INTERNATIONAL COURT OF JUSTICE

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ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE AERIAL INCIDENT OF 10 AUGUST 1999

(PAKISTAN *v.* INDIA)

JURISDICTION OF THE COURT

JUDGMENT OF 21 JUNE 2000

2000

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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(PAKISTAN c. INDE)

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CASE CONCERNING THE AERIAL INCIDENT OF 10 AUGUST 1999

(PAKISTAN *v.* INDIA)

JURISDICTION OF THE COURT

Jurisdiction of the Court.

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Article 17 of the General Act of 1928 and Article 37 of the Statute of the Court — Article 17 as basis of jurisdiction challenged on diverse grounds — Freedom of the Court to select the ground on which it founds its decision.

India's communication of 18 September 1974 that it has never been party to the General Act as an independent State — Communication to be considered in the circumstances of the present case as having served the same legal ends as notification of denunciation under Article 45 of the General Act.

* *

Declarations of acceptance of the compulsory jurisdiction of the Court by the Parties under Article 36, paragraph 2, of the Statute.

Commonwealth reservation (subparagraph (2) of first paragraph of India's declaration):

Pakistan's contention that the Commonwealth reservation should be regarded as an extra-statutory reservation going beyond the conditions of Article 36, paragraph 3, of the Statute — Court's jurisdiction existing only within the limits within which it has been accepted — Paragraph 3 of Article 36 of the Statute never regarded as laying down in an exhaustive manner the conditions under which declarations may be made — Recognition in the practice of States of

their right to attach to declarations of acceptance of the jurisdiction of the Court reservations defining the parameters of that acceptance.

Pakistan's contention that the Commonwealth reservation should be regarded as a discriminatory act constituting an abuse of right — Reservation referring generally to States which are or have been members of the Commonwealth — Freedom of States to limit the scope ratione personae *of their acceptance of the Court's jurisdiction.*

Pakistan's contention that the Commonwealth reservation is obsolete — Change or disappearance of historical reasons for the appearance of the reservation — Considerations which cannot prevail over the intention of a declarant State as expressed in the text of its declaration — Limitation of the scope ratione personae *of acceptance of the jurisdiction of the Court binding on the latter.*

Pakistan's contention that India is estopped from invoking the Commonwealth reservation against it — Article 1, paragraph (ii), of the Simla Accord of 1972 constituting an obligation, generally, on the two States to settle their differences by peaceful means to be agreed by them — Provision in no way modifying the specific rules governing recourse to any such means, including judicial settlement.

Multilateral treaty reservation (subparagraph (7) of first paragraph of India's declaration) — No necessity to consider in the present case.

* *

Article 36, paragraph 1, of the Statute.

Absence from the United Nations Charter of any specific provision of itself conferring compulsory jurisdiction on the Court — Reliance by Pakistan on Articles 1, paragraph 1, 2, paragraphs 3 and 4, 33, 36, paragraph 3, and 92 of the Charter.

Reliance by Pakistan on Article 1, paragraph (i), of the Simla Accord — Obligation of the Parties to respect the principles and purposes of the Charter in their mutual relations — Provision not as such entailing any obligation on the two States to submit their disputes to the Court.

* *

Obligation of the Parties to settle their disputes by peaceful means, and in particular the dispute arising out of the aerial incident of 10 August 1999, in accordance with the provisions of the Charter and with the other obligations which they have undertaken.

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, BEDJAOUI, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc PIRZADA, REDDY; *Registrar* COUVREUR.

In the case of the aerial incident of 10 August 1999,

between

the Islamic Republic of Pakistan,

represented by

Mr. Amir A. Shadani, *Chargé d'affaires a.i.*, Embassy of Pakistan in the Netherlands,

as Acting Agent;

Mr. Jamshed A. Hamid, Legal Adviser, Ministry of Foreign Affairs,

as Co-Agent;

Mr. Moazzam A. Khan, First Secretary, Embassy of Pakistan in the Netherlands,

as Deputy Agent;

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

as Chief Counsel;

Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, Member of the Institut de droit international,

Dr. Fathi Kemicha, Doctor of Law of Paris University, *avocat* at the Paris Bar,

Mr. Zahid Said, Barrister-at-Law, Ministry of Law, Justice and Human Rights,

Mr. Ross Masud, Deputy Legal Adviser, Ministry of Foreign Affairs,

Mr. Shair Bahadur Khan, Deputy Legal Adviser, Ministry of Foreign Affairs,

as Counsel;

Miss Norah Gallagher, Solicitor,

and

the Republic of India,

represented by

H.E. Mr. Prabhakar Menon, Ambassador of India to the Netherlands,

as Agent;

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

as Co-Agent and Advocate;

Ms M. Manimekalai, Counsellor (Political), Embassy of India in the Netherlands,

as Deputy Agent;

H.E. Mr. Soli J. Sorabjee, Attorney General of India,

as Chief Counsel and Advocate;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, Member of the Institut de droit international,

Mr. Alain Pellet, Professor, University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

as Counsel and Advocates;

