DISSENTING OPINION OF JUDGE AL-KHASAWNEH

Lack of jurisdiction does not relieve Parties of duty to settle dispute through peaceful means — Jurisdiction cannot be invoked on the basis of the United Nations Charter in the absence of consent — Effect of Indian communication of 1974 regarding the General Act — Effect of lack of subsequent reaction to that communication — Conclusion declining jurisdiction, though justifiable, does not possess necessary certainty to fortify it against recurring doubts — Irrelevance of "multilateral treaty" reservation — Justifiable doubts regarding obsolescence of "Commonwealth" reservation — Case not conclusively made for obsolescence — Right of States to make reservation not unlimited — Intention of declarant State to be ascertained from wording of reservation as well as from circumstances — Indian declaration of 1974 — Intended against one State only — Unlike other reservations ratione personae *no defensible justification — Extraordinary and exceptional nature of Indian reservation puts it outside purview of permissibility — The issue of separability — Relevance of concepts from major systems of law — Analysis of decision by Indian Supreme Court — Relevance of and analogies from law of treaties — Separability is possible.*

1. I regret that in this, the first case in which I participate, I am unable to agree with all the conclusions reached by the majority. Consequently I am unable to join in their decision that the Court has no jurisdiction.

2. Before explaining the reasons that have led me to take this position, I must emphasize that I endorse wholeheartedly the call made by the Court on the two States to settle this dispute, and indeed all the disputes that have plagued their relations since 1947, through peaceful means. The question of jurisdiction is important but it is ultimately a technical matter, and lack of jurisdiction does not in itself indicate that the dispute is not justiciable, nor does it relieve the parties of their duty to pursue peaceful settlement on the basis of international law. I also feel that the call made by the Court is both urgent and appropriate. Its urgency may be measured against the possibilities of dangerous escalation which, on more than one occasion in the recent past, almost brought India and Pakistan to the brink of nuclear confrontation. Its appropriateness, on the other hand, rests on precedent and the fact that in making this call, the Court is acting wholly within its powers, as the principal judicial organ of the United Nations.

3. Within the context of the present case the making of this call is all the more pertinent in view of the disquieting fact that all attempts at pur-

suing other peaceful means were rejected by the respondent State before the case was brought to the Court.

4. The Court's jurisdiction has been invoked on the grounds that it falls within what is meant by the phrase "all matters specially provided for in the Charter of the United Nations". To the extent that this argument was abandoned by counsel for Pakistan and, more importantly, since the Charter does not provide for compulsory jurisdiction, I find myself in agreement with the majority view.

5. I am also in substantive agreement with my colleagues that the 1928 General Act for the Pacific Settlement of International Disputes does not provide a basis for the Court's jurisdiction in view of the Indian communication of 1974, which, while not constituting a formal denunciation of the said Act, not having been made in accordance with the procedure laid down in Article 45 of the Act, has nevertheless been treated as "a notification" by the Secretary-General of the United Nations. This fact, taken together with the lack of any subsequent reaction by the parties to the Act, including Pakistan — if one is to accept that the latter's communication of 1974 announcing that the Act "continued in force" for Pakistan by way of succession meant that it was party to the General Act — confirms this conclusion.

6. I must add, however, that I share in this conclusion with considerable hesitation, for I continue to believe that the only thing that could be stated with certainty and without too much fear of contradiction with regard to this alleged basis of jurisdiction is that the Dominion of India was bound by the General Act as of 21 May 1931. All else remains in the realm of subjective and contradictory statements, and this includes such questions as whether the Act devolved on Pakistan by automatic succession; whether India continued to be bound by it after its independence by succession or otherwise and — beyond the present case — whether the Act is a political treaty, whether political treaties are transmittable and lastly whether the Act survived the demise of the League of Nations and the conclusion of a revised General Act. By confining itself to the effects of the Indian communication of 1974 and not dealing with these interrelated issues, some of which have appeared before the Court in previous cases, the Court may have achieved mathematical elegance but at the expense of leaving those issues without clarification. In other words the Court based its decision on a conclusion which might be justifiable in the present context, but which falls short of the certainty required to fortify the decision against recurring doubts.

