ORAL ARGUMENTS

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague,
from 4 to 26 June 1973

FIRST PUBLIC SITTING (4 VI 73, 3 p.m.)

Present: President LACHS; *Vice-President* AMMOUN; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, SIR Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Judge* ad hoc Sir Muhammad ZAFRULLA KHAN; *Registrar* AQUARONE.

Also present:

For the Government of Pakistan:

H.E. Mr. J. G. Kharas, Ambassador of Pakistan to the Netherlands, *as Agent*;
Mr. S. T. Joshua, Secretary of Embassy, *as Deputy-Agent*;
Mr. Yahya Bakhtiar, Attorney-General of Pakistan, *as Chief Counsel*;
Mr. Zahid Said, Deputy Legal Adviser, Ministry of Foreign Affairs, Government of Pakistan, *as Counsel*.

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court meets today to consider the request for the indication of interim measures of protection, under Article 41 of the Statute of the Court and Article 66 of the 1972 Rules of Court, filed by the Government of Pakistan on 11 May 1973, in the case concerning the *Trial of Pakistani Prisoners of War*, brought by Pakistan against India.

The proceedings in this case were begun by an Application by the Government of Pakistan, filed in the Registry of the Court on 11 May 1973[1]. The Application founds the jurisdiction of the Court on Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, generally known as "the Genocide Convention", and on Article 36, paragraph 1, of the Statute of the Court. The Applicant asks the Court to adjudge and declare that Pakistan has an exclusive right to exercise jurisdiction over the Pakistani nationals, now in Indian custody, and accused of committing acts of genocide in Pakistani territory, by virtue of the Genocide Convention; that the allegations against the aforesaid prisoners of war are related to acts of genocide; that there can be no ground in international law justifying the transfer of custody of the prisoners of war to Bangla Desh for trial in face of Pakistan's exclusive right to exercise jurisdiction over its nationals accused of committing offences in Pakistani territory, and that India would act illegally in transferring such persons to Bangla Desh for trial, and that even if India could legally transfer Pakistani prisoners of war to Bangla Desh for trial, it would be divested of that freedom since in the atmosphere which, according to the Government of Pakistan, prevails in Bangla Desh, a "competent tribunal" within the meaning of Article VI of the Genocide Convention cannot be created in practice nor can it be expected to perform in accordance with accepted international standards of justice.

On 11 May 1973, the day on which the Application was filed, Pakistan filed a request, under Article 41 of the Statute and Article 66 of the 1972 Rules of Court, for the indication of interim measures of protection[2]. I shall ask the Registrar to read from that request the details of the measures which the Government of Pakistan asks the Court to indicate.

The REGISTRAR:

"(1) That the process of repatriation of prisoners of war and civilian internees in accordance with international law, which has already begun, should not be interrupted by virtue of charges of genocide against a certain number of individuals retained in India.

(2) That such individuals, as are in the custody of India and are charged with alleged acts of genocide, should not be transferred to 'Bangla Desh' for trial till such time as Pakistan's claim to exclusive jurisdiction and the lack of jurisdiction of any other government or authority in this respect has been adjudged by the Court."

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[1] See pp. 3-7, *supra*, and p. 111, *infra*.

[2] See pp. 17-18, *supra*, and p. 111, *infra*.

The PRESIDENT: The Government of India was informed forthwith by telegram of the filing of the Application and of the request for interim measures of protection, and of the precise measures requested, and a copy of the Application and of the request were sent to it by air mail the same day[1].

By communications of 22 May, confirmed on 25 May, the Parties were informed that the President proposed to convene the Court for a public sitting on 29 May 1973 at 10 a.m. to hear the observations of the Parties on the request by Pakistan for the indication of interim measures of protection[2].

On 24 May 1973, a letter dated 23 May from the Ambassador of India at The Hague was received in the Registry of the Court[3]. In this letter it was observed that the Application founds the jurisdiction of the Court on Article IX of the Genocide Convention and on Article 36, paragraph 1, of the Statute of the Court, and attention was drawn to the reservation attached by India to its ratification of the Convention, to the effect that for the submission of any dispute in terms of Article IX to the jurisdiction of the Court, the consent of all the parties to the dispute would be required in each case. The Government of India, the letter continued, presumed that the Application and request were communicated to them for their consideration whether consent should be given in terms of Article IX, but regretted that they could not give consent for Pakistan to raise the alleged subject-matter of the claim before the Court. It was therefore stated that there was no legal basis whatsoever for the jurisdiction of the Court, and that Pakistan's Application and request were without legal effect. The Court will deal with this question in accordance with the relevant rules of the Statute and its Rules in due course.

The text of this letter from the Indian Ambassador was communicated to the Agent of Pakistan, who addressed a letter[4] to the Court in which it was claimed that the consent of India to the jurisdiction of the Court was not necessary, that the reservation attached to the Indian ratification of the Genocide Convention was inadmissible and without legal effect, and that Pakistan also relied on all other provisions establishing the Court's jurisdiction, and in particular the Indian declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928, read with Article 36, paragraph 1, and Article 37 of the Statute.

A further letter was received on 28 May from the Indian Ambassador, enclosing a document entitled "Statement of the Government of India in support of its letter dated 23 May 1973 addressed to the Registrar of the International Court of Justice"[5]. In this document the arguments of India in support of its contention that the Court is without jurisdiction were set out and developed at greater length.

On 28 May the Court decided, as a result of communications received from the Governments of Pakistan and India, to postpone the opening of the public hearings; and on 1 June the Court fixed 4 June as the date for the opening of the hearings, and the Parties were immediately so informed[6].

Shortly before 1 p.m. on 4 June 1973, the Ambassador of India at The Hague handed to the Registrar a further letter, enclosing a document setting out the

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[1] See p. 113, *infra*.
[2] See pp. 116 and 120, *infra*.
[3] See p. 117, *infra*.
[4] See pp. 118-120, *infra*.
[5] See p. 121, *infra*.
[6] See pp. 137 and 138, *infra*.

position of the Government of India[1]. A copy of the letter and the document was supplied as rapidly as possible to the Agent of Pakistan.

Since the Court in the present case includes upon the Bench no judge of Pakistani nationality, the Government of Pakistan notified the Court on 12 May 1973 of its choice of Sir Muhammad Zafrulla Khan to sit as judge *ad hoc* in the case pursuant to Article 31, paragraph 2, of the Statute[2]. No objection to this was made by India within the time-limit fixed therefor pursuant to Article 3 of the Rules of Court.

I shall therefore call upon Sir Muhammad Zafrulla Khan to make the solemn declaration required by Article 20 of the Statute, and I invite the Court to rise.

Sir Muhammad ZAFRULLA KHAN: I solemnly declare that I will perform my duties and exercise my powers as judge, honourably, faithfully, impartially and conscientiously.

The PRESIDENT: I place on record the declaration made by Sir Muhammad Zafrulla Khan and declare him duly installed as judge *ad hoc* in the present case.

I regret that Judge Dillard is not with us today, being prevented by illness from being on the Bench, and it is doubtful whether he will be able to take part in the case.

I declare now the oral proceedings open and request the Agent of Pakistan to take the floor and present his case for the indication of interim measures of protection.

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[1] See p. 139, *infra*.
[2] See p. 114, *infra*.

STATEMENT BY MR. KHARAS

AGENT FOR THE GOVERNMENT OF PAKISTAN

Mr. KHARAS: Mr. President, Members of the Court. I deem it a great privilege and honour to stand before this august tribunal, once more, in my capacity as Agent of the Government of the Islamic Republic of Pakistan.

Pakistan has always striven to ensure the resolution of all disputes through conciliation and negotiation, and where these means have failed, through adjudication. Our record during the 25 years of Pakistan's independence bears testimony to these endeavours. It is in the same spirit and tradition that the Government of Pakistan have moved the International Court of Justice, the principal judicial organ of the United Nations to adjudge upon the dispute between India and Pakistan regarding the Pakistani prisoners of war in Indian camps and the threatened transfer of 195 of them to Bangla Desh for trial for alleged acts of genocide.

The Government of Pakistan will be represented by Mr. Yahya Bakhtiar, Attorney-General of Pakistan, as Chief Counsel, and Mr. Zahid Said, Deputy Legal Adviser of the Pakistan Ministry of Foreign Affairs, as Counsel.

Mr. President, I request the Court to call upon Mr. Yahya Bakhtiar to make submissions on behalf of the Government of Pakistan.

ARGUMENT OF MR. BAKHTIAR

CHIEF COUNSEL FOR THE GOVERNMENT OF PAKISTAN

Mr. BAKHTIAR: Mr. President and Members of the honourable Court. This is a request under Article 41 of the Statute of the Court read with Rule 66 of the Rules of Court, whereby the Government of Pakistan are seeking an indication of provisional measures of protection, with regard to 195 or any other number, out of over 92,000 Pakistani prisoners of war, detained by India in Indian prison camps for over 17 months. India has threatened to hand over these 195 prisoners of war to Bangla Desh for trials on charges of genocide and what they call crimes against humanity. It announced that the trials would be held by the end of May 1973.

The Government of Pakistan have much appreciated the steps which you, Mr. President, and the Court, have taken in giving priority to our request, and to treat it as an urgent matter, particularly when the Court has yet to consider, at the appropriate stage, the merits of the case and also satisfy itself about its competence to deal with and decide the dispute between the Parties.

The competence of the Court to decide the case on merits has been challenged by India. India has every right to do so. It is, however, astonishing that India should do so without appointing an agent or following the procedure of raising preliminary objections at the proper time. It is regrettable that India has chosen to ignore the process of this Court, and has absented herself from these proceedings. India is a party to the Statute of the Court, and is obliged to follow the procedure laid down by the Statute and Rules of Court. This, Mr. President, is not merely a matter of courtesy to the Court but is an inescapable duty imposed by law upon parties to the Statute. In particular, the attention of the Court is drawn to the mandatory provision contained in Article 38, paragraph 3, of the revised Rules of Court. This attitude of India, in our opinion, is highly contemptuous as it amounts to arrogating to herself the function of the Court by purporting to predetermine the issue of jurisdiction which it is for the Court to decide in due course. In view of the irregular manner in which India has objected to the exercise of jurisdiction by the Court to decide the dispute, the Court would be fully justified in disregarding India's observations, as they have not been presented in accordance with the rules. Nevertheless, in the course of my submissions, I shall comment briefly on the nature, relevance and implications of India's objection to the Court exercising jurisdiction.

The Government of Pakistan felt obliged to institute these proceedings since the Government of India, disregarding the rights of Pakistan, under Article VI of the Genocide Convention and under international law, proposed to hand over 195 Pakistani nationals to Bangla Desh for the purpose of trials for alleged acts of genocide and of so-called crimes against humanity. The central issue in the proceedings instituted by Pakistan will be whether or not Pakistan has an exclusive right to try these persons by virtue of Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948, to which both India and Pakistan are parties. Article VI of the Genocide Convention reads as follows:

> "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as

may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

At the time the acts in question are alleged to have been committed, the territory now constituting Bangla Desh was universally recognized as a part of Pakistan and Article VI of the Genocide Convention, therefore, confers on Pakistan exclusive jurisdiction to hold such trials. This jurisdiction is further strengthened by the fact that the individuals accused of the offences in question are Pakistani nationals.

In addition to those accused of acts of genocide, India has in her hands over 92,000 Pakistani prisoners of war and civilian internees, who should long since have been repatriated under Article 118 of the Third Geneva Convention of 1949 on the Treatment of Prisoners of War and Articles 133 and 134 of the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War. The physical conditions and morale of the prisoners and internees concerned is rapidly deteriorating and their return to Pakistan has become a matter of extreme urgency. I shall revert to this matter at a later stage of my submissions.

Keeping in view these facts, the Government of Pakistan have requested the Court for indication of the following measures of protection in order to preserve the respective rights of Parties, pending the decision of the Court on the merits of the case:

"(1) That the process of repatriation of many thousands of prisoners of war and civilian internees in accordance with international law, which has already begun, should not be interrupted by virtue of charges of genocide against a certain number of those still detained . . .

(2) That such individuals, as are in the custody of India and are charged with alleged acts of genocide, should not be transferred to 'Bangla Desh' for trial till such time as Pakistan's claim to exclusive jurisdiction and the lack of jurisdiction of any other government or authority in this respect has been adjudged by the Court."

We submit that the facts of the case, as also the principles of law applicable to the indication of interim measures of protection, fully justify such action by the Court.

Before I proceed to submit to the Court a statement of the facts out of which the difference between Pakistan and India necessitating the institution of these proceedings has arisen, I would beg leave of the Court to make a brief explanation.

The specific issue submitted to the Court in Pakistan's Application has arisen out of India's deliberate and prolonged default in carrying out her clear, imperative and unconditional obligation in respect of the repatriation of Pakistani prisoners of war in her custody. That obligation is spelled out in Article 118 of the Third Geneva Convention and under Articles 133 and 134 of the Fourth Geneva Convention, to which I shall revert in due course.

India's default in carrying out that obligation has given rise to several other differences also, but with those the Court is not concerned in these proceedings.

To enable the Court, however, to appreciate fully the background of the issue here submitted to the Court it is necessary for me to explain at some length the facts leading up to the emergence of that issue.

Mr. President, the circumstances which forced Pakistan to institute these proceedings require to be mentioned briefly, so that our case, and the urgency of the matter, are properly appreciated. The honourable Court may be pleased

to know that it has been the desire, anxiety and endeavour of the Government of Pakistan to settle the question of repatriation of the prisoners of war in accordance with the Geneva Convention and through bilateral talks and negotiations with India. We were, and still are, ready to discuss and settle all other matters of dispute with India; but while India has been professing willingness to discuss and settle the question of prisoners of war and other disputes, she has in actual fact been creating difficulties and attaching conditions in order to gain political advantage. I think, therefore, it would be appropriate, at the very beginning of my address, to give the Court a somewhat detailed exposition of the circumstances in which this dispute has arisen so as to make clear to the Court the necessity for interim measures of protection, pending a final decision of the case.

The war between India and Pakistan in 1971 was a result of the intervention of the Government of India in the internal affairs of Pakistan, followed by armed aggression against Pakistan. The Government of India supported and instigated the secessionist movement in East Pakistan led by extremist elements in the Awami League, the major political party in East Pakistan. When, in March 1971, the military Government of Pakistan decided to take action to restore law and order in East Pakistan, the Indian Government, its Parliament and high officials, publicly declared support for the Awami League. Earlier, to make it more difficult for the Government of Pakistan to restore law and order in East Pakistan, the Government of India, as the Court already knows, prohibited over-flights of Pakistani aircraft between the two wings of Pakistan in violation of the principles of international law and the obligation of the Government of India under international conventions. India gave money, arms and ammunition to the rebels in East Pakistan, and Indian armed forces personnel infiltrated into Pakistan territory to commit acts of sabotage. Later in 1971, India provided modern weapons, training and sanctuary to the so-called "Mukti Bahini" guerrillas.

Finally, on 21 November 1971, in complete violation of her obligation under the Charter of the United Nations to refrain from the threat or use of force against the territorial integrity of any State, India commenced aggressive military operations across the international border into the territory of the eastern province of Pakistan. Those attacks continued to mount. Thus a state of war was imposed upon Pakistan. The fighting spread to West Pakistan also and on 4 December 1971 India formally notified the existence of a state of war to Pakistan through the Government of Switzerland. While the conflict raged on both sides of the subcontinent, action by the Security Council was blocked by repeated vetoes of the Soviet Union, which enabled India to achieve her military objectives in East Pakistan. Following a deadlock in the Security Council, the uniting-for-peace procedure was invoked to place the matter before the General Assembly of the United Nations. The General Assembly adopted resolution 2793 (VI) by an overwhelming majority, on 9 December 1971, whereby 104 nations called upon the Governments of India and Pakistan to take forthwith all measures for an immediate cease-fire and for withdrawal of their armed forces on the territory of the other to their own side of the borders.

In the meantime, pressure was steadily mounting against the far outnumbered Pakistani forces on the eastern front. On 11 December 1971, the Chief of Staff of the Indian Armed Forces, General Manekshaw, called upon the Pakistan forces in East Pakistan to surrender to the Indian Army. In a radio broadcast he gave his "solemn assurance" that the personnel who surrendered would be treated with the dignity and respect all soldiers are entitled to, and that India would abide by the provisions of the Geneva Conventions.

The External Affairs Minister of the Government of India confirmed in the United Nations Security Council on 12 December 1971 that the prisoners of war would be India's responsibility, in these words:

> "During the conflict India stands committed to dealing with the enemy forces according to the Geneva Conventions. India's Chief of Army Staff has assured his Pakistani counterpart of this commitment of the Government of India on 7 December. He has gone one step further in assuring the West Pakistani troops in East Bengal of their safe evacuation to West Pakistan if they would surrender . . ."

Consequent upon the call of General Manekshaw and the assurances repeated by the Minister of External Affairs of the Government of India in the Security Council, and in order to avoid further bloodshed, on 16 December 1971 the Eastern Command of the Pakistan army surrendered to India and a large number of personnel became prisoners of war of India. Consistent with Article 12 of the Third Geneva Convention of 12 August 1949 relative to the treatment of prisoners of war, these persons passed into the hands of the belligerent power—India. It is to be noted that paragraph 1 of the said Article 12 states as follows:

> "Prisoners of War are in the hands of the enemy power and not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist the detaining power is responsible for the treatment given them."

The commentary of the International Committee of the Red Cross on this Article is also significant, and states as follows:

> "War is a relationship between one State and another, or, one may also say, between one belligerent Power and another; it is not a relationship between individual persons. The logical consequence is that prisoners of war are not in the power of the individuals or military units who have captured them. They are in the hands of the State itself of which these individuals or military units are only the agents." (*Commentary of the I.C.R.C.*, Jean S. Pictet, pp. 128-129.)

According to information received from the International Committee of the Red Cross, India took 81,888 armed personnel as prisoners of war. In addition, India also detained over 10,000 civilians including 6,500 women and children.

On 16 December 1971, India, having achieved her military objectives in East Pakistan and facing increasing criticism from the world and mounting diplomatic pressure, declared that it would accept a cease-fire in the western theatre of the war if Pakistan would do likewise. On 17 December 1971, Pakistan agreed to a cease-fire. Hostilities between India and Pakistan consequently ceased at 14.30 hours GMT on 17 December 1971. The Security Council again took cognizance of the conflict, and adopted resolution 307 on 21 December 1971, in which it noted the cessation of hositilities and called upon India and Pakistan to withdraw from territories occupied by them. The Security Council also called for the observance of the Geneva Conventions. The Security Council resolution has been reproduced in Annex B of Pakistan's Application, and it would be useful if I read out the operative paragraph number 1 for the information of the Court. The Security Council:

> "*Demands*, that a durable cease-fire and cessation of all hostilities in all areas of conflict be strictly observed and remain in effect until withdrawals

take place, as soon as practicable of all armed forces to their respective territories and to positions which fully respect the cease-fire line in Jammu and Kashmir supervised by the United Nations Military Observer Group in India and Pakistan;

Calls upon all member States to refrain from any action which may aggravate the situation in the sub-continent or endanger international peace;

Calls upon all those concerned to take all measures necessary to preserve human life and for the observance of the Geneva Conventions of 1949 and to apply in full their provisions as regards the protection of wounded and sick, prisoners of war and civilian population."

I would like to stress that it is clear, from the preamble to this resolution, that Pakistan and India were the only belligerent powers in the armed conflict, and that the Security Council recognized that cessation of hostilities had already taken place on 17 December 1971. The preambular paragraphs 2-7 read as follows:

"*Noting* General Assembly resolution 2793 (XXVI) of 7 December 1971,

Noting the reply of the Government of Pakistan on 9 December 1971 (doc. S/10440),

Noting the reply of the Government of India on 12 December 1971 (doc. S/10445),

Having heard the statements of the Deputy Prime Minister of Pakistan and the Foreign Minister of India,

Noting further the statement made at the 1617th meeting of Security Council by the Foreign Minister of India containing a unilateral declaration of cease-fire in the western theatre,

Noting Pakistan's agreement to the cease-fire in the western theatre with effect from 17 December 1971."

These recitals indicate that Pakistan and India were the only belligerent powers in the conflict. I also draw attention now to preambular paragraph 8 which states as follows: "*Noting* that consequently a cease-fire and cessation of hostilities prevail." India acknowledged its responsibility as the sole belligerent power against Pakistan before the Security Council. The Foreign Minister of India stated before the Security Council on 21 December 1971, as follows:

"With the independence of 'Bangla Desh' and surrender of Pakistani troops there, their earliest possible repatriation from the Eastern theatre has to be arranged. They are under our protection [I emphasize this, Mr. President, they are under our protection] and we have undertaken to treat them in accordance with the Geneva Convention. The presence of the Indian forces in 'Bangla Desh' is, therefore, necessary for such purposes as the protection of the Pakistani troops who have surrendered to us and for prevention of reprisals and the like."

The Government of Pakistan have made every possible effort to settle the dispute with India and to ensure implementation of the Geneva Conventions. These efforts have been made through diplomatic channels, public statements, bilateral talks and even through unilateral actions.

On 20 December 1971, the Government of Pakistan, taking note of the news from Dacca about the indiscriminate killings by the Mukti Bahini guerrillas and pointing out that the Indian forces had assumed command and full responsibility for law and order in East Pakistan, asked all governments, including that of Switzerland, which is the Protecting Power for the interests of the Government

of Pakistan in India, to use their influence with the Government of India to bring an end to the atrocities in East Pakistan. On the same day, by another aide-mémoire, the Government of Pakistan requested friendly governments, the International Red Cross and other humanitarian organizations for immediate assistance in respect of Pakistani prisoners of war and other civilians in Indian custody. The Government of Pakistan added that civilians, police officials and others who could be released without waiting for further formalities, should be repatriated immediately.

Again on 25 December 1971 the Government of Pakistan expressed to the Government of India, through the Government of Switzerland, Pakistan's deep concern over reports of lawlessness and indiscriminate killings in East Pakistan of those who were loyal to Pakistan. The Government of Pakistan stated:

> "Now that the cease-fire has become effective and the hostilities have ceased, it is necessary that all those whose life is threatened by the unsettled and disturbed conditions in East Pakistan, should be placed under the care of the Red Cross and repatriated without any delay."

In the last week of December 1971, the Government of Pakistan saw press reports to the effect that Dacca and New Delhi were thinking of holding trials of the former Governor of East Pakistan and other Pakistani high officials. The British Broadcasting Corporation quoted the Foreign Secretary of the Government of India, to the effect that the Geneva Convention did not provide for protection of armed forces personnel accused of committing serious crimes, and that the Government of India would deliver to Bangla Desh those persons included in the list of "criminals" being prepared by the Bangla Desh authorities. For the first time this news emanated, Mr. President, from India and Indian authorities, not from Bangla Desh, that the trial should be held. Thereupon, in early January 1971, the Government of Pakistan requested the Government of Switzerland, as well as the International Committee of the Red Cross, to immediately convey the concern of the Government of Pakistan to the Government of India, pointing out that the Government of Bangla Desh had no *locus standi* in the matter of the recent international conflict between India and Pakistan and that the Geneva Conventions were applicable only between India and Pakistan. Accordingly, the Government of India was bound to ensure that Pakistani personnel were not subjected to any trials by the authorities established by the Government of India in Dacca.

As regards the prisoners of war and civilian internees generally, the Court will appreciate that Article 118 of the Third Geneva Convention of 1949 and Articles 133 and 134 of the Fourth Convention require their release—in the case of prisoners of war—"without delay" after the cessation of active hostilities; and in the case of internees "as soon as possible". Accordingly, in numerous communications to foreign governments, including the Government of Switzerland, the Government of Pakistan pointed out that there was no moral or legal basis for the continued detention and non-release of the prisoners of war by India and called for compliance with the Geneva Conventions.

In regard to the repatriation of prisoners of war the relevant provision is Article 118 of the Third Geneva Convention relative to the Treatment of the Prisoners of War. This article provides as follows:

> "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.
>
> In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of

hostilities, or failing any such agreement, each of the detaining powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraphs . . ."

With regard to civilian internees, who could only have been validly detained under Article 42 of the Fourth Geneva Convention if the security of India made it absolutely necessary, Article 134 of the Convention is applicable and provides as follows: "The Contracting Parties shall endeavour, upon close of hostilities, to ensure the return of all internees to the last place of residence, or to facilitate their repatriation." Article 133, paragraph 1, of the Fourth Geneva Convention is even more categorical and states: "Internment shall cease as soon as possible after the cessation of hostilities." Also the Government of Pakistan lodged innumerable protests with the Government of India against the cruel and inhuman treatment of Pakistani prisoners of war and civilian internees. On 24 October 1972, for instance, the Government of Pakistan requested the Government of Switzerland to convey to the Government of India Pakistan's serious concern over the frequency of firing incidents in the prisoner of war camps in India and over the failure of the Government of India to take appropriate action to punish the Indian officials responsible for causing death or injury to the prisoners. In accordance with Article 132 of the Third Geneva Convention, the Government of Pakistan requested that an enquiry be instituted promptly to investigate two such incidents. Also in accordance with that Article, the Government of Pakistan expressed the desire that the representatives of the two sides should meet to decide on the manner of the enquiry, expressing the view of the Government of Pakistan that a joint enquiry would be desirable as it would help to establish confidence in the fairness and impartiality of the enquiry. The Government of India, however, rejected Pakistan's request for an enquiry, taking the position that the request for instituting an enquiry should be addressed not only to India but also to Bangla Desh.

