CASE CONCERNING THE AERIAL INCIDENT OF 10 AUGUST 1999 (PAKISTAN *v.* INDIA) (JURISDICTION OF THE COURT)

Judgment of 21 June 2000

In its judgment in the case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India), by a vote of fourteen to two, the Court declared that it had no jurisdiction to adjudicate upon the dispute brought before it by Pakistan against India.

The Court was composed as follows: 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.

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The full text of the operative paragraph of the Judgment reads as follows:

"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."

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Judges Oda and Koroma and Judge ad hoc Reddy appended separate opinions to the Judgment of the Court. Judge Al-Khasawneh and Judge ad hoc Pirzada appended dissenting opinions to it.

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History of the proceedings and submissions of the Parties
(paras. 1-11)

On 21 September 1999, Pakistan filed in the Registry of the Court an Application instituting proceedings against 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.

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."

After a meeting held on 10 November 1999 by the President of the Court with the Parties, the latter 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 Order of 19 November 1999, the Court, taking into account the agreement reached between the Parties, decided accordingly and fixed time limits for the filing of a Memorial by Pakistan and a Counter-Memorial by India on that question. Hearings were held from 3 to 6 April 2000.

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In the Application Pakistan requested 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."

In the note attached to its letter of 2 November 1999, India requested 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."

At the close of the hearings Pakistan requested 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."

India submitted "that the Court adjudge and declare that it has no jurisdiction to consider the Application of the Government of Pakistan."

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The Court begins by recalling that, 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;

and that India disputes each one of these bases of jurisdiction. The Court examines in turn each of these bases of jurisdiction relied on by Pakistan.

Article 17 of the General Act of 1928
(paras. 13-28)

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.

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 "insofar as it might still be operative", that is, insofar ... 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.

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. 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. 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."

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. That Article provided for the devolvement upon the Dominion of India and upon the Dominion of Pakistan of the rights and obligations under all international agreements to which British India was a party.

India disputes this interpretation of the Indian Independence (International Arrangements) Order of 14 August 1947 and of the agreement in the Schedule thereto. In support of this argument India relies on a judgment rendered by the Supreme Court of Pakistan on 6 June 1961, and 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". Pakistan could not have, and did not, become party to the General Act of 1928. Each of the Parties further relies in support of its position on the practice since 1947.

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On this point, the Court observes in the first place 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. 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". Thus, in the *Aegean Sea Continental Shelf* case, the Court ruled 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 communication addressed by India to the United Nations Secretary-General on 18 September 1974, the Minister for External Affairs of India declared that India considered that it had never been party to the General Act of 1928 as an independent State. The Court considers that India could not therefore have been expected formally to denounce the Act. Even if, *arguendo*, the General Act was binding on India, the communication of 18 September 1974 was 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. It followed 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 could not be regarded as party to the said Act at the date when the Application in the present case was filed by Pakistan. It followed that the Court had 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.

Declarations of acceptance of the Court's jurisdiction by the Parties
(paras. 29-46)

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, with respect to "(2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations;" and "(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".

The "Commonwealth reservation"
(paras. 30, 31 and 34-46)

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".

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

India rejects Pakistan's line of reasoning. In its pleadings, it 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 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". India also rejects Pakistan's alternative arguments based on estoppel in relation to the Simla Accord and on obsolescence.

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The Court first addresses Pakistan's contention that the Commonwealth reservation 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. The Court observes 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 had indicated that "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 this right has been recognized in the practice of States. The Court thus 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 considers that it need not therefore pursue further the matter of extra-statutory reservations.

Nor does 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 adds 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.

The Court addresses, 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. The Court recalls that 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). While the historical reasons for the initial appearance of the Commonwealth reservation in the declarations of certain States under the optional clause might have changed or disappeared, such considerations could not, however, prevail over the intention of a declarant State, as expressed in the actual text of its declaration. India had in the four declarations whereby, since its independence in 1947, it had accepted the compulsory jurisdiction of the Court made clear that it wished to limit in this manner the scope ratione personae of its acceptance of the Court's jurisdiction. Whatever might have been the reasons for this limitation, the Court was bound to apply it.

The Court further regards 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 ..." 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. The Court cannot therefore accept Pakistan's argument in the present case based on estoppel.

In the Court's view, 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 the Court considers it unnecessary to examine India's objection based on the reservation concerning multilateral treaties contained in subparagraph (7) of the first paragraph of its declaration.

Article 36, paragraph 1, of the Statute
(paras. 47-50)

Finally, Pakistan has sought to found the jurisdiction of the Court on paragraph 1 of Article 36 of the Statute. 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. The Court also observes that paragraph (i) of Article 1 of the Simla Accord 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. It follows that the Court has no jurisdiction to entertain the Application on the basis of Article 36, paragraph 1, of the Statute.