7. The third basis on which the Court's jurisdiction has been invoked is the optional clause system, to which both India and Pakistan are party. Both States have attached various conditions and reservations to their respective declarations accepting the Court's compulsory jurisdiction. Two of them concern us in the present case. Let me refer first to the so-called "multilateral convention" reservation common to both declarations. To the extent that the actions complained of by Pakistan would

prima facie constitute breaches under customary international law, the reservation is simply irrelevant and cannot bar the Court's jurisdiction[1].

8. The other reservation, found in the Indian declaration only, is the Commonwealth reservation. As is well known, this reservation has its genesis in a reservation made by the United Kingdom and the six other members of the Commonwealth in 1930 when they became party to the General Act. When the Dominion of India acceded to the General Act in 1931 the reservation was incorporated into the Indian declaration. The rationale for it then was that disputes among Commonwealth members would be settled by a court to be specially created for this purpose but which in fact never came into existence. Notwithstanding this and the further fact that the Commonwealth has since undergone fundamental changes bordering on a metamorphosis, the reservation continued to appear in the declarations made by some Commonwealth countries including recent cases of newly independent States, although the number of States entering such a reservation is quite small. In these circumstances doubts regarding the obsolescence of the reservation are quite justified. I have in mind primarily Judge Ago's dissenting opinion in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*[2], but doubts have also been expressed in the literature[3]. Against this line of thinking, it has been argued that the doctrine of obsolescence does not apply to unilateral acts. This argument is not without force, except that it is based on the assumption that what starts as a unilateral undertaking goes on being so even when it is transformed into mutual arrangements, raising in other parties to the optional clause system reasonable expectations not dissimilar to those raised under treaty relations. Be this as it may, whilst doubts linger regarding the obsolescence of this reservation, the case has not been conclusively made for obsolescence.

9. The major obstacle to the argument of obsolescence, as far as the present case is concerned, is the repeated insertion of the Commonwealth reservation in successive Indian declarations accepting the Court's compulsory jurisdiction, and it is precisely the maintenance of this reservation and the modifications that were inserted into it that sets the Indian reservation aside from other Commonwealth reservations found in declarations made by other States, and leaves no doubt as to the existence of a conscious will on the part of India to transform the reservation — originally meant as a means of providing for alternative modes of peaceful settlement — into a reservation *ratione personae*, properly so described, directed against one State only: Pakistan, a State which maintains no similar reservation with regard to India. Thus in 1959 India modified the

[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, pp. 424-425, para. 73.

[2] *I.C.J. Reports 1992*, p. 326.

[3] Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, pp. 120-122.

wording of the reservation to read: "(2) Disputes with the Government of any State which, on the date of this Declaration, is a Member of the Commonwealth of Nations"[4]. Omitted from the new version were the words "all of which disputes shall be settled in such manner as the parties have agreed or shall agree" which were contained in previous declarations.

10. In 1974 a new declaration was made by India and again the reservation was maintained, but with a new modification. It now reads: "(2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations"[5].

11. By 1974, Pakistan had left the Commonwealth and the change in the wording was necessary to bar the Court's jurisdiction in disputes with that State, which was in fact trying to invoke that jurisdiction against India. There can be no doubt in the light of those circumstances that the reservation was intended to operate against Pakistan. The only other States that were no longer Members of the Commonwealth were South Africa, but that happened in 1960, and Ireland, which had left the Commonwealth in 1948.

12. The argument has however been made that even if the reservation was directed at Pakistan alone, this would be no more than a classic reservation *ratione personae* made under a system of compulsory jurisdiction where the practice has permitted a choice of partners, and that therefore the Indian reservation did not amount to discrimination or abuse of rights but is wholly within a declarant State's discretion.