On 11 December 1972, the Government of Pakistan once again drew the attention of the Government of India to the various incidents of firing by Indian armed guards at the helpless and defenceless Pakistani prisoners of war and civilian internees in India. Besides calling for an enquiry into these incidents, the Government of Pakistan requested that the Government of India comply with the Geneva Conventions, release the prisoners of war without further delay and ensure their treatment in conformity with the Geneva Conventions.

As mentioned earlier, on frequent occasions the Government of Pakistan drew the attention of foreign governments to the continuing violations of the Geneva Convention of 1949 by the Government of India. Their attention was drawn to the following provisions contained under Article 1, common to all four Conventions: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

During January 1973 the Government of Pakistan once again informed a large number of the signatories of the Geneva Conventions of the failure of the Government of India to carry out her obligations under the Geneva Conventions and expressed the hope that the signatories to the Conventions would take note of the resultant situation and "consider steps to ensure respect for the observance of these Conventions".

Recently again, on 30 March 1973, the Government of Pakistan invoked Article I of the Conventions and requested each of the signatory States with which Pakistan has diplomatic relations to do everything in its power to ensure that the Geneva Conventions were respected by the Government of India.

A number of States that are parties to the Geneva Conventions have in-

formed the Government of Pakistan of the efforts they have made to ensure respect for these Conventions. Many of these States have issued public statements calling upon India to release and repatriate Pakistani prisoners of war and civilian internees without delay.

The General Assembly of the United Nations unanimously adopted resolution 2938 (XXVII) on 29 November 1972, whereby it: "*Calls* for the return of the prisoners of war in accordance with the Geneva Conventions and relevant provisions of the Security Council resolution 307 (1971)."

Besides approaching the Government of India officially through the Swiss Government for compliance with the Geneva Conventions of 1949, the Government of Pakistan also repeatedly called, publicly, and in negotiations with the Government of India, for the release and repatriation of Pakistani prisoners of war and civilian internees.

The Government of Pakistan has repeatedly expressed its desire for the normalization of the situation in the subcontinent. Speaking to the National Assembly of Pakistan on 14 April 1972, the President of Pakistan said:

> "We want to live in peace with India. We want Sheikh Mujibur Rehman to overcome his problems and his difficulties. For we ardently believe that the people of the whole subcontinent deserve a better future than the constant friction and conflict that has marred their past. Our peoples, both theirs and ours, are too poor to live in a state of permanent hostility. We want to direct all our energies from wars of destruction to wars on poverty, illiteracy and hunger. We shall go on trying to resolve our differences and shall always remain ready to seize any reasonable opportunity to realize this supreme objective.
>
> We are prepared to resolve all our bilateral differences. But we cannot bargain State principles for human flesh. The right of self-determination of the people of Jammu and Kashmir has not been bestowed on them either by India or Pakistan—it is their inherent right which no one can take away from them.
>
> We made many overtures, took many initiatives, and now India has come back with its first positive response. Recently, I received a letter from the Prime Minister of India stating that India was prepared to discuss all outstanding issues unconditionally and that she seeks peaceful co-existence with Pakistan. My answer welcoming this approach has been communicated to her.
>
> It is my earnest hope that the negotiations we are going to start will be conducted in a spirit of fairness. Given that kind of approach, there is no reason why we should not make a good beginning and resolve amicably at least the more pressing issues."

The first round of talks between India and Pakistan was held, at the level of Special Emissaries, in Murree and Rawalpindi from 26 to 29 April 1972. In the course of these talks, Mr. D. P. Dhar, the Special Emissary of the Prime Minister of India, stated on the one hand, that the Government of India did not desire to detain the Pakistani prisoners of war a day longer than absolutely necessary but, on the other hand, he said the prisoners of war could not be released without *(a)* the association of the Government of Bangla Desh with discussions on the question, and *(b)* the conclusion of a peace agreement between India and Pakistan. At that meeting, and subsequently in public statements issued by the External Affairs Minister of the Government of India, it was clearly stated that the question of recognition of Bangla Desh was a bilateral matter between Islamabad and Dacca.

At the Simla Conference of Heads of Government of India and Pakistan, held from 28 June to 2 July 1972, the question of the release of the prisoners of war was taken up along with other outstanding questions. The Government of India, however, expressed its inability to release the prisoners without the consent of the Government of Bangla Desh.

On 11 July 1972, the Prime Minister of India said, in the course of a press conference in New Delhi—and please, Mr. President, mark this—that the prisoners of war could not be released unless there was a final settlement of the Jammu and Kashmir question. This was yet another example of the attempted use of prisoners of war as a means of pressure on Pakistan for concessions on political and other unrelated issues.

The preconditions for the release of prisoners of war were arbitrarily drawn and redefined from time to time. At the meeting of the representatives of India and Pakistan, held in New Delhi from 25 to 29 August 1972 the Indian side changed its earlier position under which recognition of Bangla Desh had no connection with the release of prisoners of war. It now stated that not only was Bangla Desh a necessary party to the discussion of the repatriation of Pakistani prisoners of war and civilian internees, but the recognition of Bangla Desh by Pakistan would facilitate further progress in this regard. The Pakistani side noted the Indian view. It stated that the question of recognition of Bangla Desh was under the consideration of the Government of Pakistan; but it also made it clear during the talks that Pakistan did not accept that recognition could be made a precondition for the release of prisoners of war, and that the Government of India had acknowledged this fact in public statements.

Nevertheless, until 17 April 1973, India and Bangla Desh continued attempts to use the Pakistani prisoners of war as a lever of pressure to enforce recognition of Bangla Desh by Pakistan. The Government of India itself did not categorically make recognition a precondition, but its stand was tantamount to little less than that. It maintained that Pakistan armed forces in East Pakistan had surrendered to the joint command of India and Bangla Desh and, therefore, they could not be released without discussions involving Bangla Desh also. The Government of Bangla Desh in turn maintained that discussions on the question of prisoners of war could not be held except on the basis of parity between Pakistan and Bangla Desh. In other words, Pakistan was required to recognize Bangla Desh first, and even then, Bangla Desh and India would require discussions on the question of release of prisoners of war.

The Government of Pakistan pointed out on numerous occasions that, under Article 118 of the Third Geneva Convention, the prisoners of war were required to be released without delay after the cessation of active hostilities, and that this obligation was unilateral and unconditional once hostilities had ceased. Even in the absence of any agreement between the parties to the conflict, each of the detaining powers had, under Article 118, a duty itself to establish and execute without delay a plan of repatriation of prisoners of war. As the Court is aware, under the previous Geneva Convention—that of 1929—the obligation to release prisoners of war only arose upon the conclusion of peace. The change brought about by Article 118 of the 1949 Convention, that is, the release upon the cessation of active hostilities, was intentional.

The reasons for it are given by the late Sir Hersch Lauterpacht in his 6th edition of *Oppenheim's International Law*, Volume II, page 613:

> "That provision was inspired by the experience of the Second World War when, following upon the unconditional surrenders of the enemy powers no treaty of peace was concluded between the principal belligerents

> for some years and when public opinion viewed with disapproval the continued detention of prisoners of war at a time when there was no longer any reasonable possibility that hostilities might be resumed."

What I have just quoted exactly describes our case. The Government of India did not, however, respond to the request for the release of the Pakistani soldiers and civilians.

Realizing by that time that public opinion throughout the world was highly critical of her treatment of and attitude towards the Pakistani prisoners of war, the Governments of India and Bangla Desh issued a joint statement on 17 April 1973. I quote from that statement:

> ". . . the two Governments *are ready to seek a solution* to all humanitarian problems *through simultaneous repatriation* of the . . . *prisoners of war* and civilian internees, *except those required by the Government of the People's Republic of Bangladesh for trial on criminal charges,* the repatriation of *Bengalis* forcibly detained in Pakistan and the repatriation of *Pakistanis in Bangladesh* . . ."

and then they defined those Pakistanis in Bangla Desh, that is "*all non-Bengalis who owe allegiance and have opted* for repatriation to Pakistan".

It may be noticed that the question of recognition of Bangla Desh by Pakistan was omitted, but India persists in attaching other conditions to the release of prisoners of war and civilian internees which are totally inadmissible under the Geneva Conventions. The 17 April statement called upon Pakistan to *(a)* acquiesce in the trial of a certain number of Pakistani prisoners of war, and *(b)* accept the transfer, from Bangla Desh to Pakistan, of members of an ethnic and linguistic minority who in fact are victims of Bengali racial prejudice but who, according to the said joint statement, allegedly owe allegiance and have opted for repatriation to Pakistan, as preconditions for the release of Pakistani prisoners of war.

Quite clearly there is no warrant for the imposition of such conditions on the release of prisoners of war. Accordingly, the Government of Pakistan declared on 20 April 1973 that it could not accept these demands as preconditions for the release of Pakistani prisoners of war, although it was prepared to discuss all humanitarian issues. The Government of India, however, has, in a letter of 8 May 1973, continued to insist that Pakistan accept in principle the package deal mentioned above. India thus refused even to hold discussions except on the basis of prior acceptance of the said proposals. In its reply of 16 May 1973, the Government of Pakistan has once again suggested that the two Governments should resume discussions without preconditions in the interest of an early solution of the humanitarian problem.

As for Bengalis in Pakistan, who wish to return to their homes in Bangla Desh, the Government of Pakistan has throughout followed a humanitarian policy. In January 1972, the President of Pakistan unconditionally freed Sheikh Mujibur Rahman, and Mr. Kamal Hossain, the now Prime Minister and Foreign Minister, respectively, of Bangla Desh, who were under detention in Pakistan on charges of inciting and organizing a rebellion against the Government of Pakistan. With regard to the other Bengalis in Pakistan, the Government has publicly declared its willingness to co-operate in arrangements for their repatriation. As a first step, exit permits have been issued in favour of 12,000 Bengalis. With the issue of additional permits, this number will rise to 15,000. Pakistan has informed the International Committee of the Red Cross and the United Nations Secretary-General of its willingness to allow these persons to

leave either by the land route or by sea. The delay in their departure is a result of the failure of Bangla Desh to make arrangements for their transportation. The rest of the Bengalis in Pakistan, totalling over 157,000 according to estimates prepared by the International Committee of the Red Cross, will likewise be permitted to leave Pakistan, if they so wish. Meanwhile, they are being treated in a humane manner. The Government of Pakistan will naturally accept the transfer of Pakistan nationals from Bangla Desh. As to who is a Pakistan national is a question that can be determined by Pakistan alone. It is a well-known principle of international law that a State has the exclusive right to decide who its nationals are. The determination of eligibility of persons in Bangla Desh for transfer to Pakistan cannot, however, be linked to the release of Pakistani prisoners of war. There is no logic in the proposition that unless Pakistan accepts all the non-Bengalis in Bangla Desh, the prisoners of war will not be released. Prisoners of war have a special status in international law which entitles them to be dealt with in accordance with the rules independently of all extraneous considerations.

The Government of Pakistan had hoped that the Government of India would agree to simultaneous implementation of the provisions of Article 118 of the Third Geneva Convention and Articles 133 and 134 of the Fourth Convention on a reciprocal basis. As the Government of India continued to delay the release of Pakistani prisoners of war and civilian internees, the Government of Pakistan proceeded to carry out its obligations unilaterally and unconditionally. First, the Indian sailors under detention in Pakistan were released in January 1972 and repatriated. Then Indian nationals who were stranded in Pakistan as a result of India-Pakistan hostilities were allowed to leave Pakistan. Later in the same year, all Indian civilian internees in Pakistan were released and repatriated. The sick and wounded Indian prisoners of war were repatriated on a priority basis. Finally, on 1 December 1972, the Government of Pakistan announced its decision to release, unilaterally, the Indian prisoners of war. They were repatriated in December 1972 and I would like to stress that today there is not a single Indian soldier or civilian who is under detention in Pakistan in connection with the events of 1971.

The Government of Pakistan also gave full effect of the provisions of the Geneva Convention in regard to the treatment of sick and wounded prisoners of war and civilian internees. In its final report on the Indian prisoners of war camp at Lyallpur in Pakistan, the International Committee of the Red Cross paid compliments to the authorities of the Government of Pakistan for ensuring full compliance with the provisions of the Geneva Convention.

In spite of all these efforts, not only has the Government of India continued its unlawful detention of the Pakistani soldiers and civilians in contravention of its obligations under the Geneva Convention, it has also subjected them to cruel and inhuman treatment. We submit, Mr. President, that the condition and morale of our prisoners as a result of the inhuman treatment being meted out to them is relevant to the issue of urgency in this request for interim measures of protection. It would not be out of place to draw the attention of the Court to just a few instances of inhuman treatment. According to the information received by the Government of Pakistan, more than 40 prisoners of war have been shot dead by Indian armed guards and more than 80 have been wounded. Insults and indignities, extraordinary punishments, and mass reprisals have been inflicted upon them, and there have been reports of torture and atrocities by the Indian authorities against the defenceless prisoners. Over-crowding, unhygienic conditions and inadequate medical supplies have been reported from several of the Indian camps.

It has been reported that the Government of India maintained a secret camp, No. 66, at Delhi for interrogation and brain-washing of selected Pakistani prisoners of war. Electric shocks were administered to Pakistani soldiers and some of them were incarcerated with insane persons. In an article, based on the reports of the International Committee of the Red Cross, the *Washington Post* of 23 December 1972 revealed that in one incident Indian army dogs were let loose on Pakistani prisoners and eight received severe bites. Nails of Prisoner Shafqat Husain were pulled out during interrogation in Amritsar and his ankles were burnt with cigarettes. A rope was tied around his body and wetted, causing terrible contraction. At a camp in Allahabad, a prisoner was spread-eagled in the sun for several hours and the punishment was described by the camp commander as "light". A series of collective punishments were inflicted on the prisoners of war in enclosures which were not even scenes of escape attempts. In a camp at Ramgarh, prisoners were deprived of food for two days and put on half rations for 45 days. Prisoners in camp No. 99 at Allahabad were denied water for one day and forced to lie for two hours in the burning midday sun. In another camp at Allahabad, prisoners were locked inside cells and not even allowed to go to latrines. They had to relieve themselves in buckets placed in their overcrowded cells and to sleep right next to the buckets. Despite the stifling summer heat, the electric fans in the barracks were switched off. All windows and doors were kept closed. The *Washington Post* quoted another ICRC report to depict the conditions of imprisonment in the following words: "Never has the term 'cage' been used more accurately than in describing the Meerut maze of barbed wire where each barrack is closely fenced by barbed wire."

On 13 October 1972, in camp No. 35 at Allahabad, Indian armed guards opened fire on the prisoners. The ICRC later reported: "Of the six prisoners killed during this incident, two at least if not three, seemed to be cases rather of cold-blooded murder than of self-defence."

One of the consequences of the publication of the ICRC Report on the ill-treatment of the Pakistani prisoners of war was the expulsion by the Government of India of Mr. George Hoffman, chief ICRC delegate in India. In fact, Mr. Hoffman was declared *persona non grata*. Further, the Government of India refused ICRC teams permission to visit prisoner of war camps. This refusal was in direct contravention of Article 126 of the Third Geneva Convention which requires that the delegates of the ICRC "shall have permission to go to all places where prisoners of war may be". One could reasonably presume that these two steps, taken by the Government of India, were designed to obstruct the functions of the ICRC and to intimidate its functionaires, who had done no more than their duty by faithfully reporting on the conditions in the prisoner of war camps in India. The visits of the ICRC were suspended for a number of weeks, and Mr. George Hoffman had to be replaced by a new chief delegate of the ICRC (Mr. Nils de Uthemann).

The ill-treatment of the Pakistani prisoners of war by India raised protests even in the Parliament of Switzerland, which is acting as the Protecting Power of the Government of Pakistan. It was reported in the newspapers on 17 March 1973 that on 16 March 1973:

> "Dr. Claudius Alder raised the question of Pakistani War Prisoners in the Swiss Parliament and said 'there are tens of thousands of [Pakistani] POWs held in India under vulnerable circumstances'.
>
> He asked the Swiss Government to answer the following questions:
>
> '(1) Has the Swiss Government knowledge of scandalous conditions in

Indian prison camps which led to sharp exchanges between ICRC and India?

(2) What has the Government done to secure their release and why have its efforts until now produced no success?

(3) Is the Government not also of the opinion that it can force immediate measures in favour of release of POWs on humanitarian grounds and what does the Government propose to do in its capacity as the protecting power to make India change her attitude and initiate immediate release of the POWs?'"

In contrast, the Indian prisoners of war while in detention in Pakistan were accorded treatment even more generous than prescribed by the Geneva Convention. There was not a single untoward incident at any of the camps for Indian prisoners of war or civilian internees. Even attempts at escape by the Indian soldiers were prevented without recourse to the use of force. The International Committee of the Red Cross described the main camps in Pakistan as "a model of good POWs camp".

The conduct of the Government of India in regard to the detention of Pakistani prisoners of war and civilian internees and their ill-treatment evidences a pattern of deliberate disregard and contravention of obligations under the Geneva Convention. I will not go into further details, but I find it incumbent to submit for the perusal of the Court a booklet reflecting world-wide public opinion on the subject, entitled *Voices against Barbarity*[1].

With this background, we come to the facts out of which the immediate dispute between India and Pakistan has arisen.

The Court adjourned from 4.15 p.m. to 4.35 p.m.

During the occupation of East Pakistan by Indian armed forces, and with India's encouragement and help, some Awami League leaders declared East Pakistan as the independent State of Bangla Desh and later on announced their intention of holding trials for charges of genocide and crimes against humanity made against a number of Pakistani prisoners of war in Indian custody. These trials were to be in respect of alleged acts committed before the outbreak of war, in what was then East Pakistan and indisputably Pakistani territory. The authorities in Bangla Desh have from time to time reiterated their intention to proceed with such trials. In paragraph 5 of the Application, Pakistan has drawn attention to the various statements made by authorities in Bangla Desh regarding the holding of trials for alleged acts of genocide. This intention is also clear from Presidential Order No. 8 of 1972 issued by the President of Bangla Desh, and entitled the "Bangladesh Collaborators (Special Tribunal) Order 1972". In the preamble of that order it is stated as follows:

> "Whereas certain persons, as individuals or as members of organizations, directly or indirectly, have been collaborators of the Pakistan Armed Forces which had illegally occupied Bangladesh by brute force and have aided and abetted Pakistan armed forces and co-operated in committing genocide and crimes against humanity . . ."

It is clear, therefore, that whatever other allegations there may be, those made against certain personnel of the Pakistan Army are in respect of, or include acts of genocide. The various statements made by government spokesmen of Bangla Desh, and also by the Prime Minister of Bangla Desh, have been set out

[1] Not reproduced.

in Annex C to Pakistan's Application, and do not need repeating here. The most significant of these, however, is the statement of the Foreign Minister of Bangla Desh, Dr. Kamal Hossain, on 17 April 1973. This is reproduced in Annex C-VIII of the Application, and I would like to read it out for the Court's information.

> "*The Times of India* News Service. Dacca, April 17.
>
> The Foreign Minister, Dr. Kamal Hossain, today announced the Bangla Desh Government's decision to try 195 POWs for war crimes. The proceedings will begin by the end of May.
>
> Dr. Hossain made the announcement soon after his return from New Delhi where he had gone on a four-day visit to draw up a joint strategy with India for solving outstanding problems in the sub-continent.
>
> He said the trial will be held in Dacca by a special tribunal comprising persons of the status of Supreme Court Judge.
>
> Details of the trial decision were given in the form of a Press release at a news conference. It said the trial will be held in accordance with universally recognized juridical norms. Eminent international jurists will be invited as observers.
>
> Investigations of the crimes allegedly committed by the Pakistan occupation forces and members of the auxiliary forces have been completed. The 195 prisoners to be tried have been charged with serious crimes, including genocide, crimes against humanity, breach of Article 3 of the Geneva Convention, murder, rape and arson.
>
> The accused will be given facilities to arrange for their defence and engage counsel of their choice, including foreigners.
>
> The Foreign Minister, however, did not have an immediate reply to the question whether Pakistani lawyers would be allowed to appear at the trial."

On the same day, that is 17 April 1973, Radio Bangla Desh carried the following news:

> "One hundred and ninety-five Pakistani prisoners of war will be tried in Bangladesh for committing genocide, war crimes against humanity and breaches of the Geneva Convention.
>
> Announcing this official decision a Press release issued in Dacca this afternoon said that the accused were expected to be produced before a special tribunal in Dacca by the end of next month. Investigations into the crimes committed by Pakistani occupation forces were almost complete."

From this statement it is clear that trials for acts of genocide are contemplated and are likely to be held very soon. In fact, these could commence at any time; and hence the great urgency in the case for interim measures pending the Court's final decision.

The statement of the Foreign Minister, Dr. Kamal Hossain, being made soon after the Joint Communiqué of India and Bangla Desh on 17 April 1973, is significant. The relevant part of that communiqué has been reproduced in paragraph 7 of the Application:

> "Without prejudice to the respective positions of the Government of India and the Government of the People's Republic of Bangla Desh, the two Governments are ready to seek a solution to all humanitarian problems through simultaneous repatriation of the Pakistani prisoners of war and civilian internees, except those required by the Government of the People's

Republic of Bangladesh for trial on criminal charges, the repatriation of Bengalis forcibly detained in Pakistan and the repatriation of Pakistanis in Bangladesh, i.e., all non-Bengalis who owe allegiance and have opted for repatriation to Pakistan."

It is clear from this communiqué that India is proposing to surrender to Bangla Desh those prisoners of war who are wanted for trial on criminal charges even though India is at present refusing to repatriate the remaining prisoners. These charges relate, according to the Foreign Minister of Bangla Desh, *inter alia*, to acts of genocide allegedly committed by Pakistani armed personnel. It is also relevant to bring to the notice of the Court that Pakistan issued a statement in response to the India-Bangla Desh Joint Communiqué on 20 April 1973, with regard to the trial of the prisoners of war. The Government of Pakistan in this statement declared as follows:

"The Government of Pakistan notes with concern that the 'initiative' embodied in the statement issued in Delhi invites Pakistan to compromise the principle by agreeing to, or acquiescing in, conditions which are irrelevant and unrelated to the repatriation of the Prisoners of War.

The Government of Pakistan cannot recognise the competence of the authorities in Dacca to bring to trial any among the Prisoners of War on criminal charges. According to an established principle of International Law, only a competent tribunal of Pakistan can have jurisdiction in this matter, since the alleged criminal acts were committed in a part of Pakistan and since also the persons charged are the citizens of Pakistan. It would be repugnant to a nation's sovereignty to surrender its exclusive jurisdiction in this regard. The Government of Pakistan reiterates its readiness to constitute a Judicial Tribunal, of such character and composition as will inspire international confidence to try persons charged with the alleged offences."

This was followed by a communication dated 23 April 1973 from the Minister of State for Foreign Affairs, Government of Pakistan, to the Minister of External Affairs, Government of India, in which he stated as follows:

"Dear Sardar Swaran Singh,

By the time this reaches you, your Government will have seen the statement that the Pakistan Government has issued in response to the Indian Bangladesh Declaration on the question of repatriation of prisoners of war and related matters. We should like you to know that in defining its response the Government of Pakistan has been motivated by a sincere resolve to see the obstacles to sub-continental reconciliation removed.

My Government feels that the Government of India's statement opens the door to resumption of dialogue between our two Governments, which, unfortunately, has remained suspended for several months. We consider it important that we resume discussions with your Government with a view to an early settlement of the prisoners of war question so as to be able to take further steps to implement the Simla Agreement and pave the way for the normalization of the situation in the sub-continent.

My Government would be happy to receive in Islamabad a representative of the Government of India to discuss this matter. From our point of view the period 28 April-3 May, both days inclusive, will be suitable. However, if that should not be convenient for your Government the Indian delegation would be equally welcome if it came at a later date, preferably in the third week of May, when the President and I will have returned from Iran.

With best wishes."

The response from the Minister for External Affairs, Government of India, was received in a message on 9 May and I quote the relevant part of the message, with regard to trials, which is as follows:

> "*Likewise, the contention of Pakistan Government in paragraph 3 of its statement questioning the competence of the Government of Bangla Desh to bring to trial certain prisoners of war on crime charges is unacceptable.* The same is the case with the untenable observation contained in paragraph 7 of Pakistan's statement about the Pakistani nationals in Bangla Desh, who have declared their allegiance to Pakistan and are desirous of repatriation.
>
> We earnestly hope, therefore, that the Pakistan Government would review their stand on joint Indo-Bangla Desh declaration which suggests a practical way for simultaneous resolution of all humanitarian issues emanated from the December 1971 conflict. Obviously there cannot be a solution which takes into account only those issues which interest Pakistan and ignore the position of Bangla Desh and India." (Emphasis added.)

Now here it is important what he says:

> "*In our view, talks can be purposeful and lead to quick results if Pakistan Government was to indicate their agreement in principle to the solution set out in paragraph 5 of the joint declaration of 17 April 1973.* The representatives of India and Pakistan can then work out the modalities for implementing the solution.
>
> I should like to add that I have consulted Dr. Kamal Hussain, Foreign Minister of Bangla Desh and this letter represents the joint voice of India and Bangla Desh." (Emphasis added.)

This statement, as I submitted, was received on 9 May, wherein they refused to accept Pakistan's claim of exclusive jurisdiction and also stated that Pakistan should in principle accept the package deal that forced us on 11 May to approach this honourable Court and file an Application two days later.

The Government of India has therefore clearly denied that Pakistan has exclusive jurisdiction with regard to the trial of the 195 or any other number of prisoners of war in question and has attached improper conditions, contrary to the Geneva Conventions, with regard to the repatriation of Pakistani prisoners of war. A dispute has, therefore, arisen between the Government of India and the Government of Pakistan within the definition laid down by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, namely "a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons". It is this dispute which the Government of Pakistan has found it necessary to refer to the International Court for decision.

