DISSENTING OPINION OF JUDGE PIRZADA

Obliged to dissent from the reasoning in the Judgment of the Court and its conclusion, but in agreement with paragraphs 51 to 55 thereof — Effect of the Indian Independence Act and Independence (International Arrangements) Order 1947, dividing British India into two independent States, India and Pakistan, both were successor States — General Act of 1928 devolved upon India and Pakistan — Between 1947 and 1999 India and Pakistan settled their disputes (i) by negotiations, (ii) through mediation of third parties, (iii) through judicial tribunals and (iv) had agreed to have access to the International Court of Justice if no other forum was available and filed appeal or application before the International Court of Justice — India's conduct covered by doctrine of estoppel — India's Commonwealth reservation is aimed at Pakistan only and is obsolete, discriminatory and is invalid under Article 39 of the General Act — Commonwealth reservation is severable from the Indian declaration — India's communication of 18 September 1974 was sent to counter the declaration of Pakistan of 30 May 1974 that it was bound by the General Act and having regard to the pleas raised by Pakistan before the ICJ in the Trial of Pakistani Prisoners of War *case, the Indian communication was not sent in good faith and cannot be treated or deemed to be a denunciation of the General Act, among others, it did not comply with Article 45 of the General Act — Analysis of the decisions of the International Court of Justice, the Supreme Court of Pakistan and the Supreme Court of India — The Court has jurisdiction, among others, under Article 17 of the General Act and, in view of the allegations of Pakistan that India, by shooting down Pakistan's aircraft inside Pakistan's airspace and killing 16 trainees, committed breaches of obligations of customary international law not to use force and not to violate the sovereignty of another State — The Court's task is to ensure respect for international law as its principal guardian — Judicial caution and restraint, but principles of constructive creativity and progressive realism could be evolved — The Court ought to have rejected India's preliminary objection to the jurisdiction and ought to have entertained the Application filed by Pakistan — The Parties are under obligation to settle in good faith their disputes including the dispute regarding the State of Jammu and Kashmir and in particular the dispute arising out of the aerial incident of 10 August 1999 — Let India and Pakistan keep in view the ideals of Quaid-e-Azam Mohamed Ali Jinnah and Mahatma Gandhi and take effective measures to secure peace, security and justice in South Asia.*

I hold the President and the Judges of the International Court of Justice in high esteem for their erudition and experience. I regret that I find myself obliged to dissent from the reasoning in the Judgment of the

Court and its conclusion. I am, however, in full agreement with paragraphs 51 to 55 thereof.

STATEMENT OF FACTS

Allegations by Pakistan

1. Pakistan in its Application of 21 September 1999 claims:

> "On the 10th day of August 1999 an unarmed Atlantique aircraft of the Pakistan navy was on a routine training mission with sixteen personnel on board. While flying over Pakistan air space it was fired upon with air to air missiles by Indian air force planes, without warning. All sixteen personnel, mostly young naval trainees, on board the aircraft were killed . . . The wreckage of the Atlantique was discovered around 1455 hrs scattered across the area of a radius of one square kilometre. The wreckage of the plane was about 2 km inside Pakistan territory which is a clear proof that when the aircraft was shot it was well within Pakistan's air space.
>
> By the time the wreckage was found by Pakistan navy's Sea King helicopters there was a gap of about 2½ hours. The Indian helicopters, knowing the actual position of the shooting down of Pakistan's aircraft, sneaked into Pakistan's territory to pick up a few items from the debris." (Application of the Islamic Republic of Pakistan of 21 September 1999.)

In its Memorial, Pakistan referred to subsequent events:

> "Pakistan, in conformity with the purposes and principles enshrined in the Charter of the United Nations, did not resort to any retaliatory measures. Instead on 25 August 1999, Pakistan requested the Secretary-General of the United Nations, in view of the false and misleading claims made by the Indian side regarding the shooting down of the unarmed Naval aircraft, to send a 'Fact Finding Mission' to the region to ascertain facts about the incident. The Secretary-General in his Note dated 3 September 1999 informed the Government of Pakistan that the *Indian Government did not see the need for any kind of third party investigations into the incident and, therefore, rejected the request.* He regretted that he was unable to send a mission to the region since this was not possible without the full cooperation of all the parties.
>
> Moreover, on 30 August 1999, the Government of Pakistan made a démarche to the Government of India, through its High Commission in Islamabad, demanding that the Government of India should pay an amount of US$60.2 million as compensation for the loss of

the Pakistani Aircraft and for the loss of lives of the personnel on board. India did not respond to Pakistan's demarche but *publicly rejected* Pakistan's claim closing the door to any possible negotiations, even under the Simla Accord. Nor did India launch any investigation into the incident to establish responsibility or inform Pakistan that it had done so under the existing obligations spelt out in the Agreement between the two countries dated 6 April 1991 on the Prevention of Airspace Violations.

In view of the Indian refusal to settle this dispute through acceptance of a Fact-Finding Mission of the United Nations or any other third party intervention as well as direct bilateral negotiations, the Government of Pakistan has accordingly invoked, in the present Case, the jurisdiction of the International Court of Justice to adjudicate upon the dispute between the two countries and to establish the international responsibility of the Government of India, including the payment of compensation for shooting down the Pakistani aircraft and for the loss of human life, as a consequence of this illegal action." (Memorial of Pakistan, pp. 3-5; emphasis added.)

In the course of the oral proceedings, Mr. Munshi, the Attorney General of Pakistan added:

"The Court, will, of course, be aware that for over half a century a dispute has existed between India and Pakistan regarding the State of Jammu and Kashmir and for the implementation of United Nations resolutions which guaranteed to the people of Jammu and Kashmir their right of self-determination. India has regrettably not implemented the United Nations resolutions which it had agreed to at all material times.

. . . . . .

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

'The Secretary-General regrets the loss of life following the downing of the Pakistani aircraft by the Indian Air Force. He is increasingly concerned at repeated incidents between Indian and Pakistan and urges that the differences between them be resolved by peaceful means. He calls on both countries to exercise maximum restraint. The Secretary-General looks forward to an early resumption of the bilateral dialogue between the two countries in the spirit of the Lahore Declaration'." (CR 2000/1, pp. 14, 15, paras. 6, 9 (Munshi).)

Sir Elihu Lauterpacht submitted:

> "If the aircraft was not shot down over Pakistan territory it could only have been shot down over the territory of India. That is the stark alternative. Yet, if that were so then surely the logic of India's position would have required it, in order to avoid judicial scrutiny of its behaviour, to have invoked its reservation No. 10, paragraph *(d)*, which excludes 'disputes with India concerning or *relating to* (and I emphasize 'relating to') the airspace superjacent to its land and maritime territory'. If the aircraft had been flying over India and was shot down there, then the dispute would have been one 'relating to' the airspace superjacent to India. India could have invoked the reservation. But India has not done so. Could there be a clearer acknowledgment — no doubt unintended — that the shooting down did not occur in India's airspace? And from this it follows that it could only have been done in Pakistan's airspace — a fact upon which Pakistan's case and India's responsibility both rest." (CR 2000/1, p. 29, para. 9 (Lauterpacht).)

Denial by India

2. India in its Counter-Memorial denied various allegations. Mr. Soli Sorabjee, Attorney-General of India, repudiated the allegations and stated:

> "I take this occasion to deny all allegations made by Pakistan with regard to the aerial incident of 10 August 1999 which took place in western India in the Kutch region in the State of Gujarat. Pakistan is solely responsible for the incident and must bear the consequences of its own acts." (CR 2000/2, p. 11 (Sorabjee).)

It is unnecessary at this stage of the preliminary objections to the jurisdiction of the Court to make any comments on the allegations made by Pakistan and the denial thereof by India.

Contentions of the Parties

3. The contentions of the Parties, as reflected in the Memorial and the Counter-Memorial and their oral submissions, will be dealt with hereunder.

*

EFFECT OF THE INDIAN INDEPENDENCE ACT, INDIAN INDEPENDENCE (INTERNATIONAL ARRANGEMENTS) ORDER 1947 AND THE DEVOLUTION OF THE GENERAL ACT OF 1928 ON INDIA AND PAKISTAN

Indian Independence Act

4. Section 1 (1) of the Indian Independence Act 1947 reads: "As from the 15th day of August 1947, two Independent Dominions shall be set up in *India*[1] to be known respectively as India and Pakistan." (Emphasis added.)

The then British Prime Minister, Mr. Attlee, stated before the House of Commons:

> "With regard to the status of these two Dominions, the names were not meant to make any difference between them. They were two successor States and both of them would be Dominions in the fullest sense of the term." (A. N. Aiyar, *Constitutional Laws of India and Pakistan*, 1947 ed., p. 53.)

On 14 July 1947, dealing with the defence of the North West Frontier, the British Prime Minister said:

> "This is a matter that is very much in the minds of the Members of both Successor Governments, and there is a Joint Defence Council to consider it. I should not like to go further than to say that the Government would be perfectly willing to go into discussions *with the Successor Government* on any matter of common defence." (Official Report No. 440 C 127; emphasis added.)

The words *with the Successor Government* refer to Pakistan as the North West Frontier is within its territory.

United Nations

5. On membership and representation of India and Pakistan in the United Nations, the legal opinion prepared by Assistant Secretary-General Kerno, issued to the press on 12 August 1947, stated as follows:

> "In international law, the situation is analogous to the separation of the Irish Free State from Great Britain, and of Belgium from the Netherlands. In these cases, the portion which separated was considered new State; the remaining portion continued as an existing State with all of the rights and duties which it had before." (Marjorie M. Whiteman, *Digest of International Law*, Vol. 2, p. 800.)

Pakistan did not subscribe to the view of the Secretariat of the United

[1] India means undivided British India.

Nations that it was a new State, and that view had been criticized by Professor D. P. O'Connell in his leading work on State succession, as follows:

> "The opinion of the Secretariat has been criticized as drawing an improper analogy from the cases of the Irish Free State and Belgium. In those cases the old sovereigns actively participated in the act which created the new States. The creation of Pakistan, on the other hand, was not the act of India, nor did India directly participate in it. It was a division enacted by a constitutional superior, and in no sense of the word could it be considered that there was any secession on the part of Pakistan. Both the Dominions were in the position of new States." (D. P. O'Connell, *State Succession in Municipal Law and International Law*, Vol. 1, p. 8.)

On being admitted to the membership of the United Nations the Representative of Pakistan declared as follows, in August 1947:

> "In one sense, the admission of Pakistan to the United Nations is not the admission of a new member. Until August 15 of this year, Pakistan and India constituted one State. On August 15 they agreed to constitute themselves into two separate sovereign States. One chose to continue to call itself by the old name of India, which had applied to the whole of the country, and the other elected to call itself by the name of Pakistan.
>
> Inasmuch as Pakistan had been a part of India, it was, in effect, under the latter name, a signatory to the Treaty of Versailles and an original Member of the League of Nations . . . In the same sense, Pakistan, as a part of India, participated in the San Francisco Conference in 1945 and became a signatory to the United Nations Charter. Therefore, Pakistan is not a new Member of the United Nations, but a co-successor to a Member State which was one of the founders of the Organization." (*I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, p. 79.)

