The PRESIDENT: Please be seated. The sitting is open. I should like first of all to inform you that Judge Vereschechtin, for urgent reasons of which he has informed me, will not be present at this morning's hearing. Furthermore, I hasten to assure the Parties, and Sir Elihu in particular, that, since I was obliged to attend to urgent official duties and miss part of yesterday's session at the end of the morning, I of course read the verbatim record of the hearing very carefully yesterday evening. This morning the Republic of India will be presenting the second round of its oral arguments. Je vais donc sans plus attendre donner la parole à S. Exc. M. Soli Sorabjee, *Attorney General* de l'Inde. M. Sorabjee, vous avez la parole.

M. SORABJEE : Monsieur le président, Madame et Messieurs les honorables membres de la Cour, je vais répondre à l'argumentation présentée hier au nom du Pakistan.

1. L'une des thèses soutenues par le Pakistan était que l'exception à la compétence de la Cour soulevée par l'Inde constituait un exercice abusif de ses droits. Monsieur le président, l'Inde répond à cela que l'exception d'incompétence est un moyen de défense légitime dont une partie peut se prévaloir et qu'en soulevant son exception à la compétence de la Cour, l'Inde n'a en aucune façon abusé «pour autant des droits qu'elle tire en la matière du paragraphe 6 de l'article 36 du Statut de la Cour et de l'article 79 du Règlement de la Cour». A cet égard, permettez-moi d'attirer votre attention sur un rappel de l'affaire concernant l'*Application de la convention pour la prévention et la répression du crime de génocide (C.I.J. Recueil 1996*, p. 622, par. 46). A des fins de commodité, je cite la partie du paragraphe 46 qui nous intéresse :

> «Au terme du présent arrêt, [la Cour] tient à préciser qu'elle n'en considère pas pour autant que la Yougoslavie aurait, en présentant des exceptions, abusé des droits qu'elle tire en la matière du paragraphe 6 de l'article 36 du Statut de la Cour et de l'article 79 du Règlement. La Cour rejette donc la demande formulée à cet égard par la Bosnie-Herzégovine dans ses conclusions finales. La Cour doit, dans chaque instance introduite devant elle, vérifier si elle a compétence pour connaître de l'affaire et, le cas échéant, si la requête est recevable; les exceptions éventuellement soulevées par la partie défenderesse peuvent être utiles pour clarifier la situation juridique.»

Je me permets aussi d'appeler votre bienveillante attention sur l'argumentation que j'ai présentée dans le premier tour de plaidoiries (CR 2000/3, p. 10).

2. Le Pakistan s'est également reporté hier (CR 2000/3, p. 11) à l'acceptation par l'Inde de la compétence obligatoire dans le cadre de la convention sur le droit de la mer et des procédures de règlement des différends de l'OMC pour attaquer la réserve relative aux membres du Commonwealth ou en tout état de cause contester le droit de l'Inde d'invoquer ladite réserve. On a fait grief à l'Inde de ne pas avoir répondu aux arguments présentés par le Pakistan dans le premier tour de plaidoiries.

Monsieur le président, qu'est-il besoin, à notre humble avis, de répondre à n'importe quelle allégation sans tenir compte de sa pertinence ou de son importance pour la question à l'examen ? La thèse de l'Inde est que l'acceptation de la juridiction obligatoire au titre de quelque convention internationale que ce soit ne s'applique en aucune façon à la question fondamentale de la compétence de cette éminente institution pour connaître de la requête présentée par le Pakistan.

Le sujet traité et le champ d'application au titre de la Convention sur le droit de la mer et des procédures de règlement des différends de l'OMC sont différents. La décision d'accepter telle ou telle convention internationale et d'accepter la juridiction obligatoire est, pour tout Etat souverain, y compris l'Inde, un exercice de raisonnement tactique fondé sur l'appréciation des avantages qu'a le pays considéré à agir ainsi, en tenant compte des facteurs économiques du moment et des impératifs pratiques qui s'attachent à une convention donnée. L'acceptation par l'Inde de la compétence obligatoire au titre de la Convention sur le droit de la mer et de la procédure de règlement des différends de l'OMC ne se rapporte ou ne s'applique en aucune façon à la question de savoir si la réserve relative aux membres du Commonwealth est valable ou peut être invoquée.

3. Un autre point de l'argumentation en faveur du Pakistan soulevé hier (CR 2000/3, p. 13 et suiv.) est que l'Inde n'a

pas répondu aux observations qu'il a faites dans son premier tour de plaidoiries sur la désuétude de la réserve relative aux membres du Commonwealth ou son inopposabilité au Pakistan. A cet égard, il ne faut pas perdre de vue les faits suivants :

a) le Pakistan, dans le mémoire qu'il a fait tenir à la Cour le 7 janvier 2000, a prétendu que la réserve relative aux membres du Commonwealth «étant contraire aux normes fondamentales de la Charte des Nations Unies, à savoir le principe de l'égalité souveraine et le caractère universel des droits et obligations des Membres de l'Organisation des Nations Unies, *elle n'a aucun effet juridique*» (mémoire du Pakistan, p. 15, par. C 4; les italiques sont de nous).

L'affirmation suivante du Pakistan dans son mémoire est que la réserve sortant des limites des dispositions du paragraphe 3 de l'article 36 est «dénuée d'effet juridique» (mémoire du Pakistan, p. 16, par. D 1).

b) Au paragraphe D 2, page 16 du mémoire, le Pakistan a décrit et considéré la réserve relative aux membres du Commonwealth comme «illicite et non valable».

c) S. Exc. l'*Attorney General* du Pakistan, le 3 avril 2000, au cours de sa plaidoirie, s'est exprimé comme suit :

> «S'agissant de la première, la réserve relative aux membres du Commonwealth, le Pakistan présente deux conclusions principales : la première conclusion, que je soumets très respectueusement à la Cour au nom du Pakistan est que la réserve relative aux membres du Commonwealth que l'Inde prétend invoquer n'entre pas dans les différentes catégories de réserve autorisées aux termes du paragraphe 3 de l'article 36 du Statut.» (CR 2000/1, p. 17, par. 20.)

Au paragraphe 22 (*ibid*., p. 19), l'érudit *Attorney General* du Pakistan a déclaré que : «La première thèse défendue par le Pakistan est que la réserve est incompatible avec les dispositions du Statut et ne peut par conséquent être invoquée par l'Inde à l'encontre du Pakistan.»

Monsieur le président, Madame et Messieurs de la Cour, la conséquence juridique incontournable de ces conclusions au nom du Pakistan c'est que la réserve constitue un abus de droit et est donc non valable et entachée de nullité.

d) se rendant compte que répondre à la thèse de l'Inde sur l'impossibilité de dissocier la réserve de la déclaration représente une difficulté insurmontable, le Pakistan a maintenant changé de perspective et a cherché à établir une distinction entre la nullité et l'inapplicabilité de la réserve. Nous faisons très respectueusement observer que cette distinction qu'il s'est efforcé de faire est spécieuse et que la thèse de la désuétude de la réserve relative aux membres du Commonwealth tout comme celle de son inopposabilité au Pakistan sont des inventions de dernière minute. Mais, quoi qu'il en soit, l'Inde y a donné réponse dans son premier tour de plaidoiries par l'entremise de son *Attorney General* (voir CR 2000/2, p. 13, par. 3), et la réponse détaillée et exhaustive qu'y a faite en outre M. Ian Brownlie, Q.C., dans son premier tour de plaidoiries, pourrait occuper deux pleines pages, dont j'ai donné les références dans la transcription (*ibid*., p. 26-28).

Maintenant, Monsieur le président, il faut souligner que le Pakistan, en prétendant que la question de la divisibilité n'a pas à être examinée parce qu'il n'invoque pas la nullité de la réserve mais seulement son inapplicabilité, ne fait qu'admettre clairement que la réserve n'est pas entachée de nullité. Ce changement de position du Pakistan a pour conséquence incontournable qu'il n'est plus possible de soutenir à aucun moment ni dans aucune procédure devant la Cour que la réserve est nulle. Le Pakistan ne peut plus s'abstenir de prendre position sur cette question. En conséquence, la validité de la réserve relative aux membres du Commonwealth ne peut plus être contestée. La seule question qui reste posée est de savoir si la réserve est devenue caduque ou n'est pas opposable au Pakistan. Comme l'a fait ressortir l'Inde dans sa réponse lors du premier tour de plaidoiries du 4 avril 2000, ces affirmations sont dénuées de fondement et je n'y reviendrai pas, notre argumentation ayant été développée alors.

