come back in a moment — the division of treaty obligations was established prior to Independence. It was not a case of India devolving treaties upon Pakistan; that was a matter that was regulated even before the two dominions came into existence.

Having spoken of the background, permit me please to take you to the document itself. I have read you the title page, the indication of its provenance. The title page says "Partition Proceedings, Volume III, Expert Committees Nos. III-IX"; the Contents follows, and there are nine chapters — we are only interested in the last one, Chapter 9, which is called "Foreign Relations", and extends from pages 201 to 294. The section or the chapter is introduced by the heading "Foreign Relations". The first item in it is called "Report of the Expert Committee No. IX, on Foreign Relations"; it is preceded by a list of the members: Composition — and I shall just make it very short — Mr. Pai, Mr. Ikramullah, Mr. Iskander Mirza, Mr. Achuta Menon, Mr. Jha, they were the five members; three were, as I understand it, Indian or Hindu and two were Pakistani or Muslim and there were two secretaries.

Let us start by looking at the terms of reference. "To examine and make recommendations on the effect of partition" — then follows a list of five items:

> "(i) on the relations of the successor Governments with each other and with other countries (including the countries of British Commonwealth and border tribes),

(ii) on the position of Indian nationals abroad,

(iii) on India's diplomatic representation,

(iv) on the existing treaties and engagements between India and other countries and tribes,

(v) on India's membership of international organizations."

We then enter the substance of the report, and we have headings on the "Relations of successor Governments with each other and with other countries", that contains nothing of relevance; "Relations between India and Pakistan", that we need not get into; "Relations of the two Dominions with other countries". It is interesting that in that section there appears a sentence which I admit I am taking in a sense out of context but it has a bearing on what we have been talking about: "the British Government", it says, this is in paragraph 10, page 205,

> "The British Government have taken the view on many occasions in the past that the relations of various parts of the Empire *inter se* are not relations governed by international law but are constitutional in character, but whatever may be the position in theory, in practice, in relation to each other stand in the same position as independent units."

I only mention that to support what I said on Monday, about the ancient origin, the *inter se* doctrine of the Commonwealth reservation.

Then on the next page, there follows a very important section (p. 206),

> "13. It is thus clear that in their relations with foreign countries, India and Pakistan will stand as sovereign independent units. They will as such be free to enter into treaties or agreements, to exchange diplomatic representatives and to take their place in international organizations.
>
> 14. In this connection, it is necessary to examine the juridical position as regards the international personality of India and Pakistan. Messrs. Pai, Menon and Jha [they are the Indian members] consider that the true position is that certain parts of India have become separated from the main body which continues the international personality of present India. Partition will not result in the extinction of the international personality of India."

I emphasize that — even the Indian members say that partition will not result in the extinction of the international personality of India — fully supportive of the point that I was making on Monday that we have in relation to India itself a situation of continuity.

> "Amongst the many reasons in support of this view it would be enough to mention the following:
>
> > *(a)* Clause 2 of the Indian Independence Act distinctly brings out that the territories of India shall be the territories under the sovereignty of His Majesty which immediately before the appointed day were included in British India with certain exceptions; this establishes the identity of the Dominion of India with the India of to-day.
> >
> > *(b)* After certain northern and eastern portions of its territories are separated from India, nearly three-quarters of the territory will still be comprised in the remainder along with the capital of the State [that is, India].
> >
> > It is a recognised principle of international law that a reduction in the size of a State so long as an essential part remains would not obliterate its identity. According to international jurists the identity of a State is considered to subsist so long as a part of the territory which can be recognised as an essential portion through preservation of the capital or of the original territorial nucleus or which represents the State by continuity of Government remains either as an independent residuum or as the core of an enlarged organisation. The question is whether a sufficient nucleus of territory with the capital and continuity of Government remains to carry on the personality capable of discharging general obligations. All these conditions will be fulfilled by the residuum remaining after secession and constitution of certain territories into the Government of Pakistan.

(c) The fact is that the partition of India has not been brought about by any revolution involving even momentarily the overthrow of Government established by law and in consequence the extinction of the international personality of India.

(d) It is understood that H. M. G. have recognized the position that the Dominion of India inherits the international personality of British India but in the final resort this issue will be decided by appropriate international bodies."