Other International Organizations

6. In introducing the subject of admission of Pakistan to the International Telecommunication Conference held at Atlantic City in 1947, the Argentine delegate, speaking at the sixth plenary session of the Conference 4 September 1947, said:

> "The case of Pakistan is 'sui generis', which we repeat, in our judgment, does not imply the necessity of a formal 'admission' apart from the Madrid Convention, or, still less, the necessity of a precise and prescribed 'adherence'. On the contrary, the fact we must face is this: a Member of the International Telecommunication Union, British India, has been divided into two neighbouring states which today form part of the 'Commonwealth' of British nations under

conditions of absolute legal equality. One of these dominions, India, retains its old constitutional and political name; the other acquires a new designation: Pakistan. But the two states are, in reality, the legitimate successors to the rights and commitments acquired by British India within the International Telecommunication Union when it signed the Madrid Convention." (Marjorie Whiteman, *Digest of International Law*, Vol. 2, p. 803.)

"The Chairman having observed that no objection to the opinion expressed by the Argentine delegation had been raised, the Conference members unanimously agreed that Pakistan should be considered as admitted to the Telecommunication Conference." (*Ibid.*, p. 804.)

Treaty of Peace with Japan

7. "In the Treaty of Peace with Japan the language of articles 11 and 25 taken together confines the exercise of this power to the following Governments, which have already signed and ratified the Treaty of Peace with Japan: Australia, Canada, France, the Netherlands, New Zealand, Pakistan, the United Kingdom and the United States. With respect to the participation of Pakistan it is the view of the Governments concerned that Pakistan was entitled under international law to seek and be accorded the rights and obligations which attached to British India as a participant in the war against Japan. Thus in regard to the Treaty of Peace itself, Pakistan acquired the position of a power formerly at war with Japan. Similarly Pakistan is entitled to be regarded for the purpose of article 11 of the treaty as having been represented on the IMTFE and is therefore entitled to exercise the rights conferred by article 11 of the treaty.

It is not the position of the Governments concerned that India's vote was transferred to Pakistan. Had India signed and ratified the Treaty of Peace with Japan, both India and Pakistan would, in the view of the Governments concerned, have been eligible to participate in decisions with respect to persons sentenced by the International Military Tribunal for the Far East." (Department of State press release 246, 12 May 1954, XXX Bulletin, Department of State, No. 778, 24 May 1954, p. 802.) (Marjorie Whiteman, *Digest of International Law*, Vol. 2, p. 806.)

India objected to the inclusion of Pakistan.

The Joint Under-Secretary of State for Foreign Affairs, Douglas Dodds-Parker, in answer to that part of a question concerning Pakistan's inclusion in the clemency arrangements, stated:

> "As regards Pakistan, the position is that Pakistan is entitled under international law to seek and be accorded the rights and obligations which attached to undivided India as a participant in the war against Japan. Pakistan is accordingly regarded for the purposes of the Peace treaty as having been represented on the International Military Tribunal for the Far East and, since she signed and ratified the Treaty, is entitled to participate in the Treaty's procedures for granting clemency." (528 HC Deb. (5th ser.), cols. 15-16 (24 May 1954.) (Whiteman, *op. cit.*, p. 806.)

In his article "Law of Treaties in the Contemporary Practice of India", Upendra Baxi concludes that:

> "The significance of these incidents lies in the implication that for some purposes, such as membership of a few international organisations, British India was held to mean both 'India' and 'Pakistan' and that these states were regarded as having 'legally' succeeded to British India." (*Indian Year Book of International Affairs,* 1965, p. 166.)

The position of India and Pakistan has been summed up by Dr. Nagendra Singh in his Foreword to *Succession in International Law* by T. T. Poulose:

> "this is, perhaps, the only study which has attempted a detailed examination of the question of the personality of India prior to 1947. Pakistan was the first to raise this question at the United Nations and to claim that both India and Pakistan were 'co-successors' of the original international personality of India which disappeared in 1947. Somehow to this day, the exact nature of India's original international personality, and the controversy that India and Pakistan are both successor States, have been allowed to remain shrouded in mystery. Dr. Poulose has examined both these questions threadbare and evolved a new concept called plural succession. While the conclusions are entirely his own and one may not share his views, the conclusion is inescapable, that he has offered a meaningful explanation to these complicated questions which have some theoretical importance."

Indian Independence (International Arrangements) Order 1947

8. After the passing of the Indian Independence Act and before the two Dominions came into existence, a Partition Council was set up which was composed of the representatives of the two future Dominions.

Expert Committee No. IX dealt with foreign relations. The terms of reference of the committee are given in the *Partition Proceedings* (Vol. III, see pp. 156 and 171):

"To examine and make recommendations on the effect of partition — (i) on the relations of the successor Governments with each other, and with other countries (including the countries of British Commonwealth and border tribes)." (*I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, p. 77.)

The Committee had before it the views expressed by Sir Dhiren Mitra (an Indian Jurist), then Solicitor to the Government of India on the rights and obligations of India and Pakistan under the existing treaties of the three categories namely:

(a) treaties of exclusive interest to Pakistan,
(b) treaties of exclusive interest to India, and
(c) treaties of common interest, as quoted below.

"The Treaties falling under category *(a)* . . . 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 effected. (For a discussion of similar questions, see Schwarzenberger, *International Law*, Vol. 1, p. 77.)

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)*.

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."

This committee submitted its report which came up before a higher committee called the Steering Committee. The Steering Committee's note on the juridical position regarding the international personality and its effect on international obligations appearing on page 291 of the *Partition Proceedings* reads:

"The attached note 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. Mohammed Ali [Pakistan] does not subscribe to the view set 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." (*I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, pp. 77, 78.)

This note was submitted to the Partition Council. On page 292 of the *Partition Proceedings* it is stated:

> "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 His Majesty's Government acting on behalf of the Dominions overseas. The practical advantage of this course would be that Pakistan would not have to negotiate afresh in regard to such matters."

9. Consequently, the Indian Independence (International Arrangements) Order 1947, was promulgated by the Governor-General of (British) India. The said Order provided, *inter alia,* that rights and obligations under international agreements having exclusive application to areas comprised by the Dominion of India shall devolve on India and, likewise, those having exclusive territorial application to areas comprising the Dominion of Pakistan shall devolve upon that dominion. Besides, such agreements to which India was a party immediately before the appointed day were to devolve upon both India and Pakistan and if necessary be apportioned between the two countries. Such treaties were listed in the *Partition Proceedings.* This list mentioned 627 treaties.

The International Law Association Handbook, entitled *The Effect of Independence on Treaties,* published by Stevens in 1965, contains the following statement on page 92:

> "'When India became independent in 1947, a list had been drawn up of 627 treaties, etc. binding on India. Of these, eleven affected India, exclusively, 191 affected Pakistan and 425 were of common interest. Professor Alexandrowicz, in his lectures at the Hague Academy, delivered in 1961, lists a large number of treaties made with the Indian Princes before Great Britain took over the territory, including some made by the East India Company. Very few of these treaties are included in the total number of 627, but this is not necessarily significant because . . . the International Court in the *Rights to Passage Case* [*I.C.J. Reports 1960*, p. 6] upheld the succession of both India and British India to a treaty between the Portuguese and the Marathas, which is not included in the list, nor did the list include the large number of treaties made by Princely States which subsisted until 1947. It may be that the actual lists should be greatly increased to include India's succession to treaties made by the pre-British sovereigns on various parts of Indian territory.'

Thus the International Court of Justice recognized, in the *Right of*

Passage case, that the list is not exhaustive, and upheld the succession of India and British India to a treaty not included in the list." (*I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, pp. 84, 85.)

The list of treaties in Volume III was prepared in great haste and it did not include all the treaties binding on India and/or Pakistan. The General Act for the Pacific Settlement of Disputes of 1928 might have been inadvertently not included in the list but devolved upon India and Pakistan and both are bound by the said Act. Reference may also be made to the Indian Prime Minister's statement:

> "Soon after independence, India notified all states with which she had treaty relations that she would continue to honour treaties. This is evidenced by Prime Minister Nehru's categorical statement in a letter to the Prime Minister of People's Republic of China (26 September 1959):
>
> > 'When the British relinquished power and India attained freedom on 15th August, 1947, the new Government of India inherited the treaty obligations of undivided India. They wished to assure all countries with which the British government of undivided India had treaties and agreements that the new Government of India would abide by the obligations arising from them'." (Upendra Baxi, "Law Treaties in the Contemporary Practice of India", *The Indian Year Book of International Affairs 1965*, pp. 171-172; *The Effect of Independence on Treaties*, International Law Association, 1965, p. 94.)

Case of Yangtze, *Decided by the Supreme Court of Pakistan, Is Distinguishable*

10. Reliance was placed by Mr. Soli Sorabjee, Attorney-General of India, on *Messrs. Yangtze (London) Ltd.* v. *Barlas Brothers*, PLD 1961, SC 573 (CR 2000/2, p. 15).

India cited passages from the judgment of the Pakistan Supreme Court to show that under Clause 4 of the Indian Independence (International Arrangements) Order, 1947, Pakistan was not successor to all kinds of international agreements entered into by or on behalf of British India.

First, the case pertained to a foreign award given by the London Court of Arbitration which was sought to be enforced in Pakistan under the Arbitration (Protocol and Convention) Act, 1937.

Secondly, that the Supreme Court had held that the conditions laid down in that Act for the enforcement of the award had not been fulfilled.

The Court in the same Judgment further observed as follows:

> "In matters pertaining to international arrangements, the courts should act in aid of the executive authority and should neither say nor do anything which might cause embarrassment to that authority in the conduct of its international relations. Thus if the notification contemplated under the Act had been issued, the national court would have been bound to hold that the conditions prescribed for treating an award as a foreign award had been fulfilled and would not have been entitled to go behind the notification and investigate whether reciprocal provisions did in fact also exist in the notified country." (*I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, p. 94.)

The Supreme Court of Pakistan was dealing with the Arbitration (Protocol and Convention) Act 1937 and made observations in the nature of *obiter dicta* about the Indian Independence (International Arrangements) Order, 1947. The matter was between private parties. In any case, dealing with such an issue, notice ought to have been issued by the Court to the Attorney-General under O27A R 1 of Civil Procedure Code and Order XXIX, rule 1, of the Supreme Court Rules. In the absence of such notice, validity of the decision of the Court is open to question. In the case of *Sherpao,* PLD 1992, SC 723, it was held that non-compliance of the provisions of notice renders proceedings defective.