Monsieur le président, Madame et Messieurs les honorables membres de la Cour, en réponse à celles du Pakistan, les thèses de l'Inde concernant l'Acte général de 1928 seront exposées en détail au cours du second tour par M. Alain Pellet, mon éminent et savant collègue. Toutefois, je tiens à m'exprimer brièvement sur l'Acte général de 1928 en réponse aux propos tenus hier à ce sujet par le Pakistan (CR 2000/3, p. 13 et suiv.) La tentative faite par sir Elihu Lauterpacht pour mettre l'accent sur l'arrêt de la Cour suprême du Pakistan dans l'affaire *Yangtze (London) Limited* v. *Barlas Brothers (Karachi) and C.o* est, avec tout le respect que je lui dois, aussi simpliste qu'inacceptable. L'autorité et le caractère contraignant d'un arrêt de la plus haute cour du pays, à savoir la Cour

suprême du Pakistan, dépend de ses motifs *(ratio decidendi)* et de ses conclusions. Le fait que le Gouvernement pakistanais n'ait pas été partie à l'affaire susmentionnée est sans importance. Ce qui importe, c'est qu'à aucun moment, ledit gouvernement n'a directement contesté ou mis en doute l'autorité du droit dit par la Cour suprême du Pakistan dans l'affaire précitée, *dictum* déterminant pour la question de l'applicabilité de l'Acte général de 1928.

Permettez-moi, Monsieur le président, de conclure en vous exprimant une fois encore mes remerciements pour votre amabilité et votre patience et de vous demander de bien vouloir maintenant donner la parole à mon éminent et érudit ami, Ian Brownlie, Q.C., pour qu'il s'exprime devant la Cour.

Le PRESIDENT : Je vous remercie Monsieur l'*Attorney General*. Je donne maintenant la parole à Monsieur Ian Brownlie.

M. BROWNLIE : Monsieur le président, Madame et Messieurs de la Cour.

Il me revient de traiter des questions qui divisent les Parties en ce qui concerne la réserve de l'Inde relative aux membres du Commonwealth. Avant, toutefois, d'entrer dans le vif du sujet, je voudrais commenter la proposition du Pakistan selon laquelle la Cour devrait adopter une «conception plus large» de l'interprétation et de l'application des réserves et, par voie de conséquence, des *déclarations* des Etats, lesquelles, comme l'a dit la Cour dans l'affaire *Espagne c. Canada* «doivent être interprétées comme formant un tout». Etant donné la nature des conclusions du Pakistan concernant la réserve relative au Commonwealth, cette proposition obligerait la Cour à déroger à son Statut et à sa propre jurisprudence. De fait, le conseil du Pakistan a parlé, à propos de la jurisprudence de la Cour, de «futilités plutôt passées».

Il a également été suggéré au nom du Pakistan que d'autres tribunaux s'étaient montrés moins pointilleux concernant leur propre compétence et que, de plus, ces autres tribunaux avaient à connaître d'affaires plus importantes que celle dont est saisie cette Cour. De telles suggestions sont peu convaincantes sur le plan des faits -- et, point plus important, dénuées de pertinence sur le plan du droit. Compte tenu de tout cela, le Gouvernement de l'Inde ne doute pas que la Cour appliquera les dispositions pertinentes de son Statut et les principes mûrement pesés qui ont enrichi au fil du temps sa propre jurisprudence. Comme l'a fait observer sir Hersch Lauterpacht, la Cour a examiné les arguments relatifs à sa compétence «avec un soin méticuleux».

J'en viens à présent au caractère général de l'argumentation du Pakistan en ce qui concerne la réserve relative au Commonwealth. Dans sa plaidoirie d'hier, le conseil du Pakistan a souligné que cette argumentation ne reposait pas sur le défaut de validité.

Monsieur le président, ce changement de position demande à être examiné.

En premier lieu, il s'agit d'un changement de position très significatif. Le Pakistan a invoqué le défaut de validité dans son mémoire. Sir Elihu y a fait allusion lundi dans sa plaidoirie (CR 2000/1, p. 27, par. 5). Il déclarait que la réserve «a cessé d'avoir le moindre fondement légitime» et que la désuétude «est un aspect qu'il est légitime de considérer lorsque l'on examine l'applicabilité -- je dirai même la validité -- d'une réserve».

La position adoptée par le Pakistan hier ne se fonde plus que sur la proposition selon laquelle, le Pakistan n'ayant pas consenti à la réserve de l'Inde, celle-ci ne peut lui être opposée. Comme je l'ai longuement souligné dans ma plaidoirie du premier tour, le conseil du Pakistan n'a pas expliqué en quoi précisément le concept d'opposabilité est ici pertinent. Le mot n'a rien d'explicite et ne peut désigner que le résultat d'un ensemble de conditions préexistantes.

De quelles conditions s'agit-il en l'espèce ? Il est difficile de le savoir. Il n'existe aucun principe qui voudrait qu'une réserve dépende de l'approbation d'autres Etats auteurs d'une déclaration. De plus, le Pakistan a attendu plus de cinquante ans avant de manifester son opposition.

Aussi l'argument «nouveau» avancé par le Pakistan, à savoir que la «réserve relative aux membres du Commonwealth» est une réserve «extra-statutaire», est-il absurde. A ce compte, tout Etat à l'encontre duquel est invoquée une réserve, quelle qu'elle soit, peut s'y soustraire en déclarant qu'elle a un caractère extra-statutaire. C'est là, de l'avis du Gouvernement de l'Inde, un argument déraisonnable et mal fondé. Cet argument est contraire à la position bien acceptée selon laquelle les réserves formulées en vertu du paragraphe 2 de l'article 36 ne sont pas soumises au régime du droit des traités. Les réserves s'inscrivant dans le cadre du paragraphe 2 de l'article 36 ne sont pas des réserves conventionnelles auxquelles peuvent s'appliquer les dispositions de la convention de Vienne sur le droit des traités.

Tout bien considéré, l'argument fondé sur l'opposabilité se heurte selon moi aux même difficultés que l'argument fondé sur la désuétude. J'ai indiqué mardi à propos du second que l'analyse devait s'appuyer sur l'acte unilatéral pertinent. L'acte unilatéral pertinent est de toute évidence la déclaration de l'Inde, en tant qu'instrument indivisible, et non la réserve considérée isolément. Sur cette base, c'est le Statut de la Cour et le droit et la pratique en matière de formulation des déclarations qui s'appliquent. La question de l'opposabilité ne se pose tout simplement pas. Il en résulte que la réserve de l'Inde est valide, ce que l'on nous concède à présent, et au surplus que la question de la divisibilité ne peut se poser, comme le distingué *Attorney General* de l'Inde l'a montré ce matin.

Sir Elihu s'est plaint hier que le conseil de l'Inde n'avait pas dit mot de l'argument du Pakistan relatif à l'opposabilité. Avec tout le respect qui lui est dû, ce n'est pas exact (CR 2000/2, p. 27). En revanche, le conseil du Pakistan est resté silencieux sur un certain nombre de points importants.

La position générale de l'Inde en ce qui concerne la question des réserves n'a suscité aucun commentaire. Dans ma plaidoirie de mardi, je me suis abondamment référé à la question des réserves *ratione personae*. J'ai évoqué la littérature et cité ou mentionné les sources les plus autorisées. J'ai montré, force preuves à l'appui, que le paragraphe 3 de l'article 36 du Statut autorise les déclarations précisant les Etats vis-à-vis desquels la juridiction est acceptée.