Then comes paragraph 15, which is important:

"15. Mr. Ikramullah and Lt. Col. Iskander Mirza [they are the Muslim members] do not accept the view that the Dominion of India alone will continue the international personality of the existing India. They are strongly of the view that on the 15th August two independent Dominions of equal international status will come into existence as successors to the existing Government of India which will disappear altogether as an entity. This view is reinforced by the fact that today two Governments are functioning in the country, one for Pakistan and one for India with equal status. The wording of the Indian Independence Act lends no support to the view put forward by their colleagues. It sets out to create two independent Dominions out of the existing India."

Mr. President, here is the first indication of the division of opinion which eventually had to be resolved in the Indian Independence (International Arrangements) Order, of which the schedule has been read to the Court and which stands as an international agreement between the two countries. We are entitled to take all this into consideration in reading that Order.

I concede that on Monday I suggested that one was not entitled to go behind the Order to look at the Partition Proceedings as *travaux préparatoires*, and so on. But, Mr. President, that was on Monday, and today I have seen the Partition Proceedings, and it would be entirely wrong of me to pretend that they do not have a bearing on the task before the Court.

So I move then from page 207, where I read paragraphs 13 to 15, I skipped the references to the board of tribes and to the position of Indian nationals abroad and to diplomatic representation, and I go to page 213:

"42. Existing treaties and engagements between India and other countries and Tribes. — Annexure V [that is, the list of treaties that we have been talking about] contains a list of the treaties, conventions, agreements, etc. entered into by the Government of India or by H. M. G. in which India is interested. The treaties have been classified into three categories:

A. Those which are of exclusive interest to Pakistan.

B. Those which are of exclusive interest to India.

C. Those which are of common interest.

This list also includes treaties and agreements entered into with the Tribes both on the North West and North East Frontiers."

The section continues, paragraph 43:

"43. The legal position appears to be that if India minus Pakistan will remain the same international entity as she was before partition she will continue, in respect of the rest of India, to be subject to the obligations and entitled to the benefits of all international engagements to which pre-partition India was a party either directly or through H. M. G., except those in respect of which she is rendered by partition incapable of exercising its rights and performing its obligations. This position will not be affected by any change in her constitutional set-up or by the acquisition by her of the status of a Dominion. The position which Pakistan will occupy in this respect is, however, not altogether clear. If she is regarded as a new State, one view is that she will not be bound by any treaty to which the pre-partition India was a party nor will she be entitled to any benefits thereunder. This conclusion is also supported by the opinion of international jurists, . . ."

They then cite a passage from Sir Thomas Holland which I need not read. It will appear, however, that she — that is,

Pakistan — would be bound by such treaties as were entered into by HMG on behalf of members of the British Commonwealth. We consider, for example, that the Afghan treaties entered into between HMG and the Afghan Government will continue to have force so far as the Pakistan Government is concerned.

I go to page 214, paragraph 44:

> "44. The following view has been expressed by Sir Dhiren Mitra, Solicitor to the Government of India on the rights and obligations of India and Pakistan under the existing treaties of the three categories namely [as I have read them to you before],
>
> *(a)* treaties of exclusive interest to Pakistan
>
> *(b)* treaties of exclusive interest to India, and
>
> *(c)* treaties of common interest as quoted below:"

I continue to quote — there is a quotation within what I am reading to you from the views of Sir Dhiren Mitra, and this is his view:

> "The Treaties falling under category *(a)* of your letter of the 16th July [which is not included and I have not seen it] fall within the exception mentioned in paragraph 1 of my note [again, a document I have not seen], will bind Pakistan and will not devolve upon the Dominion of India. The Afghan Treaties regarding boundaries run with the land and will bind Pakistan as the successor in interest in the territory affected.
>
> The treaties falling under category *(b)* will, of course devolve on the Dominion of India.
>
> *(c)* Treaties of common interest to both will have effect as if the Treaty was effected after consultation between the Governments of the two Dominions in accordance with the procedure indicated in McNair on Treaties, page 70 *(b)*."

I had a look at the old edition of McNair prior to the volume on treaties of 1960. I had a look at that page. It does not really shed much light upon the matter. What counts for our purposes is that Sir Dhiren Mitra is saying treaties of common interest to both will have effect as if the treaty was effected after the necessary procedures — operative in the old days — had been concluded.