13. I propose now to examine this issue bearing in mind that the Court has never had the opportunity to decide on the validity or otherwise of a reservation excluding disputes *ratione personae.*

14. As a general comment, it has long been recognized that the practice of the Court has tended to accord States more freedom to enter reservations in their declarations accepting its compulsory jurisdiction than the plain words of Article 36, paragraph 3, of the Statute provide for. One looks in vain for any reflection of the maxim *inclusio unius est exclusio alterius.* Be this as it may, the fact that a reservation is extra-statutory in the sense that it goes beyond Article 36, paragraph 3, cannot in itself, in view of the existence of settled practice, lead to invalidity. On the other hand, when all allowance is made for political realism and when cognizance is fully taken of the fact that the Court's jurisdiction operates only within the parameters of the declarations and that its jurisdiction has to be proved to the hilt, some room must be left for an objective assessment of the validity or otherwise of the reservations and conditions contained in declarations accepting its jurisdiction. To deny this is to abdicate responsibility. Where the Court strikes a delicate balance between the

[4] *I.C.J. Yearbook 1959-1960*, p. 242.
[5] *I.C.J. Yearbook 1996-1997*, p. 99.

need for care and caution in asserting its jurisdiction on the one hand, and the duty to do justice on the other, has to be decided contextually in each case.

15. Another important consideration to be borne in mind in striking that delicate balance is that the system of international adjudication is not a static one. Indeed, implicit in the very notion of an optional system is a presumption of temporariness. When the concept of an optional clause system was born, it was not possible to gain universal support for a comprehensive system of adjudication and it is still doubtful that such a system can gain support in the foreseeable future, but this should not obscure the need to move towards that ideal.

16. In deciding the validity or otherwise of reservations, the Court cannot be oblivious to the fact that merely to take note of reservations without examining their content can hardly advance the cause of international adjudication. In the realm of questions relating to the determination of its own jurisdiction *(la compétence de la compétence)* the Court has never shied away from rejecting arguments that sought, under the guise of the unilateral nature of declarations, to reserve such matters to the discretion of the declarant State. There is no reason why the same reasoning should not apply to other areas where the Court's jurisdiction is invoked.

17. The distinction drawn between situations that fall under paragraph 6 of Article 36 and the remainder of that Article is an artificial one and, if maintained, will mean that the unity of purpose of the Article will collapse.

18. From the early days of the optional clause system, reservations *ratione personae* have been made in myriad ways, but they have invariably had a rationale, or at least a reasonably defensible justification. It would not be proper for me to comment on the validity or otherwise of those reservations that have not been considered by the Court — especially as most of them are contained in declarations that have either lapsed or were withdrawn. Suffice it to mention in general that reservations *ratione personae* meant to provide for alternative ways of peaceful settlement have a rationale that fortifies them against accusations of arbitrariness. Similarly, reservations that made acceptance of compulsory jurisdiction conditional upon a number of State Members of the League of Nations accepting similar commitments also have a justification. Likewise reservations that made recognition of the declarant State a prior condition to adjudication under the optional clause may be said to have a rationale. What sets the Indian Commonwealth reservation apart, as worded in the 1974 declaration, is that it does not even pretend to have a justification. To be sure, any reservation, even if made *ratione materiae* or *ratione temporis* or otherwise, will ultimately exclude jurisdiction in respect of disputes between the declarant State and one or more other States. The difference between such reservations and the Commonwealth reservation in this case might be no more than one of more careful con-

cealment of intent, but declarant States are at least entitled to the benefit of the doubt in this regard. By entering a reservation that cannot be interpreted — when regard is given to its terms and the circumstances in which it was made — except as intended to bar jurisdiction with another State only, and when one also considers that removal of this bar to jurisdiction is not dependent on the fulfilment of an objective condition, and considers further that the State against whom the reservation is intended to operate maintains no similar reservation with regard to the declarant State and is entitled to reasonable expectations of adjudication under the network of engagements that constitutes the optional clause system, one appreciates that the Indian reservation, as presently worded, is of a truly unique nature. The Court could not have been clearer when it stated:

> "the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases"[6].

19. An assessment of the terms of the Indian Commonwealth reservation (addition of the words "or has been" a Member of the Commonwealth of Nations), the absence of a reference to alternative means of peaceful settlement agreed upon or to be agreed upon, and a consideration of the circumstances under which the reservation was made together with the actual text, reveal a clear will of arbitrary exclusion and give the reservation an exceptional nature that puts it outside the purview of permissibility. I am compelled therefore to the conclusion that the reservation is invalid and cannot bar the Court's jurisdiction.