11. In the later decision, *Superintendent, Land Customs (Khyber Agency)* v. *Zewar Khan,* PLD 1969, SC 485, the Supreme Court, wherein the appellant was represented by the Attorney-General (Pirzada) held as under:

> "In International Law too Pakistan was accepted and recognised as a successor Government and the inheritor of his Majesty's Government in the United Kingdom. This was made abundantly clear by the following statement of the then Secretary of State for Commonwealth Relations, made in the British House of Commons on the 30th June 1950:
>
> > 'It is His Majesty's Government view that Pakistan is in international law the inheritor of the rights and duties of the old Government of India and of His Majesty's Government in the United Kingdom, in these territories and that the Durand Line is the international frontier.'
>
> This was followed in 1956 by a statement of Sir Anthony Eden, the then Prime Minister of the United Kingdom to the following effect:
>
> > 'In 1947, Pakistan came into existence as a new sovereign independent member of the Commonwealth. The British Government regard her as having, with full consent of the overwhelming majority of the Pushto-speaking peoples concerned both in the admin-

istered and non-administered areas, succeeded to the exercise of the powers formerly exercised by the Crown in the Indian North-West Frontier of the subcontinent.'" (*The All Pakistan Legal Decisions*, 1969 (Vol. XXI), pp. 508, 509 SC.)

Both Judgments (1961 and 1969) were written by Justice Hamoodur Rahman. In 1969 he was the Chief Justice of Pakistan. India's contention on the basis of the judgment of the Supreme Court of Pakistan in the *Yangtze* case is untenable.

12. I am therefore of the opinion that by virtue of the Indian Independence Act and the Indian Independence (International Arrangements) Order of 1947, British India was divided into two independent States, India and Pakistan, and both were successor States and that the Pacific Settlement of International Disputes, the General Act of 1928 devolved upon and continues to apply to India and Pakistan.

*

INDIA AND PAKISTAN — 1947 TO 1999

Estoppel

13. In June 1947, when British India was to be partitioned and two independent Dominions — India and Pakistan — were to be established, the British Government considered questions about judicial forums to deal with the various problems arising out of partition and also with the demarcation of the boundaries of the two States. The British Foreign Office examined the issues whether the matters could be referred to the International Court of Justice. Reference to the Court was ruled out for the following reasons:

(a) Boundaries in such a case are not a question of international law to which the Court is confined.

(b) The Court can only decide disputes "between Parties already recognized internationally as States" (*The Transfer of Power*, H.M. Stationery Office, Vol. XI, No. 71, p. 135.)

Eventually it was decided to establish an Arbitral Tribunal to deal with the problems arising out of partition. Mr. Jinnah (Pakistan) suggested that the Chairman of the Arbitral Tribunal should be a member of the Judicial Committee of the Privy Council. Pandit Nehru (India) suggested that three Judges of the Federal Court of British India should constitute the Arbitral Tribunal (*ibid.*, p. 328). In the end there was agreement that the Arbitral Tribunal should be composed of Sir Patrick Spens as Chairman and two High Court Judges, one Muslim and one Hindu, as members (*ibid.*, p. 853).

So far as demarcation of boundaries was concerned, a Tribunal consisted of five members, two from India, two from Pakistan, and Sir Cyril Radcliffe as Chairman. India and Pakistan, both, were dissatisfied with the awards, but accepted them.

14. On 23 June 1948 an Agreement relating to air services was signed between India and Pakistan. Article XI, paragraphs (A) and (B), provide:

> "(A) If any dispute arises between the Contracting Parties relating to the interpretation or application of the present Agreement, the Contracting Parties shall in the first place endeavour to settle it by negotiation between themselves.
>
> (B) If the Contracting Parties fail to reach a settlement by negotiation,
>
> (i) they may agree to refer the dispute for decision to an arbitral tribunal appointed by agreement between them or to some other person or body; or
>
> (ii) if they do not so agree or if, having agreed to refer the dispute to an arbitral tribunal, they cannot reach agreement as to its composition, either Contracting Party may submit the dispute for decision to any tribunal competent to decide it which may hereafter be established within the International Civil Aviation Organization or, if there is no such tribunal, to the council of the said Organization, or failing that, to the International Court of Justice." (United Nations, *Treaty Series*, Vol. 28, 1949, I, No. 423, p. 158.)

At that time, both were Dominions and members of the Commonwealth, but it was agreed that the dispute could be referred to the International Court of Justice if no forum is available.

15. In 1950, Mr. Liaquat Ali Khan, the former Prime Minister of Pakistan urged India to refer the Canal Water Dispute to the International Court of Justice. He said:

> "Under the Optional Clause the Government of India have agreed to accept the jurisdiction of the International Court on the application of countries which are not members of the Commonwealth. *The exception doubtless contemplated that there would be Commonwealth machinery equally suited to the judicial settlement of disputes. While such Commonwealth machinery is lacking it would be anomalous to deny to a sister member of the British Commonwealth the friendly means of judicial settlement* that is offered by India to countries outside the Commonwealth." (Letter dated 23 August 1950 from Mr. Liaquat Ali Khan to Shri Nehru.) (R. P. Anand, *Compul-*

sory Jurisdiction of the International Court of Justice, p. 239; emphasis added.)

"though India admitted her Canal Water dispute with Pakistan to be a justiciable dispute, she preferred to refer the dispute in the first place to a tribunal consisting of two judges from India and two judges from Pakistan. If such tribunal came to be deadlocked, she proposed to settle those parts of the dispute which would not be finally decided through negotiations, and failing that, to submit them to arbitration or even to the International Court of Justice." (Letter dated 27 October 1950, from Mr. Nehru, Prime Minister of India, to the Pakistan Prime Minister.) (*Ibid.*, p. 255.)

16. In 1952 when a disagreement arose between India and Pakistan concerning the interpretation or application of the Chicago Convention, India brought it to the ICAO Council. The matter was ultimately settled by negotiation between the parties (*The Canadian Year Book of International Law*, 1974, p. 136).

17. India and Pakistan signed an Agreement on 23 October 1959. Clause 8 thereof reads as follows:

"It was agreed that all outstanding boundary disputes on the East Pakistan-India and West Pakistan-India border raised so far by either country should be referred to an impartial tribunal consisting of three members, for settlement and implementation of that settlement by demarcation on the ground and by exchange of territorial jurisdiction, if any. Any dispute which may have been referred to the tribunal can be withdrawn by mutual agreement." (*The Indian Journal of International Law*, Vol. I, 1960-1961, p. 137.)

18. In or about 1960 the Indus Water Dispute resulted in a Treaty between India and Pakistan through mediation of the President of the World Bank.

19. In 1965 a dispute arose between India and Pakistan over Rann of Kutch. On 18 August 1965 the Prime Minister of India stated in the Lok Sabha:

"Although we were quite sure that the boundary was already well-settled and the only question that remained was that of demarcation, Pakistan contested that position. Therefore, the situation had to be resolved by negotiations and, failing that, by the verdict of an impartial tribunal." (R. P. Anand, *Studies in International Adjudication*, p. 223.)

Eventually, an International Tribunal was established. India nominated Ambassador Ales Bebler, judge of the Constitutional Court of Yugoslavia, and Pakistan nominated Ambassador Nasrollah Entezam of Iran and a former President of the United Nations General Assembly. As

the two Governments failed to agree on the selection of the Tribunal Chairman, the United Nations Secretary-General, at the request of the two Governments, nominated Judge Gunnar Lagergren, President of the Court of Appeal for Western Sweden, as Chairman (Anand, *op. cit.*, p. 225).

In 1968 the Tribunal gave its award. India and Pakistan, though dissatisfied thereby, accepted the award.

20. In September 1965 there was war between India and Pakistan. The Security Council brought about cease-fire. On 10 January 1966, India and Pakistan signed the Tashkent Declaration in the presence of the *Soviet Premier who mediated between them.*

21. On and from 4 February 1971 India suspended overflights of Pakistan civil aircrafts over Indian territory which disrupted the vital airlink between West and East Pakistan. On 3 March 1971 Pakistan filed a complaint against India before the Council of the International Civil Aviation Organisation for the alleged breach of the 1944 Chicago Convention on International Air Services Transit Agreement. India raised preliminary objection as to the jurisdiction of the ICAO to entertain the complaint. Oral hearings took place on 29 July 1971; Palkhiwala appeared for India and Pirzada represented Pakistan. The objection raised by India was overruled. On or about 30 August 1971 India filed an Appeal before this Court. Pakistan raised preliminary objection as to the jurisdiction of the Court to entertain the Appeal. Oral hearings took place in June and on 7 July 1972. The Court, by its Order, held that the Court had jurisdiction to entertain the Appeal and that the ICAO Council was competent to entertain Pakistan's complaint. Before Council could go into merits, the Parties held negotiations and the complaint was not pursued. (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46.)

22. On 11 May 1973 Pakistan filed an Application before the Court regarding Prisoners of War under the Convention on Genocide and the General Act for Pacific Settlement of International Disputes 1928, *inter alia,* on the following grounds:

> "On 21 November 1971, taking advantage of the international situation in East Pakistan, and acting in breach of her obligations under the United Nations Charter, the Government of India launched direct armed attacks against Pakistan's Eastern Province. These armed attacks continued to mount until Pakistan was forced to take measures in self-defence. The fighting spread to West Pakistan and resulted in a state of war between India and Pakistan on 3 December 1971. India notified the existence of a state of war to Pakistan through the Government of Switzerland on 4 December 1971.
>
> . . . . . .

> On 16 December 1971, India made a cease-fire call which was accepted by Pakistan and hostilities ceased at 14.30 hours GMT on 17 December 1971. The Security Council of the United Nations took cognizance of the matter on 21 December 1971.
>
> . . . . . .
>
> In January 1972, the over 92,000 Pakistani prisoners of war and civilian internees, who were under Indian custody, were transferred to Prisoner of War Camps in India." (Application of Pakistan to the International Court of Justice dated 11 May 1973, *I.C.J. Pleadings, Trial of Pakistani Prisoners of War,* pp. 3, 4.)

On 24 June 1973 India, in its communication to the Court , *inter alia*, pleaded:

> "Attention, in this respect, is also invited to Article 1, clause (ii), of the Simla Agreement 1972, which was signed by the President of Pakistan and the Prime Minister of India on 2 July 1972 and, after having been considered by representative Assemblies of the two countries, was ratified and is in force. This clause provides 'that the two countries are resolved to settle their differences by peaceful means through bilateral negotiations *or by any other peaceful means mutually agreed upon between them*' (emphasis added [in original]). In so far as the repatriation of prisoners of war and civilian internees is concerned, Article 6 of the Simla Agreement does provide for negotiations between the countries concerned to settle the related questions. *The subject-matter of Pakistan's Application must, therefore, be considered and resolved in conformity with the provisions of the Simla Agreement and in consultation with the parties concerned.* No bilateral or trilateral negotiations have yet taken place on the subject-matter of Pakistan's Application." (*Ibid.*, p. 149; second emphasis added.)

In the said communication, India raised pleas, *inter alia*, that the General Act of 1928 is not in force, and assuming that the Act of 1928 is still in force, Pakistan is not a party thereto. India did not appear before the Court, but in view of India's communication of 24 June 1973, the Attorney-General of Pakistan (Mr. Yahya Baktiyar) made detailed submissions about the devolution of the General Act of 1928 on India and Pakistan (Third Public Sittings, 26 June 1973).

Subsequently, negotiations took place between India and Pakistan and the Application was withdrawn by Pakistan (*Trial of Pakistani Prisoners of War, Order of 15 December 1973, I.C.J. Reports 1973,* p. 348).