A de rares exceptions près, le conseil du Pakistan s'est montré peu enclin à aborder ces aspects, qu'il considère sans doute comme des «futilités plutôt passées». Cela est fort dommage car, au bout du compte, la réserve de l'Inde n'est qu'un exemple parmi d'autres d'une réserve *ratione personae*, ni plus ni moins.

En réponse aux conclusions que j'ai présentées lors du premier tour, sir Elihu a fait observer que le caractère inédit d'un argument ne prouve pas qu'il est faux. La proposition est logique et doit bien sûr être acceptée. Mais les circonstances dans lesquelles l'argument nouveau est avancé ne sont pas sans conséquence. L'application du système de la clause facultative a fait l'objet de longs développements dans la littérature depuis quelque quatre-vingts ans. Aucune des sources mentionnées au nom de l'Inde (CR 2000/2, p. 25-26) ne cherche à mettre en cause, sur le plan juridique, la validité de la réserve relative au Commonwealth. Le fait que sir Elihu n'a pu citer que l'opinion dissidente de M. Ago dans l'affaire *Nauru* (*C.I.J. Recueil 1992*, p. 327, par. 5) ne fait que souligner l'absence de tout autre appui dans la littérature et la jurisprudence. Et, de toute façon, le commentaire de M. Ago n'est au mieux qu'un élément d'une réflexion spéculative, et non une analyse juridique ayant un caractère définitif.

Même si, pour les besoins de la discussion, on devait concéder que la doctrine de la désuétude s'applique aux actes unilatéraux, elle ne pourrait s'appliquer au cas d'une réserve formulée en 1974 et qui fait depuis longtemps partie de la pratique du Gouvernement de l'Inde.

Que M. Ago note qu'aucun tribunal spécial propre au Commonwealth n'a été institué n'est d'aucun secours au Pakistan. La chose est notoire depuis bon nombre d'années et n'a pas empêché différents Etats d'invoquer la réserve relative au Commonwealth. L'existence de huit déclarations, dont certaines très récentes, dans lesquelles figure cette réserve autorise à conclure qu'elle n'est pas devenue superflue, ni d'un point de vue juridique ni d'un point de vue politique. Pas plus que le Commonwealth lui-même ne l'est devenu. De nouveaux membres ont grossi ses rangs ces dernières années et il regroupe aujourd'hui cinquante-quatre Etats au total.

Il convient à présent que je récapitule la position du Gouvernement de l'Inde concernant la réserve relative au Commonwealth.

Premièrement, la réserve demande à être appréciée en tant qu'elle fait partie intégrante de la déclaration pertinente, laquelle, comme la Cour l'a relevé dans l'affaire *Espagne c. Canada* doit être interprétée et appliquée comme formant un tout.

Deuxièmement, la réserve est compatible avec le paragraphe 6 de l'article 36 du Statut et, du reste, le Pakistan n'a pas prétendu autrement.

Troisièmement, la réserve est compatible avec le paragraphe 3 de l'article 36 du Statut, comme s'accordent à le reconnaître les experts.

Quatrièmement, l'affirmation selon laquelle la réserve ne serait pas valide est dénuée de fondement juridique, ainsi que l'a admis l'Etat demandeur lors du deuxième tour de plaidoiries.

Cinquièmement, ni le Statut de la Cour, ni les principes du droit international général n'autorisent à invoquer une

quelconque opposabilité, comme le soutient le Pakistan.

Sixièmement, l'affirmation du Pakistan selon laquelle la réserve ne vise que le Pakistan et a en quelque sorte un caractère discriminatoire est tout à fait gratuite.

Enfin, tant la pratique récente des Etats que les écrits des publicistes confirment que la réserve est valide et compatible avec les dispositions du Statut.

Monsieur le président, j'en ai terminé avec mes conclusions concernant la réserve relative aux membres du Commonwealth.

Dans son exposé hier, sir Elihu n'a pas apporté de nouveaux développements aux arguments précédemment avancés au nom du Pakistan au sujet de la réserve relative aux traités multilatéraux.

Sur ce point, je me bornerai à rappeler les arguments que j'ai présentés lors du premier tour de plaidoiries, à savoir que le Pakistan ne peut, à la fois, faire fond sur sa propre réserve en la matière et affirmer que la réserve de l'Inde n'est pas valide, comme il le fait dans son mémoire. Cela est contraire à la doctrine qui, par équité, prescrit la constance dans l'approbation et la réprobation. Par sa conduite, en faisant figurer cette réserve dans sa déclaration, le Pakistan l'a approuvée et a reconnu qu'elle était compatible avec le Statut de la Cour et tous autres principes pertinents du droit international général.

Même si, comme le prétend à présent le Pakistan, la requête a pour fondement le droit international coutumier, la réserve de l'Inde relative aux traités multilatéraux s'applique chaque fois que sont invoqués des moyens qui, en dernière analyse, se fondent sur la Charte des Nations Unies.

Monsieur le président, ainsi s'achève ma plaidoirie du deuxième tour. Je vous remercie, vous et vos distingués collègues, de votre coutumière courtoisie et vous demande de bien vouloir donner la parole au professeur Pellet.

Le PRESIDENT : Merci beaucoup Monsieur Brownlie. And I now give the floor to Professor Alain Pellet.

Mr. PELLET: Mr. President, Members of the Court, Sir Elihu Lauterpacht yesterday devoted the bulk of his argument to the General Act of Arbitration. I listened to him very carefully, but I admit that I left the Great Hall of Justice without really knowing what point we, or rather Pakistan, had got to.

I did understand that he had changed his mind about a number of points between the first and second round of his oral arguments. As Sir Elihu said, "that was on Monday" (CR 2000/3, p. 20)! What was true on Monday became a mistake on Wednesday! But what is Wednesday's truth concerning, for instance, the alleged succession of the two parties to the General Act of 1928? Who is the continuator? Who is not? And, first, has there been succession? Or not? What conclusions does my eminent opponent draw from the lengthy reading -- barely commented upon -- of Volume III of the 1947 *Partition Proceedings* in which he indulged himself? If there are any conclusions, I have to say that they have escaped us . . .

Our perplexity is increased by the fact that after sharply reproaching us for not having replied in every detail to some of Pakistan's arguments, Pakistan "has done the same", if I may say so, and gone even further! And it has refrained from reacting to what is still at the heart of our argument (I am referring in particular to India's 1974 communication), in the hope, no doubt, of drawing your attention to incidental items in order to deflect it from the crux of the matter.

With your permission, Mr. President, and without losing sight of the welcome recommendations that you made to the Parties at the end of Tuesday's sitting, I am therefore now going to endeavour to reply to what I think I understood of my opponent's arguments yesterday, while at the same time placing them again within the general context of India's position, which did not have the good fortune to attract his attention. I shall by and large follow the order he adopted himself, while deviating where I feel he has departed from the Cartesian logic in which I was trained . . .

1. The maintenance in force of the General Act of 1928

With regard first to the maintenance in force of the General Act, counsel for Pakistan attempted to minimize the Act's links with the League of Nations by pointing out that only Articles 9, 43, 45, 46 and 47 expressly referred to it. This list, albeit extensive, is both incomplete and misleading.

It is incomplete because my opponent forgot to mention Article 6, which enabled the parties to ask the Acting President of the League of Nations to make the necessary appointments for the constitution of the conciliation commissions.

But above all it is misleading. And it is misleading for a number of reasons:

- in the first place, it excludes the 11 Articles which referred to the Permanent Court (namely Articles 17, 18, 19, 20, 28, 30, 33, 34, 36, 37 and 41);
- in the second place, it flouts the general spirit of the text, which is clearly rooted in what I shall refer to as the "legal idealism" of the 1920s;
- in the third place, it fails to take account of an important aspect to which I drew attention on Tuesday (CR 2000/2, p. 34), namely the fact that a number of States party to the General Act (including British India) had expressly made their acceptance of Chapter II thereof, concerning judicial settlement, and, in particular, Article 17, on which Pakistan purportedly bases the jurisdiction of the Court, subject to the possibility of "requir[ing] that the procedure prescribed in Chapter II of the said Act . . . be suspended in respect of any dispute . . . submitted to the Council of the League of Nations" pending a decision of that Council.