I am continuing to read from the Mitra opinion:

> "There is no difference in this context between a Treaty concluded by the Government of India as a contracting party or His Majesty's Government in relation to the Indian Empire. Existing Treaties will continue and will operate as indicated before and will not be abrogated by reason of the Indian Independence Act except to the extent provided in section 7 thereof [which is not relevant to our purpose]. In this context, also please do not lose sight of the fact that the Indian Independence Act effects a mere change in the constitution of India, the Crown remaining the same as before."

He continues:

> "Though the Dominion of India will continue the international personality of present India, according to my note, it does not follow that the Dominion of Pakistan will have no international personality of her own dating from the 15th August 1947. As a matter of fact, she will have such personality."

That is the end of the quotation from Sir Dhiren Mitra. The text of the report continues as follows: "45. It has not been possible for the Committee in the short time available to it" ¾ I emphasize in that "short time available to it", as I mentioned on Monday, everything was being done in a great hurry ¾ "to have a more thorough examination made of the legal aspects of the matter and to pronounce an authoritative opinion. The Committee would recommend . . ." ¾ and I just pause on the word "recommend", as later on you will see there is a suggestion or an indication that the recommendation of the Committee should be followed, and this is that recommendation ¾

> "that both Governments should take steps immediately to obtain expert legal opinion on all aspects of this question. We would also suggest that the provisions of each treaty should be scrutinized by both

> Governments. Thereafter it will be open to them, if necessary, to enter into fresh agreements with the other contracting parties."

Then we go, Mr. President, from page 214 to page 215. Then there is the heading "Membership of International Organizations. — Annexure VI gives a list of the international organisations and subsidiary bodies of which India is a member." Then we refer back to paragraphs 14 and 15 for the question of India's continuation of the membership of international organizations. "The special procedure regarding membership of the United Nations is set out in Annexure VII." Then after that paragraph there follow the signatures of the five members and the two secretaries.

So, bear in mind please, Mr. President, that this document which I have been reading to you is not an agreement between the two sides, although it was signed by the five members; it is merely a document that contains an analysis and very limited recommendations.

Now we go on, Mr. President, to Annexure V, which starts at page 217, and is headed "List of Treaties, Conventions, Agreements, etc., affecting India or applicable to India to which she is a party". Then there is an attribution to the External Affairs and Commonwealth Relations Department of India, the External Affairs Wing. There then follows some 60 pages listing the treaties to which India was a party, and that continues until page 276. As I mentioned on Monday, Mr. President, that list is not wholly accurate. There are certain very significant omissions. For example, as I then mentioned the Geneva Conventions of 1929 on Prisoners of War and the Treatment of Sick and Wounded, have been overlooked. Likewise, 43 extradition treaties were overlooked; likewise the Protocol and Convention on Arbitration of 1923 found no place in the list. I think if the Court wanted to see an independent view of the matter, it could look at the international or association volume on the effect of independence on treaties where mention is made of these matters at page 109. Not only did the list omit certain treaties, it also wrongly included certain treaties ¾ for example, the Treaty between Great Britain and Bahrain, or the treaties with the Indian rulers, which had lapsed. So the list, though significantly long, is not comprehensive.

Now we come, Mr. President, to the next rather interesting bit. The annexures are followed at page 287 by something called "Steering Committee's Note on Effect of Partition on Foreign Relations". Regrettably no dates are attached to these documents, so we cannot be absolutely certain of the correct order, but it looks as if this document temporarily follows on what I have just been reading.

> "The report of Expert Committee No. IX appointed to examine the effect of partition on foreign relations is attached. The Steering Committee are in substantial agreement with the views expressed therein and recommend that the conclusions reached by the Committee be approved."

Those were the recommendations I identified to you a moment or two ago, and they were not very large; they were saying the matter should be looked at by each government on the basis of advice to be obtained. Then paragraph 2 of this Steering Committee's note states:

> "2. The Expert Committee has been unable to reach an agreed decision on the juridical position regarding the international personalities of India and Pakistan (paragraphs 14 and 15) and its effect, if any, on Treaty Obligations (paragraphs 43 and 44) and membership of International Organisations (paragraph 47). The Steering Committee proposes to put up separately a note on this subject for consideration by the Partition Council at a later date."