On 2 July 1972 Pakistan and India signed an agreement on bilateral relations at Simla, which provides, *inter alia*, that the representatives of the two sides will meet to discuss further the modalities for repatriation of prisoners of war and civilian internees. Since then, after a considerable delay, India has withdrawn her troops from Pakistan territory. However India has, till the present, refused to discuss the modalities for repatriation of prisoners of war and civilian internees, in accordance with the Geneva Conventions. Pakistan, however, in accordance with her obligations under Article 118 of the Third Geneva Convention, decided itself to establish and execute, without further delay, a plan of repatriation of the Indian prisoners of war being held in Pakistan. Accordingly, as mentioned before, Pakistan returned 617 Indian prisoners of war on 1 December 1972. India, however, responded by only repatriating 550 prisoners of war who had been captured in the fighting between Indian and Pakistani

troops on the Western borders of Pakistan. The implementation of Article 118, which had thus begun, has been arbitrarily halted by India in relation to the remaining prisoners of war, although this is clearly not justified by the fact that only about 195 individuals may be accused of alleged acts of genocide or for any other reason.

The Court may also be pleased to note that the Geneva Convention has been implemented by both sides with regard to the repatriation of the wounded and the sick.

The Government of Pakistan, therefore, submits that while granting interim measures of protection in respect of those accused of genocide, the Court may also be pleased to indicate that the implementation of the Geneva Conventions should be continued, and should not be halted merely because of the nature of the present dispute, regarding the exclusive rights to exercise jurisdiction over the 195 individuals in question. I would like to stress that the application of the Genocide Convention does not warrant the holding of over 92,000 prisoners of war and civilian internees, when there are allegations of genocide against only a few of them, or for obtaining political concessions. Pakistan, therefore, submits that it is necessary for the Court to spell this out while granting interim measures of protection, so that the present dispute is not used to delay, or defeat the right of repatriation of Pakistani prisoners of war, and civilian internees now in India, keeping in mind the inhuman treatment to which they have been constantly subjected.

Before finishing with the facts, Mr. President, I would also like to draw the attention of the Court to paragraph 10 of Pakistan's Application, in which we have asserted that a "competent tribunal", within the meaning of Article VI of the Genocide Convention, cannot be set up in Bangla Desh, in view of the extreme emotionally charged situation that prevails there. We have made this assertion without prejudice to our claim for exclusive jurisdiction, and we ask the Court to give the term "competent tribunal", in the context of the charges of genocide, a somewhat wider interpretation than that of its literal meaning.

With respect to this aspect of the case, I would draw the attention of the Court to the recent trials of the so-called collaborators held in Dacca and the manner in which Sir Dingle Foot, the chief counsel for Dr. A. M. Malik, the former Governor of East Pakistan and other eminent persons, was not allowed to enter the city after arriving at Dacca airport. Each one of these persons was convicted and sentenced to savage punishments after summary proceedings for so-called complicity with the Pakistani forces in alleged acts of genocide. That a tribunal, competent in the sense I am suggesting, cannot be set up, or function impartially, in these categories of cases, can be shown by reference to a recent Reuter's report, about demonstrations by thousands of Bengalis outside the jail in Dacca, demanding capital punishment for those detained there and awaiting trial for co-operating with the Pakistan army in 1971.

Mr. President, you can well imagine why the Government of Pakistan apprehends that if trials were to be held in such circumstances in Bangla Desh, the requirements of justice and impartiality will not be met. The trials will be viewed in West Pakistan as merely a witch-hunt and could lead to a very dangerous situation. We are anxious that such trials do not lead to any repercussions in West Pakistan, adversely affecting the minority community of the Bengalis. We do not want any further communal violence, and wish to make every effort to avoid it.

I want to bring specially to the attention of the Court that the representative and democratic Government of Pakistan of today stands for the principle of accountability for any wrongs that may have been committed by Pakistani

nationals in East Pakistan. In the absence—I request the Court to mark my submission—of an international penal tribunal agreed upon between the parties and functioning on neutral territory, the Government of Pakistan has made it clear that the principle of accountability will be upheld by us. In this connection I refer again to the statement of the Government of Pakistan issued on 20 April 1973, in which the Government policy has been clearly stated as follows:

> "The Government of Pakistan reiterates its readiness to constitute a Judicial Tribunal, of such character and composition as will inspire international confidence, to try persons charged with the alleged actions."

I now come to the principles of law relating to the indication of interim measures of protection and would endeavour to show that on the basis of these principles the Court would be justified in granting the interim measures prayed for.

In brief, the jurisprudence of the Court has established:

(a) that an Order indicating interim measures would be justified where it is apprehended that in the absence of such Order a party to the case might take action of a nature that would render the final judgment of the Court ineffective in whole or in part; and

(b) that for the purpose of indicating interim measures the Court is competent to act except in a case in which the absence of the jurisdiction of the Court to deal with the merits of the case is self-evident.

The first principle that I propose to deal with is that governing the exercise of jurisdiction by the Court in relation to a request for indication of interim measures of protection. Mr. President, we are aware that recently the Court has had occasion, in relation to the requests for interim measures by the Governments of Australia and New Zealand, to hear very well-presented and detailed expositions of the principles governing this matter. I shall, therefore, confine myself to the principles which are immediately relevant and shall try to be as brief as possible.

I refer first to the Order of the Court in the *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*) emanating from the request of the United Kingdom for the indication of interim measures of protection. In this case the Court has summed up the principles governing the jurisdiction of the Court in granting interim measures of protection in paragraphs 15 to 19 of the Order.

I would invite the attention of the Court to paragraph 15 of the Order, which is as follows:

> "Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest;"

I shall attempt to interpret this proposition in the light of Article 41 of the Statute. It is our submission that the grant of interim measures of protection flows from Article 41 of the Statute to which all parties have given their consent. The Court's power to indicate interim measures, therefore, flows from Article 41 itself which provides an independent consensual basis for the Court's jurisdiction. It may also be noted that paragraph 1 of the Article provides as follows:

> "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

Interim measures in terms of Article 41 are intended to preserve the respective rights of the parties, that is, rights under international law claimed by them. This power of the Court has not been expressly made conditional upon the existence of the jurisdiction of the Court. In our view, Article 41 of the Court's Statute clearly states the position that so long as there are rights to be preserved the Court may indicate interim measures. We contend that under Article 41 of the Statute interim measures may be indicated if necessary, and if the urgency exists, merely with reference to the rights of the parties and without regard to the existence of the jurisdiction of the Court. However, we also contend that a clear jurisdictional basis does in fact exist in this case for the purpose of enabling the Court to grant interim measures.

The proposition that with regard to interim measures of protection, the Court's jurisdiction is governed principally by the terms of Article 41 of the Statute was clearly stated by Sir Hersch Lauterpacht in the *Interhandel* case as follows:

> "In deciding whether it is competent to assume jurisdiction with regard to a request made under Article 41 of the Statute the Court need not satisfy itself—either *proprio motu* or in response to a Preliminary Objection—that it is competent with regard to the merits of the dispute. The Court has stated on a number of occasions that an Order indicating, or refusing to indicate, interim measures of protection is independent of the affirmation of its jurisdiction on the merits and that it does not prejudge the question of . . . merits. . . . Any contrary rule would not be in accordance with the nature of the request for measures of interim protection and the factor of urgency inherent in the procedure under Article 41 of the Statute." (*I.C.J. Reports 1957*, p. 118.)

We therefore submit that the proposition set out in the first part of paragraph 15 of the Order in the *Fisheries* case is the governing rule, that is, on a request for provisional measures, the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case. Indeed, we would go further and suggest that it would not be appropriate, in any circumstances, for the Court finally to determine whether it has or it has not jurisdiction on the merits of the case, at the stage of a request for indication of interim measures of protection. Such a determination can only be made in relation to a preliminary objection as to jurisdiction raised by a party and only after the necessary procedure under the Statute and Rules of Court has been followed.

In paragraph 15 of the Order in the *Fisheries* case, it was also stated that: ". . . the Court . . . ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest." We would respectfully submit that the absence of jurisdiction on the merits is manifest within the meaning of that expression, as used in paragraph 15 of the Order in the *Fisheries* case, only when the petitioner is unable to cite a basis for the jurisdiction of the Court and invites the other party to submit to the jurisdiction of the Court and that party is not willing to do so, as was the position in the *Aerial Incident* cases. If, on the other hand, one of the parties asserts that the Court has jurisdiction, and cites a prima facie basis for it, while the other party disputes this, then clearly there is a controversy about jurisdiction and the Court would not then hold that the absence of jurisdiction is manifest without making a final decision with respect to its jurisdiction. But this would be a decision which, in accordance with the Statute and Rules of Court, cannot be made at this stage without taking into consideration written and oral pleadings. It would seriously prejudice the applicant's position if he were denied interim relief on the ground that the Court, by a

purely summary view, had come to the conclusion that it would probably hold later on that it was not entitled to exercise jurisdiction.

Under Article 41, the Court has not only power to indicate interim measures when they are considered necessary but it must do so, if the circumstances so require, for the purpose of preserving the respective rights of the parties pending final determination of the case. A party may request interim measures in a grave and urgent situation involving, as in the present case, the life and liberty of a large number of persons, and where denial of indication of interim measures may cause irreparable loss of a grave nature involving such human life and liberty, which could never be made up or compensated for. Moreover to determine that lack of jurisdiction is manifest may sometimes involve exhaustive argument. What may be manifest to one may not be apparent to another. Lord Samuel, in his book *Belief and Action*, referred to the preamble of the American Declaration of Independence which states that:

> "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are life, liberty and pursuit of happiness."

He went on to say that a truth is not self-evident unless it is such that no sane man will deny it. At the very time that the Declaration of Independence proclaimed the inalienable rights of all men to liberty, negro slavery was a legalized institution in the United States and remained so for nearly a century afterwards. Therefore, I submit, Mr. President, that when the Court states that the lack of jurisdiction shall be manifest, it obviously means "self-evident" in the sense Lord Samuel has used it and means that it should be so apparent that no sane man will deny it. Absence of jurisdiction, therefore, cannot be said to be manifest where a decision can only be reached after careful consideration, close examination and exhaustive arguments.

Without finally satisfying itself as to its jurisdiction, how can the Court—and I respectfully ask the Court to consider this submission—without finally satisfying itself as to its jurisdiction, declare at the stage of granting interim measures that the lack of jurisdiction is manifest. If the Court so holds then it would mean that it has finally satisfied itself, which is surely not what the Court intended to indicate in paragraph 15 of the Order in the *Fisheries* case.

Coming to our own case, the jurisdiction of the Court is clearly founded on the basis of a provision in the multilateral convention in force between India and Pakistan. This is Article IX of the Genocide Convention, which provides as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention including those relating to the responsibility of a State for Genocide or any of the other acts enumerated in Article III shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

However, the Government of India in a letter addressed to the Registrar of the Court dated 23 May 1973[1], has stated as follows:

> "Upon instructions received from the Government of India, I have the honour to communicate to you as follows:
>
> The Government of India have received your telegrams of May 11, 13

and 14, 1973, respectively. They have also received on May 16, 1973, your airmail letter No. 54249 of May 11, 1973, along with its enclosures, which include a certified copy each of the Application filed by Pakistan instituting proceedings against India, entitled '*Trial of Pakistani Prisoners of War* (Jurisdiction under the Genocide Convention) (Pakistan versus India)' and of the Request for the indication of interim measures of protection.

The Government of India have perused the Application and the Request. Pakistan has attempted to seize the Court by invoking Article IX of the Genocide Convention, 'in accordance with which', it is stated in the Application, 'dispute between contracting parties relating to the interpretation, application or fulfilment of the Convention, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute'. It is further stated in the Application that 'the Court has jurisdiction under Article 36 (1) of its Statute'.

The Court would, no doubt, be aware that while filing its Instrument of Ratification on 27 August, 1959, to the Convention on the Prevention and Punishment of Crimes of Genocide, 1948, the Government of India entered a reservation on Article IX of the Convention, which reads as follows:

'With reference to Article IX of the Convention, the Government of India declare that, for the submission of any dispute in terms of this Article to the jurisdiction of International Court of Justice, the consent of all the parties to the dispute is required in each case.'"

Then it further says:

"The Government of India accordingly presume that the Application and the Request were communicated to them for their consideration whether consent should be given by them in terms of Article IX of the Genocide Convention.

The Government of India regrets that they cannot give consent, in terms of their aforementioned reservation to Article IX of the Genocide Convention, to Pakistan for raising the alleged subject-matter before the International Court of Justice under that Article.

Without such consent, the Court cannot be in proper seisin of the case and cannot proceed with it.

It may be further stated that there is no legal basis whatsoever for the jurisdiction of the Court. Accordingly, with the highest respect for the President of the Honourable Court, it is submitted that Pakistan's Application and Request are without legal effect.

(Signed) YADAVINDRA SINGH."

We have already made a communication to the Court in reply to India's said letter refuting her contentions for reasons briefly set out therein[1]. I would now respectfully draw the attention of the Court to Article 40 of the Court's Statute which deals with the institution of proceedings, which is the governing provision in this matter, and which does not make it obligatory to indicate the grounds on which the Court's jurisdiction is founded. Article 40 states as follows:

"Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed

[1] See p. 118, *infra*.

to the Registrar. In either case the subject of the dispute and the parties shall be indicated."

Equally Article 35, paragraph 2, of the revised Rules of Court, which has been framed to carry out the purposes of Article 40, only states that the parties instituting proceedings shall "as far as possible" specify the provision on which the applicant founds the jurisdiction of the Court. Keeping in view the Statute and Rules of Court, the Government of Pakistan, in its Application, merely referred to the main provision on which the jurisdiction of the Court could be founded, that is, Article IX of the Genocide Convention, which has already been quoted. It is clear that prima facie the Court's jurisdiction can be founded under this Article at the request of any of the parties to a dispute.

The Government of Pakistan wishes to place on record that it regards as regrettable in the extreme that the Government of India has sought to exclude the jurisdiction of the Court in respect of a multilateral convention of such major humanitarian importance, when the International Court had been made the only guarantor and supervisory body regarding the Convention's interpretation, application and fulfilment. The Government of India purported to rely on its declaration of 27 August 1959, which I again read:

"With reference to Article IX of the Convention the Government of India declare that, for the submission of any dispute in terms of this Article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute is required in each case."

As already stated in our communication we assert that the Indian declaration, referred to above, is inadmissible under the Genocide Convention and is of no legal effect whatsoever.

I would submit that the mere existence of a declaration of the nature made by India, which I have quoted cannot render the absence of jurisdiction of the Court manifest, since the Court has prima facie jurisdiction by virtue of Article IX of the Genocide Convention. Reliance by India on a declaration which purports to exclude the jurisdiction of the Court, would result in a dispute regarding the validity of the declaration itself. This would raise an extremely important issue of principle which would fall to be examined by the Court in due course, in accordance with the provisions of the Statute and Rules regarding preliminary objections with respect to jurisdiction, and cannot be dealt with summarily. I may also submit that this was precisely the course adopted by the Court in the *Fisheries* case. This is amply clear from paragraphs 16 to 19 of the Court's Order which I now read:

"16. Whereas the penultimate paragraph of the Exchange of Notes between the Governments of Iceland and of the United Kingdom dated 11 March 1961 reads as follows:

'The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice';

17. Whereas the above-cited provision in an instrument emanating from both Parties to the dispute appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded;

18. Whereas the complaint outlined in the United Kingdom Application

is that the Government of Iceland has announced its intention, as from 1 September 1972, to extend unilaterally its exclusive jurisdiction in respect of the fisheries around Iceland to a distance of 50 nautical miles from the baselines mentioned in the 1961 Exchange of Notes; and whereas on 14 July 1972 the Government of Iceland issued Regulations to that effect;

19. Whereas the contention of the Government of Iceland, in its letter of 29 May 1972, that the above-quoted clause contained in the Exchange of Notes of 11 March has been terminated, will fall to be examined by the Court in due course; . . ."

Keeping in view the principles adopted by the Court while making this Order, as set out in the paragraphs that I have just quoted, I would respectfully submit that, as in the *Fisheries* case, Article IX of the Genocide Convention is a provision in an instrument, emanating from both parties to the dispute, and which appears prima facie to afford not only a possible but a clear basis on which the jurisdiction of the Court might be founded. As the Government of India purports to exclude the jurisdiction, as in the *Fisheries Jurisdiction* case, this matter will fall to be examined by the Court in due course.

The Court may also kindly refer to the precedent in the *Anglo-Iranian Oil Company* case, interim measures, where the Iranian Government had raised an objection regarding the jurisdiction of the Court. The Court, however, did not at that stage go into the objections of the Iranian Government as to its jurisdiction, and while making the order for interim measures noted as follows:

> "Whereas the indication of such measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction" (*I.C.J. Reports 1951*, p. 93).

Similarly, in the *Interhandel* case, the Court declined to apply the preliminary jurisdiction procedure prescribed in Article 62 of the Rules to proceedings for interim measures, governed by Article 61 of the old Rules, and asserted its jurisdiction to examine the request for interim measures on the basis of the finding that the subject of the dispute fell within Article 36, paragraph 2, of the Statute, regardless at that stage of any reservations. (*I.C.J. Reports 1957*, pp. 110-111.)

In the light of these precedents we respectfully submit that the proper course, in the circumstances of the present case, is for the Court to hold that there is no jurisdictional issue that can prevent it from granting interim measures, and that any such issue is a matter to be taken up at the appropriate time and in the appropriate manner.

Before referring to the other principles governing the grant of interim measures by the Court, I would like briefly to touch upon the jurisdiction of the Court on the merits of the case. I do this not with the intention of trying to establish before the Court that it does have jurisdiction, for this is not the proper stage for that, but merely to indicate that there is more than one basis on which the jurisdiction can be established, and that not only is there every possibility that the Court will have jurisdiction on merits but that prima facie this jurisdiction clearly exists. At the same time, it is only the possibility of exercising jurisdiction on merit that is relevant while the Court considers a request for the indication of interim measures.

I shall now say a few words about Pakistan's right to challenge the admissibility of India's declaration in respect of the Genocide Convention made on 27 August 1959, which I have already quoted. In this respect I would like to

submit that the Advisory Opinion of 1951 of the International Court regarding *Reservations to the Genocide Convention*, kept open the question of the admissibility of reservations, as also their legal effect. At the outset of its Opinion, the Court discussed the nature of the question referred to it by the General Assembly of the United Nations. The observations of the Court in this respect are significant and are stated on page 21 of the Court's Opinion as follows:

> "The three questions are purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. *They do not even refer to the reservations which may in future be made in respect of any particular article*; nor do they refer to the objections to which these reservations might give rise.
>
> Question I is framed in the following terms:
>
> 'Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties of the Convention but not by others?'
>
> *The Court observes that this question refers, not to the possibility of making reservations to the Genocide Convention, but solely to the question whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention*, when there is a divergence of views between the contracting parties concerning this reservation, some accepting the reservation, others refusing to accept it." (Emphasis added.)

Thus from this it is clear that the reference to the Court did not relate to the admissibility of any particular reservation or even the possibility of making reservations to the Genocide Convention.

While considering question I referred to it, the Court also made the following observation which shows that Pakistan can question the admissibility or validity of any declaration in respect of the Genocide Convention. At page 22, the Court's Opinion reads:

> "In this state of international practice, it could . . . not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, . . . mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the *possibility* of making reservations, as well as their *validity* and *effect*." (Emphasis added.)

From this it is clear, that in the terms of what is implied by the Treaty the question of the possibility of making reservations, as well as their validity, can be raised. It is also clear from the Opinion of the Court that not all reservations are admissible. On page 24 of its Opinion the Court states:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.
>
> . . . . . .
>
> *It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty.* The Court cannot share this view. It is

obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention." (Emphasis added.)

That such reservations or declarations can be questioned before the International Court is clear from what is stated on page 27 of the Opinion:

"It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or [and this is important] by the *procedure laid down in Article IX of the Convention.*" (Emphasis added.)

This last statement is, I submit, of the greatest importance—for if the test of the validity of any reservation is to be, in the last resort, recourse to adjudication, under Article IX, then this clearly implies, and must entail, that no reservation can validly be made to Article IX itself, or, if made, must be held abortive. Otherwise, the test which the Court clearly contemplated as the ultimate safeguard would be destroyed, and the statement as made on this point obviously assumes that Article IX will always remain fully operative and available. This is very much in line with the reasoning of the Court in 1962, in the jurisdictional phase of the *South West Africa* cases, as respects the supervisory functions of the Court in regard to mandated territories.

To this I may add that Article 19 of the Vienna Convention on the Law of Treaties 1969, which to a large extent codifies general international law, provides as follows:

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty;
(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) In cases not falling under subparagraphs *(a)* and *(b)*, the reservation is incompatible with the object and purpose of the treaty."

It therefore follows that a reservation cannot be made if that particular type of reservation was expressly or impliedly intended to be excluded by the treaty itself.

Pakistan asserts that the Genocide Convention impliedly prohibits the making of a reservation or declaration in respect of Article IX purporting to exclude the jurisdiction of the Court in the terms in which it is set out in that Article. In the case of a convention having the character of the Genocide Convention, Article IX must rank as a fundamental provision on which the very future and fulfilment of the Convention depends. It states that disputes between the contracting parties with respect to the following matters shall be submitted to the International Court of Justice, at the request of any other party to the dispute:

(i) interpretation;
(ii) application;
(iii) fulfilment;
(iv) the responsibility of a State for genocide or any of the other acts enumerated in Article III.

Thus both as regards the fulfilment of the Convention, and the responsibility for genocide, the International Court of Justice has been rendered a compulsory supervisory body which can be moved by any party without having to obtain the consent of the other. This clearly excludes any liberty on the part of one State to defeat the entire supervisory jurisdiction of the Court by declaring in advance that this is dependent upon its consent to be obtained in each case. If this could be done contracting parties would become the final judges as to the interpretation and application as well as the fulfilment of the Convention, and could easily avoid a finding with regard to responsibility for genocide. This cannot have been the intention of the parties to the Convention, for rights and obligations under the Genocide Convention could clearly be rendered illusory in the absence of a compulsory procedure for its interpretation, application and fulfilment. Hence a declaration of the nature made by India, excluding the compulsory procedure for the jurisdiction of the Court, is impliedly prohibited by the Genocide Convention and is without any force.

The Court may also be pleased to note that there are many international treaties providing for the compulsory jurisdiction of the International Court, such as the International Civil Aviation Convention of 1944 and the Vienna Convention on the Law of Treaties in relation to certain important articles of that Convention. If, therefore, declarations of this nature are held to exclude the compulsory jurisdiction of the International Court this would render impossible the judicial settlement of disputes. Such declarations must, therefore, be regarded as prohibited by the multilateral treaty in question and hence without any legal effect whatsoever unless, of course, the Convention specifically permits the making of such reservations.

Mr. President, Pakistan will also, if necessary, contend that the Court has jurisdiction under Article 17 of the General Act for the Pacific Settlement of Disputes, done at Geneva on 26 September 1928, read with Article 36 (1) and Article 37 of the Statute of the Court. Article 17 of the General Act reads as follows:

> "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 any 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."

A reading of this and other relevant provisions of the Act will indicate that the jurisdiction of the Court can be founded by virtue of the obligations undertaken by the Government of India under the Convention. Pakistan, for her part, claims succession to this multilateral treaty by virtue of the Indian Independence (International Arrangements) Order 1947:

> "The Indian Independence (International Arrangements) Order 1947.
>
> *Whereas* the agreement set out in the Schedule to this Order has been reached at a meeting of the Partition Council on the 6th day of August 1947;
>
> *And Whereas* it is intended that, as from the 15th day of August, 1947 the said agreement shall have the force and effect of an agreement between the Dominions of India and Pakistan;

Now therefore in exercise of the powers conferred upon him by Section 9 of the Indian Independence Act, 1947 and of all other powers enabling him in that behalf, the Governor-General hereby orders as follows:

1. This Order may be cited as the Indian Independence (International Arrangements) Order 1947.

2. The agreement set out in the Schedule to this Order shall, as from the appointed day, [15 August 1947] have the effect of an agreement duly made between the Dominion of India and the Dominion of Pakistan."

Now the Agreement is as follows:

"Agreement as to the Devolution of International Rights and Obligations upon the Dominions of India and Pakistan

1. The International rights and obligations to which India is entitled and subject immediately before the 15th day of August, 1947, will devolve in accordance with the provisions of this agreement.

2 (1). Membership of all international organisations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India."

I will read this again:

"Membership of all international organisations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.

For the purposes of this paragraph any rights or obligations arising under the Final Act of the United Nations Monetary and Financial Conference will be deemed to be rights and obligations attached to membership of the International Monetary Fund and to membership of the International Bank for Reconstruction and Development.

(2) The Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organisations as it chooses to join.

3 (1). Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.

(2) Rights and obligations under International Agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion."

Now, Mr. President, this is the last provision which is relevant in our case:

"(4) 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 both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions.

MOUNTBATTEN OF BURMA,
Governor-General."

With regard to the succession of treaties in respect of India and Pakistan, Professor D. P. O'Connell, who holds the Chair of Public International Law at Oxford University, in his leading work on *The State Succession in International and Municipal Law* (Vol. II, pp. 128 and 129), states as follows:

"The actual treaties listed were included in Volume II, Annexure V, of the partition Proceedings of 1947, and they were apportioned between

India and Pakistan pursuant to the Indian Independence (International Arrangements) Order, 1947, which among other things provided that India was to be the only one of the two Dominions to remain a member of international organizations. The same Order, however, made provisions for the apportionment of other treaty rights and obligations between the two Dominions. Those having an exclusive territorial application to an area comprising the Dominion of India were to devolve on it alone, while Pakistan was to inherit those having a similar application to its territory. Treaties not having such an exclusive territorial application were to devolve 'both upon the Dominion of India and upon the Dominion of Pakistan, and would, if necessary, be apportioned between them'. The effect of this latter provision was to make each of the Dominions a party to those treaties which had not a localized operation, and the obligations of which could be severally discharged.