Dr. B. S. Murty, Formerly Professor and Dean of Law, Andhra and Osmania Universities, Advocate, Hyderabad,
Mr. B. Sen, Senior Advocate, Supreme Court of India,
Dr. V. S. Mani, Professor of International Space Law, Jawaharlal Nehru University, New Delhi,
Dr. M. Gandhi, Legal Officer (Grade I), Ministry of External Affairs,

as Counsel and Experts;

Mr. Vivek Katju, Joint Secretary (IPA), Ministry of External Affairs,
Mr. D. P. Srivastava, Joint Secretary (UNP), Ministry of External Affairs,

as Advisers;

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

as Research Assistant,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 21 September 1999, the Islamic Republic of Pakistan (hereinafter called "Pakistan") filed in the Registry of the Court an Application instituting proceedings against the Republic of India (hereinafter called "India") in respect of a dispute relating to the destruction, on 10 August 1999, of a Pakistani aircraft.

In its Application, Pakistan founded the jurisdiction of the Court on Article 36, paragraphs 1 and 2, of the Statute and the declarations whereby the two Parties have recognized the compulsory jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Indian Government by the Registrar; and, pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By letter of 2 November 1999, the Agent of India notified the Court that his Government "wish[ed] to indicate its preliminary objections to the assumption of jurisdiction by the . . . Court . . . on the basis of Pakistan's Application". Those objections, set out in a note appended to the letter, were as follows:

> "(i) That Pakistan's Application did not refer to any treaty or convention in force between India and Pakistan which confers jurisdiction upon the Court under Article 36 (1).
>
> (ii) That Pakistan's Application fails to take into consideration the reservations to the Declaration of India dated 15 September, 1974 filed under Article 36 (2) of its Statute. In particular, Pakistan, being a Commonwealth country, is not entitled to invoke the jurisdiction of the Court as subparagraph 2 of paragraph 1 of that Declaration excludes all disputes involving India from the jurisdiction of this Court in respect of any State which 'is or has been a Member of the Commonwealth of Nations'.

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

4. At a meeting held between the President of the Court and the representatives of the Parties on 10 November 1999, pursuant to Article 31 of the Rules of Court, the Parties provisionally agreed to request the Court to determine separately the question of its jurisdiction in this case before any proceedings on the merits, on the understanding that Pakistan would first present a Memorial dealing exclusively with this question, to which India would have the opportunity of replying in a Counter-Memorial confined to the same question. By letters of 12 November 1999 and 25 November 1999 respectively, the Agent of Pakistan and the Deputy Agent of India confirmed the agreement to the procedure given *ad referendum* on 10 November 1999.

By Order of 19 November 1999, the Court, taking into account the agreement reached between the Parties, decided that the written pleadings should first be addressed to the question of the jurisdiction of the Court to entertain the Application and fixed 10 January 2000 and 28 February 2000, respectively, as the time-limits for the filing of a Memorial by Pakistan and a Counter-Memorial by India on that question.

The Memorial and the Counter-Memorial were duly filed within the time-limits so prescribed.

5. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them availed itself of the right conferred by Article 31, paragraph 3, of the Statute to proceed to choose a judge *ad hoc* to sit in the case: Pakistan chose Mr. Syed Sharif Uddin Pirzada for this purpose, and India Mr. B. P. Jeevan Reddy.

6. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed should be made accessible to the public on the opening of the oral proceedings.

7. Public sittings were held from 3 to 6 April 2000, at which the Court heard the oral arguments and replies of:

For Pakistan: Mr. Hamid,
H.E. Mr. Munshi,
Sir Elihu Lauterpacht,
Dr. Kemicha.

For India: H.E. Mr. Menon,
H.E. Mr. Sorabjee,
Mr. Brownlie,
Mr. Pellet,
Dr. Sreenivasa Rao.

*

8. In the Application, the following requests were made by Pakistan:

"On the basis of the foregoing statement of facts and considerations of law, and while reserving its right to supplement and or to amend this Application, and subject to the presentation to the Court of the relevant evidence and legal argument, Pakistan requests the Court to judge and declare as follows:

(a) that the acts of India (as stated above) constitute breaches of the various obligations under the Charter of the United Nations, customary international law and treaties specified in the body of this Application for which the Republic of India bears exclusive legal responsibility;

(b) that India is under an obligation to make reparations to the Islamic Republic of Pakistan for the loss of the aircraft and as compensation to the heirs of those killed as a result of the breaches of the obligations committed by it under the Charter of the United Nations and relevant rules of customary international law and treaty provisions."

9. In the note attached to its letter of 2 November 1999, the following submissions were presented by India:

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

(i) to adjudge and declare that Pakistan's Application is without any merit to invoke the jurisdiction of the Court against India in view of its status as a Member of the Commonwealth of Nations; and

(ii) to adjudge and declare that Pakistan cannot invoke the jurisdiction of the Court in respect of any claims concerning various provisions of the United Nations Charter, particularly Article 2 (4) as it is evident that all the States parties to the Charter have not been joined in the Application and that, under the circumstances, the reservation made by India in subparagraph 7 of paragraph 1 of its declaration would bar the jurisdiction of this Court."