20. Having reached this conclusion, I shall now turn to the consequential question of whether the invalid part of the Indian declaration is separable from the rest or, whether, as was argued for India, the declaration and the reservation stand or fall together.

21. The separability of void or invalid reservations from declarations accepting the Court's compulsory jurisdiction is still in most ways *terra incognita*. The paucity of precedents and the further fact that, on the few occasions when the question was considered — notably in the *Certain Norwegian Loans* and *Interhandel* cases, and in the *Fisheries Jurisdiction (Spain* v. *Canada)* case[7] — it was not settled, are both undoubtedly contributory factors to the lack of authoritative solutions. However, much of

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[6] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, p. 418.

[7] *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 55; *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, pp. 57, 77 and 116; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisidiction of the Court, Judgment, I.C.J. Reports 1998*, para. 47.

the uncertainty stems from the very nature of the concept of separability itself, which, though governed by the general principles of interpretation, depends largely on a reconstruction of the parties' probable intention in making the legal act, as well as on another factor, extraneous to the text itself, namely whether continued performance will lead to unjust results for the concerned party after severance of the impugned part.

22. By contrast to the Court's jurisprudence, a wealth of concepts exists in the major systems of law, and whether these are to be found in the domain of the judicial review of public statutes or of private contracts, they are relevant as general principles of law within the meaning of Article 38, paragraph 1 *(c)*, of the Statute of the Court.

23. Recourse should be had to those concepts and also to the law of treaties (the Vienna Conventions of 1969 and 1986), not only because declarations accepting the Court's compulsory jurisdiction constitute a "network of engagements", but also because the views of some of the judges in the aforementioned cases had the effect of leading the International Law Commission to reopen its consideration of the matter of separability, a process which led in turn to the adoption of Article 44 of the 1969 Vienna Convention on the Law of Treaties, and of the same numbered Article in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, both of which deal with separability.

24. As an example from one of the major systems of law, the Court was kindly invited by the Attorney General for India to consider a case decided by the Supreme Court of India in 1957, in which the underlying principle 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"[8]

is said to support India's contention as to inseparability of the reservation from its declaration.

25. A closer look at that decision, far from supporting such a contention, in fact reveals a more complex and less severe test for separability — which relies heavily on United States judicial precedents and authorities — than was suggested to the Court.

[8] *R. M. D. Chamarbaugwalla* v. *The Union of India*, 1957, Supreme Court Reports, pp. 950-951; CR 2000/2, p. 14.

26. Thus the Indian Supreme Court, in commenting on an earlier decision stated:

> "The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it."[9]

27. As for the test itself, it comprises seven elements, only parts of which were cited in the oral pleadings, i.e., the first element and the first half of the second element. The first element relates to whether the legislature would have enacted the valid part if it had known the invalidity of the rest and is simply irrelevant in the present case.

28. No one has contended that India knew in advance that its Commonwealth reservation was invalid. In fact, India argued that its Commonwealth reservation was not "repugnant to Article 36, paragraph 3, or any other article of the Statute".

29. The second element relating to the valid and invalid portions being so inextricably mixed up that they cannot be separated, is balanced by the rest of the element under the same heading (which was not cited), but which states:

> "On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable."[10]

Applying this to the Indian declaration, even a cursory perusal would confirm that its various elements are formally classified into distinct headings and apply *ratione materiae* to separate matters, the integrity of which would not be affected by striking out the impugned reservation.

30. The third element is that even if the valid and invalid parts are distinct, the invalidity of some will result in the invalidity of the whole, if they all form part of a single scheme intended to operate as a whole. This element of the test is more to the point, for here the intention of the legislature or — by analogy — the declarant State comes to the forefront and assumes primacy over the other elements. But in this area also, the Indian argument fails because of the lack of evidence to support the

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[9] *R. M. D. Chamarbaugwalla* v. *The Union of India*, 1957, Supreme Court Reports, p. 944.