. . . . . .

Pakistan's own attitude to the problem has never been clarified. Generally she seems disposed to claim automatic inheritance of treaties, and immediately after partition claimed to be a party to the Conventions relating to Obscene Publications and the Traffic in Women and Children in virtue of the signature of British India. The Secretary-General notified signatory States of this claim, and having received no comments assumed that there were no objections to it. In the case of Conventions such as the Chicago Convention, in which membership of organizations is involved, Pakistan acted in response to the decision of the United Nations on membership and filed accessions."

Mr. President, Pakistan's attitude is to follow faithfully the Indian Independence (International Arrangements) Order in so far as multilateral conventions are concerned and to consider, in accordance with Article IV of the Schedule to that Agreement which I have just quoted to the Court, that rights and obligations under all multilateral agreements to which India was a party immediately before partition devolve both on India and Pakistan. It is, therefore, our case, Mr. President, that the General Act for the Pacific Settlement of International Disputes of 1928 is binding between India and Pakistan and, consequently, that there is a possible foundation for the jurisdiction of the Court on the basis of this instrument also. It is true that India, purporting to act under Article 39 of the General Act, has made reservations in respect of her obligation under Article 17 and the Court will no doubt wish to consider the effects of these reservations during the jurisdictional phase of the case, when Pakistan will be ready to present full argument concerning them. In our view these reservations do not affect the present case, but at this stage our contention is, simply, that Article 17 of the General Act, as well as Article IX of the Genocide Convention constitute, to use the language of the Court's Icelandic interim measures Order, a provision in an instrument emanating from both parties which appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded. We shall, therefore, leave it to the Court to indicate whether it wishes to hear any further arguments on the General Act during the present interim measures proceedings.

Mr. President, since Pakistan also relies on Article 17 of the General Act in order to found the jurisdiction of the Court, as Article 41 of the General Act specifically provides that any dispute concerning interpretation or application

of the Act shall equally be submitted to the International Court of Justice, we also submit that Article 33 of that Convention is applicable. This provides as follows:

> "In all cases where a dispute forms the object of arbitration or judicial proceedings, and particularly the question on which the parties differ arises out of acts already committed or on the point of being committed, the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute, or the Arbitral Tribunal, shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures.
>
> If the dispute is brought before a Conciliation Commission, the latter may recommend to the parties the adoption of such provisional measures as it considers suitable.
>
> The parties undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute."

We draw special attention to the words:

> "... the Permanent Court of International Justice acting in accordance with Article 41 of its Statute or the Arbitral Tribunal shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures."

Mr. President, here I should have mentioned also that, apart from relying on the law of State succession in order to show that Pakistan is a party to the General Act for the Pacific Settlement of International Disputes of 1928, Pakistan also relies, independently of this, on the fact that that Indian Independence (International Arrangements) Order 1947 sets out, in the schedule of that Order, an agreement duly made between India and Pakistan. The Treaty is entitled "Agreement as to the Devolution of International Rights and Obligations upon the Dominions of India and Pakistan" and paragraph 4 of this Agreement between India and Pakistan provides as follows—as I have already quoted:

> "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 both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two dominions."

In view of the obligation under this agreement the General Act of 1928, which is a multilateral treaty, became binding both on India and Pakistan, irrespective and independently of any rule of general international law regarding State succession. Moreover, Mr. President, we submit that by virtue of this agreement India is estopped from denying the applicability of the General Act as between India and Pakistan.

As I have already submitted, the Court could also act under the power conferred under this General Act for interim measures of protection.

While dealing with the possibility of the Court exercising jurisdiction on merits, I would also submit that both the Government of India and the Government of Pakistan have made optional clause declarations and the jurisdiction of the Court could also be founded on the basis of those declarations without

regard, at this stage, to any reservation made by either party. I again refer here to the precedent in the *Interhandel* case where the Court asserted its jurisdiction to examine the request for interim measures under Article 61 of the old Rules of Court on the basis of the finding that the dispute fell prima facie within Article 36, paragraph 2, of the Statute regardless, at that stage, of any reservations.

Mr. President after this I have to make some comments on the letter which the Government of India has sent to the Registrar and as the Court is aware, before we came to the Court another letter had been sent. If you will permit me I will commence and deal with this part of the letter which we have already received—I have not read the other letter yet—tomorrow morning, because there is very little time now left to conclude this subject of dealing with India's letter and objections.

The Court rose at 17.50 p.m.

SECOND PUBLIC SITTING (5 VI 73, 10.30 a.m.)

Present: [See sitting of 4 VI 73.]

Mr. BAKHTIAR: May it please the Court, just before I addressed the Court yesterday, a further communication, bearing yesterday's date, was received from the Government of India addressed to the Registrar of the Court, which has no doubt been distributed to the Members of the Court[1].

What I said to the Court yesterday, and what I shall have to say to the Court today in continuation of my address, was of course prepared before the receipt of this latest Indian communication. In point of fact, what I have and will say, touches on a number of points raised in that last communication, and I shall also comment on the previous Indian communication dated 28 May[2]. I have already made some brief comments on their previous letter of 23 May 1973[3]; but obviously, in the time available, it has not been possible to prepare any specific reply to this latest communication—the one dated 4 June—and I feel sure that the Court would not expect me to make one at this stage.

I would go further and submit that Pakistan is not bound to do so in these present proceedings. These various Indian communications, taken together, amount to a full Memorial, not on the question of interim measures, but on the substance of the Court's jurisdiction to consider and pronounce upon the ultimate merits of the case—a matter which cannot arise at this stage so long as the Court is satisfied that a possible basis for its eventual jurisdiction exists.

In our view the course being followed by India amounts to an abuse of the process of the Court. India, while declining to appear and professing to disregard these proceedings is, in fact, arguing her case virtually as fully as if she were appearing, by means of a series of communications which the Court cannot well avoid receiving, or looking at, although they should strictly, in the circumstances, be regarded as out of order and irreceivable. Nor can we be in any way sure that the latest Indian communication of 4 June will be the end of the matter.

When I have completed my present address, there will be nothing to prevent India sending in a further communication, commenting on it; and if Pakistan then asks the Court for an opportunity to reply to it, and this is accorded, an Indian rejoinder to that can be expected. Such a process could go on indefinitely if the Court allowed it, and it is one which enables India to reap almost all the advantages of being a party to the proceedings, while simultaneously reserving the right not to recognize them.

Moreover, it is a process which seriously handicaps Pakistan in the presentation of her case. Instead of being able to deal in a straightforward way with the issue of interim measures as such, Pakistan has been side-tracked into a number of highly complex issues of jurisdiction which do not really arise now, and should be gone into at a later stage; and, even so, Pakistan has not been able to deal with these jurisdictional questions on the basis of, and by way of answer to, a completed Indian memorial or oral statement, which Pakistan would have

[1] See pp. 139, *infra*.
[2] See pp. 121, *infra*.
[3] See pp. 117, *infra*.

before her for the purpose of preparing the sort of considered reply which is customary in proceedings before the Court.

The Indian arguments have come out piecemeal in successive communications, each one overtaking Pakistan in dealing with the previous one, and in the middle of the proceedings of an inherently urgent character that do not afford time for a comprehensive treatment, at this juncture, of issues that are strictly extraneous to the question of interim measures.

It is not for me to say what the Court should do in these circumstances. The situation is evidently a very difficult one both for the Court and for us. We feel certain, however, that the Court will ensure that justice is done to Pakistan, and I will, therefore, now resume the thread of my address where I left off yesterday, only reserving the right to ask for further time when we have been able to study the Indian communication of 4 June more carefully.

As the Court is aware, the Government of India, in a further letter addressed to the Registrar of the Court and dated 28 May, has raised a series of points on the question of the competence of the Court to grant interim measures in this case. It may be convenient to the Court if I comment specifically on the most important of these points in so far as I have not been able to do so already. After dealing with this Indian letter, I shall go on to consider the principles applicable regarding the substance of the request for interim measures.

However, before commenting on the assertions made by the Government of India in its letter to the Registrar, I would like to say a few words about the character of such letters and their relevance, keeping in view the provisions of the Statute and the Rules of Court.

The first of these letters, which was dated 23 May, appears to seek clarification about the basis on which the jurisdiction of the Court was to be founded, since it made the following statement:

> "The Government of India accordingly presume that the Application and the Request were communicated to them for their consideration whether consent should be given by them in terms of Article IX of the Genocide Convention."

This, of course, was not at all the reason. On the contrary, the Government of Pakistan, in a communication to the Registrar dated 25 May 1973[1], made it clear that Pakistan did not invite India to give her consent but founded the jurisdiction of the Court on the basis of various instruments in force between the Parties. We expected that the Government of India would then follow the procedure laid down in the Statute and Rules of Court, and appoint an agent and put in an appearance at the present hearing of the case regarding the indication of interim measures of protection. Instead, the Government of India chose to submit the letter of 28 May, in paragraph 33 of which they foreshadowed still further correspondence with the Registrar without entering any appearance in the case or appointing an agent.

At this juncture, therefore, and in this context I would like to refer to the Statute and Rules of Court. I draw attention to Article 42 of the Statute which states, in paragraph 1, that: "The parties shall be represented by agents."

Article 43 of the Statute is also relevant and provides, in paragraph 2, as follows:

> "The written proceedings shall consist of the communication to the Court and to the parties of Memorials, Counter-Memorials and, if necessary, Replies; also all papers and documents in support."

[1] See p. 118, *infra*.

It is clear, therefore, that the letter sent by India, without the appointment of an agent, is not a written proceeding within the meaning of the Statute and Rules of Court.

Let me now refer to Article 38, paragraph 3, of the Revised Rules of Court, which states as follows:

> "The party against whom the application is made and to whom it is notified shall, when acknowledging receipt of the notification, or failing this, as soon as possible, inform the Court of the name of its agent."

It is clear that India has acknowledged receipt of the notification of the present proceedings transmitted to her by the Registrar in accordance with Article 36, paragraph 1, of the Rules of Court. However, in spite of India's obligation to appoint an agent in these circumstances, she has not done so. The letter of the Government of India of 28 May 1973, which is of the nature of a written pleading, therefore, has no legal status.

We recognize, of course, that independently of any arguments that may or may not be advanced by the Parties, the Court is obliged to consider for itself whether it is competent to act. Nevertheless, we feel that if India has a case against the granting of interim measures, or the exercise of jurisdiction for that purpose, she should appear before the Court and make her oral submissions on these points.

In spite, however, of the inadmissibility, under the Statute and Rules of Court, of a document such as the Indian letter of 28 May and the subsequent letter of 4 June, and without prejudice to our rights in this respect, I would, nevertheless, with the minimum of repetition, try to show that the contentions made therein have no substance whatsoever and are not such as the Court could accept. As far as the letter of 4 June is concerned, I will make my submission at a later stage.

I submit that the point to which the whole Indian contention leads is that contained in paragraph 31 of their letter of 28 May 1973 (p. 131 *infra*). That is, that the absence of jurisdiction is so manifest that the Court is not properly seised of the case for any purpose, even for that of considering the indication of interim measures of protection. It is suggested that there is no occasion for any oral proceedings and that the only proper action for the Court to take after itself examining the Application and the Request, in the light of India's observations, is to remove the Application from the list by an administrative order.

I have already referred to the relevant jurisdictional clauses under various instruments in force between the Parties which establish prima facie the possibility of exercising jurisdiction by the Court in respect of the merits of the dispute, and I do not find it necessary to refer to these clauses again.

I would like to emphasize that the whole elaborate Indian argument on Article IX of the Genocide Convention and on the General Act, in their latest letter, *in itself showed that the absence of jurisdiction is not manifest. If they* take more than 50 close-typed pages and give arguments in them merely to show that the lack of jurisdiction is manifest, then certainly it is not, and there would be no need for such elaborate argument. The Indian letters themselves show that on the contrary the question of jurisdiction must, at the very least, be controversial and of such a nature as the Court can only deal with after having heard full argument at the jurisdictional stage of the case. It is quite clear from the Indian letters that the lack of jurisdiction of the Court to deal with the matter is not self-evident but requires exhaustive examination. This is clearly the case, for instance, in regard to the question of the validity of India's reservation to

Article IX of the Genocide Convention and it is also the case in regard to such a question as that of the relevance and effect of Article 23 of the Vienna Convention of the Law of Treaties. But we submit that these are not matters to be gone into at this stage, in advance of the Court's consideration of its substantive jurisdiction respecting the case as a whole. We have already outlined our contentions on some of these matters and wish to reserve ourselves on others, unless directed by the Court to go into them even at the present stage. There are, however, certain further points in the Indian letter of 28 May which we find necessary to comment on at once.

For instance, the passage from paragraph 31 of the Indian statement which I quoted a short time ago is quite misconceived, because the only cases in which the Court has held itself not even to be seised of a case for any purpose are those in which there was no text or instrument on which the jurisdiction could be based, so that jurisdiction depended entirely on the consent or acceptance of the respondent. This occurred in several of the *Aerial Incident* cases and in two *Antarctica* cases where the Applicant admitted the absence of any possible prior basis of jurisdiction and invited the Respondent to accept the Applicant's offer regarding the Court's jurisdiction. It was only when that acceptance was clearly not forthcoming that the Court removed the case from the list.

For instance, the Application of the United States regarding the *Aerial Incident* of 10 March 1953, in so far as the jurisdiction of the Court was concerned, stated as follows:

> "The United States Government, in filing this application with the Court, submits to the Court's jurisdiction for the purposes of this case. The Czechoslovak Government appears not to have filed any declaration with the Court thus far, although it was invited to do so by the United States Government in the note annexed hereto. The Czechoslovak Government, however, is qualified to submit to the jurisdiction of the Court in this matter and may upon notification of this application by the Registrar, in accordance with the Rules of the Court, take the necessary steps to enable the Court's jurisdiction over both parties to the dispute to be confirmed.
>
> The United States Government thus founds the jurisdiction of this Court on the foregoing considerations and on Article 36 (1) of the Statute." (*I.C.J. Reports 1956*, p. 7.)

It is clear, therefore, that the Applicant is merely inviting the Respondent to accept the jurisdiction of the Court and is not relying on any instrument emanating from the Parties, as in the *Fisheries* case, or for that matter in the *Interhandel* case. The same is true of the *Aerial Incident* case of 8 October 1953 between the United States and the USSR. I refer the Court to the *I.C.J. Reports* at page 10. The invitation is more or less of a similar nature and I do not propose to quote it. I may also refer to the Application of the United States in the case concerning the *Aerial Incident* of 4 September 1954, in which the United States went so far as to state:

> "... the Soviet Government in a note dated 10 October 1957 which is made an Annex to the present application rejected the United States Government's invitation. The Soviet Government is qualified to submit to the jurisdiction of the Court in this matter and may, upon notification of this application by the Registrar, in accordance with the Rules of the Court, take the necessary steps to enable the Court's jurisdiction over both Parties to the dispute to be confirmed."

I may also refer to just one of the *Antarctica* cases, that is the one instituted by the United Kingdom against Argentina in its Application of 4 May 1955 (*I.C.J. Reports 1956* at p. 13). The Application contains the following reference to the question of jurisdiction:

> "The United Kingdom Government . . . declares that it hereby submits to the jurisdiction of the Court for the purposes of the case referred to the Court in the present Application . . . The Argentine Government has not, so far as the United Kingdom Government is aware, yet filed any declaration accepting the Court's jurisdiction, either generally under Article 36 (2) of the Statute or specially in the present case. The Argentine Government, which has frequently expressed its adherence to the principle of judicial settlement of international disputes, is, however, legally qualified to submit to the jurisdiction of the Court in this case. Consequently, upon notification of the present Application to the Republic of Argentina by the Registrar in accordance with the Rules of Court, the Argentine Government, under the settled jurisprudence of the Court, can take the necessary steps to that end, and thereby cause the Court's jurisdiction in the case to be constituted in respect of both Parties."

It is to this class of case that the passages from Hudson, Rosenne and Shihata cited in the Indian letter (pp. 129-131, *infra*) refer and it is altogether a different type of case from the present one. Moreover, and I particularly draw the Court's attention to this aspect, in those cases there was no question of interim measures of protection. In marked contrast are such cases as the *Anglo-Iranian Oil Company* case, the *Interhandel* case and the *Fisheries Jurisdiction* case, where the Court seised itself of the request for interim measures because there was an instrument emanating from the Parties which appeared prima facie to afford a possible basis on which the jurisdiction of the Court might be founded. As regards the existence of any reservations and their validity and legal effect—a question which must of course be gone into at the proper time—it may be mentioned that in the *Interhandel* case the automatic reservation of the United States regarding domestic jurisdiction was clear. The question of the jurisdiction of the Court under that reservation was to be decided by the Government of the United States and they had made their decision to the effect that the case fell within their reservation. Nevertheless, the Court seised itself of the case and went into the question of interim measures. The reason why it did not grant the interim measures in that case was connected with the substantive merits of the matter as urgency no longer remained. The Court, therefore, did not think any interim measures were necessary but this was not because it held that it did not have jurisdiction to grant them.

I would therefore like to stress that Pakistan is not required for the purpose of a request for interim measures to establish the Court's jurisdiction, but only to show that there is a possible basis for it and that its absence is not so apparent as to be beyond argument. It is not of our choosing, Mr. President, that we have been led at this stage of the proceedings into saying so much about the question of the Court's substantive jurisdiction in regard to the case as a whole, which should of course be reserved for a later stage. I would recall that in the *Anglo-Iranian Oil Company* case, the Court specifically stated that a grant for interim measures in no way prejudiced the question of its ultimate jurisdiction to pronounce on the merits of the case.

Mr. President, I would now like to cover some of the other points raised by the Government of India in its letter of 28 May 1973. In this letter (p. 123, *infra*) the Government of India has made certain preliminary observations and has stated

that she regards the Genocide Convention as among the most important humanitarian conventions adopted by the United Nations. If the Government of India truly regarded the Genocide Convention as so important then why did she purport to make a reservation in respect of the jurisdiction of the International Court which, under the Convention, is the main guarantor and supervisory body regarding the due fulfilment of the Convention? I do not pretend to be aware of the motives of India in making the purported reservation. However, one wonders whether the reservation was made in view of the treatment accorded by India to the Muslim community in India and Kashmir and also to the Sikhs and Nagas and the Mizos.

In the letter (p. 123, *infra*) India asserted that any controversy, difference or dispute relating to the interpretation, application or fulfilment of the Genocide Convention should be invoked by the victim of the genocide to enforce the object and purpose of the Convention. According to India, the Applicant should be a sufferer and the Respondent must explain and defend any of his actions alleged to constitute a breach of the object and purpose of the Convention. I would, however, like to stress that Article VI of the Convention in no way stipulates that the State in whose territory the acts occurred must also be the sufferer from them. One can imagine cases where this might not be so—for instance, acts of genocide committed by one body of foreign workers in a country in respect of another such body, also temporarily in that country. I would also submit that Pakistan was not only, at the time, the State in whose territory the acts occurred but was also, by that very fact, the victim of those acts *when* they occurred, since they were committed in respect of Pakistani nationals on Pakistan territory.

India says (p. 124, *infra*) that the territory where these acts were committed, the State whose nationals were victims of genocide and who wish to bring the offenders to justice, is neither the Applicant in the present case nor even the Defendant or the Respondent. To this our answer is that the *test* date must be the date when the alleged acts took place, because it is on that date that the right to try the accused arose and on that date the territories that now constitute Bangla Desh were Pakistani territories. We submit, Mr. President, that a change in the status of the territory taking place subsequently is irrelevant and cannot affect a right which had already accrued.

On the same page, India states that since Pakistan has pointed to the difficulty of being able to establish in practice a competent tribunal in Bangla Desh within the meaning of Article VI of the Genocide Convention, the Court has been approached by Pakistan to adjudge and declare upon the rights, obligations and competence of a third State, viz. Bangla Desh which is a party in interest even in the absence of its consent to the Court's jurisdiction. In this context the *Monetary Gold* case has been cited about which I will presently say something. I would, however, first emphasize that quite apart from anything to do with the case, the Indian argument is incorrect, for it is not Bangla Desh's rights and obligations which Pakistan is asking the Court to consider but the position of India.

If we have argued that no tribunal in Bangla Desh would be competent—in the sense that no fair trial can be expected from any court there—that is in order to show why, quite apart from Pakistan's exclusive right to try the persons concerned, they should not be sent to Bangla Desh, and why the Court should, in respect of India, not Bangla Desh, grant interim measures to prevent it; for once done it would be irreversible and hence completely prejudicial to Pakistan's right to try these persons if the Court in due course holds that Pakistan has that right.

We submit that the *Monetary Gold* case is not a precedent which is relevant in the present context. Firstly, because it did not deal with an application for interim measures and, therefore, the Court was at once seized with the question as to whether or not it had jurisdiction to pronounce on the merits of the Application made to it by the Governments of Italy and the United Kingdom. And, secondly, because in that case the gold in question was admittedly that of Albania and the Governments of the United Kingdom and Italy were claiming the right to set off their claims against Albania as against Albania's right to the recovery of the gold. It was a case which could not be decided without first determining the merits of the Italian claim against Albania, for in order to consider the question of priority of claims as between Italy and the United Kingdom *inter se*, it was first necessary to determine whether Albania had committed any internationally wrong action against Italy and whether she was under an obligation to pay compensation to her and, if so, to determine also the amount of such compensation. Only if Italy had a good claim against Albania could the question of priority of that claim as against that of the United Kingdom arise. The Court accordingly held that the Albanian legal interest would not only be affected by its decision but would form the very subject-matter of the decision and hence it declined to exercise jurisdiction.

I would refer in particular, as to the facts, to pages 21 and 22 of the Judgment, and to pages 31-34 as to the view taken by the Court. We therefore submit that this argument of India is wholly misconceived and I would once more stress that we are not asking the Court to pronounce on Bangla Desh's rights vis-à-vis Pakistan, but are simply asserting as against India that we have the exclusive right to try the persons concerned who should not, therefore, be handed over by India in a manner irreversibly prejudicial to Pakistan's right if it exists, as we contend it does, and as is for the Court to decide.

For two additional reasons Bangla Desh has no *locus standi* in this matter. First, Bangla Desh is not a party to the Genocide Convention and can, therefore, have no rights under Article VI as such and, secondly—and this I submit is important—at the time the alleged acts are said to have been committed, Bangla Desh was not even in existence and Pakistan had already acquired and completed rights by virtue of the commission of the said acts. These acquired rights arose contemporaneously with the commission of the acts in question. It is also a fact that Bangla Desh is not even a party to the Statute of the Court, nor a member of the United Nations. However, Bangla Desh's lack of status is not the real point in these proceedings. The point is whether, as between Pakistan and India, the persons concerned should be irreversibly handed over, and whether the Court should grant interim measures in respect of that matter.

I have not commented on all the points contained in the Indian letter of 28 May, and designedly so, because these points—all of them controversial and controverted by us are relevant, if at all, only to the substance of the question of the Court's jurisdiction to pronounce on the merits of the case. They cannot, in our view, properly be regarded as material at this stage, when the question is simply whether or not to make a grant of interim measures. I shall, therefore, now leave the issue of jurisdiction and pass on to the substance of our application for those measures.

As I have said, I now propose to deal with the principles applicable regarding the substance of a request for interim measures, such as the existence of urgency in the case and the need for protection. Most important of all is the principle expressed in paragraph 21 of the Order of the Court in the *Fisheries Jurisdiction* case, which was as follows:

"21. Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue."

I first refer to the principle regarding urgency and the need for interim measures of protection. This principle is implied in the Court's action in the *Interhandel* case, which concerned the proposed sale of some shares in the General Analine and Film Corporation by the United States. The shares in question, which were vested in the United States Government, as a result of trading-with-the-enemy legislation, were claimed by the Swiss Government as the property of its nationals. The Swiss Government contended that the shares in question were not enemy property and could not be vested in the United States Government. The Swiss Government, apprehending that the United States was about to sell the shares, requested the Court to prevent it from selling "so long as the proceedings in this dispute are pending". The Court declined to grant interim measures of protection on evidence being produced that the shares could not be sold until after the termination of judicial proceedings taking place in the United States with regard to whether or not the shares constituted enemy property, and that there was no likelihood of a speedy conclusion of those proceedings. Moreover, the United States Government indicated to the Court that it was not taking action at that time even to fix the time schedule for the sale of shares.

In the recent *Fisheries* case between Great Britain and Iceland on the other hand, the Government of Iceland was preparing to take, within a month, action involving the extension of its exclusive fisheries zone, the result of which would have been to exclude British trawlers from fishing in those waters in the future. The urgency pleaded by the British Government was the need for fishing companies in the United Kingdom to plan in advance the grounds to which they could direct their vessels, and that a voyage to Iceland took perhaps three weeks to prepare and undertake. On the basis of these facts the Government of the United Kingdom succeeded in pleading "urgency" in the case. The Court thought fit to grant interim measures of protection.