This reservation of British India, on which Pakistan is maintaining a stubborn silence, and which was the subject of paragraph 2 of British India's 1931 Act of Accession of, is, in its original language, worded as follows:

> "His Majesty's Government reserves the right *in relation to the disputes mentioned in Article 17 of the General Act* to require that the procedure prescribed in Chapter II of the said Act shall be suspended in respect of any dispute which has been submitted to and is under consideration *by the Council of the League of Nations,* provided that notice to suspend is given after the dispute has been submitted *to the Council . . .*" (*Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999,* ST/LEG/SER.E/17, Sales No. E.99.V.5, p. 97) (emphasis added);
>
> [«En ce qui concerne les différends mentionnés à l'article 17 de l'Acte général, Sa Majesté se réserve le droit de demander que la procédure prescrite au chapitre II dudit Acte soit suspendue pour tout différend soumis au Conseil de la Société des Nations et en cours d'examen par ce dernier, à condition que la requête de suspension soit déposée après que le différend aura été soumis au Conseil . . .» (*Traités multilatéraux déposés auprès du Secrétaire Général, Etat au 30 avril 1999,* ST/LEG/SER.E/17, numéro de vente. F.99.V.5, p. 1017)]

this is followed by the conditions concerning the time-limits.

Moreover, this is not the only reservation of British India expressly relating to the League of Nations. The reservations contained in paragraphs 3 (i) and 3 (ii) of the Act of Accession of British India and the other members of the Commonwealth are formulated along the same lines with regard to both Chapter I and Chapter III, relating to conciliation and arbitration respectively.

These conditions, which could be referred to as "reservations concerning exhaustion of procedures before the Council of the League of Nations" also show how, for countries party to the old General Act, this Act was inextricably linked to the League system. And this was particularly true for those countries which had expressed reservations of this type in one form or another. The number was not insignificant, Mr. President, since it concerned seven of the 20 parties listed by the Secretary-General: in addition to British India, the United Kingdom, Canada, Australia, New Zealand, France and Italy (cf. *Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999,* ST/LEG/SER.E/17, Sales No. E.99.V.5, pp. 1015-1018).

Furthermore, these conditions quite clearly show that the 1928 Act cannot have remained in force after the demise of the League of Nations, at least vis-à-vis the States which had accepted the procedures described by the Act only as a second resort, giving clear priority to the Council of the Geneva Organization, as was the case with British India. With regard to those States at least it was the whole philosophy of the system which became inapplicable, as they could no longer obtain suspension of the procedures of the General Act (including those based on Article 17) pending examination of the dispute by the Council of the defunct League of Nations, even though they had clearly made their accession subject to that condition. This factor alone at any event shows that the General Act of 1928 cannot have remained in force, at least in so far as these seven States are concerned.

Having thus minimized the links between the General Act and the League of Nations Pact system, Sir Elihu undertook to convince you that, after all, the numerous provisions of this instrument that refer to the League of

Nations related to purely technical points covered by United Nations General Assembly resolution 24 (I) concerning the "Transfer of certain Functions, Activities and Assets of the League of Nations".

Although, *in fine*, the United Nations Secretary-General assumed the functions of depositary of the General Act of 1928 when, as from 1973, certain States endeavoured to bring it back to life, as I mentioned on Tuesday (CR 2000/2, p. 38), the same Secretary-General had taken the view, as from 1949, that these depositary functions no longer fell to him (see *ibid*., pp. 37-38). And that is where Professor Lauterpacht's reasoning is flawed: one has to believe that the member States of the General Assembly in 1949 did not consider that this was a problem of succession to purely technical functions, since these States undertook to "restore to the General Act of 26 September 1928 its original efficacy" by adopting the new General Act of 1949. With this substitution, the General Assembly found that the transfer of the functions of the League of Nations to the United Nations effected by resolution 24 (I) was not sufficient to "restore its efficacy" to the General Act. And it is interesting to note that none of the States which took part in the debates prompted by the Belgian initiative -- whether they voted for or against the resolution -- that none of the States participating in the 1949 debate argued otherwise and therefore shared the opinion of Sir Elihu.

In brief, on this point, Mr. President:

(1) the 1928 Act appeared to all member States of the United Nations in 1949 to be too closely linked to the League of Nations and the PCIJ for its survival to be assured, either by resolution 24 (I) or by Article 37 of the Court's Statute;

(2) in addition, certain parties to the General Act, including British India, had further strengthened, in so far as they were concerned at least, the links between the General Act and the Pact system, by reserving the right to make settlement by the Council of the League of Nations prevail over solutions offered by the Act; with the result that

(3) with regard to those States, the General Act cannot in any case be regarded as still being in force, as this priority given to political settlement by the Council of the League of Nations --on which they had expressly made their accession contingent -- can no longer be ensured.

2. Article 43 of the General Act and the reservations expressed in 1931 by British India

I now come, Mr. President, to two questions which I regard as inseparable: first, Article 43 of the General Act (this involves answering the question of who could be bound by this instrument); and, second, the reservations expressed by British India in 1931 when it acceded to this treaty (here we need to know who can be bound *with India*). Yesterday my opponent only briefly touched upon Article 43, being very careful not to allude to the reservations in question. Yet the two questions are related: they both concern the problem of participation in the General Act, first in a general manner (Article 43 clearly addresses this point), and, secondly, in British India's relations with the other parties to the General Act (and the reservations of 1931 enable this second question to be addressed). In both cases, membership of the League of Nations is the key factor.

The unavoidable starting point (but deftly avoided by counsel for Pakistan) is Article 43, paragraph 1, of the General Act, which I should like to read:

> "1. The present General Act shall be open to accession by all the Heads of States or other competent authorities *of the Members of the League of Nations* and the non-Member States to which *the Council of the League of Nations* has communicated a copy for this purpose." (Emphasis added)

Thus it is undoubtedly a closed treaty, to which only Members of the League of Nations were able to accede, unless they had been invited to do so by the Council of the League. However, as I pointed out on Tuesday, on the basis in particular of the joint dissenting opinion of 1974 so dear to the Pakistani side (CR 2000/2, p. 34), this possibility disappeared irrevocably with the demise of the League of Nations, and no one is suggesting that Pakistan would have received such an invitation.

This starting point must be linked to another item that our opponents haughtily continue to ignore. This concerns, as I have said, the reservations to which British India made its accession subject in 1931, in particular the two reservations which I drew to the attention of the Court and Pakistan in the hearing of the day before yesterday (CR 2000/2, pp. 44-46). These two reservations are both closely related to the question with which we are dealing and, since I quoted them in English on Tuesday, I shall now read them again in their French translation. I therefore

quote British India's reservations of 1931:

> «1. Sont exclus de la procédure décrite dans l'Acte général, y compris la procédure de conciliation :
>
> . . . . . .
>
> iii) les différends entre le Gouvernement de l'Inde et les gouvernements de tous autres Membres de la Société des Nations, membres du Commonwealth britannique des Nations, différends qui seront réglés selon une méthode convenue entre les parties ou dont elles conviendront;
>
> . . . . . .
>
> v) les différends avec tout Etat partie à l'Acte général qui n'est pas membre de la Société des Nations.» (*Traités multilatéraux déposés auprès du Secrétaire général*, état au 30 avril 1999, ST/LEG/SER.E/17, n° de vente F.99.V.5, p. 1017.)
>
> ["1. That the following disputes are excluded from the procedure described in the General Act, including the procedure of conciliation:
>
> . . . . . .
>
> (iii) Disputes between His Majesty's Government in the United Kingdom and the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree;
>
> . . . . . .
>
> (v) Disputes with any Party to the General Act who is not a Member of the League of Nations." (*Multilateral Treaties Deposited with the Secretary-General*, Status as at 30 April 1999, ST/LEG/SER.E/17, Sales No. E.99.V.5, p. 973)]

Apart from a very brief reference in Pakistan's Memorial (section A.2), p. 7), I am not aware that the legality of these reservations has been challenged. Like those I referred to earlier concerning the priority given to settlement by the Council of the League of Nations, these reservations are identical to those expressed by the other four parties to the General Act which were both Members of the League of Nations and members of the Commonwealth (the United Kingdom, Canada, Australia and New Zealand) (see *Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999*, ST/LEG/SER.E/17, Sales No. E.99.V.5, pp. 1015-1018). No party to the General Act has ever voiced the slightest objection to these reservations, any more than those commenting on the Act have asserted or suggested that they might be in any way unlawful.