So now we go over the page to page 288, and we have the "Partition Council's Decision":

> "1. The Council approve the recommendations of the Steering Committee on the report of Expert Committee No. IX.
>
> 2. The Council noted that the Steering Committee would put up separately a note for consideration on the juridical position regarding the international responsibilities of India and Pakistan and its effect, if any, on Treaty Obligations and membership of International Organizations."

So that decision came before the note had been put up. The next document is the note ¾ "Note on the Juristic Position regarding International Personality and Treaty Obligations". This begins at page 289, and from what appears in a later document, which I will come to, it would look as if this note was prepared by Mr. Patel, who I understand would be an Indian, who is not a member of the Committee.

> "It has to be considered who inherits the international obligations and corresponding privileges

contracted by the present Government of India.

In the determination of this question not only the Dominions of India and Pakistan but also H. M. G. and other Member nations of international organisations are vitally interested and must have their say."

Then comes the paragraph:

"The Secretary of State for India was advised by the Foreign Office to the effect that the terms of the India Independence Act will lead to the inference that the new Dominion of India continued the international personality of the existing India. The Cabinet Committee in the U. K. which examined this matter thought that this view should be accepted by H. M. G. so far as India's external relations were concerned, but that it would be reasonable for the assets of the Government of India outside India to be included in the joint equitable division of assets, even though legally such assets would pass to the rest of India."

Then, the note continues,

"During the passage of the Bill in the House of Commons the Government spokesman clarifying the position, stated as follows:

'The question of international status of the two new Dominions is not one which will be finally determined by terms of this Bill [that is, the Indian Independence Bill which became the Act]. It is a matter for members of U. N. O. and other foreign states as much as for H. M. G. in the U. K. Our own view is that the new Dominion of India continues the international personality of existing India and that she will succeed as a matter of International Law to membership of U. N. O. which existing India enjoys as an original signatory of San Francisco Charter. Similarly representatives of the Dominion will in our view be entitled to membership of existing international organisations and specialised agencies in which India has hitherto participated. Our hope is that on establishment of new Dominion of Pakistan she will be accepted as a new member of Family of Nations and that she will before long be able to make her proper contribution to international goodwill and collaboration.'"

And then Mr. Patel continued after a few lines:

"As H. M. G. have pointed out in the above statement the question can only be decided in the light of International Law on State Succession and not with reference to the convenience of the parties."

Then he continues:

"The recognised principles are that neither a variation in the extent of a State's territory nor a change in its constitution, affects the identity of the State."

And he goes on to give a number of examples, and the last one he mentions is:

"Indeed, in the case of India herself, the separation of the entire Province of Burma from India in 1937, did not affect the identity of India as an international entity and the membership of the League of Nations . . .

On the establishment of the two new Dominions, the position of the Dominion of India will not be materially altered."

Then he goes on to refer to the effect of changes in the constitution:

"it is established beyond question that a change in the form of Government does not in any way alter the international personality of a State".

I then quote the whole of the following paragraph on page 290.

"Such being the position, it will not be open to the Dominion of India, even if it chooses to do so, to

contend that in consequence of the setting up of the two new Dominions the identity of India as an international person has been destroyed and that in consequence the new Dominion of India is no longer responsible for the obligations previously assumed by India. On the contrary, for reasons already explained, the Dominion known as India will not only in name but also in fact remain identifiable with the international person known as India and all the obligations and rights of India will continue to be discharged or asserted by the Dominion of India. The terms of the Indian Independence Bill confirm this view."

Then I skip towards the end of the summary:

"To sum up, the position in international sphere consequent upon the setting up of the two new Dominions will be as follows:

(1) All international obligations assumed by pre-existing India will devolve on the Dominion of India and that Dominion will be entitled to the rights associated with such obligations. (In this category will fall India's membership of the United Nations.)

(2) All international obligations assumed by the pre-existing India which have exclusive territorial application to any area comprised in Pakistan will devolve on the Dominion of Pakistan with all the rights associated with such obligations.