23. On 30 May 1974, Mr. Z. A. Bhutto, the Prime Minister of Pakistan filed a declaration with the United Nations Secretary-General in view of India's objections to the 1928 Act in the case concerning *Trial of Pakistani Prisoners of War*.

(a) That Pakistan has been a separate party to the General Act of 1928 from the date of its Independence, i.e., 14 August 1947;

(b) In order to dispel all doubts, Pakistan notified that it continues to be bound by the accession of British India of the General Act of 1928.

24. To counter the above declaration of Pakistan and in view of the pleas raised by Pakistan in the Court in the case concerning *Trial of Pakistani Prisoners of War*, in September 1974 India sent three communications to the United Nations Secretary-General; (i) contesting the position taken by Pakistan in the letter of 30 May 1974, (ii) the so-called Commonwealth reservation and (iii) India's assertions regarding the General Act of 1928.

The circumstances in which Pakistan left the Commonwealth in 1972 are well known. India added the words "has been a member of the Commonwealth of Nations" in its reservation in September 1974. This was obviously an arbitrary and discriminatory act aimed at Pakistan.

The Simla Agreement and the Lahore Declaration

25. The Simla Agreement (2 July 1972) and the Lahore Declaration (21 February 1999) reinforce the applicability of principles and purposes of the United Nations Charter. Paragraph 1 of Article 1 of the Charter makes it incumbent upon the parties to bring about by peaceful means, and *in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of peace.

It must also be noticed and noted that the Lahore Declaration was signed by India in February 1999 after the Indian communication of 18 September 1974.

The terms "any other peaceful means mutually agreed upon between them", in the Simla Accord, in their ordinary and natural meaning refer to any means for peaceful settlement whether in a bilateral treaty agreed upon before 2 July 1972 or which may have been available by agreement after that date. Chapter II of the General Act for peaceful settlement "already agreed upon" by both the Parties before 2 July 1972 creates mutually binding obligations between them and the procedure under Article 17 of the General Act of 1928 is available. India and Pakistan have become Parties to several multilateral treaties since 2 July 1972, and all means for peaceful settlement of disputes stated therein are binding.

The interpretation put by India on the words in the Simla Accord and the Lahore Declaration is restrictive, narrow and unreasonable.

26. It is clear that between 1947 and 1999 India and Pakistan settled their disputes (i) by negotiations, (ii) through mediation of third parties, (iii) through arbitral or judicial tribunals, (iv) had agreed to have access

to the International Court of Justice if no other forum was available, (v) the Parties even filed an appeal or applications before the Court. In these circumstances, the conduct of India is covered by the doctrine of estoppel.

A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency. (Judges Alfaro and Fitzmaurice in the case concerning *Temple of Preah Vihear, I.C.J. Reports 1962*, pp. 39-51, 61-65; Professor Ian Brownlie, *Principles of Public International Law*, p. 646).

*

INDIA'S COMMONWEALTH RESERVATION IS OBSOLETE

27. Lord Rosebery, in a speech in Adelaide in 1884, had described the Empire as a "Commonwealth of Nations".

28. The term "Commonwealth" has no single fixed meaning. It is used in two main senses: first, to denote an association of independent member States; secondly, to include territories which are in various ways dependent on those independent members. The Commonwealth evolved from the British Empire, which came to be called the British Commonwealth of Nations in the 1920s; the latter designation was also ambiguous, usually (though not always) referred to the United Kingdom and the self-governing Dominions. (See S. A. de Smith, "The United Kingdom and Commonwealth", *Constitutional and Administrative Law*, p. 649.)

29. The development of dominion status is a torturous, oft-told tale. By 1926 the following Commonwealth countries were called self-governing dominions: Canada, Australia, New Zealand, South Africa (which left the Commonwealth in 1961), the Irish Free State (which became known as Eire in 1937 and seceded from the Commonwealth, under the name of the Republic of Ireland, in 1949) and Newfoundland (which relinquished its self-governing institutions after a financial collapse in 1933 and joined Canada as its tenth province in 1949). In the Report of the Inter-Imperial Relations Committee (the Balfour Report) of the Imperial Conference held in 1926, it was declared that the United Kingdom and the Dominions were:

> "equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations" (S. A. de Smith, "The United Kingdom and Commonwealth", *Constitutional and Administrative Law*, pp. 657, 658).

30. Some elements of inequality could be eliminated only by imperial

legislation. It was necessary to pass the Statute of Westminster 1931 in order to remove the Dominions from the definition of "colony" (Sect. 11), to abolish the doctrine of legislative repugnancy and to exclude Dominion Parliaments from the restrictive operation of the Colonial Laws Validity Act 1865 (Sect. 2), to declare that Dominion Parliaments had extraterritorial powers (Sect. 3) and to provide that no future United Kingdom Act was to extend or be deemed to extend to a Dominion as part of its law unless the request and consent of the Dominion concerned were expressly recited in the Act in question (S. A. de Smith, "The United Kingdom and Commonwealth", *Constitutional and Administrative Law*, pp. 658, 659).

Inter Se *Doctrine and the Optional Clause*

31. When, about a decade after the launching of the League of Nations, the British Dominions faced the question of accepting the optional clause in the Statute of the Permanent Court of International Justice, they adopted a common policy with respect to disputes *inter se*. The latter, by the view which prevailed, were not international disputes within the meaning of the Statute, since the relations between the autonomous Dominions (or between any of them and the United Kingdom) were *not international*. An Imperial Conference of 1926 had thought it would then be premature for the Dominions to accept the optional clause. By the understanding reached, there was not to be a move in this matter by any Dominion before discussion with the others. Canada initiated such discussion in 1929. The sequel was acceptance of the optional clause by all the Dominions. All except the Irish Free State, however, reserved disputes *inter se*. (See *The American Journal of International Law*, Vol. 51, 1957, p. 612.)

Privy Council

32. The Privy Council was the apex Court of Appeal in the Commonwealth. An advisory opinion of the Privy Council had been sought twice in disputes between Commonwealth members. (Re *Cape Breton* (1846), 5 Moo. PC 259 (annexation of Cape Breton to Nova Scotia); Re *Labrador Boundary Dispute* (1927) 137 LT 187.)

Proposed Commonwealth Court of Appeal

33. As early as 1929, an Imperial Conference had recommended that there be a Commonwealth tribunal. More explicit conference proposals of 1930 looked to a plan whereby there would be, not a continuing machinery such as a permanent court, but boards chosen by the disputant States for the adjudication of particular disputes. All of the persons

composing such boards were to be from within the Commonwealth. (See *The American Journal of International Law*, p. 613.)

The Commonwealth Prime Ministers' Conference in 1962 expressed the hope that the regular appointment of judges from other Commonwealth countries would strengthen the Judicial Committee and emphasize its importance as a Commonwealth link. It might have done so a generation ago, but it is obviously too late now. A proposal was made in or about 1966 to set up a peripatetic Commonwealth Court composed of judges from various Commonwealth countries. Its jurisdiction would be twofold: (i) as a final Court of Appeal in certain cases from the courts of the Commonwealth countries, and (ii) to determine justiciable disputes between Commonwealth countries. Some countries expressed their approval, but the majority was not interested. (See O. Hood Phillips, *Constitutional and Administrative Law*, pp. 828, 829.)

India and Pakistan

34. Sir Stafford Cripps, during the debate on the Indian Independence Bill said:

> "India and Pakistan will take their places proudly in the comity of free and independent nations of the world, strengthened, we believe by the close ties of friendship with which they will be greeted as new Members of the British Commonwealth of Nations; and it is, I am sure, the hope of all of us that this membership of our Commonwealth which they will share, will help them in the future to keep close to one another, and that the time will come when their present bitterness and opposition may be engulfed in the single purpose of the progress and prosperity of all the peoples of the Indian continent, whatever their race or creed. And, in that great forward journey upon the two new members of the British Commonwealth of Nations will embark on 15th August next, which will become an historic day, we wish them 'God speed' and assure them that we may ever be by their side in time of difficulty to extend a helping hand. Their leaders who have struggled and suffered for the faith that was in them through long and hard years, we salute now as fellow-workers in the cause of world peace and progress. May the sun which is now rising on their independence, never set upon their freedom and prosperity." (*Liquidation of British Empire [Parliamentary Debates on the Indian Independence]*, ed. by Ashiq Hussain Batalvi, p. 287.)

On 16 July 1947, the Earl of Listowel, the Secretary State of India, stated before the House of Lords:

> "Both Dominions will start their career of full independence as partners in the British family of nations, and will share with the other Members of the Commonwealth the advantages. *The Membership of the Commonwealth will impose a moral obligation to remain in peace.*" (*Liquidation of British Empire*, p. 348; emphasis added.)

The India (Consequential Provision) Act 1949 recognizes that India is a Republic while remaining a member of the Commonwealth. In 1955, Pakistan also announced its intention of becoming a Republic while remaining a full member of the Commonwealth. The Pakistan (Consequential Provision) Act 1956 made provision as regards the operation of existing law relating to Pakistan view of this new status, and the Commonwealth Prime Ministers in London issued a declaration in 1955 similar to that of 1949, in which reference is made to "the member nations of the Commonwealth", the "Commonwealth countries" and "the United Kingdom and other Commonwealth countries". (See O. Hood Philips, *Constitutional and Administrative Law*, 1967, pp. 806, 807.)

35. The symbol of Commonwealth association is the Queen and Head of the Commonwealth, rather than the Crown. The Queen has adopted a new personal flag, initial E and Crown within a chaplet of roses, for use where the Royal Standard (especially associated with the United Kingdom) is inappropriate.

36. There can be no more fitting words about the present Commonwealth than those spoken by Her Majesty Queen Elizabeth II in a Christmas broadcast from New Zealand in 1953:

> "The Commonwealth bears no resemblance to the empires of the past. It is an entirely new conception built on the highest qualities of the spirit of man: friendship, loyalty and the desire for freedom and peace." (*Commonwealth Yearbook 1987*, p. 5.)

37. In the pamphlet "Britain and the Commonwealth" published in 1997 with a foreword by Tony Blair, the British Prime Minister, it is observed that:

> "The Commonwealth has changed dramatically since the 1931 Statute of Westminster. A club of self-governing British Dominions grouped around Britain has become a modern association of independent equals and a forum for all its members to tackle challenges and problems together. These include the need to promote sustainable economic and social development; to alleviate poverty; to provide universal access to education; to protect the environment; to combat criminal activities such as drug trafficking and money laundering; to fight communicable diseases; and to support the United Nations and other international institutions in the search for peace and stability in the world."

38. Without any disrespect to the Commonwealth, reference may be made to its graphic description by S. A. de Smith:

> "Over-enthusiastic descriptions of the Commonwealth — 'a family of like-minded nations, speaking the same political language and voluntarily co-operating on matters of common concern . . .' have led to a reaction. Nowadays the Commonwealth is apt to be dismissed as a gigantic farce, as the emperor who had no clothes, as the disembodied grin on the face of the Cheshire cat." (S. A. de Smith, *Constitutional and Administrative Law*, p. 667.)