Now there is no doubt that the reservations which I have just read out again -- I already read them on Tuesday -- the reservations which I have just read rule out the possibility of Pakistan invoking the old General Act against India, if we assume, for the purposes of the argument, that it is still in force and that India is a party thereto, which is most certainly not the case.

It follows from these two reservations, Mr. President, that British India only adhered to the General Act on the twofold condition that the procedures described therein would not apply to disputes between it and either other members of the Commonwealth which were also Members of the League of Nations or States which were not members of the League. Thus if Pakistan could be regarded as party to the General Act -- which of course I am assuming only for the purposes of the argument -- it would inevitably fall into one or other of those categories that I shall now briefly consider in turn.

First scenario: Pakistan is regarded as a Member of the League of Nations. This is not possible, Mr. President, since, for the reasons to which I shall be returning in a moment, in this connection it neither represented a "continuation" of, nor succeeded to, British India.

This is not possible, but if it were, the Court's jurisdiction would be ruled out in any case because of British India's reservation concerning disputes between it and a Member of the League of Nations that is also a member of the

Commonwealth -- and on this second aspect I should like to refer to what my learned colleague and friend Ian Brownlie said on Tuesday morning and earlier today, since the problem arises in terms similar to those relating to the "Commonwealth reservation" contained in India's optional declaration.

Second scenario: Pakistan cannot be regarded as a Member of the League of Nations. This is indeed quite true. However, in this case not only could it not accede to the General Act because of the accession clause contained in Article 43 of that instrument, which reserves this possibility solely for Members of the League of Nations, but also British India's reservation concerning disputes with States that are not Members of the League of Nations must apply.

There is no other possibility: the alternative is between being and not being, having been or not having been, a Member of the League of Nations -- and this, for the Members of the Commonwealth at any rate, leads to the same result concerning the Court's lack of jurisdiction in their disputes with India.

3. Pakistan's non-succession to the General Act of 1928

This being so, Mr. President, it cannot reasonably be claimed that Pakistan was somehow a Member of the League of Nations, nor that it succeeded to British India in this respect. And this leads me on to my third point concerning the alleged succession, or rather, non-succession of Pakistan to the General Act.

According to counsel for Pakistan, Pakistan «était partie parce que l'Inde l'était dès le début» (CR 2000/3, p. 16), which implies that in this respect it would have succeeded to British India. If I have understood correctly (although, as I said at the beginning of my statement, I am not sure that I did understand correctly . . .), the whole thrust of Sir Elihu's argument on this point apparently follows from the lengthy extracts he quoted from the Report of Expert Committee No. IX, on Foreign Relations, with a view, it would seem, to uncovering a "truth" concerning the legal situation of the two States with regard to the succession of States, a truth which, I repeat --subjective though it be, like any truth -- eluded me. I shall now attempt to be clearer in so far as "my portion of truth" is concerned . . .

In fact all this discussion on the succession of States is important only in so far as the General Act of 1929 is concerned and it is on that Act that I am going to endeavour to refocus the debate, for, without underestimating the very great documentary interest of the reading with which Sir Elihu obliged us, it is that, after all, which is of concern to us.

I shall not inflict a further reading of this fascinating document upon you, Members of the Court, since what emerges from it can be summed up in a few words: the representatives of India and Pakistan were not in agreement on the legal analysis of the situation resulting from partition and I do not think that much more can be drawn from that reading.

From the passages concerning the position of Pakistan's representatives referred to by Sir Elihu, it would appear that these affirmed that the future Pakistan had a vocation to succeed fully to British India. This position emerges, for instance, from the refusal of Mr. Ikramullah and Mr. Iskander Mirza to accept "their position", to accept «la thèse selon laquelle le dominion de l'Inde sera seul continuateur de la personnalité internationale de l'Inde actuelle» (*Partition Proceedings*, Vol. III, p. 206, CR 2000/3, p. 19).

With regard to the majority position, this is clearly illustrated by that of Mr. Pai, Mr. Menon and Mr. Jha, who «considèrent qu'en réalité, certaines parties de l'Inde ont été séparées de l'entité principale, qui reste continuatrice de la personnalité internationale de l'Inde actuelle» (*Partition Proceedings*, Vol. III, p. 206, CR 2000/3, p. 18).

There is nothing new under the sun (if we can talk about sun in this fine city of The Hague . . .): these positions correspond very accurately to those maintained before you respectively by Pakistan on the one hand, and India on the other.

Sir Elihu has endeavoured to persuade you that these opposing positions were reconciled by the text of paragraph 4 of the Schedule to the Indian Independence (International Arrangements) Order 1947: «C'est donc de cette manière que le conseiller constitutionnel a concilié les positions des deux États, et a tenu compte à la fois de l'avis de l'Inde et de celui du Pakistan, en particulier de celui du Pakistan» (CR 2000/3, p. 27). It is a, shall we say, optimistic or . . . Pakistani view of the «dénouement»!

We must be clear about this, Mr. President: there can be no doubt that the Schedule is indeed the «dénouement». But, far from giving satisfaction to Pakistan, it very much inclines to the Indian side, at any rate in so far as we are

concerned.

There can obviously be no question of talking in terms of superiority or inferiority: the two States are equal and equal in terms of sovereignty and no one has ever had the preposterous idea --which Sir Elihu seems to be ascribing to us (cf. CR 2000/3, pp. 17 or 27) -- to suggest that Pakistan is devoid of international legal personality. There is not even any need to determine whether India alone constitutes a continuation, *in abstracto*, of the legal personality of British India for all possible purposes. Rather it is sufficient to establish *that for the purposes of interest to us* -- i.e., succession to the status of Member or former Member of the League of Nations, there can be no doubt about the answer: independent India, and it alone, succeeded to British India: not Pakistan.

And this emerges from the *dénouement* described by Sir Elihu, and I am not sure that it is necessary for this purpose to adopt the part of a "detective unravelling a mystery" (CR 2003/3, p. 16). It is sufficient to read the Schedule to the Order of 14 August 1947 -- but it is necessary, unlike our sleuth, to read it in full and not make do with half measures and race straight through to paragraph 4.

Paragraph 4 does indeed state that:

> "rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions".

But only -- and this is how paragraph 4 begins -- "*Subject to Articles 2* and 3 of this agreement". Article 3 does not concern us; it deals with treaties covering territorial aspects. But Article 2 is fundamental for us, and the first sentence of paragraph 1 thereof deserves to be cited again:

> «La qualité de membre de toutes les organisations internationales *ainsi que les droits et obligations attachés* à *cette qualité* seront dévolus *exclusivement* au Dominion de l'Inde.» (Emphasis added)

Pakistan was not a Member of the League of Nations. Nor could it become one, as the League was now defunct. It could not succeed to British India because of this crucial provision. This amply demonstrates, I believe, that Pakistan could not have succeeded to the rights and obligations attaching to membership of the League of Nations as enjoyed by British India.

This, moreover, was precisely the position of the Pakistan Supreme Court in the 1961 *Yangtze* case, from which I cited the relevant passages the day before yesterday (CR 2000/2, pp. 46-47).

My friend Sir Elihu Lauterpacht exhibited great discretion on this matter. He explained to us that this was a very complicated case -- which, incidentally, is true -- that the Pakistan Government, since it was not party to the case, had not been able to make its views heard -- which is perhaps also true (I do not know, I have to say, how Pakistan's Supreme Court works and I have unfortunately not had the time to obtain the relevant information; I assume that Sir Elihu has done so?); he also told us that the Supreme Court did not have available all the information it needed to decide; as he said: «cette Cour n'aurait en tout cas pas pu avoir connaissance de toutes les indications détaillées des *Partition Proceedings* dont j'ai donné lecture ici ce matin» (CR 2000/3, p. 32); in other words, Pakistan's Supreme Court allegedly did not decide with full knowledge of the facts, as it did not have the benefit of the arguments of the learned counsel for Pakistan.