10. In the written proceedings, the Parties presented the following submissions:

On behalf of the Government of Pakistan,

in the Memorial:

"In view of the above submissions, the Government of Pakistan respectfully requests the Court to exercise jurisdiction and proceed to decide the case on merits."

On behalf of the Government of India,

in the Counter-Memorial:

"For the reasons advanced in this Counter-Memorial, India requests the Court

— to adjudge and declare that it lacks jurisdiction over the claims brought against India by the Islamic Republic of Pakistan."

11. At the oral proceedings, the Parties presented the following submissions:

On behalf of the Government of Pakistan,

At the close of the sitting of 5 April 2000:

"For the reasons developed in the written pleadings and in the oral proceedings, Pakistan requests the Court:

(i) to dismiss the preliminary objections raised by India;
(ii) to adjudge and declare that it has jurisdiction to decide on the Application filed by Pakistan on 21 September 1999; and
(iii) to fix time-limits for the further proceedings in the case."

On behalf of the Government of India,

At the close of the sitting of 6 April 2000:

"The Government of India therefore respectfully submits that the Court adjudge and declare that it has no jurisdiction to consider the Application of the Government of Pakistan."

* * *

12. To found the jurisdiction of the Court in this case, Pakistan relied in its Memorial on:

(1) Article 17 of the General Act for Pacific Settlement of International Disputes, signed at Geneva on 26 September 1928 (hereinafter called "the General Act of 1928");
(2) the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute of the Court;
(3) paragraph 1 of Article 36 of the said Statute.

India disputes each one of these bases of jurisdiction; the Court will examine them in turn.

* *

13. Pakistan begins by citing Article 17 of the General Act of 1928, which provides:

"All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

Pakistan goes on to point out that, under Article 37 of the Statute of the International Court of Justice:

"Whenever a treaty or convention in force provides for reference of a matter to . . . the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

Finally, Pakistan recalls that on 21 May 1931 British India had acceded to the General Act of 1928. It considers that India and Pakistan subsequently became parties to the General Act. It followed that the Court had jurisdiction to entertain Pakistan's Application on the basis of Article 17 of the General Act read with Article 37 of the Statute.

14. In reply, India contends, in the first place, that "the General Act of 1928 is no longer in force and that, even if it were, it could not be effectively invoked as a basis for the Court's jurisdiction". It argues that numerous provisions of the General Act, and in particular Articles 6, 7, 9 and 43 to 47 thereof, refer to organs of the League of Nations or to the Permanent Court of International Justice; that, in consequence of the demise of those institutions, the General Act has "lost its original efficacy"; that the United Nations General Assembly so found when in 1949 it adopted a new General Act; that "those parties to the old General Act which have not ratified the new act" cannot rely upon the old Act except "'in so far as it might still be operative', that is, in so far . . . as the amended provisions are not involved"; that Article 17 is among those amended in 1949 and that, as a result, Pakistan cannot invoke it today.

India adds that British India had in 1931

> "expressly made [its] acceptance of Chapter II of the [General] Act . . . and, in particular, Article 17 . . . 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".

That condition would preclude the General Act of 1928 from remaining in force, at least in relation to India, after the demise of the League of Nations.

15. Pakistan contends, on the contrary, that "the General Act survived the demise of the League of Nations". Referring to the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock in the case concerning *Nuclear Tests (Australia* v. *France)* (*I.C.J. Reports 1974*, pp. 327 *et seq.*), Pakistan stresses that the General Act of 1928 was independent of the League of Nations both organically and ideologically; that the disappearance of certain provisions of the General Act or, in certain cases, the impairment of their efficacy, did not affect its application; that, finally, the 1949 revision did not extinguish the original treaty.

16. Secondly, the Parties disagree on the conditions under which they succeeded in 1947 to the rights and obligations of British India, assuming, as Pakistan contends, that the General Act was then still in force and binding on British India.

17. In this regard, India argues that the General Act was an agreement of a political character which, by its nature, was not transmissible. It

adds that, in any event, it made no notification of succession as provided for in the case of newly independent States by Articles 17 and 22 of the Vienna Convention of 1978 on Succession of States in respect of Treaties, which, on this point, is considered by India to have codified customary law. Furthermore, India points out that it clearly stated in its communication of 18 September 1974 to the Secretary-General of the United Nations that

> "[t]he Government of India never regarded themselves as bound by the General Act of 1928 since her Independence in 1947, whether by succession or otherwise. Accordingly, India has never been and is not a party to the General Act of 1928 ever since her Independence."

Nor, continues India, could Pakistan have succeeded to British India in 1947 as party to a political treaty such as the General Act. Nor, moreover, was Pakistan "the continuator of British India"; it accordingly followed, in India's view, that Pakistan could not become party to the General Act, because, under Article 43 of that Act, only States Members of the League of Nations could accede, or "non-Member States to which the Council of the League of Nations has communicated a copy [of the Act] for this purpose".

18. Pakistan, recalling that up to 1947 British India was party to the General Act of 1928, argues on the contrary that, having become independent, India remained party to the Act, for in its case "there was no succession. There was continuity", and that consequently the "views on non-transmission of the so-called political treaties [were] not relevant here". Thus the communication of 18 September 1974 was a subjective statement, which had no objective validity. Pakistan, for its part, is said to have acceded to the General Act in 1947 by automatic succession by virtue of international customary law.