Let us now look at the facts in the present case. I refer once again to the statement of the Foreign Minister of Bangla Desh, Dr. Kamal Hossain, which was reported by Radio Bangla Desh and the *Times of India* news service, and I only quote the first paragraph of that statement as reported, which I think, is significant. The whole statement appeared as Annex C-VIII to the Application. "The Foreign Minister, Dr. Kamal Hossain, today announced the Bangla Desh Government's decision to try 195 POWs for war crimes. The proceedings will begin by the end of May." I may also refer to the message sent to the Government of Pakistan by the Minister of External Affairs of India on 8 May which states, *inter alia*:

"Likewise the contention of Pakistan Government in paragraph 3 of its statement questioning the competence of the Government of Bangla Desh to bring to trial certain prisoners of war on criminal charges is unacceptable."

This clearly showed that India, in complete disregard of Pakistan's rights and claims, contemplates to transfer Pakistani prisoners of war for trial to

Bangla Desh any time now, and hence the requirements of urgency are clearly met.

With respect, Mr. President, I would like to submit that in regard to urgency this case stands at a higher footing than the *Fisheries* case, in which interim orders were granted by the Court since, in this case, human lives are involved.

This brings me to the last principle applicable in the case of interim measures, and expressed by the Court in paragraph 21 of the Order in the *Fisheries* case. In accordance with this, three points have been borne in mind:

(a) The right of the Court to indicate provisional measures as provided for in Article 41 of its Statute has as its object to preserve the respective rights of the parties pending the decision of the Court.

(b) The object in exercising this right is that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings.

(c) That the Court's judgment should not be anticipated by reason of any initiative regarding the matters which are in issue.

Hence we are referring to the power of the Court under Article 41 of the Statute only. I shall separately refer to the independent powers of the Court to grant interim measures under Article 33 of the General Act for the Pacific Settlement of International Disputes of 1928. Let us then consider each of these points emphasized by the Court in paragraph 21 of its Order in the *Fisheries* case.

The question in issue between India and Pakistan in these proceedings is whether or not Pakistan has exclusive jurisdiction with respect to the holding of trials for genocide and other crimes, in relation to the 195, or any other number of Pakistani prisoners of war, now in Indian custody. Should the Government of India, before the decision of the Court, hand over the Pakistani prisoners of war in question to Bangla Desh for trials, it would not be possible to preserve the rights of Pakistan pending settlement of the dispute and the proceedings before the Court will be rendered infructuous. The respective rights of the Parties can best be preserved through interim measures of protection calling upon India not to make such a transfer until the Court has finally decided whether Pakistan's claim to exclusive jurisdiction is valid, If the prisoners of war are transferred to Bangla Desh this step will be clearly irreversible for, even if they remained alive, the Bangla Desh authorities would be unwilling to hand them back. In this context I draw attention to the statement of Sardar Swaran Singh, Minister of External Affairs of the Government of India in the Security Council on 21 December 1971, which I referred to yesterday and which I am going to refer to again:

> "The presence of the Indian forces in Bangla Desh is, therefore, necessary for such purposes as the protection of the Pakistani troops who have surrendered to us and [here it is important] for the prevention of reprisals and the like."

The moment the troops are sent back Swaran Singh says that there will be reprisals. Before they come and see the court they may be lynched. This is our apprehension. I would now show, Mr. President, that this gives an indication of the fact that the Bangla Desh people and the Government will not be willing to reverse any steps which they may take in regard to the trials and sentencing of Pakistani prisoners of war, even if the Court's decision declared Pakistan's exclusive jurisdiction.

I will now show that the handing over of the prisoners of war will result in irreparable prejudice to rights which are the subject of dispute in these judicial proceedings. My submission is that if the prisoners of war in question are

handed over to Bangla Desh, not only would the requirements of fair trial not be met, but also Pakistan's exclusive right to hold such trials will be prejudiced. It is Pakistan's right and duty to hold such trials and to expel from its armed forces and punish those individuals who may have been responsible for any kind of criminal acts. This is absolutely essential from the point of view of discipline in the armed forces of any country and, therefore, our rights will be irreparably prejudiced if the persons concerned are handed over to Bangla Desh. The Bangla Desh trials will be politically motivated and of a vindictive nature, and in our view will not be such as can impartially establish the guilt or innocence of the individuals involved. India herself apprehended such a situation when the Indian Foreign Minister, whose statement I have just quoted, stated apprehension about the prevention of reprisals and the like. But whether they were found guilty or acquitted, the accused could then take shelter behind the principles or criminal law of universal validity that a person may not be placed in double jeopardy. Pakistan would then be excluded from trying the prisoners of war at any future time, and hence its right to hold such trials would be irreparably prejudiced. Moreover, the trials will be viewed in Pakistan as having taken place illegally in disregard of Pakistan's right under international law and the Genocide Convention, and will inevitably lead to an increasing enmity and to the reversal of steps taken so far to move towards an era of peace and amity in the subcontinent, thus further extending and aggravating this dispute between India and Pakistan.

Lastly, Mr. President, it is clear from the Order of the Court in the *Fisheries* case that no party should anticipate the ultimate decision of the Court on the merits by means of any initiative taken regarding the matters which are in issue pending the judgment of the Court. We submit that India has a duty not to anticipate that the case instituted by Pakistan before the Court will be decided against Pakistan and in favour of the contention of the Government of India regarding the exercise of jurisdiction over the prisoners of war in question. To anticipate such a decision in a final and irreversible manner would amount to prejudging the decision of the Court on the merits of the case.

Before coming to the end of my submissions, Mr. President, I would like also to refer to the independent power of the Court under Article 33 of the General Act for the Pacific Settlement of Disputes of 1928. Since Pakistan has invoked Article 17 of the General Act as an additional basis for the jurisdiction of the Court, I draw attention to the mandatory provision in Article 33 which states: "the Permanent Court of International Justice . . . *shall* lay down within the shortest possible time the provisional measures to be adopted."

I would respectfully submit that, in contrast to Article 41 of the Statute, Article 33 of the General Act is more stringent, and involves an element of duty for the Court, since the word "*shall*" instead of the word "may" has been used with regard to the provisional measures to be indicated.

I also draw attention to the obligation that the parties have undertaken under Article 33, paragraph 3, of the General Act to abstain from all measures likely to react prejudicially upon the execution of the judicial decision and abstain from any sort of action whatsoever which may aggravate or extend the dispute. I submit that if the prisoners of war are transferred to Bangla Desh and the Court subsequently decides that Pakistan alone has jurisdiction, it will be impossible to give effect to that decision. Again there is no doubt whatever that the trials in question, if held in Bangla Desh, will be merely a public show in order to justify the execution of the arbitrarily selected high-ranking military personnel of the Pakistan army and civil servants. In this context I would again draw attention to the obligation of the parties in the Agreement on Bilateral

Relations between the Government of Pakistan and the Government of India, signed at Simla on 2 July 1972, which provides in Article 1, paragraph 2, as follows:

> "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. Pending the final settlement of any of the problems between the two countries neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peace and harmonious relations."

Under this treaty also India cannot unilaterally hand over 195 or any other number of prisoners of war.

The present issue between India and Pakistan regarding Pakistan's right to exclusive jurisdiction is a difference between them which has been referred to the International Court of Justice, which provides a peaceful means for the settlement of differences. There is, I submit, an obligation on India that pending final settlement of the problems between the two countries, including the question of jurisdiction with respect to the said prisoners of war, India shall not unilaterally alter the situation by transferring the Pakistani prisoners of war in question to Bangla Desh. Such an act would also be clearly detrimental to the maintenance of peace and harmonious relations.

It may be noted that over 17 long months have passed without any allegation being levelled at any particular individual, and if the Government of India could wait so long merely to receive allegations, there is no reason why India cannot wait for the decision of this Court regarding the question of jurisdiction. In fact, if her claim is indeed in accordance with her professed regard for the Convention she should not hesitate to have the matter adjudged by the Court rather than unilaterally take action which would be considered illegal and not conducive to the maintenance of friendly relations in the subcontinent.

Mr. President, there remains one final matter, and that concerns the fate of the thousands of prisoners of war and civilian internees who are not numbered amongst the small number accused of genocide. We recognize, of course, that their situation in respect of any grant of interim measures is different, inasmuch as the fact that India continues to detain them, though illegally, does not by itself—at least in theory—prevent their ultimate repatriation to Pakistan. We have, however, indicated that the deeply unsatisfactory circumstances of their detention, which amount to a sort of indefinite sentence of imprisonment, are gravely affecting their physical and mental health, so that by the time they are repatriated their condition may have deteriorated or suffered in such a way that the effects cannot easily be reversed; and also, Pakistan's right to the return of her troops and other nationals as useful human beings will be prejudiced. It was, as I mentioned earlier, precisely the public concern over the harmful results of detention continued long after any military justification for it had ceased to exist, that led to the change introduced by Article 118 of the 1949 Geneva Conventions in order to bring the obligation to repatriate into play immediately upon the cessation of active hostilities. Another factor is the anxiety and further mental strain caused to those concerned, and to their families, by the ever-present possibility of surrender to Bangla Desh, the uncertainty surrounding the matter and the whole question of repatriation.

In view of India's undoubted obligation to repatriate all these prisoners and internees, and the patent invalidity of the grounds adduced for not doing so, Pakistan has in the present proceedings refrained from asking the Court for any

direct declaration to that effect, since this might only serve as a pretext for their continued detention during the months that may well elapse before the Court was able to give its final decision on the matter, whereas our contention is that the obligation to repatriate exists at this very moment, and should be implemented immediately. We do, however, feel justified in requesting the Court if, as we hope, it grants our request for interim measures in respect of those in danger of transfer to Bangla Desh, to add as a natural corollary that the non-transfer of these persons and their continued dentention in India pending the Court's ultimate decision as to who has the right to try them is not to constitute a ground for the continued detention of all the other prisoners and internees as well—seeing that in this case no question of a possible transfer to Bangla Desh can arise and there exists no valid cause why they should not forthwith be released and returned to Pakistan. We believe that it is within the power of the Court to give this indication, and we earnestly request it to do so.

I would now like to draw the attention of the Court to the connection that exists between the question of repatriation of all the remaining prisoners of war and the allegations of genocide against 195 or any other number of such persons, and to show that the Court can also indicate to India the interim measures of protection prayed for by Pakistan in paragraph 3 (1) of Pakistan's request, that is:

> "That the process of repatriation of prisoners of war and civilian internees in accordance with international law, which has already begun, should not be interrupted by virtue of charges of genocide against a certain number of individuals detained in India."

The Government of India has continued to illegally detain over 92,000 Pakistani prisoners of war and civilian internees for over 17 months, and has maintained that a number of these prisoners of war are wanted by Bangla Desh for having committed acts of genocide. This number has now been stated as being 195 persons. However, to this day India has not specified the names of individuals against whom accusations are going to be made. The effect of this has been that India has held on to over 92,000 Pakistani prisoners of war and civilian internees taken from East Pakistan after its occupation by India. The process of implementation of the Geneva Conventions and, in particular of Article 118 of the Third, and Articles 133 and 134 of the Fourth Convention, which had already begun, has been halted by India mainly on the excuse, or one of the excuses, that there are allegations of genocide against a few individuals. Pakistan's right to the repatriation of its prisoners of war, in accordance with international law, is being prejudiced by virtue of these allegations against a certain number of individuals, who have not to this day been named. I would repeat here what we have stated in paragraph 9 of Pakistan's Application, that is, that the Genocide Convention does not warrant the holding of over 92,000 persons in custody, in breach of rights under international law regarding their repatriation, merely because of allegations against a few regarding acts of genocide. In order, therefore, to preserve the rights of Pakistan, the Court could, we submit, call upon India to obtain immediately from Bangla Desh the names and particulars of the 195 accused, and to continue the process of implementation of the Geneva Conventions with respect to the rest. This submission is of course without prejudice to Pakistan's right to repatriate and try the 195 prisoners of war.

In conclusion I would respectfully submit that if there ever was a case in which the requirements of law and considerations of justice and humanity called for immediate action by means of measures of protection, and in the

other ways we have mentioned, it is this one. The life, liberty and well-being of a large number of persons is at stake, as also the right of their State with regard to their repatriation and the trial of those of them who may be accused of offences. The urgency is obvious, and so is the irreparable character of what may occur if no steps are taken to prevent it. The Court alone can take these steps, and we believe it will do so.

Having concluded my submissions, Mr. President, I thank you and the Members of the honourable Court for giving me a very patient hearing.

The Court adjourned from 11.35 a.m. to 11.45 a.m.

Mr. President, before I am asked any questions, I think I made a submission in the course of my address that, on the latest Indian letter, the Court did not instruct me to make any comment at this stage. By "at this stage" I did not mean at this stage of interim measures, I meant today. I will naturally require time to consider that lengthy document, running into over 30 close-typed pages, with many references, and unfortunately for three days the libraries are closed, so that will take us up until some time next week, probably Wednesday or Thursday, to be of some assistance to the Court in making comments on that letter.

The PRESIDENT: I understand that you wish to be given an opportunity to make some additional statements in connection with the last letter of the Indian Government, at a later stage. At the end of these comments you will make your submissions.

Mr. BAKHTIAR: Yes, naturally, after we conclude, Mr. President.

The PRESIDENT: This opportunity will be granted to you. The Court will then hold a hearing in order to give you this opportunity not earlier than next Thursday: meanwhile, three of my colleagues would like to put some questions to you today.

QUESTIONS BY JUDGES ONYEAMA, JIMÉNEZ DE ARÉCHAGA AND SIR HUMPHREY WALDOCK

Judge ONYEAMA: My question is this: What in your view is the legal effect of Pakistan's failure to object to India's reservation to Article IX of the Genocide Convention?

Judge JIMÉNEZ DE ARÉCHAGA: Has the Government of Pakistan addressed to the depositary any communication, declaration, notification of succession or accession regarding the 1928 Geneva General Act or the 1949 Revised General Act on the Peaceful Settlement of Disputes?

Mr. BAKHTIAR: I have already made some submissions on this point, but I will make some further submissions.

Judge Sir Humphrey WALDOCK: I should be glad if the Government of Pakistan could clarify a little further the reasons why they consider that the Indian reservation to Article IX was prohibited by the Genocide Convention. The other questions which I should like to put to the Government of Pakistan concern the Indian Independence International Arrangements Order. There are two questions; the first is: Does the Government of Pakistan agree with the statement of the Indian Government, in its letter of 4 June[1], that the General Act of 1928 is not included in the list of treaties that was drawn up by the Expert Committee No. 9; and, if so, in the opinion of the Government of Pakistan, does that affect the devolution of that agreement as between the two Governments? And then, the second question is: Would the Government of Pakistan be good enough to explain further its argument—if I understood it correctly—that the devolution agreement, contained in that Indian Independence International Arrangements Order of 1947, contained an agreement which devolved of its own force on the Government of Pakistan and the Government of India so as to create mutual obligations between them in connection with the General Act of Geneva? If you could be good enough to explain a little further your argument upon that point.

Mr. BAKHTIAR: I shall certainly endeavour to answer all these questions, and I shall try to do them by Thursday, so that my address is concluded on that day, if you will please grant me permission for that.

The PRESIDENT: Yes, the Court will now rise, and the exact date of the next hearing will be announced early next week. The hearing will not be held, according to your wishes, earlier than Thursday, 14 June.

Mr. BAKHTIAR: I am much obliged to the Court.

The Court rose at 11.55 a.m.

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[1] See p. 139, *infra*.

THIRD PUBLIC SITTING (26 VI 73, 10 a.m.)

Present: Vice-President AMMOUN; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, IGNATIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH; *Judge* ad hoc Sir Muhammed ZAFRULLA KHAN; *Registrar* AQUARONE.

Le VICE-PRÉSIDENT faisant fonction de Président: La séance est ouverte. La Cour est réunie pour permettre à l'agent du Pakistan de répondre aux questions qu'ont posées M. Onyeama, M. Jiménez de Aréchaga et sir Humphrey Waldock. Il lui sera loisible de présenter également les observations qu'il jugera pertinentes à ce stade de la procédure.

M. le Président Lachs et M. Dillard, souffrants, ne peuvent assister à l'audience. M. Ruda a été également excusé pour cette audience.

Mr. BAKHTIAR: May it please the Court: my presentation today will fall into two parts. It will be mainly directed to furnishing the Court with our comments on the Indian letter to the Registrar of the Court which, as I said when I last addressed the Court, had almost the dimensions of a written pleading. In so doing I shall cover several of the points raised in the questions that have been put to me by Judges Onyeama, Jiménez de Aréchaga and Sir Humphrey Waldock. However, since it may be convenient to the Court to have the questions separately dealt with, I shall begin by giving our answers to them.

I propose to deal with the questions in the following order. The first was that put by Judge Onyeama concerning Pakistan's failure to object to India's reservation to Article IX of the Genocide Convention—if, in fact, there was any such failure, a point I shall return to later. However, before replying to this question it will be convenient, for reasons that will become apparent in due course, to open with the first of Judge Sir Humphrey Waldock's questions, namely why we considered the Indian reservation to Article IX to be prohibited —that is to say, as we would put it, impliedly prohibited. This will pave the way for our answer to Judge Onyeama's question, and after that I shall come to Judge Jiménez de Aréchaga's question and Sir Humphrey Waldock's second question, between which there is a certain connection, and then I will end up with Sir Humphrey Waldock's third question.

Judge Sir Humphrey Waldock's first question was:

> "I should be glad if the Government of Pakistan could clarify a little further the reasons why they consider that the Indian reservation to Article IX was prohibited by the Genocide Convention."

It is not our contention that the Convention expressly prohibited reservations to Article IX or, indeed, to any article of the Convention. Nor, on the other hand, did it expressly allow them. It was simply silent on the subject. In these circumstances the permissibility of any reservation must depend on its own intrinsic character in relation to that of the Convention itself. The Court in its Advisory Opinion in the case of *Reservation to the Genocide Convention* made it clear that although the silence of the Convention about reservations did not rule out the possibility that they could be made, it equally did not mean that the parties could make any reservations they liked at will. At page 22 of its Opinion the Court stated:

> "The character of a multilateral convention, its purpose . . . mode of preparation and adoption, are factors which must be considered in determining, in the absence of any . . . provision on the subject, the possibility of making reservations, as well as their validity and effect."

I would stress those last few words "the possibility of making reservations, as well as their validity and effect". Again, on page 24 of its Opinion, the Court stated:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them . . .
>
> It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention."

From these passages it is clear that the Court visualized that a reservation could only be valid and have legal effect, as such, if it was not against the object and purpose of the Convention or, in other words, its basic aim and character. Conversely, the Court recognized that the basic character of the Convention would be a restricting factor on the making of reservations.

In view of this, we contend that reservations that are inconsistent with the basic character of the Convention must be regarded as impliedly prohibited by it, or, to put the matter in another way, such reservation must, in the light of the character of the Convention, be considered as null and void and without legal effect.

In the *Reservations* case the Court was not considering any particular reservation. It was answering specific questions addressed to it by the United Nations General Assembly which, as their terms and the circumstances in which they came to be put to the Court clearly show, were to a significant degree directed to clarifying the position of the Secretary-General in receiving and dealing with ratifications and accessions to the Convention to which reservation might be allowed. This can also be seen from the Court's own remarks about the middle of page 19 of its Opinion. The Opinion cannot, therefore, be regarded as an exhaustive statement of the law relating to reservations, and a careful study of it does reveal certain seeming inconsistencies in the views expressed. For instance, in answer to the first of the three questions addressed to it, the Court said that a State which made and maintained a reservation that was not compatible with the object and purpose of the Convention could not be regarded as being a party to the Convention.

On the other hand, in answer to the second part of the question (Question II *(b)*), the Court said that any other party which accepted the reservation as being compatible could regard the reserving State as being a party to the Convention. It seems to us, however, that any given reservation must either be objectively compatible or else not. It is difficult to see how the same reservation could be compatible for some States but not for others. Equally, it is difficult to see how, in the case of a convention having the character of the Genocide Convention, the obligations of which are essentially absolute but not contractual, a State can be a party to it in relation to certain parties to the convention but not in relation to certain other parties, for this would seem to imply that the same acts of genocide can be contrary to the Convention in some contexts and not in others.

Moreover, if an incompatible reservation has nonetheless been accepted by another party, then the convention which is in force between that party and the reserving party is not the convention which would in certain respects be incompatible with it—in short, an amended convention, although the procedure prescribed by Article XVI of the Convention for amending it would not have been followed. In accordance with Article XVI, a request for the revision of the Genocide Convention has to be made in writing addressed to the Secretary-General. Thereupon the General Assembly has to decide upon the steps, if any, to be taken in respect of such request.

I have made these remarks not by way of criticism of the Court which, in 1951, was faced with a very difficult and in some ways novel situation, and which was moreover concerned only to give answers to certain particular questions of an abstract character. I have made these remarks because, in my submission, the question of the effect of a reservation which runs contrary to the basic character and policy of a convention requires further consideration, and should be gone into by the Court *de novo*; but not in proceedings about interim measures, for what I have been saying strongly reinforces our whole contention that the jurisdictional issues that arise in the present case are of such a complex kind that they could not be finally decided by the Court at this stage, either in favour of or against its jurisdiction.

However, the Court in 1951 did show itself very much aware of the sort of reasons why a reservation such as India's might be considered to amount to a nullity, having regard to the character of the Genocide Convention itself; and after stating that "The objects of such a convention must . . . be considered" it went on to describe the Convention as follows:

> "The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; . . ."

I respectfully draw the attention of the Court to this sentence again:

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishement of those high purposes which are the *raison d'être* of the convention."

I emphasize the word "accomplishment" because I will be using the word "fulfilment" in a different context.

> "Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."

I emphasize the words "all its provisions".

In the case of a convention having the character described in this passage from the Court's 1951 Opinion, it is our contention that the inclusion in it of a clause for the obligatory reference to the International Court of any disputes concerning the interpretation, application or fulfilment of the convention—and I stress the word "fulfilment"—has to be regarded as showing an intention to

confer a supervisory role on the Court, as a guarantee for the fulfilment of the objects and purposes of the Convention, much in the same way as the Court held in its 1962 *South West Africa* Judgment—and by implication in its *South West Africa* Advisory Opinion of 1950—that the Court had a supervisory function in respect of the mandate. Article IX was intended to act as a safeguard against breaches of the Convention and this was unquestionably the view taken by the Court itself in the *Reservations* case, as shown by the last passage cited by me in my oral submission earlier on this point, on page 50, *supra*.

In view of the importance of the matter, I will venture to read that passage again, and also the comment I then made on it. On page 27 of the Court's Opinion, it states:

> "It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention."

This last statement is—as I submitted before, and I submit again—of the greatest importance; for if the test of the validity of any reservation is to be made in the last resort, recourse to adjudication under Article IX, then this clearly implies and must entail that no reservation can validly be made to Article IX itself or, if made, must be held abortive. Otherwise, the test which the Court clearly contemplated as the ultimate safeguard would be destroyed and, the statement it made on this point obviously assumes that Article IX will always remain fully operative and available. Hence, a reservation to Article IX must be regarded as contrary to the policy of the Convention and held inadmissible. In this context we also refer to and adopt Australia's argument about the automatic-type reservation to an optional clause declaration being contrary to the policy of the Statute and, therefore, void. [*Nuclear Tests*, sitting of 22 May 1973.]

I will now revert to Judge Onyeama's question, which was: "What in your view is the legal effect of Pakistan's failure to object to India's reservation to Article IX of the Genocide Convention?"

It may be that Pakistan did not enter any specific objection to India's reservation, as such, because—and I shall return to this in a moment—for the reasons I gave in answering Sir Humphrey Waldock's first question we regarded this reservation as being inherently invalid, and therefore null and void, irrespective of whether any objection was or was not taken to it.

However, Pakistan did in fact, by a different process, object to this reservation, because we publicly objected to any reservations at all being made to the Genocide Convention. In fact Pakistan has consistently taken the stand that the convention could not properly be subject to reservations.

I may refer here to the statement of Pakistan in the General Assembly of the United Nations, when the Advisory Opinion of the International Court of Justice was being discussed. The representative of Pakistan stated—and I quote from the Summary Record:

> "Mr. *Ali* (Pakistan) did not intend to examine in detail the various opinions expressed during the discussion but wished to make some comments on the question of reservations to the Convention on Genocide.
>
> While considering the Court's opinion with all the respect due to it, he

keenly regretted that he was unable to accept an opinion which did not take account of the humanitarian aspect of the problem. It was not without value to recall the atrocities committed, for purposes of racial extermination, against groups of human beings, in particular women and children. After seeing such degrading acts, it was comforting to find that the humanitarian feelings which should animate any civilized society had inspired the drafting of the Convention on Genocide. It seemed scarcely conceivable [I emphasize these words that Mr. Ali, the representative of Pakistan, said 'It seemed scarcely conceivable'] that the giving of a certain flexibility to that convention should now be visualized, and it was in any case contrary to the principles of the Charter, according to which States were determined 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. No reservation to the Convention on Genocide could be examined in the light of the so-called criterion of compatibility with the aim and purpose of the Convention. The terms of 'compatibility' and 'incompatibility' could be given no clear legal definition, and consequently the adoption of that criterion would give rise to the most serious dangers, as the United Kingdom representative had stressed. No one could dispute the fact that the Convention on Genocide, in view of its very nature, and scope, could not be the object of any reservation whatsoever." (*UN, GA, OR*, 6th Session, 1951-1952, Sixth Committee, 7 November to 29 January, at p. 88.)

This has always been and continues to be Pakistan's position today, and even if our statement in the General Assembly was a little too sweeping, because we realize that some reservations may be trivial or only technical, it was unquestionably intended to relate to and cover any reservation of a fundamental character such as, for the reasons I gave in replying to Sir Humphrey Waldock, the Indian reservation clearly is.