(3) All international obligations assumed not by the international entity known as India as such but by His Majesty's Government in the United Kingdom acting on behalf of the British overseas possessions and which have territorial application to India as a whole will devolve on both the Dominions with all the rights associated with such obligations."

Now we come — that is the note that was put up — to the Steering Committee's note on the juridical position regarding the personality of the two countries.

"1. The attached note [that is, the one I have just read to you] on the juridical position regarding the international personality of India and Pakistan and its effect on international obligations has been prepared by Mr. Patel and is based on a summary of the correspondence exchanged between the Secretary of State for India and His Excellency the Governor General. Mr. Mohd. Ali [that is a Muslim member] does not subscribe to the view set out in it. He considers that the present Government of India will disappear altogether as an entity and will be succeeded by two independent Dominions of equal international status both of whom will be eligible to lay claims to the rights and obligations of the present Government of India."

Here we have a further indication of the difference of opinion between the Indian and the Pakistani side regarding the true succession. "The note is submitted for the consideration of the Partition Council."

So now Mr. President, we come to the Partition Council's Decision. It gets more and more interesting.

"His Excellency [that is presumably the Governor General] said that he had just received a telegram from the Secretary of State pointing out that it was essential for Pakistan to apply for membership of U. N. O. before the 10th August . . ." — this was in order that Pakistan should make it to the United Nations at that session.

"His Excellency said that H. M. G. were not anxious to interfere in what they considered to be a domestic matter between India and Pakistan, but they had felt it necessary to point out that there was a grave objection to India's national identity being extinguished by reason of the partition."

The reason given was of the possible impact that it might have on the rules relating to international indebtedness in cases of State succession.

And then he goes on:

"Mr. Mohmad Ali [and this is a Pakistani member] said that according to the formula he had suggested India would continue her membership of International Organisations like U. N. O. on behalf of the Dominion of India as from the 15th August, while Pakistan would apply for membership of such

> International Organisations as she desired to join. As regards obligations and rights in respect of treaties which run with the land, it was agreed that these would devolve only on the Dominion concerned. Pakistan's viewpoint was, however, that both Dominions should assume all international obligations and enjoy all rights arising out of treaties and agreements negotiated by the existing Government of India or by H. M. G. acting on behalf of the Dominion overseas. The practical advantage of this course would be that Pakistan would not have to negotiate afresh in regard to such matters."

Now we are coming to the interesting *dénouement*.

> "His Excellency [that is the Viceroy] suggested that Mr. Cooke [Mr. Cooke was a very distinguished English barrister who was at that time a member of the Parliamentary Draftsman's Office], the Constitutional Adviser, should be asked to evolve, if possible, a formula which would meet the case of both sides."

Let me emphasize that: *a formula which would meet the case of both sides*.

> "He would place this formula before the Pakistan and Indian cabinets for consideration when they met, to consider the Adaptation Orders."

Then follows the Partition Counsel's decision:

> "The Council agreed that the Constitutional Adviser should be requested to [I think it is evolve, but the copy is defective] evolve, if possible, a formula which would meet the case of both sides."

It is a decision of the Partition Council. "Such a formula, if evolved, would be placed before the Pakistan and India Cabinets for their approval."

The next, and, you will be pleased Mr. President to know, the final document is the Indian Independence (International Arrangements) Order 1947, which has to be read in the light of this long history that I have just given you and particularly in the light of the instruction given to the Constitutional Adviser to evolve a formula which would meet the case of both sides. And what was that formula? Well, I will just read the opening recital of the Indian Independence (International Arrangements) Order: "Whereas the agreement set out in the Schedule to this Order has been reached at a meeting of the Partition Council on the 6th day of August, 1947"; we come to paragraph 4:

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

"All international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan." And so in this manner, the Constitutional Adviser reconciled the positions of both countries, gave effect both to India's view and to Pakistan's view, particularly Pakistan's view. The situation was one of parthenogenesis, in other words you have two entities, a cell splitting into two separate entities, each of which has its own personality and each of which inherits or assumes or contains, whatever word you like, the rights and duties internationally of the previous international person.

Mr. President, I understand that you like to rise at this time, and this might be a convenient place at which to break. I hope that after the Court returns, I shall not take very long.

The PRESIDENT: Thank you very much, Sir Elihu. The Court will now rise for 15 minutes.