As I have shown, I do not think that my eminent opponent's police investigation (it was he who described his investigation in this way . . .) has provided us with anything very new: the extracts from the Partition Proceedings which he read out simply established that there were two opposing arguments. That is still the case today.

But what is interesting is that the Judgment of the Pakistan Supreme Court (which all the same could hardly have been unaware of Pakistan's position with regard to the conditions of its accession to independence) adopted, specifically with regard to an arbitration treaty (in fact a number of arbitration treaties), a position totally at odds with Pakistan's own stance:

> «Le Pakistan ne pouvait pas, en vertu de l'ordonnance relative à l'indépendance de l'Inde (accords internationaux) succéder aux droits et obligations de l'Inde britannique comme Membre de la Société des Nations...» (Documentation concernant la succession d'Etats, *Série législative des Nations Unies*, 1967, ST/LEG/SER.B/14, p. 139 -- for the complete quotation, see CR 2000/2, p. 47).

And, contrary to what Sir Elihu asserted (CR 2000/3, p. 31), India's Attorney General has not had caused anything to be said on this Judgment other than what he said on Tuesday. This is borne out if one simply compares the relevant passage of his presentation with the Judgment itself:

- I quote the Attorney General:

> «L'ordonnance relative à l'indépendance de l'Inde (accords internationaux) de 1947 ne prévoyait pas et, de fait, ne pouvait pas prévoir la dévolution de droits et obligations conventionnels qui n'étaient pas susceptibles d'être transmis par voie de succession à un pays séparé de l'Etat originel et élevé au rang de puissance souveraine indépendante, compte tenu de la pratique des Etats. Tel est le point de vue qu'a adopté la Cour suprême du Pakistan...» (CR 2000/2, p. 15);

- there is no need to cite the *Yangtze* Judgment: it says the same thing *word for word* (ST/LEG/SER.B/14, précis, p. 137); the Attorney General's only mistake was perhaps not to have inserted the quotation marks . . .

The inevitable interpretation of the 1947 Order adopted by the Pakistan Supreme Court results from the clear text of that Order. It is also confirmed by the practice followed by Pakistan itself. A practice which, incidentally, is sometimes a little stretched.

Thus, for instance, as was pointed out in a study of the United Nations Secretariat prepared for the International Law Commission in 1968, "it was considered that, because of its separation from India, Pakistan had ceased to belong to the Berne Convention [for the protection of literary and artistic works] from the date it became independent, 14 August 1947". On 4 June 1948 Pakistan issued a declaration of accession to the 1928 Rome text of the Berne Convention, in accordance with the text [. . . which] became effective from 5 July 1948. According to the International Office,

> "when Pakistan formed part of India, it was *ipso facto* a party to the Union; subsequently it left the Union when India and Pakistan were separated. On 5 July 1948, it again became a member of the Union as a contracting country" ("Succession of States to multilateral treaties: studies prepared by the Secretariat", *Yearbook of the International Law Commission*, 1968, Vol. II, p. 16, para. 38).

The same applied to the Constitution of FAO, to which India had been party since 16 October 1945, while Pakistan submitted an application for membership on 25 August 1947 ("Succession of States to multilateral treaties: sixth study prepared by the Secretariat", *Yearbook of the International Law Commission*, 1969, Vol. II, pp. 37-38, para. 49), not to mention the United Nations Charter and numerous treaties establishing international organizations.

But the same happened with regard to many other conventions to which British India had been party, in particular the 1929 Geneva Conventions that Sir Elihu mentioned both on Monday (CR 2000/1, p. 57) and yesterday morning (CR 2000/3, pp. 22-23). These treaties do not, however, fall directly within the ambit of Article 2 of the 1947 Schedule, which leads me to move on briefly to a fourth point relating to the list of 627 treaties which seems to intrigue the Pakistani side so much.

Before doing so, I should like to briefly sum up this third point:

(1) the representatives of India and future Pakistan were, during the *travaux préparatoires* for the 1947 Order, at loggerheads over the continuity of the personality of British India; that is all that the work of Committee No. IX shows;

(2) these disagreements still exist today between India and Pakistan;

(3) with regard to both participation in international organizations and the rights and obligations resulting therefrom, paragraph 2 of the 1947 Agreement clearly settles this matter in favour of succession thereto *solely* by India, to the exclusion of Pakistan;

(4) this is confirmed by the clear interpretation adopted by the Pakistan Supreme Court itself in the 1961 *Yangtze* Judgment and by the practice followed, *volens nolens*, by Pakistan itself; and, of course

(5) the same applies to the General Act of Arbitration, to which British India was party only because it was a Member of the League of Nations.

Mr. President, I need another 20 minutes or so. May I continue?

The PRESIDENT: Please continue, Professor.

4. List of the six hundred and twenty-seven treaties

Mr. PELLET: I shall therefore now move on to the list of 627 treaties enumerated in Annex 5 to the Report of Expert Committee No. IX.

According to Professor Lauterpacht I said a lot of silly things yesterday about this list, but he has shown indulgence:

> «deux exemples suffiront. Contrairement à ce qu'il a dit, le comité d'experts n'a pas préparé l'annexe où figure la liste des traités... Contrairement aussi à ce qu'il a déclaré, le rapport du comité d'experts, bien que signé par les experts, ne constituait pas un accord...» (CR 2000/3, p. 28).

On the first point, Mr. President, I duly apologize since it does in fact seem that this famous list was prepared not *by* experts but *for* them, by a certain Mr. Branch of the External Affairs Branch of the External Affairs and Commonwealth Relations Department (India) (*Partition Proceedings*, Vol. III, p. 217). However, I did not state that this list constituted or formed part of an agreement. What I said was completely different, namely that the list "formed the basis on which the [devolution] agreement was negotiated. It constitutes the key element in the *travaux préparatoires* and demonstrates the agreement of the negotiators on the position in relation to the treaties cited" (CR 2000/2, p. 50). And this I maintain: whilst the Committee's report refers -- very systematically, it would seem -- to the disagreements between its members, it does not mention any disagreement relating to the list -- something which cannot be said of the legal status of Pakistan in their eyes (pp. 213-215, paras. 42-46), and it is on this last point, which I have already touched upon, that the Committee recommends that "a more thorough examination . . . of the legal aspects of the matter" [«un examen plus approfondi des aspects juridiques de la question»] be made (p. 214, para. 45), not on the list itself or the distinction it makes between three categories of treaty.

It is quite possible, and even probable, that this list contains a number of errors and omissions. It is nonetheless highly significant, if only because it does *not* contain *any* treaty of arbitration, which strengthens the position of the Pakistan Supreme Court in the *Yangtze* case concerning the arbitration agreements of 1923, 1927 and 1937, and also India's position with respect to the non-transmissibility, as a general rule, of this type of agreement.

As for the three "significant omissions" [«importantes omissions»] which Sir Elihu saw fit to refer to, there is nothing surprising about them (CR 2000/3, pp. 22-23). I shall look at them briefly one by one:

(1) the Geneva Conventions of 1929 on Prisoners of War and the Treatment of Sick and Wounded: contrary to what Pakistan seems to think, these conventions quite clearly found no place in the list and, incidentally, gave rise to an incident when Pakistan attempted to become party thereto by means of a notification of succession of 31 January 1948. This attempt

> "by the Pakistan Government had no effect as regards the participation of Pakistan in the 1929 Conventions as a separate party. *Pakistan* became a party by accession and not by succession . . ." ("Succession of States to multilateral treaties: studies prepared by the Secretariat", précis, *Yearbook of the International Law Commission* 1968, Vol. II, p. 40, para. 167);

(2) the 43 extradition treaties which my opponent lumped together: if anything is surprising about them, it is not their absence from the list. Concluded *intuitu personae*, bilateral extradition treaties do not lend themselves to succession imposed by a newly independent State on the co-contracting party of the predecessor State, with which these agreements must inevitably be renegotiated (see H. J. Keith, "State Succession to Treaties in the Commonwealth", *ICLQ*, 1964, p. 1442). What is more surprising is the presence of two extradition treaties on the list (the 1911 Treaty with Siam and the 1931 Treaty with Iraq -- see Partition Proceedings, Vol. III, pp. 220 and 218); unless specific reasons of which I am unaware made this solution necessary, it is these two treaties which should not have been included in the list, and not the 43 others which were erroneously omitted. This reduces, if I may say so, the level of error which Sir Elihu believed he had been able to identify;

(3) the Protocol relating to the arbitration clauses of 1923: as we have seen, this is one of the instruments which was expressly involved in the *Yangtze* case, heard in 1961 by the Pakistan Supreme Court, which

rightly held that Pakistan could not succeed to British India with respect to these clauses. Furthermore, in the publication entitled *Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999*, the Secretary-General confirms that Pakistan is still not party to these clauses (*précis*, p. 974).