39. The circumstances in which some of the countries have retained Commonwealth reservation are distinguishable.

40. On 18 September 1974, India's declaration excluded "disputes with the Government of any state which is or *has been a Member of Commonwealth of Nations*". India's declaration prior to 1974 excluded:

> "disputes with the Government of any country which on the date of this Declaration is a member of the Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree".

In the context and circumstances, the words "has been a Member of the Commonwealth of Nations" were added on 18 September 1974 to exclude disputes with Pakistan only, as (i) Pakistan had left the Commonwealth in or about 1972 in the circumstances well known, and (ii) in the *Trial of Pakistani Prisoners of War* case in 1973, vital issues had been raised by Pakistan in its Application against India before the Court. At that time, dissociation of Eire and South Africa from the Commonwealth was almost a past and closed matter.

> "Nor was India averse in principle in 1949 to the proposal that there should be recourse to this Court in connection with the treatment by South Africa, another Commonwealth country at that time, of Indians in that territory." (CR 2000/1, p. 35 (Lauterpacht).)

Further in 1948 and 1950, India had agreed that access to the International Court of Justice could be had if no other forum is available. As stated earlier, India is estopped from invoking the Commonwealth reservation. The reservation of India, purporting to exclude Pakistan and Pakistan only, is *per se* discriminatory, arbitrary and invalid.

41. R. P. Anand observes in his book *Compulsory Jurisdiction of the International Court of Justice:*

> "Probably this reservation, which was originally intended to emphasize the absence of an international element in the relations of the members of the Commonwealth, is now obsolete and in default of any corresponding machinery within the Commonwealth, produces results contrary to the purposes which inspired it." (P. 249.)

42. I therefore endorse the views expressed by Judge Ago in the *Nauru* case in 1992:

> "It is therefore most likely that it [the United Kingdom] would not, by itself, have raised insurmountable obstacles. Particularly since the clause excluding from the acceptance of the compulsory jurisdiction of the International Court of Justice disputes with States Members of the Commonwealth — a clause originally inserted in the declaration in anticipation of the establishment of a special court for the Commonwealth — could easily have been regarded as obsolete, since that expectation has never been fulfilled." (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 327, para. 5.)

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COMMONWEALTH RESERVATION IS SEVERABLE FROM THE INDIAN DECLARATION OF SEPTEMBER 1974

43. In the *Norwegian Loans* case, Sir Hersch Lauterpacht concluded that "the automatic reservation was invalid and could not be separated from the Acceptance as such".

However, the Judge propounded the doctrine of severability and observed:

> "That general principle of law is that it is legitimate — and perhaps obligatory — to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument. *Utile non debet per inutile vitiari.* The same applies also to provisions and reservations relating to the jurisdiction of the Court." (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 56, 57.)

44. In the *Interhandel* case President Klaestad observed:

> "The question of a similar French reservation was discussed in one Separate and two Dissenting Opinions appended to the Judgment in the *Norwegian Loans* case. But the Court did not consider and decide this question and was not in a position to do so, since the question of the validity of the reservation was not in dispute between the Parties, who had not laid it before the Court and had not argued it." (*Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 75.)
>
> "These considerations have led me to the conclusion that the Court, both by its Statute and by the Charter, is prevented from acting upon that part of the Reservation which is in conflict with

Article 36, paragraph 6, of the Statute, but that this circumstance does not necessarily imply that it is impossible for the Court to give effect to the other parts of the Declaration of Acceptance which are in conformity with the Statute. Part *(a)* of the Fourth Preliminary Objection should therefore in my view be rejected." (*Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 78.)

45. As K. R. Simmonds has summed up:

"Both the Judges, Judge Klaestad and Judge Armand-Ugon, seem to have decided that the automatic reservation was only a secondary or an accessory stipulation to a basically valid acceptance of the Court's jurisdiction under the Optional Clause; the jurisdiction of the Court would be sufficiently upheld by treating the reservation as inoperative and severable from the document upon which the Court must rely." (Footnote omitted.) (K. R. Simmonds, "The Interhandel Case", *The International and Comparative Law Quarterly*, Vol. 10, 1961, p. 526.)

46. Reliance was placed by India on the decision of the Supreme Court in *RMDC* v. *India* 1957 SCR 930 (CR 2000/2, p. 14 (Sorabjee)). In that case, the Supreme Court considered the doctrine of severability and laid down as many as seven principles. But on the application of the said principles it was held that the impugned provisions were severable.

47. In the subsequent case, *Harakchand* v. *Union of India*, it was held:

"The matter is clearly put in Cooley on Constitution Limitations, 8th edn. at p. 360:

'It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same Act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorise the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other.'

Applying the test to the present case we are of opinion that the provisions held to be invalid are not inextricably bound up with the remaining provisions of the Act." (AIR 1970 Supreme Court 1453 (V 57C 308).)

48. Article 44 of the Vienna Convention on the Law of Treaties recognizes separability of clauses in the Treaty.

49. T. O. Elias, in his book *The Modern Law of Treaties*, expresses the view that "only the clauses affected by an alleged ground of invalidity, if distinct and separable, and not an essential basis of the treaty, may be eliminated, the remainder being kept in force" (p. 140).

50. In the cases of *Belios* v. *Switzerland* (1988) (ECHR Series A, No. 132) and *Loizidou* v. *Turkey* (1995) (ECHR Series A, No. 310), the European Court of Human Rights treated the objectionable reservation as severable.

51. In the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*, Judge Bedjaoui in his dissenting opinion observed that:

> "And treaty law, as codified in 1969, enshrines in Article 44 of the Vienna Convention — admittedly with certain exceptions — the *principle of separability* of the various provisions contained in a treaty. I really cannot see why a declaration should wholly escape this principle." (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, dissenting opinion of Judge Bedjaoui, p. 539, para. 60.)
>
> "This issue has in fact been raised in a number of cases, including the *Norwegian Loans* and *Interhandel* cases, and some judges have evoked and accepted the principle of separability (cf. *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 55-59; *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, pp. 57, 77-78, 116-117.)" (*Ibid.*, pp. 539-540, para. 61.)

52. Having regard to recognized principles of the doctrine of severability, clause (2), "disputes with the government of any State which is or has been a Member of the Commonwealth of Nations" can be separated from the rest in the declaration of India of 18 September 1974.

The "Commonwealth members reservation" is not so central as to constitute "an essential basis of the consent of India" to be bound by its declaration under the optional clause. It is not made in good faith. It serves no rational or legitimate purpose, as there exists no separate procedure for the compulsory jurisdiction of disputes between Commonwealth countries. It is purposeless and of no legal effect. Hence its severance does not affect the validity of rest of India's declaration under Article 36, paragraph 2, of the Statute.

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No Valid Denunciation by India of the General Act of 1928

53. In the communication of 18 September 1974 India asserted:

(a) the Government of India never regarded themselves as bound by the General Act (of 1928) since its Independence by succession or otherwise;

(b) accordingly, India has never been and is not a party to the General Act of 1928 since its Independence.

54. The said Communication was sent by India to counter the Communication of Pakistan of 30 May 1974 whereby Pakistan expressed its intention to be bound by the General Act. Such plea had already been raised by Pakistan before the Court in the case *Trial of Pakistani Prisoners of War* of 1973.

Pakistan has rightly urged about the Indian Communication:

> "The first is that it is declaratory — and declaratory only. It is a statement made in 1974 that as from an event in 1947 — that is to say, 27 years previously, India's independence — India was not a party to the General Act 'it is not and never has been'.
>
> The second point follows closely from the first. It is that India's concern to make the position absolutely clear '. . . so that there is no doubt in any quarter', was merely a statement of its own view of the legal position. It was a subjective statement which might or might not have had objective validity (though, in so far as relevant, Pakistan says that it had no objective validity). Moreover, it was not a denunciation of the General Act — and this was so for two reasons. First, in India's view there was no General Act to denounce. Second, even if there was, India did not formally denounce it in the manner provided for in Article 45 of the General Act . . . Consistent with the logic of its position, India did not use words of denunciation because that would have implied that India regarded itself as committed to the General Act at the time of the denunciation, which it denied. India could have done, if it had wished to denounce the General Act, it could have done as both France and Britain did and denounced the General Act formally, but it chose not to do so." (CR 2000/1, p. 54 (Lauterpacht).)

55. The assertions made by India in the said Communication are erroneous, misconceived and illegal. The said Communication cannot be deemed to be a denunciation. There is no material before the Court that any State party to the General Act treated India's Communication as denunciation. The Communication does not comply with the provisions of Article 45 of the General Act. In the joint dissenting opinion in the case of *Nuclear Tests*, dated 20 December 1974, reference was made to India's letter of 24 June 1973 (mentioned in paragraph 22 above) and Pakistan's declaration, but no notice was taken of India's Communication of 18 September 1974:

> "In the case concerning *Trial of Pakistani Prisoners of War*, by a letter of 24 June 1973 India informed the Court of its view that the 1928 Act had ceased to be a treaty in force upon the disappearance

of the organs of the League of Nations. Pakistan, however, expressed a contrary view and has since addressed to the Secretary-General a letter from the Prime Minister of Pakistan affirming that she considers the Act as continuing in force. Again, although the United Kingdom, in a letter of 6 February 1974, referred to doubts having been raised as to the continued legal force of the Act and notified the Secretary-General of its denunciation of the Act in conformity with the provisions of paragraph 2 of Article 45, it did so in terms which do not prejudge the question of the continuance in force of the Act.

Moreover, it is axiomatic that the termination of a multilateral treaty requires the express or tacit consent of all the parties, a requirement which is manifestly not fulfilled in the present instance." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 344, para. 70.)

Reference may also be made to the practice of the Secretary-General of the United Nations with regard to multilateral treaties:

"The International Law Commission in 1966 described this practice as follows:

'In the absence of any clause on reservations in agreements concluded after the General Assembly resolution on reservations to multilateral conventions, the Secretary-General adheres to the provisions of that resolution and communicates to the States concerned the text of the reservation accompanying an instrument of ratification or accession without passing on the legal effect of such documents, and "leaving it to each State to draw legal consequences from such communications". He transmits the observations received on reservations to the States concerned, also without comment. A general table is kept up to date for each convention, showing the reservations made and the observations transmitted thereon by the States concerned. A State which has deposited an instrument accompanied by reservations is counted among the parties required for the entry into force of the agreement.' (*Official Records, Twenty-first Session, Supplement No. 9* (A/6309/Rev.I), p. 37.)" (*I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, pp. 87, 88.)

56. The Government of India must have known the notifications of France and the United Kingdom. The language of the notifications was clear and categorical and specific mention therein was made about denunciation. The omission thereof from the Indian Communication was not cogently and plausibly explained by India.

Professor Rosenne states that "where the right of denunciation is reserved, the State concerned must take a positive step to exercise it" (Shabtai Rosenne, *The Law and Practice of the International Court of Justice*, Vol. II, p. 82).