[10] *Ibid.*, p. 951.

claim that the declaration and reservation were intended to operate as a single scheme. Nothing can be more obvious than the fact that *ex post facto* statements made while this case was being considered before the Court to the effect that the declaration "constitutes an integral whole, an unity, reflecting the intention of the party" cannot substitute retroactively for the total lack of evidence. The only evidence that could be adduced in this respect was the fact that the Commonwealth reservation was maintained in the various declarations made by India accepting compulsory jurisdiction. No firm inference however can be drawn from this practice, save the inference that the reservation was important — perhaps even of considerable importance — to India, but this cannot of itself support a finding that it was the crucial or essential element in India's acceptance of compulsory jurisdiction. In the first place there is a general presumption that States do not act lightly or frivolously and, in the area of formulating the terms of their acceptance of the Court's compulsory jurisdiction, it is reasonable to assume that States attach importance to all the reservations and conditions contained in their declarations, especially if such conditions have withstood the test of time and the even more havoc-wreaking scrutiny of rigorous officials. However, to infer that every reservation that has not been purged or trimmed falls within the ambit of the crucial element of consent is to assume too much.

31. In the *Certain Norwegian Loans* case Judge Hersch Lauterpacht's often-quoted opinion on the inseparability of the French reservation on domestic jurisdiction from the rest of France's declaration rested on two grounds: the subject-matter of the reservation and the supporting evidence. With respect to the subject-matter, the French reservation, relating as it did to domestic jurisdiction, defined a general attitude towards the concept of compulsory jurisdiction and the limits within which France was ready to accept limitations to its own jurisdiction. His inference as to inseparability was therefore entirely justified. By contrast, the Indian reservation related only to a group of States and could not therefore define a general attitude or a general posture to compulsory jurisdiction. Additionally, the centrality of reserving matters to domestic jurisdiction pertains by definition to the very concept of sovereignty and this fact was supported by statements that had been made in the French Chamber of Deputies. In the present case no evidence could be supplied by India, either with reference to the "legislative history" of the declaration or otherwise, regarding the essential or crucial character of the Commonwealth reservation to India's consent.

32. The remaining elements in the test devised by the Indian Supreme Court — 4, 5, 6 and 7 — deal respectively with the requirement that what is left should not be so thin and truncated; the primacy of substance over formal classification; the requirement that there be no subsequent modification of the valid part amounting to judicial legislation; and the need to look at the legislative history of the Statute, its object, title and pre-

amble. Applying these elements to the Indian declaration they all argue for separability of the reservation from the declaration.

33. I have delved into the learned arguments in this Indian decision in answer to the call to do so made by the Attorney General for India, but it is unnecessary to delve in like fashion into similar concepts found in other major systems of law. It is reasonable to expect that the solutions devised by those systems would not be radically different from that decision. Suffice it to mention, for example, that under Islamic law, the problem of separability would seem to be governed by the maxim *"Ma La Udraku kulluh La Utraku Julloh"* — that which cannot be attained in its entirety should not be substantially abandoned. A concept remarkably similar to the Roman law principle *ut res magis valeat quam pereat* — a document should be given validity wherever possible. It is also similar to what is generally agreed to be one of the basic goals of the law on invalidity, as formulated in the Vienna Conventions of 1969 and 1986, namely "to preserve, whenever possible, the validity of conventional arrangements rather than to altogether destroy it by considerations alien to that goal"[11].

34. To be sure, the law of treaties has had to acknowledge a tension, traceable to the early publicists[12], between the need on the one hand to preserve the integrity of treaties and to guard against arbitrary separability, and on the other not to permit States to invoke the very invalidity which they may have caused to be freed from their other obligations. Additionally, as treaties have tended to become more multilateral and heterogeneous in content, the rules governing separability have also tended to become more relaxed.

35. Reflecting those developments in the field of treaty-making and reconciling, or at least trying to reconcile those tensions, Article 44 of the Vienna Convention on the Law of Treaties opened the door for the principle of separability of treaty provisions, albeit in suitably guarded terms and subject to cumulative conditions stricter in some respects than those found under the general principles of law referred to in Article 38, paragraph 1 *(c)*, of the Statute.