The Court adjourned from 11.15 a.m. to 11.35 a.m.

The VICE-PRESIDENT, Acting President: Owing to an important official commitment, the President has asked me to preside over the remainder of today's hearings. I will now give the floor to Professor Elihu Lauterpacht, to continue his presentation.

Sir Elihu LAUTERPACHT: Thank you, Mr. President.

Before the break, I completed my analysis of the proceedings of the Partition Committees. I will not attempt to list all the points at which the account that I have just given differs from the statement made by my friend Professor Pellet, but two examples will suffice. Contrary to what he said, the Expert Committee did not prepare the annex that contains the list of treaties; that was prepared elsewhere and possibly adopted by them, but it did not have any special authority.

And again contrary to what he said, the report of the Expert Committee, though signed by the experts, did not represent an agreement — an agreed view of the position — an agreement was not reached until the Partition Council delegated the solution to Mr. Cooke, and Mr. Cooke drafted the terms of the Schedule to the Order, in the words which confer upon India and Pakistan equal status in relation to succession or continuity of treaties.

I think I should perhaps at this point just emphasize that India and Pakistan started life, after 15 November, as States on equal footing. This was not a situation in which Pakistan seceded from, or separated from, a pre-existing State of India. The words of the Indian Independence Act make it quite clear. The preamble, or title — the long title — of the Indian Independence Act describes it as an act to make provision for the setting up in India ¾ by which they mean the sub-continent of India ¾ of two independent dominions. The two independent dominions are created within the old territory of India, and as I said the operative Section 1, states; "as from the 15th day of August 1947, two independent Dominions shall be set up in India". The creation of Pakistan did not involve a secession for India, did not involve a subordination of Pakistan's international status to that of India. Treaties that were binding on India, prior to Independence, were equally binding on Pakistan after Independence. With the exception of those specifically dealt with, namely the position of India in relation to international organizations and the position of territorially related treaties.

This is the position, Mr. President, that Pakistan subsequently maintained in the United Nations. The Court has before it, as Annex G of the Pakistan Memorial, an extract from the very considerable volume, prepared by the Secretary-General, under the title of "Multilateral Treaties deposited with the Secretary-General". I happen to have in my hand the copy from the library here, which is the status as at 31 December 1997. Evidently the pagination is not quite the same as the pagination in the copy from which Annex G of the Pakistan Memorial was made. But the content is the same. The Court will find the content of what is in Annex G also in the 1997 edition at page 1001.

Now that volume, the Secretary-General's volume, contains a reference to what was called a notification of succession. I am reading now from footnote No. 10 attached to the item of the General Act of Arbitration in 1928, a notification of succession from the Government of Pakistan. Now, the text, or what purports to be the text, of the Pakistan notification appears in that footnote 10. No date is given to the Pakistan communication. However, we have succeeded in obtaining, albeit in a rather last-minute fashion, but we managed to obtain from the Pakistan Mission to the United Nations, a copy of the original text communicated to the Secretary-General. It is dated 3 October 1973; I mention the date because it has to be related to the response or reaction by India which was deferred for nearly a year, until 18 September 1974.

The most peculiar aspect of the document that was filed by Pakistan on 3 October 1973, is that certain passages appear to have been deleted from it in the text which is printed in the Secretary-General's volume. The passages that have been omitted appear at three different points in the Pakistani letter, and they all have a similar content, and so the omission of them could hardly have been accidental. It is as if someone — I do not say that someone did, but I am saying, it is as if someone — for some reason decided to omit from the printed text that the world was made aware of, certain passages from the original communication. And what are those certain passages? First of all, in paragraph 3, of which the opening words — as they appear in the Secretary-General's volume, at page 898 of Annex G — are:

> "As a result of the arrangements mentioned in paragraph 1 [appear in the letter as follows], Pakistan has been a separate party to the General Act of 1928 from the date of her independence, i.e., the 14th August 1947; . . ."