Obligation to settle disputes by peaceful means
(paras. 51-55)

Finally, the Court recalls that its 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. As regards India and Pakistan, that obligation was restated more particularly in the Simla Accord of 2 July 1972. Moreover, the Lahore Declaration of 21 February 1999 reiterated "the determination of both countries to implementing the Simla Agreement". 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.

Separate opinion of Judge Oda

Judge Oda fully supports the decisions reached by the Court in concluding that the Court has no jurisdiction to entertain the Application filed by Pakistan.

The Court rejects the 1928 General Act which Pakistan asserts as one basis for the Court's jurisdiction. The Court, after having analysed India's accession to the Act, India's denunciation of the Act, and the possibility of Pakistan's succession as a party to the Act, based its rejection on the ground that India was not, in any event, a party to the Act on the date of Pakistan's Application in 1999.

Judge Oda does not disagree with the Court's reasoning on this point. After conducting an analysis of the manner in which the 1928 General Act was drafted and of the development in the 1920s of the issues concerning the compulsory jurisdiction of the Permanent Court in the League of Nations era, he suggests that the Act itself cannot be considered a document that would confer compulsory jurisdiction upon the Court independently from or in addition to the "optional clause" under Article 36, paragraph 2, of the Statute of either the Permanent Court or of the present Court. He also points out the fact that all States which acceded to the General Act had already accepted the compulsory jurisdiction of the Court by making declarations under the "optional clause" pursuant to Article 36, paragraph 2, of the Court's Statute and did not intend to assume any new obligation as far as the Court's jurisdiction was concerned.

Judge Oda asserts that the Court's jurisdiction is conferred *only* pursuant to Article 36, paragraphs 1 or 2, of its Statute and therefore could *not* have been conferred by the 1928 General Act.

Separate opinion of Judge Koroma

In his separate opinion Judge Koroma stated that, although he entirely agreed with the Court's findings and the reasoning underlying them, he felt the Judgment should have responded to the issues of justiciability and jurisdiction which were raised in the course of the proceedings, given the importance of the case.

He acknowledged that the acts complained of by Pakistan, and their consequences, raised legal issues involving a conflict of the rights and obligations of the Parties. He, however, observed that for a matter to be brought before the Court, the parties must have given their consent either prior to the institution of proceedings or in the course of such proceedings.

He elaborated on this by pointing out that the question whether there is a conflict of legal rights and obligations between parties to a dispute and whether international law applies (justiciability) is different from whether the Court has been vested with the necessary authority by the parties to a dispute to apply and interpret the law in relation to that dispute (jurisdiction). He stated that where the parties have not given their consent the Court is forbidden by its Statute and jurisprudence from exercising its jurisdiction.

Judge Koroma also stated that the Judgment thus rendered should not be seen as an abdication of the Court's role but rather a reflection of the system within which the Court had been called upon to render justice. On the other hand, the Court, as an integral part of the United Nations system entitled to contribute to the peaceful settlement of disputes, guided by the Charter and its jurisprudence, acted judiciously in reminding the Parties of their obligation to settle their disputes by peaceful means.

Separate opinion of Judge ad hoc B. P. Jeevan Reddy

Judge ad hoc Jeevan Reddy has voted in favour of all parts of the *dispositif* of the Judgment. He has, however, emphasized, in his separate concurring opinion, the observation contained in paragraphs 47 to 51 of the Judgment. In particular, he stressed the element of "good faith" required of States wishing to settle their disputes by peaceful means. In this connection, he referred to the Simla Agreement and the Lahore Declaration whereunder both India and Pakistan have agreed to settle all their differences by peaceful means bilaterally. They have also condemned "terrorism in all its forms and manifestations" and reiterated "their determination to combat this menace". The Parties are under an obligation, Judge Reddy said, "to create an atmosphere" where bilateral negotiations can be conducted meaningfully. He concluded by expressing the hope that both countries would settle all their differences in the above spirit and devote their energies to developing their economies as well as friendly relations between them.

Dissenting opinion of Judge Al-Khasawneh

In his dissenting opinion, Judge Al-Khasawneh, reiterating that lack of jurisdiction did not in itself mean that the dispute was not justiciable, joined the call made by the Court on the two States to settle this, and other disputes, through peaceful means. He felt that such a call was urgent in view of the possibility of dangerous escalation, and pertinent in view of the rejection by India of any other modes of peaceful settlement before the case was brought to the Court.