57. Further, the applicable rule is, as approved by the Court in the *North Sea Continental Shelf* case, when an agreement or other instrument itself provides for the way in which a given thing is to be done, it must be done in that way or not al all (*I.C.J. Reports 1969,* para. 28).

58. Mere affirmation by India that it was not bound by the General Act, which is denied by Pakistan, is unilateral and its validity cannot be determined by the Court at the preliminary stage. Reference may be made to the finding of the Court in the Appeal by India against Pakistan, *re:* ICAO, which is *res judicata.*

> "The Court considers however, that for precisely the same order of reason as has already been noticed in the case of its own jurisdiction in the present case, a mere unilateral affirmation of these contentions — contested by the other party — cannot be utilized so as to negative the Council's jurisdiction. The point is not that these contentions are necessarily wrong but that their validity has not yet been determined. Since therefore the Parties are in disagreement as to whether the Treaties ever were (validly) suspended or replaced by something else; as to whether they are in force between the Parties or not; and as to whether India's action in relation to Pakistan overflights was such as not to involve the Treaties, but to be justifiable *aliter et aliunde;* — these very questions are in issue before the Council, and no conclusions as to jurisdiction can be drawn from them, at least at this stage, so as to exclude *ipso facto* and *a priori* the competence of the Council." (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 64, para. 31.)

59. I am therefore of the opinion that the General Act of 1928 has not been validly denounced by India and it continues to be bound by the said Act.

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EFFECT OF THE GENERAL ACT OF 1928 ON INDIA'S RESERVATION

60. The 1928 Act contains a strict code of rules regulating the making of reservations. This aspect has been dealt with in paragraph 82 of the joint dissenting opinion in the *Nuclear Tests* case:

> "In the present instance, this objection is reinforced by the fact that the 1928 Act contains a strict code of rules regulating the making of reservations, whereas no such rules govern the making of reservations to acceptances of the Court's jurisdiction under the optional clause. These rules, which are to be found in Articles 39, 40, 41, 43 and 45 of the Act, impose restrictions, *inter alia*, on the kinds

of reservations that are admissible and the times at which they may be made and at which they will take effect. In addition, a State accepting jurisdiction under the optional clause may fix for itself the period for which its declaration is to run and may even make it terminable at any time by giving notice, whereas Article 45 (1) of the Act prescribes that the Act is to remain in force for successive fixed periods of five years unless denounced at least six months before the expiry of the current period. That the framers of the 1928 Act deliberately differentiated its régime in regard to reservations from that of the optional clause is clear; for the Assembly of the League, when adopting the Act, simultaneously in another resolution drew the attention of States to the wide possibilities of limiting the extent of commitments under the optional clause 'both as regards duration and as regards scope'. Consequently, to admit that reservations made by a State under the uncontrolled and extremely flexible system of the optional clause may automatically modify the conditions under which it accepted jurisdiction under the 1928 Act would run directly counter to the strict system of reservations deliberately provided for in the Act." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 349, para. 82.)

61. The reservations made by India to Article 17 of the General Act are prohibited by that Act and are without legal effect because the operation of Article 17 of the General Act is subject to Article 39.

Article 39 provides:

"1. In addition to the power given in the preceding article, a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.

2. These reservations may be such as to exclude from the procedure described in the present Act:

(a) disputes arising out of facts prior to the accession either of the Party making the reservation of or any other Party with whom the said Party may have a dispute;

(b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States;

(c) disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories.

3. If one of the parties to a dispute has made a reservation, the other parties may enforce the same reservation in regard to that Party.

> 4. In the case of Parties who have acceded to the provisions of the present General Act relating to judicial settlement or to arbitration, such reservations as they may have made shall, unless otherwise expressly stated, be deemed not to apply to the procedure of conciliation."

The reservations made by India do not fall under the permissible reservations exhaustively set out in Article 39 of the General Act.

62. I would also draw the attention to Article 41 of the General Act which reads as follows:

> "Disputes relating to the interpretation or application of the present General Act, including those concerning the classification of disputes and the scope of reservations, shall be submitted to the Permanent Court of International Justice."

This jurisdiction is saved to the present Court by virtue of Article 37 of the Statute. Consequently, since questions of interpretation and application of the General Act have arisen, including those concerning the scope of reservations and their admissibility, the International Court of Justice has jurisdiction to determine the matter.

63. The Court has jurisdiction under Article 17 of the General Act, notwithstanding India's reservation as was held by the Court in the *Appeal relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972,* p. 53 and, in view of the observations made in this behalf in the joint dissenting opinion in the case concerning *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 253, paras. 91, 94, 95 and 97.

64. In any case, there is lack of good faith on the part of India. In the case of *Cameroon* v. *Nigeria,* the Court has set out the principle of good faith:

> "The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969." (*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 296, para. 38.)

65. In view of these considerations, I am of the opinion that the Court is competent to exercise jurisdiction under Articles 17, 39 and 41 of the General Act, read with Article 36, paragraph 1, and Article 37 of the Statute.

Without prejudice to the above, the following observations may be made.

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RESERVATIONS

General Observations

66. Some general remarks may be made as to the reservations. The observations made by two distinguished former Presidents of the Court may be reproduced.

Dr. Nagendra Singh (India):

"Over the years however, States have come to attach more and more exceptions and reservations and exclusions to their declarations of acceptance until today the declaration of India, for example, contains eleven separate reservations one of which is subdivided into five subsections . . .

Yet when such an acceptance is so whittled away, or hedged around with reservations and exclusions, that the actual kernel of jurisdiction remaining is minimal, the effect of such a gesture can hardly be regarded as encouraging . . . the apparent simplicity of the optional clause, a simplicity which appears to have been intended by its creators, has disappeared under the shadow of a thicket of overlapping and interconnecting reservations, making the task of the Court based on optional clause jurisdiction in some cases an extremely difficult one." (Judge Nagendra Singh, *The Role and Record of the International Court of Justice*, pp. 19, 20.)

Sir Muhammad Zafrulla Khan (Pakistan):

"In other words, and this is the point which it is worth stressing, as the composition of the United Nations has become wider, the idea of compulsory judicial settlement, which was favoured by so many of the States gathered at San Francisco in 1945, has also found increased acceptance, but at a markedly slower rate. The system of compulsory judicial settlement was of course not built in as an integral part of the United Nations peace-keeping machine; but it is to be feared that widespread hesitation in the acceptance of that system may betray certain reserve with regard to the general principle of judicial settlement of disputes, which, as we have seen, was built into the United Nations system.

Another discouraging tendency, the seeds of which were sown in 1946, is that of depositing declarations of acceptance of the Court's compulsory jurisdiction subject to reservations. Reservations of this kind have been before the Court on more than one occasion, and have been the subject of severe criticism. Nevertheless, although in recent years there has been some improvement in this respect, there are still deposited with the Secretary-General, and not withdrawn, declarations of this kind which, as recognitions of jurisdiction, are no more than the shadow without the substance." (*Ibid.*, p. 294.)

In view of the observations aforesaid, validity of India's reservations is open to question.

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ARTICLE 36, PARAGRAPH 2, OF THE STATUTE OF THE COURT AND THE INDIAN RESERVATION

67. Pakistan has tried to establish that a reservation which is not permissible under Article 36, paragraph 3, of the Statute has no legal effect when objection is taken to it by the applicant State. Such a reservation has been described as *ultra vires* of Article 36 of the Statute or an extra-statutory reservation.

68. During the oral submissions Pakistan pleaded:

> "*(a)* ... the Commonwealth reservation which India claims to invoke, lies outside the range of reservations which are permitted by Article 36, paragraph 3, of the Statute. The language of this paragraph is clear. Declarations shall be made either unconditionally or upon two possible conditions: reciprocity or for a certain time. I shall refer to reservations which fall outside the permitted scope as 'extra-statutory'. I shall submit that an extra-statutory reservation made by a defendant State may be applied by the Court against a plaintiff State only if there is something in the case which allows the Court to conclude, and I emphasize to conclude, that the plaintiff has accepted the reservation. Such acceptance can be inferred in two situations. One is where the plaintiff State has itself made the same or a comparable reservation. The other is when the plaintiff, being confronted by the invocation of the reservation by the defendant State, has shown itself willing to join issue on the interpretation of the content of the reservation, without challenging its opposability to itself. But if the plaintiff challenges the applicability of the reservation, and I emphasize this, then the Court must decide, by reference to its content and the circumstances, whether it is applicable or opposable as against the plaintiff." (CR 2000/1, pp. 17-18 (Munshi).)

"The obvious answer — an answer Pakistan is now challenging — is that the State practice has modified the express terms of Article 36, paragraph 3, and people generally have come to believe that any kind of reservation is permissible with the possible exception, perhaps, of reservations which seek to deprive the Court of the right to determine questions relating to its own jurisdiction — the so-called automatic reservations.

The first comment to be made on this is that the number of States

concerned is limited. One hundred and eighty-five States are parties to the Statute of the Court. Sixty States are parties to the optional clause. Of these, 23 have signed without any extra-statutory reservations. Of the 37 who have signed with reservations that fall outside the range of Article 36, paragraph 3, 14 have made these reservations relating either to matters of domestic jurisdiction, which hardly amounts to a reservation in the real sense, or have excluded disputes for which other means of settlement exist. So the number of States with real extra-statutory reservations seems to amount to no more than 23 (the same number as those who have not made extra-statutory reservations). Those 23 represent only about 38 per cent of the signatories of the parties to the Statute. It would not seem proper, therefore, to allow so unrepresentative a number of States to have the power of amending the clear text of Article 36, paragraph 3, of the Statute." (CR 2000/1, p. 21 (Munshi).)

69. Pakistan's pleas may be examined in the context of the Judgments of the Court. In the recent case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*, the Court gave effect to a Canadian reservation to the optional clause relating to fisheries conservation and management matters. That reservation apparently fell outside the ambit of reservations permitted by Article 36, paragraph 3. The Court described Spain's position regarding the relevant reservation as follows:

"Spain appears at times to contend that Canada's reservation is invalid or inoperative by reason of incompatibility with the Court's Statute, the Charter of the United Nations and with international law. However, Spain's position mainly appears to be that these claimed incompatibilities require an interpretation to be given to paragraph 2 *(d)* of the declaration different from that advanced by Canada." (*Fisheries Jurisdiction (Spain* v. *Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 451, para. 40.)

Having referred to the Spanish arguments, which showed that Spain's main dispute with Canada related to the interpretation of the reservation, the Court stated:

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

that it has jurisdiction to adjudicate upon the dispute brought before it by Spain's Application." (*I.C.J. Reports 1998*, pp. 451-452, para. 41.)

70. The Court therefore did not examine the validity or applicability of the Canadian reservation by noting that both States recognized "a wide liberty in formulating their declarations".

In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia) (Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240), Australia, as defendant, invoked the terms of its reservation excluding disputes "in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement". That was a reservation evidently outside the terms of Article 36, paragraph 3. The Court rejected the argument on the ground that no relevant alternative existed. The Court noted that Nauru's declaration also contained a similar reservation and thus assumed willingness on the part of the two countries to accept and give effect to the reservation.