36. Thus, in paragraph 3 of Article 44, the principle of separability is established in cases where the ground relates solely to particular clauses (which is self-evidently the case with respect to the Commonwealth reservation) and where:

(a) The said clauses are separable from the remainder of the treaty with

[11] Rozakis. *The Concept of* Jus Cogens *in the Law of Treaties*, 1976, p. 124.

[12] For an historical overview see *Codification of International Law, Supplement to the American Journal of International Law*, Vol. 29, 1935, pp. 1134-1144.

regard to their application — which is again self-evident in the case of the Commonwealth reservation.

(b) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole.

The International Law Commission's commentary on what was to become Article 44, paragraph 3 *(c)*, makes it clear that whether the condition is met "would necessarily be a matter to be established by reference to the subject-matter of the clauses, their relation to the other clauses, to the *travaux préparatoires* and to the circumstances of the conclusion of the treaty"[13].

In this regard, the subject-matter of the Commonwealth reservation — being particular to a group of States and not representing a general attitude towards the concept of compulsory jurisdiction such as would be, for example, the exclusion of matters falling within the domestic jurisdiction of the declarant State — does not give rise to an inference that acceptance of the reservation was an essential or crucial basis of consent to submit to compulsory jurisdiction. Moreover, the relationship of the reservation to other reservations or conditions or other parts of the declaration cannot support such an inference. The only inference that can be drawn is that the reservation is readily separable from the remainder of the declaration. As for the *travaux préparatoires* (or their equivalent in the area of the optional acceptance of compulsory jurisdiction) no evidence whatsoever was provided by India that, with reference to those sources, its consent depended crucially on inseparability of declaration and reservation.

The words "and to the circumstances of the conclusion of the treaty" may give credence prima facie to the argument that, since the revised version of India's latest declaration in 1974 took place in circumstances where India was trying to avoid Pakistan's invocation of the Court's jurisdiction, it represented an essential basis of India's consent. Again in the absence of supporting evidence and given that the subject-matter of the reservation is confined to a particular class of disputes, any conclusion that goes beyond acknowledging that the reservation was an important — as distinct from an essential — basis of consent would be unwarranted. Indeed the very fact that India chose to renew its declaration — with modifications — under those circumstances would support this conclusion.

(c) Continued performance of the remainder of the treaty would not be

[13] *Yearbook of the International Law Commission*, 1966, Vol. II, p. 238. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., pp. 166-167.

unjust. As is well known, this condition has been criticized as being inevitably subjective, adding little to the underlying basis of condition *(b)* [14]. Against this, the rationale for the paragraph seems to be that it is useful to deal with situations where — with the passage of time — certain provisions may gain or lose in importance in a way not foreseen in the negotiations. Whatever the merits or demerits of this condition, it is apparent that the continued binding force of the Indian declaration without the reservation would not be unjust for India, given that Pakistan maintains no such reservation with regard to India. Moreover, while opinions differ as to the obsolescence *stricto sensu* of the Commonwealth reservation, there can be little doubt that the reservation is losing in relevance as time passes [15], as can be seen not only from the diminishing number of Commonwealth members who maintain such a reservation but also from the phenomenon — admittedly still in *statu nascendi* — of greater readiness on the part of States, including Commonwealth members, to submit to compulsory jurisdiction in other fora and under important instruments, for example under the 1982 Law of the Sea Convention and within the framework of the World Trade Organization.

37. It would seem therefore that the reservation in question is likely to decline further in importance over time, which would support the conclusion that striking out the Commonwealth reservation is unlikely to lead to unjust results for India by reason of the continued performance of its remaining obligations under its declaration.

38. It would follow, therefore, that the reservation is separable from the rest of the declaration.

(Signed) Awn S. AL-KHASAWNEH.

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[14] Capotorti, "L'extinction et la suspension des traités", 134 *Recueil des cours*, 1971, p. 463.

[15] The literature lends authority to this view; Merrills for example observes "this reservation must be taken to have outlived its usefulness" (*British Year Book of International Law*, 1993, p. 222).