He agreed with the majority that there is no comprehensive system of jurisdiction deriving from the United Nations Charter. He also agreed, but with considerable hesitation, with the majority view that the 1928 General Act did not provide a basis for jurisdiction in view of the 1974 Indian communication, which, while not a formal denunciation of the Act, was treated as a "notification" by the Secretary-General, there being, moreover, no reaction from other parties to the Act including Pakistan — assuming that the latter was itself a party.

He nevertheless thought that, by not addressing pertinent and interrelated issues such as India and Pakistan's status as parties to the General Act, the transmittability of the General Act and the question whether it is still in force, the Court's decision, though justifiable under the circumstances, did not attain the certainty necessary to fortify it against recurring doubts.

Moving on to the next ground of jurisdiction, the optional clause system, Judge Al-Khasawneh noted that the declarations made by India and Pakistan contained a number of reservations and conditions, two of which concerned the present case:

(1) The multilateral treaty reservation;

(2) The Commonwealth reservation.

The first of these two reservations was irrelevant, since the actions complained of were also breaches under customary international law.

The Commonwealth reservation was alleged to be (*a*) obsolete and (*b*) discriminatory. Regarding the first point, Judge Al-Khasawneh, while acknowledging that doubts in this regard were justifiable considering the fundamental changes in the Commonwealth that had taken place since 1930, when such a reservation was first introduced, thought nevertheless that the case for obsolescence was not conclusively made. Two reasons accounted for this. Firstly, a small number of Commonwealth States had included the reservation — in one form or another — in their declarations and, secondly, India had maintained the reservation with modifications in its successive declarations — a practice from which the existence of a conscious will, as well as a degree of importance for India, could be firmly inferred.

However, the reservation had undergone a change in wording that led to the inescapable conclusion that it was meant to operate against one State only, Pakistan. This was confirmed also by analysing the circumstances that had led to this change.

While not all reservations that were extra-statutory were invalid, it was nonetheless open to the Court to pronounce on the validity of a reservation allegedly tainted by arbitrariness or discrimination. Judge Al-Khasawneh felt that the Indian declaration fell outside the purview of permissibility because it was directed against one State only, thereby denying that State the benefits of reasonable expectations of adjudication, and also because, unlike other reservations ratione personae, the Indian reservation had no rationale or reasonably defensible justification. He therefore came to the conclusion that the Indian reservation was invalid.

Dealing with the consequential issue of separability, Judge Al-Khasawneh felt that not much guidance could be gained from the precedents, both because of their paucity and because they had not been followed. Agreeing that concepts from major systems of law were relevant, he went on to analyse a case decided by the Indian Supreme Court in 1957, which revealed a complex and less severe test for separability than was suggested to the Court by India. He noted in this regard that India could not adduce any supporting evidence that the Commonwealth reservation was a crucial element of its acceptance of compulsory jurisdiction; nor could this conclusion be reached from the terms of the reservation, which related to a group of States. Unlike the French reservation on domestic jurisdiction in the *Norwegian Loans* case, which defined a general attitude to the very concept of jurisdiction, India's reservation could not be said to define such an attitude.

Other major legal systems also admitted of separability. Thus, under Islamic law, the concept would seem to be reflected in the maxim: that which cannot be attained in its entirety should not be substantially abandoned. Analogies from the law of treaties were also relevant, and Article 44 of the Vienna Conventions of 1969 and 1986 admitted of separability arising out of invalidation, albeit in suitably

guarded terms. Applying the test of Article 44, Judge Al-Khasawneh came to the conclusion that the Indian Commonwealth reservation was both invalid and separable from India's declaration.

Dissenting opinion of Judge ad hoc Pirzada

In his dissenting opinion Judge Pirzada regretted that he found himself obliged to dissent from the reasoning in the Judgment of the Court and its conclusion. However, he is in agreement with paragraphs 51 to 55 thereof.

In his view, the effect of the Indian Independence Act and the Indian Independence (International Arrangements) Order 1947 was that British India was divided into two independent States, India and Pakistan. The British Prime Minister, Mr. Atlee, stated: "With regard to the status of the two Dominions, the names were not meant to make any difference between them. They were two successor States." The list of treaties mentioned in Volume III of the Partition Proceedings was not exhaustive (*Right of Passage over Indian Territory, I.C.J. Reports 1960*). The case of *Yangtze* (1961) relied upon by India is distinguishable. In a later decision, in the case of *Zewar Khan* (1969), it was held by the Supreme Court of Pakistan that apart from the statement of the Secretary of State for Commonwealth Relations, in international law too Pakistan was accepted and recognized as a successor government. The Pacific Settlement of International Disputes and the General Act 1928 devolved upon and continues to apply to India and Pakistan.