What can we conclude from all this, Mr. President? Firstly, without doubt, that the list of the 627 treaties is clearly less fanciful than Sir Elihu would have us believe. Secondly, that the absence of any arbitration treaty is by no means fortuitous, which confirms India's position with regard to the non-transmissibility of these types of agreement, at least as they were viewed at that time. Finally, following on from this, that Pakistan was not entitled to succeed to British India with respect to the General Act of Arbitration of 1928, partly because the Act comes under this category -- and this also applies to India -- and partly because only Members of the League of Nations (which status Pakistan could not claim) could become party thereto.

5. Pakistan's communication of 30 May 1974

This brings me to the fifth point which Sir Elihu addressed yesterday. It concerns what purports to be Pakistan's notification of succession of 30 May 1974 -- and, Mr. President, I did say *of 30 May 1974*, not 3 October 1973, contrary to what Pakistan says it discovered «plutôt à la dernière minute» thanks to the copy of the "original text" bearing that date which its Permanent Mission supplied to Pakistan's team of lawyers (see CR 2000/3, p. 29).

And to the astonishment of detective Lauterpacht:

> «L'aspect le plus singulier du document déposé par le Pakistan le 3 octobre 1973 est que certains passages semblent avoir disparu dans la version imprimée du recueil du Secrétaire général. Les passages omis concernent trois endroits différents de la lettre du Pakistan, et ils ont tous un contenu similaire -- leur omission ne peut donc guère avoir été accidentelle. C'est comme si quelqu'un -- je ne dis pas que c'est le cas, mais je dis que c'est comme si quelqu'un -- avait décidé pour une raison quelconque d'omettre dans la version imprimée qui serait diffusée au monde entier certains passages de la communication d'origine.» *(Ibid.)*

Counsel for Pakistan then endeavours to systematically compare what he presents as the original text of 3 October 1973 with that published by the Secretary-General. And, having remarked that "Pakistan's basic legal position is here being distorted or omitted" [«la position juridique fondamentale du Pakistan est ici déformée, ou éludée»] (CR 2000/3, p. 30) and that, if the omitted passages had appeared in the official publication, "then there would have been a wider general understanding of what the true nature of the succession of Pakistan and India was to the obligations of the original British India" [«la vraie nature de la succession du Pakistan et de l'Inde aux obligations de l'Inde britannique originelle aurait d'une manière générale été plus largement comprise»] (CR 2000/3, p. 31), he concludes:

> «J'invite donc la Cour, à qui une copie de cette lettre sera bien évidemment fournie, à en tenir compte [il parlait d'une différence entre le texte de la lettre de 1973 et la publication des Nations Unies] lorsqu'elle examinera la vraie nature de la succession.
>
> Il me semble [Sir Elihu parle] que cette analyse des *Partition Proceedings* et de cette lettre amène à s'interroger sur la validité des vues exprimées par les conseillers juridiques du Secrétaire général de l'Organisation des Nations Unies, auxquelles M. Pellet a fait référence à la page [46 du compte rendu -- CR 2000/2, p. 46].
>
> Voilà donc pour ce point, qui est, je crois, un élément vraiment central de l'argumentation relative à l'Acte général.» (*Ibid.*)

All things considered, Mr. President, I believe that my eminent opponent and friend's vocation as a detective is less well-founded than his vocation as a lawyer! Although a communication was indeed addressed to the Secretary-General on 3 October 1973 by Pakistan's Permanent Mission to the United Nations, the Secretary-General responded to this Note with another Note dated 31 January 1974 (a copy of which was obtained by the Indian delegation yesterday evening by India's Permanent Mission in New York and will of course also be made available to the Court and Pakistan, if they so wish). If I may, Mr. President, I should like to read the important part of this note (begging your indulgence if I continue to mispronounce the language of Shakespeare and Bentham . . .):

> «Il a été pris bonne note de la déclaration figurant au paragraphe 5 de la note de la mission permanente précisant que «le Pakistan continue d'être lié par la ratification faite par l'Inde britannique de

l'Acte général de 1928» et que «en revanche, le Gouvernement pakistanais ne confirme pas les réserves faites par l'Inde britannique».

A cet égard, il convient de rappeler l'usage international que le Secrétaire général s'estime obligé de suivre en ce qui concerne les traités multilatéraux pour lesquels il assume les fonctions de dépositaire : selon cet usage, une notification de succession qui, tout comme une ratification ou une adhésion, constitue un acte par lequel un Etat confirme sur le plan international son consentement à être lié par un traité, doit émaner soit du chef de l'Etat ou du gouvernement, soit du ministère des affaires étrangères. La notification est alors officiellement portée à l'attention des Etats intéressés par le Secrétaire général en sa qualité de dépositaire, et versée aux archives.

En conséquence, le Secrétaire général saurait gré à M. le Représentant permanent de bien vouloir faire établir une notification sous la forme prescrite ci-dessus.

Dès que cette notification aura été reçue, le Secrétaire général ne manquera pas d'en enregistrer le dépôt et d'en informer officiellement tous les Etats intéressés.» *[Translation by the Registry]*

This, Mr. President, explains the mystery in which Sir Elihu believed he was immersed (and carried you along with him, Members of the Court): following this Note from the Secretary-General to Pakistan's Permanent Mission, the Prime Minister of Pakistan addressed a new notification of succession to the Secretary-General on 30 May 1974. I have to say that we have not been able to obtain this second notification as it will apparently take two to three days to extract it from the United Nations archives. But evidently what is reproduced in the publication of the Secretary-General are the terms of this letter from the Prime Minister dated 30 May 1974.

This explanation -- mundane, I am afraid, but unambiguous -- dispels the dark suspicions harboured by the Pakistani side. If anyone deliberately omitted to include certain passages from the initial Note of Pakistan's Permanent Mission, it was not the United Nations Secretariat, but the Prime Minister of Pakistan himself. And if the true nature of the succession is to be found in one of these communications, we should, of course, look for it in the communication dated 30 May 1974, not in that dated 3 October 1973. Indeed the Pakistani side is scarcely in a position to attempt to cast doubt on the competence or integrity of United Nations officials or (I quote Sir Elihu) "the value of the view of the United Nations Secretary-General's legal advisers".

Similarly, Professor Lauterpacht saw fit to point out, with regard to the date of 3 October 1973 on which he erroneously based himself: «Si je précise la date, c'est qu'il faut la rattacher à la réponse, ou à la réaction, de l'Inde, qui a tardé pendant près d'un an, jusqu'au 18 septembre 1974» (CR 2000/3, p. 29). However, India clearly reacted promptly: it responded within three and a half months of the notification of succession being received by the United Nations Secretariat, which, bearing in mind the likely transmission delays, is particularly swift.

This is, moreover, less than the time it took Pakistan to rectify the text of its first "so-called" notification of succession. And, in four months, it had ample time to reflect upon the precise wording of this notification (to which the Secretary-General, incidentally, drew attention in the note I read out a few moments ago).