However, we go further than this, and contend that *ex hypothesi* there can be no necessity to object to an inherently invalid reservation. Objection, or non-objection, can only be relevant in those cases where, in the absence of any objection, the reservation could become valid. When the reservation is inherently invalid *per se*, irrespective of objection, it is a nullity and void *ab initio*. Consequently, there is nothing to which an objection could attach. Objection cannot invalidate what is already invalid, nor can failure to object validate it. Accordingly, the question of objection or non-objection becomes immaterial in relation to this type of reservation. This is really the short answer we would give to Judge Onyeama's question—namely that even if Pakistan had not declared a general objection to reservations to the Genocide Convention, the absence of any specific objection to India's reservation would not have any adverse legal effect on Pakistan's position, because the reservation was in any case void. I shall indicate later, in my comments on India's letter of 4 June[1], why we contend that this did not produce the further effect of causing India not to be, or to cease being, a party to the Genocide Convention.

I come next to the question asked by Judge Jiménez de Aréchaga which was as follows:

"Has the Government of Pakistan addressed to the despositary any communication, declaration, notification of succession or accession regarding the 1928 Geneva General Act or the 1949 Revised General Act on the Pacific Settlement of Disputes?"

[1] See p. 139, *infra*.

The answer to this question, in the terms in which it is framed, is that the Government of Pakistan has not addressed to the depositary any communication, declaration, notification of succession or accession regarding the 1928 General Act for the Pacific Settlement of Disputes, and Pakistan has not acceded to the 1949 Revised General Act. However so far as the 1928 General Act is concerned, Pakistan contends that she was, as a matter of law, a separate party to this treaty as from 14 August 1947, the date of independence, and absence of notification to the depositary cannot of itself undo or nullify that. We know of no text or principle of law which could cause Pakistan to cease to be a party to the Act of 1928, if she was one, merely because such notification was not made, particularly in circumstances where there was no positive obligation to do so. In any event, notification is essentially a formal step and the absence of it cannot in our view cancel substantive rights.

In answer to this question I would make two further submissions. First, that Pakistan was not a new State and hence there was no requirement of notice, and secondly, even if there was such requirement, sufficient notice was in fact given by Pakistan.

I respectfully submit that there was no requirement of notifying succession on the Government of Pakistan because Pakistan, as already submitted, was, not a new State, but a continuation of the old personality of British India. It was not a case of Pakistan seceding from India, but of a partition of British India into two States, both of which carried on the personality of the former one. This is a position that Pakistan has consistently taken and which was declared by Pakistan in its very first statement before the General Assembly of the United Nations, to which I shall presently refer. In this respect Pakistan's position has always been clear and consistent with regard to succession to multilateral treaties entered into by British India. We have, as I submitted in my oral submission earlier this month, faithfully followed the Indian Independence (International Arrangements) Order 1947, which I have quoted earlier. Here I may, with the permission of the Court, give the historical background to the said Indian Independence (International Arrangements) Order 1947, so that the position may be made clear beyond doubt that Pakistan along with India is a successor to the personality of British India.

Both the Dominions of India and Pakistan were established on 15 August 1947 under the Indian Independence Act passed by the British Parliament. It is noteworthy that Section IX, paragraph 1, Article 1, of the Indian Independence Act provides as follows—I will only read the first section and its subsections:

> "(1) The Governor-General shall by order make such provision as appears to him to be necessary or expedient:
>
> *(a)* for bringing the provisions of this Act into effective operation;
> *(b)* for dividing between the new Dominions, and between the new Provinces to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor-General in Council or, as the case may be, of the relevant Provinces which, under this Act, are to cease to exist;
> *(c)* for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the Orders in Council, rules and other instruments made thereunder in their application to the separate new Dominions."

Throughout a picture appears of the old India emerging into two new dominions.

"*(d)* for removing difficulties arising in connection with the transition to the provisions of this Act;

(e) for authorising the carrying on of the business of the Governor-General in Council between the passing of this Act and the appointed day otherwise than in accordance with the provisions *in that behalf of the Ninth Schedule to the Government of India* Act, 1935."

I respectfully draw the Court's attention to this provision, because what happened was that from the day the Act was passed till the appointed day, that is 15 August, when freedom was to come, the administration of the country was carried on under this Act, authorizing the carrying on of the business of the Governor-General in Council between the passing of this Act and the appointed day, otherwise than in accordance with the provisions of the Government of India Act. It means a partition council was set up, two separate cabinets for future governments were set up and they carried on the business. All important decisions were carried on with the consent of the two future cabinets which met together through their representatives in the partition council.

"*(f)* for enabling agreements to be entered into, and other acts done, on behalf of either of the new Dominions before the appointed day."

Agreements could be entered into on behalf of the Dominions before the appointed day, that is before 15 August.

"*(g)* for authorising the continued carrying on for the time being on behalf of the new Dominions, or on behalf of any two or more of the said new Provinces, of services and activities previously carried on on behalf of British India as a whole or on behalf of the former Provinces which those new Provinces represent;

(h) for regulating the monetary system and any matters pertaining to the Reserve Bank of India; and

(i) so far as it appears necessary or expedient in connection with any of the matters aforesaid, for varying the constitution, powers or jurisdiction of any legislature, court or other authority in the new Dominions and creating new legislatures, courts or other authorities therein."

It is thus sufficiently clear from this section of the Indian Independence Act that two new dominions were to replace the old personality of British India, namely, Bharat—that is, India—and Pakistan. Here I may also respectfully draw the attention of the Court to the Indian Constitution. The Court will be pleased to find that the Indian Constitution I believe in the first article states "India", that is, Bharat. For internal purposes the country is called Bharat, for external, international purposes the country is called India.

After the passing of the Indian Independence Act and before the two dominions came into existence, a Partition Council was set up which was composed of the representatives of the two future dominions. All decisions of importance with regard to the partition of the country were taken in this Council, which was presided over by the Governor-General of British India but which had in fact a tripartite character, because the Cabinets of the future dominions had already started functioning under Section IX of the Independence Act. Several expert committees were set up to submit reports to the Partition Council with a view to facilitating the partition of the country in various fields. Expert

Committee No. IX dealt with foreign relations. The terms of reference of this committee, as given in the *Partition Proceedings*[1], Volume III, at page 203, may be of interest to the Court. The first term of reference was:

> "To examine and make recommendations on the effect of partition—(i) on the relations of the successor Governments with each other, and with other countries (including the countries of British Commonwealth and border tribes)."

I will not go further into these terms of reference at the moment. I respectfully draw the attention of the Court to the words "successor Governments", that is to say that both governments were to be the successor governments. This committee submitted its report which came up before a higher committee called the Steering Committee. The Steering Committee in its note on the said report of the Expert Committee No. IX stated as follows:

> "The report of Expert Committee No. IX appointed to examine the effect of partition on foreign relations is attached. The Steering Committee are in substantial agreement with views expressed therein and recommend that the conclusions reached by the Committee be approved.
>
> 2. *The Expert Committee has been unable to reach an agreed decision on the juridical position regarding the international personalities of India and Pakistan* (paragraphs 14 and 15) *and its effect, if any, on treaty obligations* (paragraphs 43 and 44) *and membership of international organisations.* The Steering Committee propose to put up separately a note on this subject for consideration by the Partition Council at a later date."

The Steering Committee's note was put up before the Partition Council and the Partition Council decided as follows:

> "The Council approved the recommendations of the Steering Committee on the report of Expert Committee No. IX.
>
> The Council noted that the Steering Committee would put up separately a note for consideration on the juridical position regarding the international responsibilities of India and Pakistan and its effect, if any, on treaty obligations and membership of international organizations."

In compliance with the decision of the Partition Council, the Steering Committee prepared a note on the juridical position regarding international personality and treaty obligations. This note was prepared by Mr. Patel representing India, but Mr. Mohammed Ali, representing Pakistan, did not subscribe to the views set out in it. I read from the Steering Committee's note on the juridical position regarding the international personality and its effect on international obligations appearing on page 291 of the *Partition Proceedings*, Volume III:

> "The attached note on the juridical position regarding the international personality of India and Pakistan and its effect on international obligations has been prepared by Mr. Patel and is based on a summary of the correspondence exchanged between the Secretary of State for India and His Excellency the Governor-General. Mr. Mohammed Ali does not subscribe to the view set in it. He considers [and I respectfully draw the attention of the Court that right from the beginning, what Pakistan's stance has been is what Mr. Mohammed Ali's view has expressed] that the present Government of India will disappear altogether as an entity and will be succeeded

[1] See pp. 156 and 171, *infra*.

by two independent Dominions of equal international status both of whom will be eligible to lay claims to the rights and obligations of the present Government of India.

The note is submitted for the consideration of the Partition Council."

This note was submitted to the Partition Council, where the views of Mr. Mohammed Ali and Mr. Patel were considered. Pakistan had in the Council, by way of compromise—and I emphasize this, by way of compromise—agreed that British India's membership of international organizations like the United Nations would devolve on the dominion of India but insisted—and I read from the Partition Council's decision appearing on page 292 of the *Partition Proceedings*, Volume III—that:

"Pakistan's viewpoint was, however, that both Dominions should assume all international obligations and enjoy all rights arising out of treaties and agreements negotiated by the existing Government of India or by His Majesty's Government acting on behalf of the Dominions overseas. The practical advantage of this course would be that Pakistan would not have to negotiate afresh in regard to such matters.

His Excellency suggested that Mr. Cooke, the Constitutional Adviser, should be asked to evolve, if possible, a formula which would meet the case of both sides. He would place this formula before the Pakistan and Indian Cabinets for consideration when they met to consider the adoption of Adaptation Orders."

Before the decision could be put into an Order, as I have already submitted, the two Governments were already meeting and contemplating them. Then the decision of the Council is given in the same volume and the same page:

"The Council agreed that the Constitutional Adviser should be requested to evolve, if possible, a formula which would meet the case of both sides. Such a formula, if evolved, would be placed before the Pakistan and Indian Cabinets for their approval."

Consequently, after all that approval was obtained and a formula evolved, the Indian Independence (International Arrangements) Order, 1947, was promulgated. I beg leave of the Court to read this Order again. It appears on page 293 of the same volume:

"*The Indian Independence (International) Arrangements Order, 14 August 1949*

Whereas the agreement set out in the Schedule to this Order has been reached at a meeting of the Partition Council on the 6th day of August, 1947;

And whereas it is intended that, as from the 15th day of August, 1947, the said agreement shall have the force and effect of an agreement between the Dominions of India and Pakistan;

Now therefore in exercise of the powers conferred upon him by Section IX of the Indian Independence Act, 1947, and all other powers enabling him in that behalf, the Governor-General hereby orders as follows:

This Order may be cited as the Indian Independence (International Arrangements) Order, 1947.

The agreement set out in the Schedule to this Order shall, as from the appointed day [that is, 15 August 1947], have the effect of an agreement duly made between the Dominion of India and the Dominion of Pakistan.

SCHEDULE

Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan:

1. The international rights and obligations to which India is entitled and subject immediately before the 15th day of August, 1947, will devolve in accordance with the provisions of this agreement.

2. (1) Membership of all international organisations, together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.
For the purposes of this paragraph any rights or obligations arising under the Final Act of the United Nations Monetary and Financial Conference will be deemed to be rights or obligations attached to membership of the International Monetary Fund and to membership of the International Bank for Reconstruction and Development.
(2) The Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organisations as it chooses to join.

3. (1) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.
(2) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.

4. Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements [Mr. President, kindly note the words '*all* international agreements'] to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions."

Again, on being admitted to the membership of the United Nations the representative of Pakistan declared as follows, as late as August 1947:

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

Pakistan did not subscribe to the view of the secretariat of the United Nations that it was a new State, and that view has been criticized by Professor D. P. O'Connell in his leading work on State succession, as follows:

> "The opinion of the Secretariat has been criticized as drawing an improper analogy from the cases of the Irish Free State and Belgium. In

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

In the Security Council France accepted Pakistan's original argument, and maintained that Pakistan had inherited, along with India, the original membership of British India, and that therefore no application for membership was necessary (UN doc. S/496, 18 August 1947). At the opening of the debate in the General Assembly on the question of admission of Pakistan, the representative of Argentina declared that in his view Pakistan was already a Member of the United Nations since, with India, it inherited the original membership held by the previous Indian Government.

It is noteworthy that these and many other United Nations Members regarded Pakistan to have succeeded, along with Bharat, to the rights and obligations of British India. Pakistan's own attitude, which is the determining factor in these circumstances, has consistently been to regard in herself the continuation of the personality of British India.

Pakistan's attitude in this respect is also illustrated by her communication as regards automatic succession to international labour conventions. Whenever an opportunity arose and whenever we were asked to state our position, we said so. On this and on other occasions, as I said, Pakistan's attitude in this respect is also illustrated by her communication as regards automatic succession to international labour conventions. Pakistan communicated to the International Labour Organisation as follows:

> "I am to state that the Government of Pakistan recognised that the obligations resulting from the International Labour Conventions ratified by India prior to August 14 1947, continue to be binding upon Pakistan in accordance with the terms thereof." (Foreign Secretary of Pakistan to ILO, October 29 1947—*Official Bulletin*, Vol. XXX, No. 5, 1947, p. 334.)

I respectfully submit that the background leading to the partition of British India, which I have just brought to the notice of the Court, as also the attitude and practice of Pakistan, clearly shows that Pakistan, along with Bharat, succeeded to the personality of British India, and hence there was an automatic devolution of all agreements on both the new dominions. In consequence, there was no obligation on Pakistan to notify succession under the General Act of 1928.

I may also refer to the attitude of the predecessor State on this question, and submit that with regard to the transmission of personality it is surely the attitude of the predecessor and the successor State which must determine whether the same personality continued. Thus the Secretary of State for Commonwealth Relations stated in the House of Commons on 30 June 1949 that in the British Government's view:

> "Pakistan is in international law the inheritor of the rights and duties of the old Government of India and of His Majesty's Government in the United Kingdom in these territories and that the Durand line is the international frontier." *(446 House of Commons debates 5 S.: 1491.)*

In view of the fact that Pakistan was a successor to the personality of British India there was, as stated earlier, no need for notification of succession.

Even if it be assumed that Pakistan was a new State, and that consequently its consent to the continuation of the General Act needed to be established *de novo*, Pakistan did give sufficient notice of its intention to other States to be bound by the multilateral treaty obligations of British India. In this context I again draw attention to Pakistan's very first statement before the United Nations General Assembly which was a notice to all member States, including India, that Pakistan regarded itself as having succeeded to the obligations of British India under multilateral conventions. I quote the part which is directly relevant:

> "Inasmuch as Pakistan had been a part of India, it was, in effect, under the latter name, a signatory to the Treaty of Versailles and an original member of the League of Nations . . . In the same sense, Pakistan, as part of India, participated in the San Francisco Conference in 1945 and became a signatory to the United Nations Charter. Therefore Pakistan is not a new member of the United Nations, but a co-successor of a member State which was one of the founders of the Organization."

India itself had notice of Pakistan's succession to all multilateral conventions entered into by British India before partition, since this was clearly stated in Article 4 of the Agreement as to the devolution of international rights and obligations between India and Pakistan.

In this context it is to be noted that Article 7 of the International Law Commission draft Article on State Succession in Respect of Treaties, which India has relied on in its letter of 4 June (p. 139, *infra*), lays down that a new State, in relation to any multilateral treaty in force in respect of its territory at the date of succession, is entitled to notify the parties that it considers itself a party to the treaty in its own right. It is not stated that the giving of such notice is a condition of enjoying the substantive rights provided for by the treaty. However, we contend sufficient notice was given by Pakistan's general statement to which I have just referred, and by virtue of the treaty between India and Pakistan on the devolution of rights and obligations under international treaties. We therefore submit that this constitutes sufficient notice as between Pakistan and India, which is what matters for the purposes of the present case.

In any case a formal notification of succession is not necessary. It may be noted that the International Law Commission has defined notification of succession as follows:

> "'Notify succession' and 'notification of succession' mean in relation to a treaty any notification or communication made by a successor State whereby, on the basis of its predecessor's status as a party, contracting State or signatory to a multilateral treaty, it expresses its consent to be bound by the treaty."

In the commentary the International Law Commission goes on to state:

> "'. . .' notify succession and 'notification of succession'. These terms connote the act by which a successor State expresses and establishes on the international plane its consent to be bound by its predecessor's expression of consent to be bound by the treaty in respect of the territory which is the subject of the succession."[3]

Clearly the expression of the will to continue to be bound may be expressed without following any formal procedure.

It is relevant also to mention the League of Nations practice in dealing with a change of status. The International Law Association, in its work, *The Effect of Independence on Treaties*, in this respect has stated on page 172 as follows:

"The problem arose in the League of Nations in connexion with Burma, which was separated from India on 1 April 1937 [The Court will be pleased to note that Burma was never a part of India. It was just, for Parliamentary and administrative purposes, an extra involvement of India. That was a case of secession actually, but even there, with the League of Nations help, it was separated from India on 1 April 1937], and thereafter possessed the status of an overseas territory of the United Kingdom of Great Britain and Northern Ireland. The Secretary-General of the League of Nations, in the exercise of the functions as depositary, held that Burma continues to be bound by a ratification or accession recorded on behalf of India before the date above mentioned. Ratifications or accessions recorded on behalf of India since 1 April 1937 are not, of course, binding on Burma."

It would appear therefore that the practice of the League was to accept automatic inheritance to the rights and obligations of the predecessor State.

Before I go to the next question Mr. President, I have to make some other submission on the question asked by Judge Jiménez de Aréchaga. My last submission on the question posed by Judge Jiménez de Aréchaga relates to the connection that exists between a devolution treaty, devolution agreement and notification of succession. My submission is that a devolution agreement acts as a notification of succession vis-à-vis third States. Thus, Professor D. P. O'Connell states at page 371 of his work on State succession:

> "It is believed that the devolution agreements are confirmatory of a general succession to treaties under international law, and are intended mainly to put other parties on notice of the successor State's affirmative policy."

Pakistan clearly put other parties on notice of its affirmative policy in respect of succession to multilateral conventions, and on this point I would like to quote from page 185 of O'Connell's *State Succession in Municipal and International Law*, where he states as follows:

> "On 27 August 1947 the United Nations was informed of the promulgation on 6 August of the Indian Independence International Arrangements Order, 1947 [as far back as 27 August 1947 the United Nations was informed by Pakistan about the Indian Independence International Arrangements Order, 1947] which achieved a devolution of British Indian treaties, where relevant upon Pakistan. On the day of Pakistan independence, the Minister for Foreign Affairs of that country informed the Secretary-General that in his Government's view both India and Pakistan were automatically Members of the United Nations."

It is therefore clear that Pakistan, by communicating the devolution agreement to the United Nations, gave sufficient notice to third States that it wished to exercise its right of continuing to be bound by multilateral treaties entered into by British India. I may emphasize that the International Law Commission in its draft articles on the Law of Treaties had declared that a State had a right to succession of multilateral treaties entered into by the predecessor State, and it had also been made clear, as mentioned by me earlier, that the act of notifying succession need not be formal in nature. Whatever might be the position with respect to other States, as far as India is concerned no notice was needed because India was a party to the devolution agreement.

The Court adjourned from 11.15 to 11.35 a.m.

Mr. President, I shall now pass to the second of Judge Sir Humphrey Waldock's questions. This was as follows:

> "Does the Government of Pakistan agree with the statement of the Indian Government, in its letter of 4 June, that the General Act of 1928 is not included in the list of treaties that was drawn up by the Expert Committee No. 9; and, if so, in the opinion of the Government of Pakistan, does that affect the devolution of that agreement as between the two Governments?"

Apparently, the General Act was not included in the list of treaties drawn up by Expert Committee No. 9. The list of treaties is in no way an exhaustive one and was composed for the benefit of the members of the Expert Committee No. 9 on Foreign Relations, as could be seen from Volume III of the Partition Proceedings. This list was made up by asking various ministries and departments to communicate names of treaties to be included in the list. An examination of the list will show that a great number of treaties to which British India was a party have been omitted from it. The list was drawn up for administrative convenience and I would respectfully draw the attention of the Court to some of the many instances of omission, irrelevance and duplication in the list.

In *The Effect of Independence on Treaties*, the International Law Association, in their book, at page 109, Appendix 3, lists 45 Extradition Treaties with foreign countries executed by the United Kingdom Government on behalf of India before independence, and still in force. Of these 45 treaties, only two are included in the list prepared as Annexure V. These Extradition Treaties are with Iraq and Siam.

A bilateral Air Transport Agreement between India and the United States of America appears both on pages 221 and 252 of Volume III of the Partition Proceedings, which shows the superficial manner in which the list was hurriedly prepared.

I may also mention that included in the list are some treaties which were specifically mentioned as not devolving on either India or Pakistan as they concern direct relations between the British Crown and Bahrain. Also included in the list, at pages 228 and 229, etc., are treaties with Indian rulers which, under Section VII of the Indian Independence Act, had terminated or lapsed. I would draw the attention of the Court to Section VII of the Independence Act, which says:

> "(I) As from the appointed day—
>
> *(a)* His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India;
>
> *(b)* the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise."

As I was submitting, also included in the list at pages 228 and 229 are treaties with Indian rulers which, under Section VII of the Indian Independence Act,

had terminated or lapsed. On page 228 there is a treaty with Khan of Kalat of 1899; again with Khan of Kalat in 1903; again with the Jam of Las Bela (an Indian ruler) of 1861, 1889, 1896, 1901 and 1925; then the ruler of Kharan in 1885 and 1909. And it goes on to indicate treaties with several Rulers—these treaties are given on pages 228, 229, etc. These treaties had lapsed. They had no status whatsoever.

This would show that the list was neither exhaustive nor free from error. It was obviously drawn up in great haste and there is nothing to show that it was ever verified. Neither the Indian Independence International Arrangements Order—and this is important Mr. President—nor the devolution agreement that it embodies, makes a reference to this list, nor is it included in the schedule or annexure to that Order.

It does not, therefore, rank as an authentic statutory document, and is not also connected to the devolution agreement. The proceedings of the Partition Council do not disclose that the list was ever examined or debated upon. Thus the absence of the General Act from the list is not of any significance and does not affect the substance of rights and obligations of Pakistan and India as defined in Article IV of the Agreement between India and Pakistan of 15 August 1947 regarding the devolution of international rights and obligations upon the Dominions of India and Pakistan. The operation of that agreement is in no way circumscribed by any list nor is any list by itself creative of rights or obligations which were created by Article IV of the said Agreement. I shall respectfully draw attention once more to that article:

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

This article makes no distinction between international agreements to which India was a party immediately before the appointed day. All these agreements devolved both upon the Dominion of India and upon the Dominion of Pakistan.

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

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

Thus the International Court of Justice recognized, in the *Right of Passage* case, that the list is not exhaustive, and upheld the succession of India and British India to a treaty not included in the list.

The third question of Sir Humphrey Waldock was a follows:

> "Would the Government of Pakistan be good enough to explain further its argument—if I understood it correctly—that the devolution agreement, contained in that Indian Independence International Arrangements Order of 1947, contained an agreement which devolved of its own force on the Government of Pakistan and the Government of India so as to create mutual obligations between them in connection with the General Act of Geneva? If you could be good enough to explain a little further your argument upon that point."

In answer to this question, I would submit that the title of the Indian Independence International Arrangements Order of 14 August 1947 may be somewhat misleading, as it really sets out a bilateral agreement reached between India and Pakistan as to the devolution of international rights and obligations. It is to be noted that the very first preambular paragraph of the Order states: "Whereas the Agreement set out in the Schedule to this Order has been reached at a meeting of the Partition Council on the 6th day of August, 1947." The so-called Order, therefore, merely evidences the agreement already reached by the two countries in the Partition Council. The Partition Council was apparently set up after 3 June 1947, under the Indian Independence Act, and by agreement it continued to function even after partition of British India and the establishment of the two dominions. I refer to the work of Mr. V. P. Menon, the then Constitutional Adviser to the Governor-General of British India, *The Transfer of Power in India*. On page 397 the learned author states:

> "By an Order of the Governor-General under the Indian Independence Act, 1947, the Partition Council continued in existence even after 15 August. Its composition was then altered to include two members drawn from each of the Dominion Cabinets. India's representatives were Patel and Rajendra Prasad, while Pakistan was represented by such ministers as were able to attend the meetings in Delhi."

The International Arrangements Order then goes on to state: "Whereas it is intended that . . . the said agreement [that is the agreement set out in the schedule] shall have the force and effect of an agreement between the Dominions of India and Pakistan."

It is therefore clear that the agreement set out in the schedule of the International Arrangements Order was an international agreement between India and Pakistan. The Order, although in form an act of the former British India, evidenced this agreement. Consequently, independently of any general law regarding State succession, Article 4 of the said Agreement must apply between India and Pakistan.

We submit that the General Act for the Pacific Settlement of Disputes of 1928 is an international agreement which, under Article 4 of the said Agreement, devolves both upon the Dominion of India and the Dominion of Pakistan. The Government of Pakistan can, therefore, invoke the provisions of the General Act as against India. This ground is independent of any right of Pakistan to invoke the General Act of 1928 by virtue of the general law of State succession.

I now come to the second part of my statement and will make some comments on the Indian letter of 4 June 1973, addressed to the Registrar of the Court, in which further objections to the jurisdiction of the Court have been taken. How-

ever, I make these comments without prejudice to Pakistan's position in respect of these various Indian communications which is that they have been sent to the Court in complete disregard of the procedure laid down in the Statute and Rules of Court, and are not communications of which the Court should take cognizance. Nevertheless, we are confident that any point as to jurisdiction that has been mentioned in these letters can be effectively met by us at the jurisdictional stage of the case. I shall, therefore, only briefly touch upon the points raised in the Indian letter.