Further, according to Pakistan, the question was expressly settled in relation to both States by Article 4 of the Schedule to the Indian Independence (International Arrangements) Order issued by the Governor-General of India on 14 August 1947, which was stated to have the effect, from 15 August 1947, of an agreement between India and Pakistan; that provision reads as follows:

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

Pakistan points out that Article 2 of the agreement deals with membership of international organizations, while Article 3 concerns treaties having territorial application; that neither of these Articles is applicable here and that the proviso of Article 4 does not apply; and that accord-

ingly, under the agreement of 1947, Pakistan became a successor State to the General Act of 1928. Moreover, in order to dispel all doubts in this connection, on 30 May 1974 Pakistan addressed a notification of succession to the Secretary-General of the United Nations, stating that "the Government of Pakistan continues to be bound by the accession of British India of the General Act of 1928", while adding that it "[did] not . . . affirm the reservations made by British India".

19. India disputes this interpretation of the Indian Independence (International Arrangements) Order of 14 August 1947 and of the agreement in the Schedule thereto. It points out that Article 4 of the agreement is subject to the provisions of Article 2. Yet this latter Article provides that "[m]embership of all international organisations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India". In the same Article it is stated that "[t]he Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organisations as it chooses to join." It followed, according to India, that Pakistan could not have succeeded under the Order and agreement of 14 August 1947 to the rights and obligations acquired by British India by virtue of her membership of the League of Nations.

20. In support of this argument India relies on a judgment rendered by the Supreme Court of Pakistan on 6 June 1961, in which that Court, referring to the provisions of the Schedule to the Order of 1947, stated, *inter alia*, that

> "[u]nder these provisions . . . Pakistan . . . did not automatically become a member of the United Nations nor did she succeed to the rights and obligations which attached to India by reason of her membership of the League of Nations at Geneva or the United Nations."

The Supreme Court accordingly held that Pakistan could not have become a party to the instrument at issue before it, namely the 1927 Convention for the Execution of Foreign Arbitral Awards, which had been ratified by British India in 1937. In India's view, "[t]his reasoning [was] transposable in all respects to the General Act of 1928".

For its part, Pakistan observes that the judgment in question was given in "a case in which the Government of Pakistan was not involved" and had "had no opportunity to express its views to the Court", adding:

> "we are unaware of the extent to which the Court was sufficiently assisted in the development of its international law argument. . . . [I]n the absence of . . . knowledge about the true nature of the relationship between Pakistan and India after Independence, [and] with India before Independence, the Court could be understood not to have got matters right."

21. India also relies on the report of Expert Committee No. IX on

Foreign Relations, which in 1947 had been instructed, in connection with the preparation of the above-mentioned Order, "to examine and make recommendations on the effect of partition" on, *inter alia*, "the existing treaties and engagements between [British] India and other countries and tribes". India refers in particular to Annexure V to the said report, which contained a list of those treaties and engagements. It notes that the General Act of 1928 does not appear on that list. Pakistan, however, observes that other important treaties do not appear on the list, which has "certain very significant omissions".

India further observes that, in any event, even assuming that the 1947 agreement does have the scope claimed for it by Pakistan, it cannot take precedence over the provisions of customary law as codified in the 1978 Vienna Convention on Succession of States in respect of Treaties, as Article 8 of the Convention makes clear.

In short, and as India stated on 18 September 1974 in its communication to the United Nations Secretary-General with regard to Pakistan's notification of succession of 30 May 1974, Pakistan could not have, and did not, become party to the General Act of 1928.

22. Each of the Parties further relies in support of its position on the practice since 1947. In this regard Pakistan recalls *inter alia* that, under the agreement signed at Simla on 2 July 1972, which entered into force on 4 August of that same year (hereinafter called the "Simla Accord"), the two States declared themselves "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 Pakistan's Memorial). According to Pakistan,

> "[a]s Chapter II of the General Act . . . [of 1928] was a 'peaceful means' already 'agreed upon' by both [P]arties before the relevant date (2nd July 1972) and created mutually binding obligations between them, the aforementioned provision of the Simla Accord reaffirms and makes the procedure under Article 17 of the General Act of 1928 truly efficacious".

That procedure accordingly "continued to be available, in any case till 18 September 1974".

23. For its part, India argues that the Simla Accord

> "is no more than an arrangement between India and Pakistan first to enter into negotiations in case of any difference, and following such negotiations, to refer the matter to any other method of settlement to the extent that there is any further and specific agreement between the parties".

It adds that, in any event, India's communication to the United Nations Secretary-General of 18 September 1974 is a clear manifestation of its will not to be bound by the General Act of 1928, stating more particularly in this regard:

"while Article 45 of the General Act states that denunciation 'shall be effected by a written notification addressed' to the depository, it does not require this notification to take any particular form. India addressed such notification to the Secretary-General of the United Nations; it goes beyond a simple denunciation but it is not reasonable not to recognize that it is that at least."

Pakistan, for its part, is of the opinion that the said communication, not having been made in accordance with the procedure provided for in Article 45, does not amount to a formal denunciation of the Act.