Therefore it was certainly no accident that, in the end, Pakistan, in its "notification of succession" (I put this expression in inverted commas) of 30 May 1974,

- omitted any reference to its purported "continuation of the former personality of British India" [«continuité de la personnalité juridique de l'ex-Inde britannique»] (para. 3 of the initial Note) and its purported agreement "to be bound by all multilateral obligations of British India" [«d'être liés par toutes les obligations multilatérales de l'Inde britannique»] (para. 4 of the same Note of 1973); and it was no accident that it
- substituted the word "accession" for what initially appeared as "ratification", a point dwelt on by my opponent.

And I also note in passing that the correct notification ends as follows: "The Government of Pakistan does not, however, affirm the reservations made by British India" [«En revanche, le Gouvernement pakistanais ne confirme pas les réserves faites par l'Inde britannique»], which confirms that here we are dealing not with a succession but, contrary to what was stated earlier, a *de novo* accession.

This perhaps no longer represents Pakistan's current position, but Pakistan is clearly estopped from deviating from the position it adopted in 1974, from that reproduced in *"the printed text that the world was made aware of"* to repeat the words used by my opponent -- CR 2000/3, p. 29).

This being the case, I shall be more cautious than Sir Elihu and should like to point out that we have not been able to obtain a copy of the Prime Minister of Pakistan's original text dated 30 May 1974 but frankly I hardly think that an official from the United Nations legal service could perform anything less than a scrupulous retranscription. I hasten to add that what I have just been saying in no way calls into question the integrity of the talented counsel for Pakistan, who has simply allowed himself to be misled by an over-hasty and incomplete "investigation". However, we feel we had to "set the record straight", if I may say so, to banish any misunderstandings and doubts to which his pleading yesterday may have given rise.

6. Matters on which Pakistan has remained silent

Rest assured, Mr. President, I am coming to the end of my presentation. Before concluding, however, I should like to refer to certain matters on which Pakistan has remained silent. This will be my sixth and, in short, final point.

Counsel for Pakistan yesterday reproached India's lawyers for not replying in full to the arguments presented during the first round of pleadings. Will he allow me to point out that neither during the first nor the second round did we have any more time than he had to prepare his own reply (but in so far as he is concerned this applies only to the second round)? To paraphrase his words, we could also say:

> "As the Court will realize, in the manner in which these hearings have been organized, with no whole day between the presentation of Pakistan's case or the opportunity for India to reply to it, we have worked under considerable pressure to prepare ourselves."
>
> [«Comme la Cour le comprendra, étant donné la manière dont ces audiences ont été organisées -- il ne s'est pas écoulé vingt-quatre heures entre la plaidoirie du Pakistan et la présente matinée où l'Inde est invitée à répondre -- nous n'avons disposé que de très peu de temps pour nous préparer.»] (See CR 2000/3, p. 8.)

This being the case, we have done our best given the circumstances, and I hope, for my part, not to have left any important points uncovered.

Like my friend and colleague Ian Brownlie, I would point out, with all due respect to our opponents, that they have, for their part, left out a substantial part of the argument that we put forward during the first round. It goes without saying that the Republic of India stands by this argument in full, and that I am not about to start going over everything the Islamic Republic of Pakistan did not see fit to discuss. I should just like to enumerate the main points which have thus been passed over in silence.

The most striking of these is undoubtedly Pakistan's complete silence concerning India's position regarding the General Act. The fact of the matter is -- as I had the honour to explain in some detail on Tuesday -- that not only is Pakistan not party to the General Act of 1928, a point to which it chose to devote yesterday morning's pleadings exclusively, but also that India itself is not bound by the General Act either. It never has been bound by it since its independence, first because the Act does not lend itself to the succession of States, and, second, because independent India did not in any case give the notification that would have been essential for succession, assuming that this had been possible. Furthermore, its communication of 18 September 1974 (this date cannot possibly be disputed . . .) cannot leave any doubt as to India's desire not to be bound by it and, at the very worst, has to be seen as an unambiguous denunciation.

I also draw attention to Pakistan's equally surprising silence concerning the reservations attached to British India's Act of Accession in 1931. Now, I repeat, *each* of these three reservations to which I referred on Tuesday (see CR 2000/2, pp. 44-45) and which also appear in the Counter-Memorial (pp. 11-12) are such as to rule out the Court's jurisdiction in the present case.

In addition, although I am surely forgetting other important items -- I too, Mr. President, have had to work under pressure! -- I would mention, for the record, Pakistan's silence concerning the Simla Accord, the provisions of the Charter which it initially invoked, and the estoppel or acquiescence -- all arguments to which Mr. P. S. Rao responded the day before yesterday, and about which not a word has been uttered by the Pakistani side, which means that our excellent colleague and friend has been denied the pleasure of speaking before you again this morning.

So there is silence on many matters and it speaks volumes!

Mr. President, as the Attorney General Mr. Soli Sorabjee reminded us in the introduction to India's pleadings, India

remains committed to your distinguished Court and has demonstrated this by maintaining its optional declaration of acceptance of the compulsory jurisdiction of the Court, subject to the reservations which it has, as it is entitled to do, appended thereto. It is this declaration that marks both its consent to your jurisdiction and the limits of your jurisdiction if there is no special agreement between the Parties. And it is surely not by attempting, for a second time, to resuscitate the General Act of 1928 -- by which India has clearly let it be known that it was not bound -- that the Pakistani side is serving the cause of international justice of which you are the vigilant guardians.

Members of the Court, I thank you most sincerely for your patient attention and, Mr. President, may I ask you now to call upon His Excellency Mr. Menon who, in his capacity as Agent, will read the Republic of India's final submissions pursuant to Article 60, paragraph 2, of the Rules of Court. Thank you.

The PRESIDENT: Thank you, Professor. Je donne la parole à S. Exc. l'ambassadeur Menon, agen de l'Inde.

M. MENON : Monsieur le président, Madame et Messieurs de la Cour, cela a été un honneur pour Monsieur l'*Attorney General* de l'Inde, pour moi-même en qualité d'agent et pour les autres membres de la délégation indienne de venir devant vous. La délégation indienne exprime sa profonde reconnaissance à la Cour pour la patience avec laquelle elle a bien voulu nous écouter. Dans sa lettre du 2 novembre 1999, le Gouvernement de l'Inde a exposé ses exceptions préliminaires à la compétence de la Cour, en réponse à la requête présentée par la République islamique du Pakistan le 21 septembre 1999 dans l'affaire de l'*Incident aérien du 10 août 1999 (Pakistan c. Inde)*. Le contre-mémoire soumis par l'Inde le 28 février 2000, sur les observations présentées par le Pakistan dans son mémoire daté du 7 janvier 2000 a développé la position de l'Inde.

Les audiences de ces quatre derniers jours ont donné à l'Inde l'occasion de réaffirmer et de développer encore ses arguments, en rejetant ceux qui ont été avancés par le Gouvernement du Pakistan. L'Inde répète qu'aucun des arguments avancés par le Pakistan n'est solide, et qu'aucun d'entre eux ne fournit de base pour invoquer la juridiction de la Cour. Le Gouvernement de l'Inde prie donc respectueusement la Cour de dire et juger qu'elle n'est pas compétente pour examiner la requête du Gouvernement du Pakistan. Je vous remercie, Monsieur le président.

The PRESIDENT: Thank you, Mr. Menon. The Court takes note of the final submissions which you have read on behalf of India, as it took note yesterday of the final submissions presented by the Co-Agent of Pakistan.

This brings us to the end of this series of hearings on the question of the jurisdiction of the Court.

I should like to thank the Agents, counsel and lawyers of both Parties most sincerely for the quality of their arguments and the courtesy they have exhibited throughout these proceedings.

I also wish to thank them for the restraint they have shown following my appeal concerning the second round of the pleadings.

In accordance with practice, I shall request both Agents to remain at the Court's disposal to provide any additional information it may require, and, with that proviso, I now declare closed the oral proceedings concerning the jurisdiction of the Court to entertain the Application in the case concerning the *Aerial Incident of 10 August 1999 (Pakistan* v. *India).*

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its Judgment.

As the Court has no other business before it today, the session is closed.

The Court rose at 11.45 a.m.

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