In the letter of 4 June 1973 (p. 139, *infra*), India deals with her reservation to Article IX of the Genocide Convention, and states: firstly, that Pakistan did not raise any objection to it; and, secondly, even if the Indian reservation be held incompatible or void, the consequence would be that India will not be regarded as a party to the Convention either vis-à-vis the other parties thereto or in any case vis-à-vis Pakistan.

I have already dealt with the first of these arguments in my replies to Judge Onyeama's question and Sir Humphrey Waldock's first question, and I need not say any more as to that, except that I will refer to Articles 19 and 20 of the Vienna Convention on the Law of Treaties, which bear out the propositions I made. The question of objection to a reservation or its acceptance by non-objection under Article 20 only arises if the reservation is one that can be made according to the terms of Article 19. This means that it must not fall under any of the paragraphs *(a)* to *(c)* of Article 19. Our contention is that the Indian reservation to Article IX of the Genocide Convention is excluded by Article 19.

In any case Pakistan has always objected that reservations to the Genocide Convention cannot be made. I have already referred to the statement of Pakistan before the General Assembly of the United Nations, in answer to Judge Onyeama's question. I shall repeat here the relevant part of that statement, which was as follows: "No one could dispute the fact that the Convention on Genocide, in view of its very nature and scope, could not be the object of any reservation whatsoever." This is precisely what Pakistan's position is today, that is, that the Genocide Convention cannot be subject to any reservation, particularly one deleting for all practical purposes Article IX of the Convention, which is a basic provision on which the fulfilment of the Convention depends.

With regard to the point raised by the second Indian argument in their letter (p. 139, *infra*), that is, that even if the Indian reservation be held incompatible or void, the consequence will be that India will not be regarded as a party to the Convention, either vis-à-vis all the parties thereto or in any case vis-à-vis Pakistan, we submit as follows:

First, that the force of this argument depends almost entirely on the answer which the Court gave to the first of the three questions addressed to it in the *Reservations to the Genocide Convention* case, because we know of no general principle of law that entails that when an intrinsically invalid and therefore void reservation is attached to a State's acceptance of a treaty it is the acceptance which is thereby destroyed, and not merely the reservation. Prima facie, indeed, this would seem to be a very curious consequence. Logically one would expect that a void reservation, being a nullity, would have no effect on the acceptance, and would leave the latter intact and standing. We would, therefore, regard the correct position as being that taken up in the Australian argument in the *Nuclear Tests* case (I refer to *Nuclear Tests*, the sitting of 22 May 1973), namely that intrinsically invalid reservations, being null and void, cannot be invoked at all. Accordingly, they produce no effects whatsoever and leave the acceptance they purport to relate to standing, as if the reservation had not been made. Moreover, we believe that in this respect it makes no difference whether the

reservation is entered at a date subsequent to the acceptance, as in the *Nuclear Tests* case, or at the time of the acceptance, as in the Indian case. In either event it is severable and, being a nullity, cannot be invoked.

I submitted earlier, in reply to one of Sir Humphrey Waldock's questions, that the answers given by the Court in 1951, in reply to the three questions put to it in the *Reservations* case, if taken together, led to a situation that required further examination, and should be approached by the Court *de novo*, because the anomalies to which I drew attention have in fact largely been eliminated by Articles 19 and 20 of the Vienna Convention on the Law of Treaties, since by reason of Article 19 certain kinds of reservations simply cannot be made. However, even on the basis of the Court's Opinion in the *Reservations* case, no serious difficulty arises so long as the reservations involved are such as can reasonably be accepted by some parties, although other parties may see objection to them. But we believe the position is different with reservations of so fundamental a character as to be destructive of a basic element of the convention concerned. In this connection we would appeal to the Judgment which the Court itself gave only last year in the case between India and Pakistan on the *Appeal relating to the Jurisdiction of the ICAO Council*. The Court found in that case that attempts to defeat jurisdictional or adjudication clauses, intended under the treaty or convention to be obligatory, were inadmissible and could not be given any effect. I would like here to quote the relevant paragraph of the udgment in that case. On page 53, the Court states as follows:

> "16 *(b)* Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested. If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative—i.e., whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting."

We believe that this is so with regard to any treaty or convention containing such a clause. But we contend that it must be doubly and trebly so with regard to a convention having the character of the Genocide Convention, where the obligatory adjudication clause serves as an essential guarantee for the fulfilment of the convention—and indeed, as I mentioned earlier, expressly specifies fulfilment as well as interpretation and application. We urge the Court to look at the matter from that point of view, because it involves a question of principle of far-reaching general importance.

For these reasons we maintain both that India's reservation is intrinsically invalid, and that she cannot invoke such a reservation in order to nullify her acceptance of the Genocide Convention. She therefore remained a party to it despite—indeed because of—the unacceptable character of that reservation.

In this context I would also draw attention to the practice of the Secretary-General of the United Nations with regard to multilateral treaties. The International Law Commission in 1966 described this practice as follows:

> "In the absence of any clause on reservations in agreements concluded after the General Assembly resolution on reservations to multilateral

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

It is important to note first, that each State is free to draw legal consequences from the text of the reservation communicated to it, and secondly, that a State which has deposited an instrument accompanied by reservations is counted among the parties required for the entry into force of the agreement. It follows that a State making a reservation is to be regarded as a party to the convention, but that the validity of its reservation can be challenged on the ground that it is prohibited under the treaty. There is no reason why the Genocide Convention should be treated any differently, especially as the Court, in its Opinion of 1951, clearly visualized the probability of challenging the validity of a reservation by invoking the procedure under Article IX of the Convention, which also means that the Court implied that reservations to Article IX itself could not be made, since that Article must always remain available to the parties.

I pass on to the Indian letter of 4 June (pp. 140-141, *infra*). Here it is stated that Pakistan has attempted to invoke new titles of jurisdiction not specified in her Application, and that this is not permissible. In this context, Mr. President, I have already referred during the course of my oral statement to Article 40 of the Statute of the Court, which stipulates that in the case of a written application instituting proceedings "the subject of the dispute and the party shall be indicated". It is not mandatory at that stage, under the Statute of the Court, to indicate the ground on which the jurisdiction of the Court is founded. Article 35, paragraph 2, of the Rules of Court seems to recognize the absence of such an obligation since it states that the application must also "as far as possible, specify the provision on which the application founds the jurisdiction of the Court". The proper stage, we submit for setting out an exhaustive basis for the Court's jurisdiction is the Memorial of the Applicant. It is noteworthy that in accordance with Article 67 of the Rules of Court a preliminary objection as to jurisdiction "shall be made in writing in the time-limit fixed for the delivery of the Counter-Memorial". It follows that it suffices if the possible bases for the jurisdiction of the Court are exhaustively set out in the Memorial, even if this was not done at an earlier stage.

We would also submit that the point taken by India is a technical one, and does not merit consideration. Since the Court must in any event consider the question of its jurisdiction *proprio motu*, it ought not to exclude a possible basis of jurisdiction to which its attention is called in the written or oral proceedings merely because this had not been mentioned in the Application. Such an objection would also not in the last resort have any effect since Pakistan could amend its Application. The Indian objection is therefore without any force.

In paragraph 4 in her letter (p. 141, *infra*), India has gone on to state that Pakistan cannot rely on additional titles of jurisdiction such as the General Act of 1928, and Article 36, paragraph 2, of the Statute, as well as Article IX of the Genocide

Convention. This, we submit, is not a correct view. There is nothing in international law or procedure to prevent countries relying on more than one basis of jurisdiction, and in principle neither cancels out the other. If one basis of jurisdiction fails, the other can still stand. The principle is well established in international law that when two or more sources of jurisdiction exist at the same time, each may be relied upon, and that neither weakens nor affects the other. In the case concerning the *Electricity Company of Sofia and Bulgaria* the Permanent Court of International Justice stated:

> "... the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain". (*P.C.I.J., Series A/B, No. 77*, p. 76.)

On this matter, and also on the real bearing of the passage from the *Norwegian Loans* case cited by India, I will, for the sake of brevity, simply say that Pakistan adopts the arguments of Australia in the *Nuclear Tests* case [*Nuclear Tests*, sitting of 22 May 1973].

In the letter of 4 June 1973 (pp. 141-143, *infra*), India deals with her optional clause declaration made under Article 36, paragraph 2, of the Statute, and the reservations made by the Government of India thereunder. Reservations 1, 2 and 6 are relied on to oust the jurisdiction of the Court arising by virtue of India's optional clause declaration. The first reservation purports to oust the jurisdiction of the Court in a dispute in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement. It is claimed in paragraph 8 of the Indian letter that this reservation refers the whole matter back to the Genocide Convention and the method of settlement provided therein, namely Article IX, to which India has entered its reservation. Mr. President, my submission is that this contention is quite misconceived and based on a misinterpretation of the phrase "another method of settlement". Article IX of the Genocide Convention provides for the same method of settlement as paragraph 2 of Article 36 of the Statute, viz. reference to the International Court. The universally accepted meaning of the term "other method of settlement" is that it refers not merely to a method provided under another instrument, but to a method different in kind, for example, recourse to arbitration, to a commission of conciliation, to a fact-finding commission, to mediation by another State, or by the good offices of some State, or else, if to adjudication, then adjudication by a different tribunal. But where the tribunal is identical, the case is not one of two different methods of settlement, but of one method arising under alternative bases of jurisdiction, either or all of which can be invoked.

Reservations 2 and 6 state as follows:

> "(2) disputes with the government of any State which, on the date of this declaration, is a Member of the Commonwealth of Nations;
> (6) disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court; the Government of India has no diplomatic relations."

These reservations, Mr. President, can be dealt with together since in our view both, for similar reasons, conflict with the relevant provisions of the Statute of the Court and are hence invalid. Paragraphs 2 and 3 of Article 36 of the Statute provide:

"2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning . . .

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time."

Our submission is that paragraph 3 of Article 36 lays down the limits within which reservations can be made to such declarations. In accordance with this paragraph a declaration must be made either unconditionally or on the following conditions only: (1) reciprocity on the part of several or certain States, and (2) for a certain time.

We now refer to Article 19 of the Vienna Convention on the Law of Treaties, which India recognizes to be declaratory of customary international law and which provides as follows:

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

. . . . . .

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made."

India herself, in her letters, invokes the provisions of the Vienna Convention regarding reservations as being accepted rules of customary international law, and in view of the wide acceptance of this Convention I respectfully submit that the Court must look afresh at the reservations made by States under Article 36, paragraph 2, of the Statute. The second and sixth Indian reservations, which I have just quoted, are not of such a nature as to fall within the class of reservations enumerated in Article 36, paragraph 3, of the Statute and cannot, therefore, affect the jurisdiction of the Court which is based upon the Indian Declaration.

I also respectfully submit that the reservation relating to Commonwealth members, even if permissible, had as its rationale the availability of a procedure of consultations within the Commonwealth which, in the present context, no longer exists.

I further submit that the reservation as to not having any diplomatic relations on the date of the Application, if it can be made at all, must surely mean and cover those situations where till that date there have been no diplomatic relations at all, and not the case of Pakistan and India, which have always had diplomatic relations, such relations having only been temporarily suspended due to hostilities. It is noteworthy that Article 3 of the Simla Accord provides as follows:

"3. In order progressively to restore and normalise relations between the two countries step by step, it was agreed that:

(i) Steps shall be taken to resume communications: postal, telegraphic, sea, land, including border posts, and air links including overflights.
(ii) Appropriate steps shall be taken to promote travel facilities for the nationals of the other country.
(iii) Trade and co-operation in economic and other agreed fields will be resumed as far as possible.
(iv) Exchange in the fields of science and culture will be promoted."

We wonder how all these steps can be visualized without diplomatic relations.

That diplomatic relations have merely been suspended is also clear from Article 6 of the Simla Accord which provided that the representatives of the two sides will meet to "discuss further the moralities and arrangements for the establishment of durable peace and normalisation of relations including . . . the resumption of diplomatic relations". The Court will be pleased to mark the word used is not "establishment" of diplomatic relations but "resumption" of diplomatic relations. The two sides are obviously visualizing the resumption of diplomatic relations which had been temporarily suspended. The position at the moment is that both sides have merely to exchange ambassadors, and in view of this, this reservation of India is not applicable in the circumstances of the case.

There is also another reason why—and this is important—both these reservations are impliedly prohibited by Article 36 itself. The jurisdiction of the Court under Article 36, paragraph 2, of the Statute, relates to all parties to the Statute, and hence cannot be wholly excluded *a priori* in relation to particular parties. It can only be made conditional on reciprocity on their part.

In paragraph 11 (p. 142, *infra*), India relies on Pakistan's reservation to its declaration under the optional clause, which is as follows:

". . . disputes arising under a multilateral treaty unless:

(i) all parties to the treaty affected by the decision are also parties to the case before the Court, or

(ii) the Government of Pakistan specially agree to jurisdiction."

I respectfully submit that this reservation does not exclude the jurisdiction of the Court even if India can rely upon it. The parties to the Genocide Convention affected by the eventual decision of the Court on the merits, and which will be bound by that decision, are India and Pakistan only. India has been named as a party in Pakistan's Application. Bangla Desh is not a party to the Genocide Convention. Pakistan's Application merely calls for an interpretation of the Genocide Convention in respect of Pakistan's claim to exclusive jurisdiction to try certain individuals in the custody of India. However, it is to be noted here, and this is significant, that India, in paragraph 11 of her letter, does not assert that Bangla Desh will be affected in any manner. Instead, she asserts that several parties to the Genocide Convention, 15 of them, who have made reservations to the Genocide Convention, must all be parties to the case before the Court. I respectfully submit that the term "affected by the decision" means affected by the Court's decision on the *merits* of the case before it. In the present case, the decision of the Court on the merits will relate to the exercise of jurisdiction over the 195 or more Pakistani prisoners of war concerned, and none of these other States, mentioned by India, have any interest in regard to the individuals who have been charged with such offences. Consequently, it is clear that they cannot be affected by the decision of the Court.

It is also to be noted that any State which considers that it has an interest in any dispute before the Court can invoke Article 69 of the Rules of Court in order to intervene in the proceedings. No State has done so. Moreover, the interpretation India has placed on our reservation would result in an absurdity, since all parties to a multilateral treaty would have to be present before the Court could exercise jurisdiction. This was clearly never our intention.

I would now like to comment on that part of India's letter which deals with the applicability of the 1928 General Act for the Pacific Settlement of International Disputes. In paragraph 12, the Government of India have correctly noted that the Government of Pakistan seeks to rely on Articles 17 and 41 of the General Act of 26 September 1928, as read with Article 36 (1) and Article 37 of

the Statute of the Court. India has, however, incorrectly assumed that Pakistan does not rely on Article 33 of this Act concerning interim measures.

In the paragraphs following, the Government of India has sought to establish the following propositions:

(1) The General Act of 1928 is either not in force or its efficacy is impaired.
(2) On the assumption that the 1928 General Act is still in force, Pakistan is not a party thereto, under the law of State succession.

With regard to the first proposition I will respectfully submit that when the General Assembly adopted resolution 268 (III) on the matter of revision of the General Act of 26 September 1928, it made it clear that the 1928 Act was and would continue to be in force. Thus the fourth preambular paragraph of the said General Assembly resolution states as follows:

> "Whereas these amendments will only apply as between States having acceded to the General Act as thus amended and, as a consequence, will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative."

It is, therefore, clear that the General Act of 26 September 1928 is still basically in force.

As regards the efficacy of that Act, which the Government of India says is absent, I would like to stress that the General Assembly in the aforementioned resolution acknowledged that a party to the Act of 26 September 1928 could invoke it in so far as it might still be operative. A reference to the report of the Interim Committee of the General Assembly, which suggests the adoption of the revised Act, would indicate in what manner the 1928 General Act was regarded as effective. The Committee recorded as follows:

> "It was noted, for example, that the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of the parties which are not Members of the United Nations or parties to the Statute of the International Court of Justice. (Reports of the International Committee of the General Assembly—5 January-5 August 1948, *GA, OR*, Third Session, Supplement No. 10, United Nations doc. No. A/605, 13 August 1948, para. 46, pp. 28-29.)

Both India and Pakistan are, however, Members of the United Nations and parties to the Statute of the Court and the reason why the Interim Committee did not consider the General Act of 1928 had lost its effectiveness was a very simple one, namely because for those States, Article 37 of the Statute of the Court is binding and provides as follows:

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or 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."

Thus for Members of the United Nations, who are *ipso facto* parties to the Statute, Article 37, which I have just quoted, gives efficacy to the provisions of the General Act in question. Therefore, in respect of such States the relevant provisions of the General Act are fully operative. As I have said, India and Pakistan are both Members of the United Nations and parties to the Statute, and hence for them the General Act of 1928 in this particular case is fully effective.

I shall now deal with the Indian contention that even assuming the 1928 General Act is still in force, Pakistan is not a party thereto. The various arguments in support of this proposition are set out in the Indian letter (pp. 144-148, *infra*). I shall deal with them very briefly because most of the points involved have been covered in my answer to the questions posed by Members of the Court.

India asserts that Pakistan, having come into existence in 1947, was not an original party to the 1928 General Act nor was it a member of the League of Nations. To this our answer is that both India and Pakistan were parts of former British India and the former British India was a member of the League of Nations. I again draw attention here to the statement of the Representative of Pakistan when Pakistan was admitted to the United Nations, which I have already quoted in answer to the question posed by Judge Jiménez de Aréchaga. It may be recalled that out of British India two States emerged. One called itself Pakistan whereas the other named itself as Bharat, while at the same time continuing with the name of India in the international sphere. Both the States could therefore legitimately claim to be successors to the personality of British India. What Pakistan succeeded to, therefore, were the rights of British India as a Member of the League and also to British India's rights and obligations under the 1928 General Act. I also draw attention to Article IV of the Agreement between India and Pakistan regarding devolution of international agreements, and emphasize that in its plain meaning it covers all multilateral conventions to which British India was a party.

India also asserts that succession to a treaty regarding the settlement of disputes, which is essentially a political treaty, is not permissible under international law. To this the answer is quite simple. If the list of treaties set out by the Expert Committee No. 9 were to be examined, it would be found that there are many treaties of a political nature to which India and Pakistan succeeded.

In the said letter (pp. 144 and 145, *infra*), India has quoted Article 3 of the Draft Articles of the International Law Commission on State Succession, and has stated that in accordance with this Article a devolution agreement is not binding on third States. We would, however, submit that what is at issue before us now is that the devolution agreement is binding as between the States parties to that devolution agreement, that is, India and Pakistan, and this suffices for the purpose of the present proceedings. I would, however, add that a devolution agreement, although it may not be binding on third States, is nevertheless a declaration of intent regarding succession to the predecessor State's treaties, and in the case of multilateral treaties it is a general notice to third States of the successor State's intention to continue, as of right, the predecessor State's treaties. In the case of multilateral treaties, the International Law Commission has conceded the right of the successor State to inherit the multilateral treaties which were applicable in respect of its territory.

It is pertinent to mention also that the Draft Articles under consideration by the International Law Commission are not of course in force but still being debated, and it is common knowledge that the chief matter of controversy has been how far there is any automatic succession of new States to the rights and obligations of treaties entered into for them, or covering their territories, prior to independence. One thing is clear, however, that no one has ever doubted the right of a new State to be or continue as a party to a multilateral convention if it wants to, except in the three cases listed in Article 7, cited in the Indian letter (p. 145, *infra*), none of which is applicable here.

In her letter of 4 June 1973 (pp. 147-148, *infra*), India has also cited two passages from a judgment of the Pakistan Supreme Court to show that under clause

4 of the Indian Independence (International Arrangements) Order, 1947, Pakistan was not successor to all kinds of international agreements entered into by or on behalf of British India.

I do not consider it is necessary at this stage of the proceedings, by going into details, to show that the judgment does not in fact support India's contention before this Court except to submit very briefly that:

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

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

Thirdly, the Supreme Court in the said judgment states:

> "Under the system of law which prevailed in British India and now prevails in this country international arrangements affecting private rights and obligations do not become operative of their own force but require some legislation or other sanction. Such international arrangements are recognized and enforced in our national courts only to the extent they are incorporated into the municipal law or domestic law of our country and subject to the conditions, if any, therein specified."

The Court in the same judgment further observed as follows:

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

Professor O'Connell in his book entitled *State Succession in Municipal Law and International Law*, Volume II, at page 354, on the subject-matter of this judgment of the Pakistan Supreme Court says:

> "In view of the fact that India was not designated a party in the United Kingdom Order, it seems that the requirement of the United Kingdom law, when the United Kingdom is the forum, has not been fulfilled, and accordingly that awards made in India and Pakistan are unenforceable. Even if this difficulty could be circumvented in the case of India, additional doubts would remain concerning that of Pakistan, for whether Section 18 of the Indian Independence Act directs an English court to substitute Pakistan for India [Here I will pause to explain that in the Indian Independence Act, because 'India' was used everywhere—they said under such a heading it may well be appropriate, for 'India' use 'Pakistan', because two dominions came into existence—so this is reference to the Act, that the British Court will also be authorized to interpret in that manner, for under Section 18, the Indian Independence Act directs an English Court 'to substitute Pakistan for India'] wherever relevant must be controversial. [This is important.] The result might be that, although both India and Pakistan are parties to the protocol and conventions at the international level they are not such at the municipal level when the United Kingdom is the forum."

Again on page 356, Professor O'Connell further states that:

> "*(c)* In any event, it is not at all clear that the courts of the parties to a devolutionary agreement are entitled to regard it as *res inter alios acta*. *(d)* Novation by devolution certainly does occur with the engagement of tacit consent of other parties, and this would never occur if the successor State commenced with the presumption that the devolutionary instrument is invalid. *(e)* The fact that the Order of 1947 was made by the government of the predecessor State is immaterial, because it was part of the legislative process by which Pakistan became independent and is inseparable from the Indian Independence Act itself."

I, therefore, submit that the reliance by India on the said judgment is misconceived and not relevant to the subject-matter of the present dispute.

India then goes on to deal with the point that Pakistan did not notify its succession in respect of the General Act and the point regarding the absence of the General Act in the list prepared by the Expert Committee No. 9 in the partition proceedings. This aspect of the matter has been fully covered by me in my answer to the questions posed by Judges Jiménez de Aréchaga and Sir Humphrey Waldock and it is therefore not necessary to repeat my submissions here. I shall, therefore, go on to the Indian letter (p. 148, *infra*) at which point India states as follows:

> "Assuming that the 1928 Act is in force and that Pakistan is a party thereto, even then Pakistan cannot unilaterally invoke this Act to make the Court seized of the subject-matter of its Application, as will be patent from the following."

India then goes on to set out two independent arguments in subparagraphs *(a)* and *(b)*.

In paragraph 5 *(a)* of the Indian letter (p. 148, *infra*) it is stated that Article 29 (i) of the General Act provides as follows:

> "Disputes for the settlement of which a special procedure is laid down in other conventions in force between the parties to the dispute shall be settled in conformity with the provisions of those conventions."

The Indian contention is that, invoking the 1928 General Act, by virtue of the aforementioned Article, brings back the reference to Article IX of the Genocide Convention of 1948, and bearing in mind the reservation entered by India to that Article, the consent of the Government of India is required in each particular case before the Court can be seised of the subject-matter of any application.

We respectfully submit that this point has been misconceived. The General Act is an independent basis of jurisdiction. Therefore, invoking it does not lead the matter back to the Genocide Convention. This view is in no way contradicted but rather borne out by the passage from the Australian argument in the *Nuclear Tests* case, cited in the Indian letter (p. 149, *infra*), which will be found in *I.C.J. Pleadings, Nuclear Tests*, Volume I, the record of the sitting of 22 May 1973. Of course, jurisdiction invoked under Article IX of the Genocide Convention will be subject to any conditions specified in the Convention and to any valid reservations to that basis of jurisdiction. Similarly, jurisdiction under the General Act will be subject to any General Act conditions and reservations. But what cannot happen is that jurisdiction arising under the General Act should be subject to reservations made, not to that jurisdiction but to Article

IX of the Genocide Convention. Nor can Article IX jurisdiction be subject to General Act reservations.

In the same paragraph, India also invites attention to Article I, paragraph 2, of the Simla Agreement of 1972, which was signed by the President of Pakistan and the Prime Minister of India on 3 July 1972, and ratified thereafter by the two countries.

It is claimed that in accordance with this clause, which has only been quoted in part by India, the subject-matter of Pakistan's application must be considered and resolved in conformity with the provision of the Simla Agreement, and only through consultations.

It is also claimed that no bilateral negotiations have yet taken place on the subject-matter of Pakistan's application. I am glad that India has relied on the Simla Accord and therefore I shall set out the relevant clause in full. Article I, paragraph 2, of the Simla Accord states as follows:

> "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. [Now here an important passage in the same clause.] Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organisation, assistance or encouragement of any acts detrimental to the maintenance of peace and harmonious relations."

I first draw the attention of the Court to the words "pending the final settlement *of any of the problems between the two countries, neither side shall* unilaterally alter the situation". There is thus a clear obligation on India not to hand over the 195 or any other number of persons to Bangla Desh for trial pending the final settlement of this dispute with Pakistan.

This provision by itself is sufficient for the Court to indicate the interim measures prayed for.

Secondly, I would respectfully submit that the plain meaning of the words "or by any other peaceful means mutually agreed upon between them", includes any agreement, past or present, under which the parties have agreed to refer the matter to adjudication by this Court. In the present case there are not less than three of these: Article IX of the Genocide Convention, Article 36, paragraph 2, of the Statute of the Court, and Article 17 of the General Act for the Pacific Settlement of Disputes.