a date which I should perhaps just explain: although the Independence Act says that these two separate dominions will come into existence on 15 August, in fact it was understood and accepted that Pakistan would become an independent State on 14 August, the day before India did, largely for the purpose of avoiding any impression that Pakistan broke away from a newly independent India. It did not. However, that is just *en passant*. "Pakistan has been a separate party to the General Act of 1928 . . . from the date of her Independence, i.e. 14th August 1947, since in accordance with . . ." the Article 4 of the relevant Order, the text of which is set out below, those words are omitted and the text is omitted. "Pakistan succeeded to the rights and obligations of British India under all multilateral treaties binding upon her before her partition into the two successor States." By virtue of this continuation of the

former personality of British India and of these arrangements, "Pakistan did not need to take any steps to communicate its consent *de novo* to acceding to multilateral conventions by which British India had been bound." Words omitted by virtue of this continuation of the former personality of British India. In other words, Pakistan's basic legal position is here being distorted, or omitted.

I go on to the next paragraph, that corresponds with the last sentence of the same paragraph in Annex G: "4. Nevertheless, the Secretary-General of the United Nations was made aware of the situation through the communication referred above . . ." And then appear the following words, also omitted from the Secretary-General's text. The Secretary-General was made aware of the situation through the communication above, and here are the omitted words:

> ". . . which included the text of the relevant Order made by the last Governor-General of British India, namely the Indian Independence (International Arrangements) Order of 1947, which embodied a devolution agreement between India and Pakistan".

Now that got left out. Why? I do not know. Then we go over the page to the continuation of that same paragraph, after the quotation in full of the Indian Independence (International Arrangements) Order (this is Pakistan's original letter):

> "It is clear from Section 4 of the Devolution Agreement that Pakistan and India both agreed to be bound by all multilateral obligations of British India including obligations under the General Act of 1928."

Omitted from the Secretary-General's publication. Again, one asks why, but the fact is that its non-appearance is in itself intrinsically significant. Because if those words that I read out had been included, then there would have been a wider general understanding of what the true nature of the succession of Pakistan and India was to the obligations of the original British India.

And then paragraph 5, which appears in part in the Secretary-General's communication:

> "5. In order, however, to dispel all doubts in this connection, and without prejudice to Pakistan's rights as a successor State to British India, the Government of Pakistan hereby notifies the Secretary-General [those words do not appear in quite that form] in his capacity as depository of the General Act that Pakistan continues to be bound by [in the words used in the Pakistan Note:] the ratification of British India."

And in the Secretary-General's Note it says "the accession of British India" of the General Act. Well, this suggests that India acceded to the General Act. At what point? We do not know. But what matters is the word used in the Pakistani Note was the "ratification". I would, therefore, invite the Court, to whom a copy of this letter will obviously be given, to take it into consideration in its examination of the true nature of the succession.

It seems to me that this analysis of the Partition Proceedings and of this letter sheds some adverse light on the value of the view of the United Nations Secretary-General's legal advisers, to which reference is made by Professor Pellet at page 16 of his text. That page reference might not be entirely accurate because I think I took it from his original text and not from the *compte rendu*. But the Secretary-General's legal advisers clearly would not have known at the time they took their view, relied on by India, of the circumstances leading up to the adoption of the Indian Independence Order.

So much, then, for that point, which I think is really central to the case on the General Act. I now just need to say very few words about the reference made by India to the case of *Yangtze (London) Limited* v. *Barlas Brothers (Karachi) and Co.* I could of course take a long time analysing this case to the Court, but I will forgo that. It is more complicated than the mere recitation of extracts from the Judgment might suggest. The case is really about the inapplicability of a treaty that had not been incorporated into domestic law. It does not show what His Excellency the Attorney General of India said it showed at CR 2000/2, page 15. But it is worthwhile bearing in mind that whatever weight the Court may wish to attach to the words in *Yangtze (London) Limited* v. *Barlas Brothers (Karachi) and Co.*, it was a case in which the Government of Pakistan was not involved. The Government of Pakistan had no opportunity to express its views to the Court, and we are unaware of the extent to which the Court was sufficiently assisted in the development of its international law argument. Moreover, the Court could not in any event have been aware of all the details of the Partition Proceedings that I read to the Court this morning, and in the absence of that degree of knowledge about the true nature of the relationship between Pakistan and India after Independence, with India before Independence, the Court could be understood not to have got matters right. I say no

more about *Yangtze (London) Limited* v. *Barlas Brothers (Karachi) and Co.*

So this, Mr. President, brings me to the concluding observations, which I respectfully wish to offer the Court. They relate primarily to the optional clause basis of the Court's jurisdiction but also have some overall relevance to the Court's approach to the case.