24. Lastly, India recalls that when British India acceded to the General Act on 21 May 1931 it attached various reservations to that accession. Thus it was stated that:

"the following disputes are excluded from the procedure described in the General Act . . .

. . . . . .

(iii) Disputes between the Government of India and the Government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree".

. . . . . .

(v) Disputes with any Party to the General Act who is not a Member of the League of Nations."

India argues that Pakistan "was not and did not become a Member of the League of Nations" and that this latter reservation accordingly excludes any jurisdiction of the Court in this case. It adds that, even assuming that Pakistan were to be regarded as having belonged or belonging to the League of Nations, then the first reservation would become applicable, since the dispute before the Court is between two countries which are members of the Commonwealth.

25. Pakistan, for its part, contends in its Memorial that

"the reservations made by India while becoming a party to the General Act on 21 May 1931 do not fall under the permissible reservations *exhaustively* set out in Article 39 of the General Act. They are inadmissible and have no legal effect" (original emphasis).

*

26. The Court would observe that the question whether the General Act of 1928 is to be regarded as a convention in force for the purposes of Article 37 of the Statute of the Court has already been raised, but not settled, in previous proceedings before the Court (see *I.C.J. Pleadings, Nuclear Tests*, Vol. II, p. 348; *I.C.J. Pleadings, Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, p. 143; case concerning the *Aegean Sea Continental Shelf (Greece* v. *Turkey), I.C.J. Reports 1978*, Judg-

ment of 19 December 1978, p. 17). In the present case, as recalled above, the Parties have made lengthy submissions on this question, as well as on the question whether British India was bound in 1947 by the General Act and, if so, whether India and Pakistan became parties to the Act on their accession to independence. Further, relying on its communication to the United Nations Secretary-General of 18 September 1974 and on the British India reservations of 1931, India denies that the General Act can afford a basis of jurisdiction enabling the Court to entertain a dispute between the two Parties. Clearly, if the Court were to uphold India's position on any one of these grounds, it would no longer be necessary for it to rule on the others.

As the Court pointed out in the case concerning *Certain Norwegian Loans*, when its jurisdiction is challenged on diverse grounds, "the Court is free to base its decision on the ground which in its judgment is more direct and conclusive" (*I.C.J. Reports 1957*, p. 25). Thus, in the *Aegean Sea Continental Shelf* case, the Court stated that:

> "[a]lthough under Article 59 of the Statute 'the decision of the Court has no binding force except between the parties and in respect of that particular case', it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than [the Parties in the case]" (*I.C.J. Reports 1978*, pp. 16-17, para. 39).

The Court went on to rule on the effect of a reservation by Greece to the General Act of 1928 without deciding the issue whether that convention was still in force. In the present case, the Court will proceed in similar fashion and begin by examining the communication addressed by India to the United Nations Secretary-General on 18 September 1974.

27. In that communication, the Minister of External Affairs of India declared the following:

> "I have the honour to refer to the General Act of 26th September 1928 for the Pacific Settlement of International Disputes, which was accepted for British India by the then His Majesty's Secretary of State for India by a communication addressed to the Secretariat of the League of Nations dated 21st May 1931, and which was later revised on 15th February 1939.
>
> The Government of India never regarded themselves as bound by the General Act of 1928 since her Independence in 1947, whether by succession or otherwise. Accordingly, India has never been and is not a party to the General Act of 1928 ever since her Independence. I write this to make our position absolutely clear on this point so that there is no doubt in any quarter."

28. Thus India considered that it had never been party to the General Act of 1928 as an independent State; hence it could not have been expected formally to denounce the Act. Even if, *arguendo*, the General Act was binding on India, the communication of 18 September 1974 is to be considered in the circumstances of the present case as having served the same legal ends as the notification of denunciation provided for in Article 45 of the Act. On 18 October 1974 the Legal Counsel of the United Nations, acting on instructions from the Secretary-General, informed the member States of the United Nations, together with Liechtenstein, San Marino and Switzerland, of India's "notification". It follows from the foregoing that India, in any event, would have ceased to be bound by the General Act of 1928 at the latest on 16 August 1979, the date on which a denunciation of the General Act under Article 45 thereof would have taken effect. India cannot be regarded as party to the said Act at the date when the Application in the present case was filed by Pakistan. It follows that the Court has no jurisdiction to entertain the Application on the basis of the provisions of Article 17 of the General Act of 1928 and of Article 37 of the Statute.

* *

29. Pakistan seeks, secondly, to found the jurisdiction of the Court on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. Pakistan's current declaration was filed with the United Nations Secretary General on 13 September 1960; India's current declaration was filed on 18 September 1974. India disputes that the Court has jurisdiction in this case on the basis of these declarations. It invokes, in support of its position, the reservations contained in subparagraphs (2) and (7) of the first paragraph of its declaration; those reservations are formulated as follows:

> "I have the honour to declare, on behalf of the Government of the Republic of India, that they accept, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special agreement, and on the basis and condition of reciprocity, the jurisdiction of the International Court of Justice over all disputes other than:
>
> . . . . . .
>
> (2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations;
>
> . . . . . .
>
> (7) disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction;
>
> . . . . . ."