In June 1948, India and Pakistan signed an Air Services Agreement, which provided for recourse to the International Court of Justice if no tribunal was competent to decide disputes, though both were dominions at that time. As regards the water dispute, Mr. Liaquat Ali Khan, the then Prime Minister of Pakistan, stated in his letter of 23 August 1950:

> "Under the optional clause the Government of India agreed to accept the jurisdiction of the International Court on the Applications of countries which are not members of the Commonwealth. The exception doubtless contemplated that there would be Commonwealth machinery equally suited to the judicial settlement of disputes. While such Commonwealth machinery is lacking, it would be anomalous to deny to a sister member of the British Commonwealth the friendly means of judicial settlement that is offered by India to countries outside the Commonwealth."

Pandit Nehru, the then Prime Minister of India, in his letter of 27 October 1950, stated that India preferred to refer the dispute to a tribunal; if there was deadlock, India proposed to settle those parts of the disputes through negotiation, failing that, to submit them to arbitration or even to the International Court of Justice. In fact, between 1947 and 1999 India and Pakistan settled their disputes (i) by negotiations, (ii) through mediation of third parties, (iii) through judicial tribunals and, (iv) had access to the International Court of Justice through Appeal or Applications. In the circumstances, India's conduct is covered by the doctrine of estoppel.

India, in its communication of 18 September 1974, asserted that it never regarded itself as bound by the General Act of 1928. The said communication was sent to counter the declaration of Pakistan of 30 May 1974 whereby, to dispel all doubts, Pakistan notified that it continues to be bound by the General Act. Such pleas had already been raised by Pakistan before the International Court of Justice in the *Trial of Pakistani Prisoners of War* case. The Indian communication was not sent in good faith and cannot be treated or be deemed to be a denunciation of the General Act and, among others, it did not comply with Article 45 of the General Act of 1928. Mere affirmation by India that it was not bound by the General Act, which is denied by Pakistan, is unilateral and its validity cannot be determined at the preliminary stage in view of the finding of the International Court in the appeal by India against Pakistan in the *ICAO* case, which is *res judicata*.

India's Commonwealth reservation is obsolete, having regard to the view of Judge Ago in the *Nauru* case, since the expectation of the Commonwealth Court could not be fulfilled. The Indian Commonwealth reservation is aimed at Pakistan only, and is discriminatory and arbitrary. It does not fall under the permissible reservations exhaustively set out in Article 39 of the General Act and is invalid.

In any case the Indian Commonwealth reservation is severable from the Indian declaration, having regard to Article 44 of the Vienna Convention on the Law of Treaties, the opinions of President Klaestad and Judge Armand-Ugon in the *Interhandel* case and the opinion of Judge Bedjaoui in the *Fisheries Jurisdiction* case. Reference was also made by Judge Pirzada to the rules of interpretation laid down by the Indian Supreme Court in the *RMDC* (1957) and *Harakchad* (1970) cases: The International Court of Justice is competent to exercise jurisdiction under Articles 17 and 41 of the General Act.

Though the International Court, in the *Nicaragua* case (1984), had held that the declarations of acceptance of the compulsory jurisdiction of the Court are facultative and unilateral engagements, it further held in that very case: "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration." These principles will be applicable to the Indian declaration as well.

Judge Pirzada considered that, in view of the allegations by Pakistan that India, by its incursion into Pakistan's airspace and by shooting down the Pakistan naval aircraft *Atlantique* on 10 August 1999 when 16 persons were killed, committed breaches of obligations of customary international law — (i) not to use force against another State, (ii) not to violate the sovereignty of another State — therefore the International Court has jurisdiction regarding the claim of Pakistan. Judge Pirzada relied upon the findings of the Court in the *Nicaragua* case (1984). He also referred to the separate and dissenting opinions of Judge Weeramantry, Judge Vereshchetin and Judge Bedjaoui in the *Fisheries Jurisdiction* case (1998). Judge Pirzada observed that the Court's task is to ensure respect for

international law. It is its principal guardian (Judge Lachs in his separate opinion in the *Lockerbie* case in 1992).

Judge Pirzada stated that, in view of the consensual nature of its jurisdiction, the Court generally shows judicial caution and restraint. However, in due course of time, principles of constructive creativity and progressive realism could be evolved by the Court.

Judge Pirzada, for the reasons set out in his dissenting opinion, concluded that the Court ought to have rejected India's preliminary objections to the jurisdiction of the Court and ought to have entertained Pakistan's Application.

Judge Pirzada emphasized that the Parties are under an obligation to settle in good faith their disputes, including the dispute regarding the State of Jammu and Kashmir and in particular the dispute arising out of the aerial incident of 10 August 1999. Let India and Pakistan keep in view the ideals of Quaid-e-Azam Mohamed Ali Jinnah and Mahatma Gandhi and take effective measures to secure peace, security and justice in South Asia.