I would respectfully submit that it is not the task of the Court to indulge the assumed sensitivities of States that have loaded their optional clause declarations with reservations which significantly limit their effect — limit their effect even to the point of disappearance. The strict constructionist approach which the Court is today being asked by India to follow differs little, if at all, from the approach developed by the Permanent Court of International Justice 70 years ago, and which has formed a significant feature of the International Court's approach to the treatment of optional clause declarations, reservations and their interpretation. That approach was developed in an entirely different international scene. The seeking after consent in the strictest possible way is put in the forefront of the exercise, as if States would never accept the Court's jurisdiction if the limitations on their notices of consent were less rigorously applied.

As a matter of policy, I respectfully question the merits of this view. The Court should not be so apprehensive — if I may put it that way — about the impact of its accepting jurisdiction in cases where there is some doubt about its jurisdiction, and where it is confronted time after time with arguments against its jurisdiction based upon a strict view of the notion of consent, and thereby a limited view of the ability of the Court to do justice when it comes to dealing with the merits. The Court cannot turn a blind eye to the fact that States are increasingly accepting the compulsory jurisdiction of international tribunals over a wide range of cases that are no less important than those that come to this Court, and they do so on the basis of a widely expressed consent. Indeed, many of those cases that come before these other tribunals ¾ or could come before them ¾ are actually more important, economically and politically, than some of those cases that come to this Court. I think in particular of the type of case that is considered within the dispute settlement machinery of the World Trade Organization. These are massive cases, affecting large sectors of national economies and the livelihood of many, many people. Yet States have been willing to accept in relation to them compulsory jurisdiction. So what, then, is the problem about the application of, I do not say compulsory, jurisdiction by this Court, but are they more liberally viewed by this Court of the way in which consent is expressed to its jurisdiction? And I may hardly make the point that although the jurisdiction of the Security Council is not a judicial jurisdiction, it remains a fact that the Security Council is capable of scrutinizing the most delicate activities of States ¾ the most sensitive, national security activities of States ¾ without question being raised as to its competence to do so.

I hope the Court will not feel that I am being unduly arrogant in referring it to a small work which I wrote about ten years ago called "Aspects of International Adjudication", in which there is a chapter on consent, where the kind of sentiments that I am expressing to the Court at this moment are set out more thoroughly, with some very interesting examples. It will not take the Court long to look at the relevant pages, and I would respectfully submit them to you.

There is, I suggest, an element of absurdity in a situation in which India can be compelled to litigate on a matter of international trade that can seriously affect its economy and yet can resist the ability of this Court to resolve a matter such as the unlawful destruction of an aircraft. I respectfully invite the Court to adopt the approach which is open to it of seeing in the particular relationship of India and Pakistan, especially in the mutual undertakings of the two sides in the Simla Accord, a basis on which it can interpret ¾ that is, the Court can interpret ¾ the Indian reservation in a manner that opens a gate to the discharge by the Court of its real functions, not in a manner which interposes a barrier. The function of the Court is the decision of substantive issues, not a further excursion into the now ancient trivialities of the restrictive interpretation of jurisdictional clauses.

With those words, Mr. President, I reach the end of my submissions in reply. I thank you for hearing me. At this point the Statute requires that the Agent should formally confirm the submissions of Pakistan, which I now invite you, Mr. President, to ask him to do. Thank you.

The VICE-PRESIDENT: Thank you so much, Professor Lauterpacht. I now give the floor to the distinguished Agent of Pakistan.

Mr. HAMID: Mr. President and honourable Members of the Court, may I, as the Co-Agent of Pakistan, take this opportunity of formally confirming the submissions of Pakistan that the Court should dismiss the objections to the jurisdiction raised by India, and that the case should continue. Thank you.

The VICE-PRESIDENT: Thank you so much, the distinguished Agent of Pakistan.

This now concludes the second round of oral argument by the Islamic Republic of Pakistan. The Court will resume tomorrow morning at 10 a.m. for the second round of oral argument to be presented by the Republic of India. The Court will now rise.

The Court rose at 12 noon.