30. With respect to the first of these reservations, relating to States which are or have been members of the Commonwealth (hereinafter called the "Commonwealth reservation"), Pakistan contended in its written pleadings that it "ha[d] no legal effect", on the grounds that: it was in conflict with the "principle of sovereign equality" and the "universality of rights and obligations of members of the United Nations"; it was in breach of "good faith"; and that it was in breach of various provisions of the United Nations Charter and of the Statute of the Court.

In its Memorial, Pakistan claimed in particular that the reservation in question "[was] in excess of the conditions permitted under Article 36 (3) of the Statute", under which, according to Pakistan, "the permissible conditions [to which a declaration may be made subject] have been exhaustively set out . . . as (i) on condition of reciprocity on the part of several or certain states or (ii) for a certain time." This reservation was accordingly "illicit". It was, however, "not so central as to constitute 'an essential basis of the consent of India' to be bound by its declaration under the optional clause". Hence acceptance of the Court's jurisdiction under Article 36, paragraph 2, of the Statute would remain valid, the aforementioned reservation not being applicable. Pakistan contended in the alternative, citing Article 1 of the Simla Accord, that, even if the reservation were to be regarded as valid, India would in any case be prevented from invoking it against Pakistan by the operation of estoppel.

In its oral pleadings, Pakistan developed its argument based on Article 36, paragraph 3, of the Statute, contending that reservations which, like the Commonwealth reservation, did not fall within the categories authorized by that provision, should be considered "extra-statutory". On this point it argued 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 . . . 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 . . . then the Court must decide, by reference to its content and the circumstances, whether it is applicable or opposable as against the plaintiff."

Pakistan further claimed at the hearings that the reservation was "in any event inapplicable, not because it [was] extra-statutory and unopposable to Pakistan but because it [was] obsolete". In support of this position,

Pakistan *inter alia* gave the following account of the historical origins of this reservation:

> "it grew out of a conception of what was then called 'the British Commonwealth of Nations'. This was based on the idea that international law was not applicable in relations between the Commonwealth members. The idea was called the '*inter se* doctrine'. The Commonwealth was a close-knit family. Disputes between its members were not governed by international law and were not appropriate for settlement in an international court. They were intended to be dealt with in other 'family tribunals' which, in fact, never came into existence . . . the original idea of the *inter se* doctrine has withered away, and . . . the Commonwealth members, including India, have come to regard each other as ordinary States between whom the normal rules of international law apply and between whom litigation may take place upon an international level, in the ordinary way."

Finally, Pakistan claimed that India's Commonwealth reservation, having thus lost its raison d'être, could today only be directed at Pakistan. In Pakistan's view:

> "the Commonwealth reservation [was] maintained by India only as a bar to actions by Pakistan . . . This discrimination against Pakistan in India's acceptance of the optional clause really amount[ed] to an abuse of right."

31. India rejects Pakistan's line of reasoning. In its Counter-Memorial, it disputed in the following terms the argument in Pakistan's Memorial that the Commonwealth reservation was contrary to the provisions of Article 36, paragraph 3, of the Statute:

> "None of the commentators on the jurisdiction of the Court . . . have suggested that the reservation is invalid on this, or any other, ground. Article 36 (3) was envisaged from the beginning as allowing a choice of partners [in regard to which a government was prepared to accept the jurisdiction of the Court] . . ."

On this point, India, in its oral pleadings, stressed the particular importance to be attached, in its view, to ascertaining the intention of the declarant State. It contended that "there is no evidence whatsoever that the reservation [in question] is *ultra vires* Article 36, paragraph 3" of the Statute and referred to "[t]he fact . . . that it has for long been recognized that within the system of the optional clause a State can select its partners". India accordingly concluded that the challenge to the validity of the reservation had no legal basis, that the reservation in question was a classical reservation *ratione personae*, that it was "stated in unambiguous

terms", and that it "involve[d] no subversion of Article 36, paragraph 6, or any other provision of the Statute".

India also queried the correctness of the theory of "extra-statutory" reservations put forward by Pakistan, pointing out that "[any] State against which the reservation [were] invoked, [could] escape from it by merely stating that it [was] extra-statutory in character".

As to Pakistan's argument that the Court might hold itself to have jurisdiction on the basis of India's declaration, even if the reservation were inapplicable, India contends that this is unsustainable, because a reservation cannot be severed from the declaration, of which it is an integral part: "The pertinent unilateral act is undoubtedly the Indian declaration as a single instrument, as a unity, and not the reservation taken in isolation."

India also rejects Pakistan's alternative argument based on estoppel, saying that in any event no estoppel relating to the Court's jurisdiction could arise in relation to the Simla Accord, as it "does not contain a compromissory clause".

Finally, in relation to Pakistan's argument that the Commonwealth reservation is obsolete, India points out that there is no support for it in doctrine, and that:

> "[e]ven if, for the sake of argument, it were to be conceded that the doctrine of obsolescence was applicable to unilateral acts, it could not apply to the circumstances of a reservation made in 1974 and which has for long been a part of the practice of the Indian Government".