71. In the *Nicaragua* case, the Court merely interpreted the second type of condition permitted under Article 36, paragraph 3, i.e. "for a *certain time*". It stated:

> "In particular, it [a declarant State] may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 59.)

The Court, in explaining the kind of reservations that may be made, limited itself to examples which fall clearly within the range permitted by Article 36, paragraph 3.

72. Reference can also be made, in this context, to the decisions of the Court in the cases of *Certain Norwegian Loans* and the *Interhandel*. The validity or applicability of the automatic reservation was not adjudicated upon. In the words of Professor Ian Brownlie:

> "In principle this form of reservation is incompatible with the Statute of the Court, since it contradicts the power of the Court to determine its own jurisdiction and is not a genuine acceptance of jurisdiction *ante hoc*. (Footnote: The Court has avoided the issue when it has been raised, as in the *Case of Certain Norwegian Loans*, ICJ Reports (1957), 9; and the *Interhandel* case, ibid. (1959), 6. However, a number of judges have held the reservation to be illegal; see ICJ Reports (1957), 42ff. (Lauterpacht), 68-70 (Guerrero); ibid. (1959), 55-9 (Spender), 76-8 (Klaestad), 92-4 (Armand-Ugon), 97ff.)" (Professor Ian Brownlie, *Principles of Public International Law*, 5th ed., p. 723.)

73. The comments of Professor Rosenne may also be mentioned:

"The *Norwegian Loans, Interhandel* and *Right of Passage* (Preliminary Objections) cases are three principal instances of judicial discussion of the validity of a reservation. In each of those instances it was argued that a particular reservation was incompatible with the optional clause, so that the whole declaration was ineffective to establish the compulsory jurisdiction. Although the parties argued the cases on the basis of the compatibility of the reservation with the system of the compulsory jurisdiction, the Court did not place itself on the same basis.

This leads to the conclusion that if, in principle and in practice, reservations other than those envisaged in Article 36, paragraph 3, of the Statute are not in themselves inadmissible, the validity of any specific reservation is a matter to be decided in each case." (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996,* Vol. II, *Jurisdiction,* pp. 770, 771.)

74. Pakistan's contentions as to inapplicability and/or lack of opposability to Pakistan of India's Commonwealth reservation are not inconsistent with the decisions of the Court involving anti-statutory reservations. Moreover, views expressed by some of the Judges of the Court in their opinions in the *Fisheries Jurisdiction* case (reproduced hereafter in paragraphs 89-91) support the contention of Pakistan. Reference may also be made to the following:

"The expectation was that a general system of compulsory jurisdiction would be generated as declarations multiplied. The conception was sound enough, but the conditions in which the system has functioned have reduced its effectiveness. The negative factors are generally the lack of confidence in international adjudication on the part of governments, the practice accepted by the Court, of making declarations, subject to various reservations and conditions, frequently arbitrary in extent, and ambiguous in form, and the tactical advantages of staying out of the system." (Professor Ian Brownlie, *Principles of Public International Law*, p. 721.)

R. P. Anand, the well-known Indian writer, states:

"As we have said earlier, the Optional Clause does not stand by itself. It is an integral part of the Statute and adherence to the Optional Clause means adherence to the whole of the Statute. It does not appear to be open to states in their unilateral declarations to make their acceptance of jurisdiction conditional upon non-application of constitutional provisions of the Court's Statute. The Court is required, both by Article 92 of the Charter and Article 1 of the Statute, to function in accordance with the Statute. Indeed, the old Court, even though it was not bound by such an express injunction to observe the Statute, held in the *Free Zones* case that it had no power to depart from the terms of the Statute on the proposal of the

parties to a case. The Optional Clause, therefore, although it leaves to an individual state large discretion as to the terms on which it accepts the compulsory jurisdiction, does not permit a state to make a declaration which is incompatible with the fixed constitutional provisions of the Court's Statute." (R. P. Anand, *Compulsory Jurisdiction of the International Court of Justice*, p. 189.)

Declarations

75. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* the Court held that the declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements and a State is either free to do so unconditionally or to qualify it with conditions or reservations. The Court also held that in fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States and in the establishment of this network of engagements, which constitutes the optional clause system, the principle of good faith plays an important role. Paragraphs 59 and 60 of the Judgment are to be read together.

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 60.)

Rule of Interpretation

76. An interpretation which leads to something unreasonable is contrary to the rule laid down by the Permanent Court and this Court:

"By the Permanent Court in the *Polish Postal Service in Danzig* (*P.C.I.J., Series B., No. 11*, p. 39)

'It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'

> This rule was approved in the Advisory Opinion of this Court: (*Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950*, at page 8." (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 95.))

77. I am therefore of the opinion that the principle of good faith is lacking in India's declaration and that the interpretation put by India on its reservation is unreasonable.

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CHARTER OF THE UNITED NATIONS

78. Pakistan in its Memorial invoked the jurisdiction of the Court on the basis of Article 36, paragraph 1, of the Statute of the Court read with Article 1, paragraph 1, Article 2, paragraphs 3 and 4; Article 33, Article 36, paragraph 3, and Article 92 of the United Nations Charter.

79. The Preamble of the Charter was referred to and relied upon by Judge *ad hoc* Ajibola in his separate opinion in the *Genocide* case:

> "The pioneering Member States that met in San Francisco to draft the United Nations Charter devoted a great deal of effort to ensuring that peace, security, justice and the pacific settlement of disputes would be ensured and thoroughly incorporated into the Charter. Hence they spelt out, in clear terms, some of their goals and aspirations to ensure the supremacy of international law, peace, security and justice among all nations." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 391.)

80. Judge Weeramantry dealt with the purposes of the United Nations in his separate opinion in the *Maritime Delimitation* case:

> "The Charter of the United Nations in Article 1 sets out as one of the Purposes of the United Nations that 'To maintain international peace and security' it shall 'bring about by peaceful means, and in conformity with the principles of justice and international law, [the] adjustment or settlement of international disputes . . .' The International Court of Justice has been set up within that framework as one of the principal organs of the United Nations and is thus obliged to act in the adjustment and settlement of international disputes 'in conformity with the principles of justice and international law'." (*Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 241, para. 99.)

81. In the declaration appended by Judge Ni in this case, he stated the following:

> "it can also be argued that it is provided in Article 92 of the United Nations Charter that the International Court of Justice shall be the principal judicial organ of the United Nations which is given the power, under Article 36 of the Court's Statute, to settle 'all legal disputes concerning *(a)* the interpretation of a treaty; *(b)* any question of international law . . .'" *(Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 20).

82. Judge *ad hoc* Ajibola appended a dissenting opinion in which the following was stated:

> "To me, the fundamental focus and obligation *as judges of the Court must be to do justice in accordance with the spirit of Article 1 of the Charter*: to maintain international peace and security; to take effective measures to prevent and remove all threats to peace; to suppress all threats of aggression or any form of breaches of peace in any part of the world within the spirit of the Charter and in accordance with international law.
>
> To me, justice requires prompt action to prevent deterioration of peaceful co-existence among nations of the world. No one goes to sleep when the house is burning.
>
> Finally, justice of this case requires that we should act in consonance and within the spirit and content of Article 2 (3) of the Charter, which states:
>
> 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'." *(Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 93; emphasis added.)

83. Dr. Nagendra Singh has written an instructive and illuminating account of *The Role and Record of the International Court of Justice.* His analysis and conclusions may be summed up:

> "If we turn to the Statute of the Court, which it must be recalled is an integral part of the Charter, there are again a number of provisions which throw a light on the relationship between the Court and the United Nations.

Article 38 of the Statute states that the function is 'to decide in accordance with international law such disputes as are submitted to it'. The essential point to notice is that the Court, although it is an organ of the United Nations, is not limited to applying some sort of 'United Nations law', but is entitled and indeed bound to apply general international law in force between all States. Speaking in very general terms, it is undoubtedly for the Court to apply the purposes and principles of the United Nations as stated in Articles 1 and 2 of the Charter, but it is bound to do so by giving decisions 'in accordance with international law'." (Judge Nagendra Singh, *The Role and Record of the International Court of Justice*, p. 43.)

"The International Court of Justice has proved to be one of the successful organs of the United Nations. Yet for certain periods of its history it has been regrettably under-used. This has been formally recognized by this Assembly, and here I need only cite resolution 3232 (XXIX), adopted in 1974, and the Manila Declaration, approved in 1982, both of which devote lengthy paragraphs to exhorting States to take a positive and active attitude to the role of the Court in the peaceful settlement of disputes. The same concern is evident in the recent valuable study on the role of the Court produced by the Asian-African Legal Consultative Committee, which has been circulated to the Assembly. What all these exhortations call for, in fact, is that States make the possibility of judicial settlement a constant of their diplomacy." (*Ibid.*, p. 317.)

84. I am therefore of the opinion that in the circumstances of the case the Court ought to have acted in consonance with the spirit and content of the relevant Articles of the Charter, as reflected in the aforesaid opinions of the judges of the Court, especially under Article 2, paragraph 3, of the Charter as opined by Judge Ajibola.

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BREACHES OF THE OBLIGATIONS OF CUSTOMARY INTERNATIONAL LAW BY INDIA

85. In its Application of 21 September 1999, Pakistan sets out the following in the legal grounds on which the claim is based:

"*(3) Breaches of the obligations of customary international law not to use force against another State*

India committed breaches of the obligations imposed on States by customary international law not to use force against another State. By attacking and shooting down Pakistan's unarmed aircraft inside

Pakistan's air space, without warning and without any provocation on its part, constitute serious breach of that obligation.

(4) Breaches of the obligation of customary international law not to violate the sovereignty of another State

The incursion into Pakistan's air space by the Indian air force jet fighters and their attack on, and shooting down of, unarmed Pakistan's naval aircraft on routine training mission inside Pakistan air space constitutes violation of Pakistan's sovereignty and breach by India of its obligation under customary international law." (Application of Pakistan of 21 September 1999, pp. 4, 6.)

In the oral submissions it was asserted:

"Pakistan does not abandon the contention that reference may properly be made to the United Nations Charter, and particularly to Article 4, paragraph 2, as a confirmation and crystallization of the general rules of customary international law on the substantive issues raised by the facts in the present case." (CR 2000/1, p. 44, para. 54 (Lauterpacht)).

86. The findings of the Court in the *Nicaragua* case in 1984 are fully applicable to the circumstances of the case:

"It may be first noted that the multilateral treaty reservation could not bar adjudication by the Court of all Nicaragua's claims, because Nicaragua, in its Application, does not confine those claims only to violations of the four multilateral conventions referred to above (paragraph 68). On the contrary, Nicaragua invokes a number of principles of customary and general international law that, according to the Application, have been violated by the United States. The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 423, 424, 425, paras. 71, 74.)

87. Judge Lachs in his separate opinion in the *Lockerbie* case *(Libya* v. *United Kingdom)* rightly observed "[t]here is no doubt that the Court's task is 'to ensure respect for international law . . .' It is its principal guardian." *(Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 26, 27.)