As regards the need to hold bilateral negotiations, I may also respectfully submit that Article 2 does not make the holding of bilateral negotiations a precondition to settlement through other peaceful means agreed upon by the parties. In any case, the facts of the dispute, which I have presented before the Court earlier, clearly demonstrate that negotiations with India with regard to this matter had entered a deadlock, since India refused to have any further discussions on the question of Pakistan's right to try the 195, or any other number of prisoners of war in question.

In subparagraph *(b)* (p. 149, *infra*), India has stated that, while becoming a party to the 1928 General Act on 21 May 1931, India made reservations excluding the following disputes from the procedure described in the General Act, including the procedure of conciliation:

> "Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement.
>
> 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 manner as the parties have agreed or shall agree.

Disputes with any party to the General Act who is not a member of the League of Nations."

India claims that the application of these conditions or reservations to Pakistan's Application is manifest. Mr. President, we beg to differ with the Government of India, and I submit that the reservations made by India to Article 17 of the General Act are prohibited by that Act and are without legal effect because the operation of Article 17 of the General Act is subject to Article 39. It is therefore necessary to read out this provision for the benefit of the Court. Article 39 reads:

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

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

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

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

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

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

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

I draw the attention of the Court particularly to the words "may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph", and submit that none of India's reservations fall under any of these paragraphs.

In addition, the first of India's reservations does not apply for the simple reason that the parties have not agreed to some other method of peaceful settlement. The method agreed in Article IX of the Genocide Convention and under Article 17 of the General Act is to refer the matter to the International Court of Justice. The two bases of jurisdiction are independent of each other and both can be relied on by Pakistan. But neither constitutes another method of settlement; they involve the same method, viz. adjudication by this Court.

As regards the second reservation, that is, the one relating to Commonwealth members, I would submit that Pakistan is no longer a member of the Commonwealth. Moreover, this reservation has no legal effect, since the reservations that could be made were exhaustively enumerated in Article 39, paragraph 2, of the General Act, and relate *ratione materiae* to the subject-matter of the dispute and not to the party with which the dispute has arisen. It was not permissible, therefore, to make a reservation excluding disputes with particular parties such as members of the Commonwealth.

The last reservation, which relates to disputes with any party to the General Act which is not a member of the League of Nations, has become infructuous or objectless since it relates only to the period when the League of Nations was in existence. In any case, in so far as the question of membership of the League is relevant, Pakistan is not in any different position from India herself, for both are successor States of British India, which was a Member of the League of Nations. I may add that this reservation also was not permissible, since it does not fall within the category of reservations exhaustively enumerated in Article 39, paragraph 2, of the General Act.

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

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

Mr. President, I will read this again; even if India has made reservations, they could only be tested under Article 41:

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

This jurisdiction, we submit, is saved to the present Court by virtue of Article 37 of the Statute. Consequently, since questions of interpretation and application of the General Act have arisen, including those concerning the scope of reservations and their admissibility, the International Court has jurisdiction to determine the matter. Since Article 41 of the General Act sets down a procedure which is designed to check the admissibility of reservations and their scope, the jurisdiction of the Court by virtue of this Article cannot be ousted by any reservation.

In view of those considerations we submit that there is every probability—I do not say "possibility", I say only "probability"—that the Court is competent to exercise jurisdiction under Article 17 of the General Act, as read with Article 36, paragraph 1, and Article 37 of the Statute.

Moreover, it is quite clear that the Court can, and must, exercise jurisdiction under Article 41 of the General Act, as read with the relevant provisions of the Statute, in order to determine the questions of interpretation and application and the questions regarding the scope and admissibility of reservations which have arisen.

In fact, even in order to consider whether or not the General Act of 1928 is applicable, as between India and Pakistan, by virtue of the general law of State succession and by virtue of the bilateral Devolution Agreement between India and Pakistan, the Court has jurisdiction under Article 41 of the General Act, since it would be trying to determine a question of application of the General Act.

The Court adjourned from 1 p.m. to 3.05 p.m.

Mr. President, I do not propose to go into the various conclusions drawn by India at the end of her letter of 4 June, with which we disagree. Broadly speaking, the aim has been to show that there is a manifest lack of jurisdiction and the Court should not, therefore, grant interim measures of protection. I would,

however, submit that the very detailed arguments set out in all these letters by the Government of India themselves demonstrate that the lack of jurisdiction of the Court is not manifest.

This is further borne out by the character of the reply I have made and of the answers given to the questions put by certain Members of the Court. In regard to the present case before the Court there are several relevant instruments prima facie conferring jurisdiction on the Court and, at the very least, there are possible bases on which jurisdiction of the Court might be founded.

We are confident that the correct course in these circumstances would be for the Court to adhere to its jurisprudence so well established by a series of Orders, more particularly in the *Fisheries Jurisdiction* case and the *Interhandel* case and now, also, in the *Nuclear Tests* cases, on which I will comment at the end of my statement.

With your permission, I shall now quote the paragraphs in the Order made in the *Interhandel* case which deal with the questions of jurisdiction. The Order runs as follows:

> "Whereas Switzerland and the United States of America have, by Declarations made on their behalf, accepted the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute;
>
> Whereas by its subject-matter the present dispute falls within the purview of that paragraph;
>
> Whereas the Government of the United States of America has invoked, against the request for the indication of interim measures of protection, the reservation by which it excluded from its Declaration matters essentially within its domestic jurisdiction as determined by the United States and whereas the Government accordingly 'respectfully declines . . . to submit the matter of the sale or disposition of such shares to the jurisdiction of the Court';
>
> Whereas at the hearing the Co-Agent of the Swiss Government challenged this reservation, on a number of grounds, and stated that, in its examination of a request for the indication of interim measures of protection, the Court would not wish to adjudicate 'upon so complex and delicate a question as the validity of the American reservation';
>
> Whereas the procedure applicable to requests for the indication of interim measures of protection is dealt with in the Rules of Court by provisions which are laid down in Article 61 and which appear, along with other procedures, in the section entitled: 'Occasional Rules';
>
> Whereas the examination of the contention of the Government of the United States requires the application of a different procedure, the procedure laid down in Article 62 of the Rules of Court, and whereas, if this contention is maintained, it will fall to be dealt with by the Court in due course in accordance with that procedure;
>
> Whereas the request for the indication of interim measures of protection must accordingly be examined in conformity with the procedure laid down in Article 61;
>
> Whereas, finally, the decision given under this procedure in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction." (*I.C.J. Reports 1957*, pp. 110-111.)

It is, therefore, clear that the consideration of even so automatic a reservation as that relied upon by the United States in the *Interhandel* case was ruled out

by the Court at the stage of a request for the indication of interim measures of protection. The juxtaposition of Articles 61 and 62 of the Rules of Court then in force impelled the Court in the same direction. That juxtaposition has not been disturbed in the corresponding Articles 66 and 67 of the 1972 Rules of Court. Any departure from this procedure would invite and encourage the kind of situation with which the Court has unfortunately been confronted in this case.

Assume that in the present case there had been no request for the indication of interim measures of protection, and the Respondent on receipt of notice of the Application had intimated to the Court that it did not see the necessity of appointing an agent or of putting in an appearance, as there was a manifest absence of jurisdiction, and that the Court ought to remove the case from the list of pending cases: what procedure would the Court have followed?

Assume the Applicant were to withdraw its request for the indication of interim measures of protection: what procedure would the Court follow thereafter?

I venture to submit that in both such situations the Court would disregard the Respondent's informal objections at this stage and would proceed to fix time-limits for the written pleadings. The question of jurisdiction would thus fall to be decided under Article 67 of the Rules of Court.

The manifest absence of jurisdiction referred to by the Court in its Orders in the *Fisheries Jurisdiction* cases can only mean such absence as was manifest on the face of the Applications in the *Aerial Incident* cases, with its logical result of removal of the cases from the Court's list of pending cases. Where the question of jurisdiction requires any kind of determination of the pleas of the parties, particularly as in this case, on jurisdictional issues of major importance, the correct solution of which is far from being obvious, then the absence of jurisdiction clearly cannot be manifest and the determination by the Court of these pleas at the stage of a request for the indication of interim measures of protection would be premature and would prejudge the question of jurisdiction on the merits, which, with all respect, is not permissible under the Rules of Court.

Again, assume that in a case in which there is no request for an indication of interim measures of protection the applicant cites a text which, prima facie, gives the Court jurisdiction to proceed with the case. On the respondent being notified it does not appoint an agent and does not put in an appearance, but requests that the case be removed from the list of pending cases as there is manifest absence of jurisdiction by virtue of a conclusive reservation made by the respondent to the cited text. What procedure would the Court follow? Even where there is no apparent answer to the reservation, I conceive the Court would call for written pleadings. Would it have made a difference if in such a case the applicant had made a request for the indication of interim measures of protection? Would the request have been turned down on the ground that, prima facie, the reservation pleaded by the respondent had force?

It would be idle to contend that a rejection of a request for indication of interim measures of protection on the ground of apparent lack of jurisdiction would not prejudice the question of jurisdiction on the merits, for in most such cases the respondent could, in the meantime, defeat the whole purpose and object of the application and the proceedings instituted thereby by carrying out the design which had been sought to be restrained by means of recourse to the Court.

For instance, in the present case, in which the Respondent, without appointing an agent and without putting in an appearance, has raised a whole cluster of objections to the jurisdiction on which the Applicant has had to comment

under stress of time and without recourse to detailed scattered materials and authorities, which would need to be collated and studied if the procedure prescribed in Rule 67 of the Rules had been adhered to; if the Court were to turn down the request for indication of interim measures of protection on the ground that jurisdiction was not established, prima facie, it would be no comfort that the Order made it clear that this would not foreclose the issue of jurisdiction and that the Applicant was at liberty to satisfy the Court in due course that it had jurisdiction to deal with the merits of the case. As soon as such an Order was made the Respondent would transfer the 195 prisoners of war concerned to Bangla Desh, thus frustrating the whole object of the proceedings and causing irreparable loss. On the other hand, if the Respondent's pleas on the matter of jurisdiction were examined in due course, as the jurisprudence of the Court has clearly prescribed, the Respondent would suffer no prejudice, whatever view the Court might adopt on the question of jurisdiction.

I respectfully submit that any departure by the Court from the course followed in the *Interhandel* case, and other cases mentioned by me, on the question of jurisdiction, at the stage of the request for the indication of interim measures of protection, would encourage a trend that the respondent State would seek to get a decision from the Court on the question of jurisdiction on the merits without following the procedure prescribed in Article 67.

In short, it is clear that for the purpose of pronouncing upon a request for the indication of interim measures of protection it is enough if the application discloses a prima facie or possible basis of jurisdiction, or else a situation in which it is clear that the Court may have jurisdiction and not clear that it has not. Where this is the case the Court may proceed to deal with the request, notwithstanding objections to jurisdiction submitted by the respondent and notwithstanding that these may merit consideration. Such objections are objections to the Court's exercising jurisdiction on the merits of the case as a whole and they fall to be considered and determined at a later stage.

India has appended to her letter of 4 June a section entitled "Additional Points". As these do not appear to be part of her legal argument my comment on them will be brief. Several of these points clearly relate to the merits of Pakistan's Application and do not arise at this stage, for instance the allegation that if the 195 accused persons were surrendered to Pakistan we would fail to try them.

Then some other of these additional points deny India's interest in the matter and assert that of Bangla Desh. But the recent war was between Pakistan and India, not Pakistan and Bangla Desh. It is India not Bangla Desh who holds the prisoners of war and civilian internees. It is India who is proposing to surrender the 195 accused to Bangla Desh. There is in consequence no other entity than India against whom Pakistan could have sought relief. Also, several of the matters India refers to are matters that lie primarily between herself and Bangla Desh, with which Pakistan has no direct concern.

As regards the concluding paragraphs of India's letter, we are glad that any intentional disrespect to the Court is disclaimed, but this cannot regularize what has been an improper process. We are also glad to see that India admits that the various jurisdictional arguments she has advanced do not constitute preliminary objections within the meaning of Article 67 of the Rules. Our comment is that it is precisely because of the irregularity of the course taken by India that her arguments cannot rank as proper preliminary objections and are therefore strictly irreceivable at this stage.

In conclusion I would respectfully submit that in the present case there are several relevant instruments which, to use the words of the Court's Order in the *Fisheries* case, "appear prima facie to afford a possible basis on which the

jurisdiction of the Court might be founded". Pakistan founds the jurisdiction of the Court in particular on the following instruments:

(i) Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Pakistan claims that the Indian reservation is not permissible and has no validity. The ratification of India is not affected by the reservation in question, and India continues to be a party vis-à-vis Pakistan.

(ii) Article 17 of the General Act for the Pacific Settlement of Disputes 1928, as read with Article 37 of the Statute of the Court, and Article 4 of the Indo-Pakistan Devolution Agreement of August 1947. The reservations made by India to the Convention are inadmissible and, in any case, are not applicable in the circumstances of the case.

(iii) The Indian declaration of acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of its Statute. The reservations of India are not permissible under the Statute and, moreover, are inapplicable to the circumstances of the case.

We also draw renewed attention to Article I, paragraph 2, of the Simla Accord, which is as follows:

> "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. Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peace and harmonious relations."

We also respectfully submit that the contentions of the Government of India with regard to lack of jurisdiction of the Court, expressed in its letters of 28 May and 4 June 1973, will fall to be examined by the Court in due course in accordance with the procedure prescribed under the Statute and the Rules of Court. We submit that in order to ensure that irreparable prejudice should not be caused to rights which are the subject of dispute in these judicial proceedings, that is, the question of Pakistan's right and claim to exclusive jurisdiction to hold such trials, the Court may be pleased to grant the interim measures prayed for by the Government of Pakistan. If the Government of India is permitted to transfer the 195 or any other number of prisoners of war in question, by anticipating the Court's judgment, this will prejudice the rights claimed by the Government of Pakistan and affect the possibility of their restoration in the event of a judgment in favour of Pakistan. On the other hand, if the prisoners in question are not transferred it will not affect any of India's rights or cause any prejudice, pending the decision of the case.

Within the last few days the Court has issued its Orders in the *Nuclear Tests* cases; and I submit that, having regard to the close similarity of the jurisdictional issues involved in those cases and the present one, the issue of those Orders can only strengthen the grounds for granting the interim measures now asked for by Pakistan. Indeed, it seems to us that the considerations as to the jurisdiction adduced by the Court in its recent Orders apply *a fortiori* in the present case.

For the sake of convenience I will take the Order made in regard to the Australian application for interim measures. The paragraphs of that Order chiefly relevant to the question of jurisdiction are Numbers 13, 17, 19-23, and also Numbers 32 and 33, all of which, we would submit, apply equally, *mutatis mutandis*, to the case of Pakistan. It is in these paragraphs particularly that the

Court states how the question of jurisdiction should be approached in relation to an application for interim measures. These paragraphs put the matter in different ways, but it seems to us that the differences are differences of emphasis only, and that they all lead to substantially the same result, and we believe also that Pakistan's case falls within the language of *each* of these paragraphs.

Paragraph 13 reads as follows:

> "Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded."

In relation to the last part of this paragraph, it is precisely Pakistan's contention that the jurisdictional provisions she has invoked appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded—and I stress the word "might" because in this passage the Court does not say that the provision invoked must be one on which the Court's jurisdiction clearly can or must be founded. The implication is indeed that it suffices if, prima facie, it possibly can.

I pass on to paragraph 17, which appears to us to re-state the last part of paragraph 13 and to confirm the interpretation of it I have just given. Paragraph 17 reads as follows:

> "Whereas the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded; and whereas the Court will accordingly proceed to examine the Applicant's request for the indication of interim measures of protection."

That exactly describes Pakistan's case. We have submitted material to the Court, and it is our contention that this material is such as should lead the Court at the present stage of the proceedings—and that is all we ask for now—to the conclusion that the provisions we invoke appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded. Again the word used is "might", and I need not repeat my argument on that point.

I come next to paragraph 19, which is as follows:

> "Whereas the Court is not in a position to reach a final conclusion on this point at the present stage of the proceedings, and will therefore examine the request for the indication of interim measures only in the context of Article 41 of the Statute."

Here, again, the language used by the Court seems to us to be exactly applicable to our own case. Throughout these proceedings we have contended that the jurisdictional issues involved are so complex, and involve such major points of principle, that the Court cannot possibly be in a position to reach a final conclusion on them at the present stage of the proceedings. Similarly, with reference to the last two lines of paragraph 19, it has throughout been our contention that the Court should examine our request for interim measures only in the context of Article 41 of the Statute.

The Court then proceeds in the next paragraph, paragraph 20, to state what examining the matter in the context of Article 41 of the Statute involves. This Article, the Court says in paragraph 20:

> ". . . has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the matters in issue before the Court".

This is exactly the effect which we ourselves have ventured to ascribe to Article 41 of the Statute, as being its clearly intended object, and but for which it would serve no useful purpose. And it has been our contention all through that this object would be defeated if the mere raising of jurisdictional objections, unless manifestly and indubitably good ones, could of themselves prevent the grant of interim measures, for the validity of these objections is part of what has to be determined in relation to the essentials of the case. But what would be the use of such determination if, by the time it is made, the position has already been prejudiced by unilateral action taken by one of the parties?

I now pass on to paragraphs 21-23 of the Court's Order. Paragraph 21 reads as follows:

> "Whereas it follows that the Court in the present case cannot exercise its power to indicate interim measures of protection unless the rights claimed in the Application, prima facie, appear to fall within the purview of the Court's jurisdiction."

Having said this, the Court in the next paragraph, paragraph 22, proceeds to indicate what, in the context, it understands by an Application that appears, prima facie, to fall within the purview of the Court's jurisdiction. In this paragraph the Court sets out briefly the nature of Australia's claim on the merits of her basic Application as a matter of substantive international law. In other words, the Court, in paragraph 22, is not referring to Australia's application for interim measures, but to her substantive claim on the merits; and clearly the object of doing so must be to see whether this claim appears, prima facie, to be one that is governed by international law. If this is correct, then in this particular context, that is, that of paragraphs 21-23 of the Court's Order, the test of whether a claim appears, prima facie, to fall within the purview of the Court's jurisdiction is whether it appears, prima facie, to be one that is governed by international law. This view is fully confirmed by the next paragraph of the Order, paragraph 23, which reads as follows:

> "Whereas it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the Government of Australia may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application."

Now, Mr. President, the facts of Pakistan's case are, of course, quite different from those of Australia's. But the principle here involved is exactly the same; for it is abundantly clear that, whatever may be the position in the *Nuclear Tests* cases, Pakistan's substantive claim in the present case is one which is indubitably governed by international law since it is made under a multilateral convention, the Genocide Convention, and involves the interpretation and application of that Convention. The claim, which is based on Article VI of the Convention, is that in the circumstances of the present case, the provision which states that persons charged with an act of genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed has the effect that it is Pakistan that has the right to try the 195 persons now held in India and accused of genocide. In relation to such a claim, and using the language

of the Court in paragraph 21 of the recent Order—which repeats that employed in the *Anglo-Iranian Oil Company* case—it certainly cannot be assumed *a priori* that the claim falls completely outside the purview of the Court's jurisdiction, or that the Government of Pakistan may not be able to establish legal interest in respect of this claim entitling the Court to admit Pakistan's Application on the merits.

Finally, so far as the Court's recent Order is concerned, I come to paragraphs 32 and 33, which read as follows:

> "32. Whereas the foregoing considerations do not permit the Court to accede at the present stage of the proceedings to the request made by the French Government in its letter dated 16 May 1973 that the case be removed from the list;
>
> 33. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the right of the French Government to submit arguments in respect of those questions."

As regards these two paragraphs, all I need to say is that if for the words "the French Government" are substituted the words "the Government of India", they are exactly applicable to the present case. I would only add, and this is important from my point of view, that whereas the Court's indication of interim measures in this case cannot prejudice India's case on jurisdiction, the Court's refusal to do so would seriously and irremediably prejudice Pakistan's case on the substantive merits of her basic Application.

It only remains for me to refer very briefly to the individual declarations or dissenting opinions of certain Members of the Court. We have read these with great interest and respect and, if I may venture to say so, admiration for the cogency of the views expressed, even where, as is natural, we cannot share them. It would be out of place for me to attempt to answer them here and I only want to make three particular short points.

First, it seems to us that the view according to which the Court, before indicating interim measures, must be more or less satisfied in the positive sense that it has jurisdiction in relation to the merits of the case, tends to overlook what is the real purpose of the Court's faculty to indicate interim measures, which is to meet a situation of an emergency character that cannot await the completion of the normal procedural stages of the case. Where the jurisdictional issues are complex and important, the Court can never be satisfied, in any positive sense, either that it has or has not got jurisdiction as to the merits, without a full examination of the matter, which must take a period of, at least, several months.

It is precisely this situation that the faculty to indicate interim measures, in order to preserve intact the ultimate right of the parties, is designed to deal with, and its whole purpose would be defeated if the Court had to go any deeper into the jurisdictional issues than to satisfy itself that the possibility that it would have jurisdiction to determine the merits of the case could not be ruled out.

Secondly, two of the learned judges who delivered dissenting opinions expressed the view that the *Nuclear Tests* cases belonged, or might belong, to that class of case in which an indication of interim measures by the Court would, in practice, have an effect equivalent to a decision on the merits of the case, or, to use the language of the Permanent Court in the *Chorzów Factory* case (*P.C.I.J., Series A, No. 10*, p. 10), would amount to giving an interim judgment on the claim formulated in the basic Application. Now whether the

indication of interim measures could, or would, have that effect, or amount to that, in the *Nuclear Tests* cases, is a matter on which it is not for us, in these proceedings, to express an opinion. The majority of the Court clearly thought not.

What we do wish to point out, however, is that whatever be the position as regards this point in the particular circumstances of the *Nuclear Tests* cases, the position in the case of the Pakistani prisoners of war is completely different. A ruling by the Court that the 195 accused persons held in India should not be handed over to Bangla Desh would not, by any possibility, have the effect of a decision, or amount to an interim judgment on the merits, or prejudice what the judgment would ultimately be, since it would leave the position completely open for the final determination by the Court of the question whether Pakistan has the right to try the persons concerned, by virtue of Article VI of the Genocide Convention.

On the contrary—and we venture to say this with the very greatest respect—it would be a refusal to grant the interim measures we ask for that might have the effect of a decision on the merits, since if it resulted in the accused being sent to Bangla Desh and tried there, the position under Article VI of the Genocide Convention would be irremediably prejudiced. Here I may submit, Mr. President, as to what we are praying for, what we are requesting for, what we have asked for—nothing more than the status quo with regard to 195 prisoners of war. We are not asking that a country which has been doing something for years should suddenly stop doing that, we are just saying that you have kept these prisoners for 18 months—keep the 195, not the rest, for some more time until this Court finally decides the questions as to who has the right to try them. This is the distinction to which we respectfully draw your attention.

Thirdly, and finally, one of the learned judges cited at length a passage from Sir Hersch Lauterpacht's separate opinion in the *Interhandel* case. In that passage the final sentence reads as follows:

> "The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction." (*I.C.J. Reports 1957*, p. 118.)

"Obviously excluding its jurisdiction"—Mr. President, that sentence is precisely applicable to Pakistan's case since, as I hope I have been able to demonstrate, there are in existence in this case instruments prima facie conferring jurisdiction on the Court, and the reservations relating to them are either null and void or, at least, not such as obviously to exclude the Court's jurisdiction, for their effect, whatever it may be, and as the Court may ultimately decide, is very far from being at all obvious in character.

Mr. President, having concluded my submissions, I request the Court to call upon Pakistan's Agent, Ambassador J. G. Kharas, to make Pakistan's final submissions in accordance with Article 56 of the Rules of Court. I thank you, Mr. President, and Members of the Court, for once again giving me a very patient hearing.

STATEMENT BY MR. KHARAS

AGENT FOR THE GOVERNMENT OF PAKISTAN

Mr. KHARAS: Mr. President, I shall now read Pakistan's final submissions regarding its request for the indication of interim measures of protection.

The Government of Pakistan submits that in this case there are instruments emanating from the parties which, at the very least, appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded in respect of the merits of the case instituted by Pakistan, through its Application of 11 May 1973, and that this enables the Court to indicate interim measures as requested. At this stage of the proceedings the Court is not called upon to finally satisfy itself that it has jurisdiction on the merits of the case, which must be left to the stage when preliminary objections are raised by the Respondent in accordance with the Statute and Rules of Court.

Pakistan further submits that in view of the irreversible nature of the action about to be taken by India, the urgency of the matter and the prejudice that might otherwise be occasioned to the final decision of the Court from such action, the Court may, in order to preserve the rights of Pakistan, pending a decision on merits, be pleased to indicate the following interim measures of protection under Article 41 of the Statute of the Court and Article 33 of the General Act:

(1) That those individuals, who are in the custody of India and are charged with alleged acts of genocide, should not be transferred out of Indian custody otherwise than to Pakistan until such time as Pakistan's claim to exclusive jurisdiction to try them has been adjudged by the Court.
(2) That the process of repatriation from India to Pakistan in accordance with international law of the Pakistani prisoners of war and civilian internees, which has already begun, should not be interrupted by virtue of the charges of genocide against a certain number of those still detained.

This, Mr. President, completes Pakistan's submissions for the grant of interim measures of protection prayed for and I once again thank you and the Members of the Court.

Le VICE-PRÉSIDENT faisant fonction de Président: Je déclare que nous sommes ici parvenus au terme de la présente phase de la procédure. Néanmoins, je prie l'agent du Pakistan de rester à la disposition de la Cour pour le cas où des questions peuvent se poser ou que la Cour ait besoin de certains éclaircissements.

The Court rose at 3.50 p.m.