32. As to the second reservation relied on by India in this case, namely that concerning multilateral treaties, Pakistan, in the final version of its argument, states that it:

> "is not arguing that the . . . reservation is void or inapplicable, or not opposable to it. It does not need to. The multilateral treaty reservation is simply irrelevant and Pakistan relies . . . on the view that the Court took of the multilateral treaty reservation in the *Nicaragua* case."

In this connection Pakistan explains that it:

> "does not need to invoke the Charter as the substantive basis for its case, which really rests on considerations of customary international law. The fact that customary international law is embodied in the Charter does not weaken the strength of Pakistan's case."

33. For its part, India, in the final version of its argument, rejects Pakistan's thesis in the following terms:

> "Even if, as Pakistan now contends, the claims are based upon customary international law, the multilateral convention reservation

of India will apply wherever there is a reliance upon causes of action which, in the final analysis, are based upon the United Nations Charter."

*

34. The Court will begin by examining the reservation contained in subparagraph (2) of the first paragraph of India's declaration, namely the Commonwealth reservation.

35. In this regard the Court will first address Pakistan's contention that this is an extra-statutory reservation going beyond the conditions allowed for under Article 36, paragraph 3, of the Statute. According to Pakistan, the reservation is neither applicable nor opposable to it in this case, in the absence of acceptance.

36. On this point, the Court recalls in the first place that its jurisdiction "only exists within the limits within which it has been accepted" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 23). As the Court pointed out in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*:

> "[d]eclarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations." (*I.C.J. Reports 1984*, p. 418, para. 59.)

37. The Court would further observe that paragraph 3 of Article 36 of its Statute has never been regarded as laying down in an exhaustive manner the conditions under which declarations might be made. Already in 1928, the Assembly of the League of Nations, in a resolution adopted by it regarding "the Optional Clause of Article 36 of the Statute of the Permanent Court of International Justice", had indicated that

> "attention should once more be drawn to the possibility offered by the terms of that clause to States which do not see their way to accede to it without qualification, to do so subject to appropriate reservations limiting the extent of their commitments, both as regards duration and as regards scope",

explaining that:

> "the reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specifically to certain classes or lists of disputes, and . . . these different kinds of reservation can be legitimately combined" (Resolution adopted on 26 September 1928).

Moreover, when the Statute of the present Court was being drafted, the

right of a State to attach reservations to its declaration was confirmed, and it was indeed considered unnecessary to clarify the terms of Article 36, paragraph 3, of the Statute on this point:

> "The question of reservations calls for an explanation. As is well known, the article has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3 in order to make express reference to the right of the states to make such reservations." (Report of Sub-Committee D to Committee IV/1 on Article 36 of the Statute of the International Court of Justice, 31 May 1945, *UNCIO*, Vol. XIII, p. 559.)

38. The Court notes that this right has been recognized in the practice of States, which attach to their declarations of acceptance of the jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute reservations enabling them to define "the parameters of [that] acceptance" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 453, para. 44). Indeed, since 1929 a number of Commonwealth States have formulated reservations concerning other Commonwealth members, and such reservations are currently to be found in the declarations of eight of those States.

39. For all of the above reasons, the Court cannot accept Pakistan's argument that a reservation such as India's Commonwealth reservation might be regarded as "extra-statutory", because it contravened Article 36, paragraph 3, of the Statute. It need not therefore pursue further the matter of extra-statutory reservations.

40. Nor can the Court accept Pakistan's argument that India's reservation was a discriminatory act constituting an abuse of right because the only purpose of this reservation was to prevent Pakistan from bringing an action against India before the Court. It notes in the first place that the reservation refers generally to States which are or have been members of the Commonwealth. It would add, as it recalled in paragraphs 36 to 39 above, that States are in any event free to limit the scope *ratione personae* which they wish to give to their acceptance of the compulsory jurisdiction of the Court.

41. The Court will address, secondly, Pakistan's contention that the Commonwealth reservation was obsolete, because members of the Commonwealth of Nations were no longer united by a common allegiance to the Crown, and the modes of dispute settlement originally contemplated had never come into being.

42. The Court at the outset recalls that any declaration "must be interpreted as it stands, having regard to the words actually used" (*Anglo-*

Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952, p. 105), and that a reservation must be given effect "as it stands" (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 27). Moreover, as the Court stated in the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*, it

> "will . . . interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court" (*I.C.J. Reports 1998*, p. 454, para. 49).

43. The four declarations whereby, since its independence in 1947, India has accepted the compulsory jurisdiction of the Court have all contained a Commonwealth reservation. In its most recent form, that of 18 September 1974, the reservation was amended so as to cover "disputes with the government of any State which is or has been a Member of the Commonwealth of Nations".

44. While the historical reasons for the initial appearance of the Commonwealth reservation in the declarations of certain States under the optional clause may have changed or disappeared, such considerations cannot, however, prevail over the intention of a declarant State, as expressed in the actual text of its declaration. India has repeatedly made clear that it wishes to limit in this manner the scope *ratione personae* of its acceptance of the Court's jurisdiction. Whatever may have been the reasons for this limitation, the Court is bound to apply it.