88. Reference may be made to the illuminating observations by Judge

Weeramantry in his dissenting opinion in the case of *Fisheries Jurisdiction (Spain* v. *Canada)*:

> "So, also, any matter that arises for adjudication within optional clause territory would be governed strictly by the rules of the United Nations Charter and the Statute of the Court. One cannot contract out of them by reservations, however framed. The basic principles of international law hold sway within this haven of legality, and cannot be displaced at the wish of the consenting State." (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, dissenting opinion of Vice-President Weeramantry, p. 501, para. 22.)

> "If, then, a State should assert that another State has sought to impose upon the applicant State a submission to the unilateral exercise of its penal jurisdiction on the high seas, to violate the basic principle of freedom of the high seas, to violate the peremptory norm of international law proscribing the use of force, to violate thereby a fundamental principle of the United Nations Charter, to violate the well-established principle of the complainant State's exclusive sovereignty on the high seas over vessels carrying its national flag, to endanger the lives of its seamen by a violation of universally accepted conventions relating to the safety of lives at seas — can all these alleged fundamental violations of international law, which would engage the jurisdiction of the Court under the general principle of submission, be swept away by the mere assertion that all these were done as a measure of conservation of fisheries resources? Reservations do not constitute a vanishing point of legality with the consensual system." (*Ibid.*, p. 502, para. 25.)

> "It may indeed be argued, on the contrary, that the preservation of legality within the system would strengthen rather than undermine its integrity. I do not think it is open to the Court, if a violation of a bedrock principle of international law is brought to its attention, to pass by this illegality on the basis that it is subsumed within the reservations clause. Such an approach could well weaken not only the authority of the Court, but also the integrity of the entire system of international law, which is a seamless web, and cannot be applied in bits and pieces. It is within this seamless fabric of international law that the entire optional clause system functions, and that consent to the Court's jurisdiction must be construed." (*Ibid.*, p. 510, para. 54.)

89. Reference may also be made to the weighty observations by Judge Vereshchetin in his dissenting opinion in the same case:

> "It is common knowledge that 'jurisdiction of the Court is based

on the consent of the parties' . . . There are a number of rules of international law which circumscribe the principle of consent. Once a State has given its consent to the jurisdiction of the Court, be that in the form of a special agreement *(compromis)*, a jurisdictional clause of a treaty, or in the form of a declaration of acceptance of the optional clause, its freedom in respect of the Court's ceases to be unlimited; still less, can it be absolute. As the case may be, it is constrained by general rules of international law *(pacta sunt servanda)*, specific rules of the treaty in question (the terms of the compromissory clause), the Statute and procedural rules of the Court." (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, dissenting opinion of Judge Vereshchetin, p. 574, para. 10.)

"Certainly, a State making a reservation sometimes does so because it 'lack[s] confidence as to the compatibility of certain of its actions with international law' . . . and for that reason wishes to evade the scrutiny of its conduct by the Court. However, it is one thing when the legality of certain actions may be seen as doubtful, and quite a different thing when the actions whose examination by the Court a State seeks to avoid, by making a reservation, are clearly contrary to the Charter of the United Nations, the Statute of the Court or to *erga omnes* obligations under international law. Being confronted with such a dilemma, it is for the Court to draw a distinction between these two different legal situations, which may lead to different conclusions as to the validity or admissibility of the reservation in question.

. . . Equally, in my view, the Court cannot give effect to a reservation which expressly exempts from its jurisdiction the examination of conduct manifestly inconsistent with the basics of international law. An objection to the Court's jurisdiction based on a reservation tainted with such a defect must be rejected by the Court as inadmissible. Recognition by the Court of the operation of a reservation of this kind might be viewed as tantamount to legal endorsement of what in fact should be considered as an abuse of the right of a State not to be sued without its consent before an international tribunal. Generally, reservations and conditions must not undermine the very raison d'être of the optional clause system." (*Ibid.*, pp. 575-576, para. 11.)

90. The following observations of Judge Bedjaoui in the *Fisheries Jurisdiction* case are relevant:

"However, a State's freedom to attach reservations or conditions to its declaration must be exercised in conformity with the Statute and Rules of Court, with the Charter of the United Nations, and

more generally with international law and with what I may venture to call '*l'ordre public international*'. Just as the acts of a State, and more generally its conduct, in whatever area of international relations, must conform to existing international legal norms, so the formulation of a reservation, which is no more than one element of such conduct, must also comply with these norms."

. . . . . .

— I do not see why the Court should hesitate to reject, or to declare inadmissible, or not opposable, or even invalid or null and void, a reservation the purpose or effect of which is to nullify or distort one or more of the provisions of the Statute or Rules of Court which govern international judicial proceedings, and to establish some sort of *ad hoc* judicial procedure suiting or benefiting the author of the reservation alone;

. . . . . .

— I do not see why the Court should allow itself to consider a reservation which, while appearing to set specific limits to the Court's jurisdiction, is in the final analysis incompatible with respect for the integrity of the declaration as a whole, since, while international law undeniably confers freedom of consent and the declaration implies recognition of the Court's jurisdiction, a reservation made within this framework must also respect the consistency and the integrity of the optional clause 'system'." (*I.C.J. Reports 1998*, dissenting opinion of Judge Bedjaoui, pp. 533-534, paras. 43-44.)

"The backbone of the optional clause 'system' consists in good faith among declarant States. Upon this principle depends the freedom of a State to formulate a reservation." (*Ibid.*, p. 537, para. 52.)

91. Judge *ad hoc* Torres Bernárdez observed the following:

"Article 36, paragraph 2, of the Statute establishes a veritable 'system of jurisdiction', termed 'compulsory jurisdiction', which is of an optional nature in that States parties to the Statute are completely free to participate in it or to refrain from doing so. Naturally, when the Court examines cases submitted to it, it is with States' declarations of acceptance of its compulsory jurisdiction that the Court concerns itself. But declarations are only the means by which States which so desire participate in the system, to a greater or lesser extent and for longer or shorter periods of time. Declarations, which are unilateral acts by States, are but a means of implementing a system founded on agreement, namely the Statute of the Court, which forms an integral part of the Charter of the United Nations. As Article 2, paragraph 2, of the Charter makes clear, all Members, in order to ensure to all of them the rights and benefits resulting from

membership, 'shall fulfil in good faith the obligations assumed by them in accordance with the present Charter'." (*I.C.J. Reports 1998*, dissenting opinion of Judge *ad hoc* Torres Bernárdez, p. 638, para. 144.)

92. I am therefore of the view that, among others, the allegations made by Pakistan, that India committed breaches of obligations of customary international law not to use force and not to violate the sovereignty of another State, ought to have engaged the jurisdiction of the Court.

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CAUTION AND RESTRAINT, CREATIVITY AND REALISM

93. In view of the consensual nature of its jurisdiction, the Court generally shows judicial caution and restraint. However, in due course of time, principles of constructive creativity and progressive realism could be evolved by the Court as are reflected in the dissenting opinions of the judges of the Court in the *Fisheries Jurisdiction* case, which have been extensively quoted by me herein above.

94. As R. P. Anand puts it:

"it is the duty of the International Court, as the principal judicial organ of the United Nations and of the international community, to avoid petrifying legal rules which may have originated in circumstances which no longer exist, and to be conscious of the new trends and tendencies and future needs of the society in determining the law. The conditions under which the classical, traditional law of nations developed, the views which it contained and the interests which it protected, have all greatly changed. In fact the very nature of the international community, which consisted of a comparatively homogeneous, Western, . . . family of nations, has been widened to include peoples with different cultures, civilizations, ideologies, and interests. Law, it must be remembered, is not a constant in a society, but is a function. In order that it may be effective, it ought to change with changes in views, powers, and interests in the community. As Judge Moreno Quintana said in the *Right of Passage over Indian Territory* case: 'As judge of its own law — the United Nations Charter, and judge of its own age — the age of national independence, the International Court of Justice cannot turn its back upon the world as it is. "International law must adapt itself to political necessities."'" (R. P. Anand, *Studies in International Adjudication*, p. 181.)

"In view of the dangers of even a limited use of force in the

present-day world because of the possibility of its developing into a nuclear catastrophe, the International Court may be the best guarantor of these rights." (R. P. Anand, *Studies in International Adjudication*, p. 34.)

95. K. R. Simmonds's observations about the Court may also be reproduced:

"If one accepts that the effectiveness of the Court depends to a substantial degree upon the scope of the jurisdiction conferred upon it, then one must see the problem of compulsory jurisdiction as crucial in the future development of the Court's work. To avoid or postpone an inevitable examination and appraisal of such a crucial problem, whatever the pressure of the extra-legal motives, cannot be justified on grounds of law or of policy and must aggravate the problem itself." (K. R. Simmonds, "The Interhandel Case", *The International and Comparative Law Quarterly*, Vol. 10, 1961, p. 547.)

96. In this respect, reference may be made to the concise comments made by Professor Kooijmans, now a Judge of the International Court of Justice, in his contribution to the Colloquium on *Increasing the Effectiveness of the International Court of Justice*:

"In view of the consensual basis of its jurisdiction, the Court may find itself situated between Scylla and Charybdis once this jurisdiction is contested. If it assumes too easily that it has jurisdiction, it may deter States from considering the Court as a useful mechanism for dispute settlement; if it finds that it has no jurisdiction, on the basis of a too restrictive interpretation of the jurisdictional clauses, it may marginalize itself. The actual result, however, will be the same, whether there is a decision on the merits or not; the Court will not have been able to carry out its main function — the settlement of the dispute. If the Court denies that it has jurisdiction, the dispute will be allowed to remain simmering; if the Court assumes that it has jurisdiction, in spite of the respondent's vigorous contestations, there is a fair chance that the defaulted party will not comply with the decision on the merits." (*Increasing the Effectiveness of the International Court of Justice, Proceedings of the ICJ/UNITAR Colloquium to celebrate the 50th Anniversary of the Court*, ed. by Connie Peck and Roy S. Lee, p. 59.)

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CONCLUSION: INDIA'S PRELIMINARY OBJECTIONS TO THE JURISDICTION OF THE COURT OUGHT TO HAVE BEEN REJECTED

97. For the reasons set out above, my view is that the Court ought to have rejected the preliminary objections to the jurisdiction of the Court

by the Government of India and ought to have entertained the Application filed by the Islamic Republic of Pakistan on 21 September 1999.

Effective Measures to Secure Peace, Security and Justice

98. Without prejudice to the aforesaid, I am in full agreement with the views of the Court expressed in paragraphs 51 to 55 of the Judgment.

99. I would like to emphasize that the Parties are under an obligation to settle in good faith their disputes, including the dispute regarding the State of Jammu and Kashmir and in particular the dispute arising out of the aerial incident of 10 August 1999.

100. Nelson Mandela, the veteran leader, has publicly acknowledged that he got immense inspiration from his heroes, Quaid-e-Azam Mohammed Ali Jinnah and Mahatma Gandhi. Both believed in the rule of law and justice. In the new millennium, let India and Pakistan keep in view the ideals of the two great leaders and take prompt and effective measures to secure peace, security and justice in South Asia.

(Signed) Syed Sharifuddin PIRZADA.