*

45. Pakistan has further argued, in the alternative, that, if the reservation were held to be valid, India would in any event be prevented from relying upon it against Pakistan by the operation of estoppel. For this purpose, Pakistan has cited Article 1 of the Simla Accord, paragraph (ii) of which provides *inter alia* 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 . . .".

The Court regards this provision as an obligation, generally, on the two States to settle their differences by peaceful means, to be mutually agreed by them. The said provision in no way modifies the specific rules governing recourse to any such means, including judicial settlement. Thus the Court cannot interpret that obligation as precluding India from relying, in the present case, on the Commonwealth reservation contained in its declaration.

The Court cannot therefore accept the argument in the present case based on estoppel.

*

46. It follows from the foregoing that the Commonwealth reservation contained in subparagraph (2) of the first paragraph of India's declaration of 18 September 1974 may validly be invoked in the present case. Since Pakistan "is . . . a member of the Commonwealth of Nations", the Court finds that it has no jurisdiction to entertain the Application under Article 36, paragraph 2, of the Statute. Hence it is unnecessary for the Court to consider India's objection based on the reservation concerning multilateral treaties contained in subparagraph (7) of the first paragraph of its declaration.

* *

47. Finally, Pakistan has sought to found the jurisdiction of the Court on paragraph 1 of Article 36 of the Statute. It stated the following in its Memorial:

> "The jurisdiction of the International Court of Justice is also founded on the provision contained in Article 36 (1) of the Statute of the Court which states, 'The jurisdiction of the Court comprises all cases which the parties refer to it *and all matters specially provided for in the Charter of the United Nations* or in treaties and conventions in force.' [Emphasis added in the original.] The said Article of the Statute is to be read with Article 1 (1); Article 2, paras. 3 and 4; Article 33; Article 36 (3) and Article 92 of the United Nations Charter. The obligations undertaken under Article 1 of the agreement on bilateral relations between India and Pakistan of 2nd July, 1972, reaffirms this basis of jurisdiction in Article (1), which states that 'The principles and purposes of the United Nations Charter shall govern the relations between the two countries'."

At the hearings Pakistan's counsel expressed himself as follows:

> "let me very briefly recall the two main grounds on which Pakistan rests jurisdiction: (i) the optional clause: (ii) the General Act. I will not pursue the argument that the Court has jurisdiction under Article 36, paragraph 1, as the case specially provided for in the Charter."

48. The Court observes that the United Nations Charter contains no specific provision of itself conferring compulsory jurisdiction on the Court. In particular, there is no such provision in Articles 1, paragraph 1, 2, paragraphs 3 and 4, 33, 36, paragraph 3, and 92 of the Charter, relied on by Pakistan.

49. Pakistan also relied on Article 1 of the Simla Accord, which provides that

> "the Government of India and the Government of Pakistan have agreed as follows:
>
> (i) That the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries".

This provision represents an obligation entered into by the two States to respect the principles and purposes of the Charter in their mutual relations. It does not as such entail any obligation on India and Pakistan to submit their disputes to the Court.

50. It follows that the Court has no jurisdiction to entertain the Application on the basis of Article 36, paragraph 1, of the Statute.

* * *

51. Finally, the Court would recall that

> "[t]here is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law . . . Whether or not States accept the jurisdiction of the Court, they remain in all cases responsible for acts attributable to them that violate the rights of other States." (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456, paras. 55-56.)

52. As the Permanent Court of International Justice had already observed in 1929, and as the present Court has reaffirmed,

> "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; . . . consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement" (case concerning the *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13; see also *Frontier Dispute (Burkina Faso* v. *Republic of Mali), I.C.J. Reports 1986*, p. 577, para. 46, and *Passage through the Great Belt (Finland* v. *Denmark), I.C.J. Reports 1991*, p. 20).

53. The Court's lack of jurisdiction does not relieve States of their obligation to settle their disputes by peaceful means. The choice of those means admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such a settlement, and to do so in good faith in accordance with Article 2, paragraph 2, of the Charter.

54. As regards India and Pakistan, that obligation was restated more

particularly in the Simla Accord of 2 July 1972, which 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". Moreover, the Lahore Declaration of 21 February 1999 reiterated "the determination of both countries to implementing the Simla Agreement".

55. Accordingly, the Court reminds the Parties of their obligation to settle their disputes by peaceful means, and in particular the dispute arising out of the aerial incident of 10 August 1999, in conformity with the obligations which they have undertaken (cf. *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456, para. 56).

* * *

56. For these reasons,

THE COURT,

By fourteen votes to two,

Finds that it has no jurisdiction to entertain the Application filed by the Islamic Republic of Pakistan on 21 September 1999.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Buergenthal; *Judge* ad hoc Reddy;

AGAINST: *Judge* Al-Khasawneh; *Judge* ad hoc Pirzada.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of June, two thousand, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Islamic Republic of Pakistan and the Government of the Republic of India, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges ODA, KOROMA and Judge *ad hoc* REDDY append separate opinions to the Judgment of the Court.

Judge AL-KHASAWNEH and Judge *ad hoc* PIRZADA append dissenting opinions to the Judgment of the Court.

(Initialled) G.G.
(Initialled) Ph.C.