CASE CONCERNING THE AERIAL INCIDENT OF 10 AUGUST 1999
(Islamic Republic of Pakistan v Republic of India)
JURISDICTION

On 22 June 2000, by a vote of 14:2, the Court delivered its Judgment in this case and declared that it had no jurisdiction to adjudicate the dispute between the Parties.[1] Since the Court did not include a judge who was a national of either Pakistan or India, each of them appointed a judge *ad hoc.*

THE PROCEEDINGS

On 21 September 1999, Pakistan instituted proceedings against India regarding a dispute on the destruction of a Pakistani aircraft, *Atlantique,* on 10 August 1999. In its Application, Pakistan requested the Court to judge and declare:

(a) That the acts of India...constituted breaches of the various obligations under the United Nations Charter, customary international law and treaties specified in its Application for which India bore exclusive legal responsibility.
(b) That India was under an obligation to make reparations to Pakistan for the loss of the aircraft and as compensation to the heirs of those killed as a result of the breaches of the obligations committed by it under the Charter and relevant rules of customary international law and treaty provisions.

As a basis for the Court's jurisdiction Pakistan's Application invoked Article 36(1)-(2) of the Court's Statute and the declarations where both States had accepted the Court's compulsory jurisdiction.

By a letter dated 2 November 1999 India notified the Court that it wished to indicate its preliminary objections to the latter's assumption of jurisdiction. The objections, set out in a note appended to the letter, requested the Court to adjudge and declare:

(i) that Pakistan's Application [was] without any merit to invoke the jurisdiction of the Court against India in view of its status as a

---

[1] For background information, refer [1999] Australian International Law Journal 344-345.

Member of the Commonwealth of Nations; and

(ii) that Pakistan [could] not invoke the jurisdiction of the Court in respect of any claims concerning various provisions of the United Nations Charter, particularly Article 2(4) as it [wa]s evident that all the States parties to the Charter ha[d] not been joined in the Application and that, under the circumstances, the reservation made by India in sub-paragraph 7 of paragraph 1 of its declaration would bar the jurisdiction of th[e] Court.

After a meeting held on 10 November 1999 between Schwebel P and the Parties, the latter agreed to request the Court to determine separately the issue of the Court's jurisdiction before any proceedings on the merits of the case. This was on the understanding that Pakistan would first present a Memorial dealing exclusively with this question, to which India would have the opportunity to reply in a Counter-Memorial confined to the same question. The Court fixed time limits for the filing of written pleadings by the Parties and hearings on the issue of the Court's jurisdiction were held from 3-6 April 2000.

SUMMARY OF THE JUDGMENT

The Court began by recalling that, to found the jurisdiction of the Court in this case, Pakistan had relied on the following in its Memorial:

(1) Article 17 of the General Act for Pacific Settlement of International Disputes, signed at Geneva on 26 September 1928 (the General Act of 1928);
(2) the declarations made by the Parties pursuant to Article 36(2) of the Court's Statute; and
(3) Article 36(1) of that Statute.

The Court examined each of these bases of jurisdiction in turn.

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

Pakistan began by citing Article 17 of the General Act of 1928 in the following manner:

> All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made

> under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It was understood that the disputes referred to above included, in particular, those mentioned in Article 36 of the Statute of the Permanent Court of International Justice. Pakistan recalled that under Article 37 of that Statute:

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

Pakistan stated that on 21 May 1931, British India had acceded to the General Act of 1928. Since India and Pakistan became parties to the General Act subsequently, Pakistan argued that the Court had jurisdiction to entertain its Application based on Article 17 of the General Act, read in conjunction with Article 37 of the Court's Statute.

In reply, India contended that "the General Act of 1928 [wa]s no longer in force and that, even if it were, it could not be effectively invoked as a basis for the Court's jurisdiction". India argued that many provisions of the General Act, particularly Articles 6, 7, 9 and 43-47, referred to organs of the League of Nations including its Permanent Court. However, with the demise of those institutions, the General Act had "lost its original efficacy", as found by the United Nations General Assembly in 1949 when it adopted a new General Act. As such, "those parties to the old General Act which ha[d] not ratified the new act" could not rely upon the old Act except "in so far as it might still be operative". Since Article 17 was among those that were amended in 1949, Pakistan could not invoke it now.

Secondly, the Parties disagreed on the conditions under which they succeeded to the rights and obligations of British India in 1947 assuming that, as Pakistan contended, the General Act of 1928 was still in force and binding on British India at that time. In reply, India argued that the General Act was an agreement of a political character that was not transmissible by its nature. India added that it made no notification of succession as well. Further, India pointed out that it had clearly stated in its communication of 18 September 1974 to the United Nations Secretary-General that:

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

Pakistan argued that until 1947, British India was party to the General Act of 1928 and India remained party to it upon independence. It said that in this case, "there was no succession. There was continuity". Consequently, the "views on non-transmission of the so-called political treaties [were] not relevant here". Thus, the communication of 18 September 1974 was a subjective statement that had no objective validity. It had acceded to the General Act in 1947 by automatic succession under international customary law.

Further, Pakistan argued that the question was expressly settled in relation to both States by Article 4 of the Schedule to the Indian Independence (International Arrangements) Order issued by the Governor-General of India on 14 August 1947. Article 4 provided for the devolvement upon the Dominions of India and Pakistan the rights and obligations under all international agreements to which British India was a party.

India disputed this interpretation of the Indian Independence (International Arrangements) Order of 14 August 1947 and the agreement in its Schedule. In support, India relied on the judgment of the Supreme Court of Pakistan delivered on 6 June 1961[2] and the 1947 Report of Expert Committee No IX on Foreign Relations. The Report had instructed the Committee, in connection with the preparation of the above Order, "to examine and make recommendations on the effect of partition". In this light, Pakistan could not have and did not become party to the General Act of 1928.

In support of their respective positions both Parties had also relied on state practice since 1947. In response, the Court observed that the question whether the General Act of 1928 was to be regarded as a convention in force for the purposes of Article 37 of the Court's Statute had already been raised. However, the question had not been settled in previous proceedings before the Court. In the present case, the Parties had made lengthy

---

[2] Messrs Yangtze (London Ltd) v Barlas Bros (Karachi) Ltd (1961) 34 International Law Reports 27; All Pakistan Legal Decisions 1961, Supreme Court 573.

submissions on this question and on whether the General Act bound British India in 1947. If so, the question for the Court now was whether India and Pakistan had become parties to the Act on accession to independence.

Relying on its communication to the United Nations Secretary-General of 18 September 1974 and on the British India reservations of 1931, India denied that the General Act of 1928 could afford a basis of jurisdiction that enabled the Court to entertain a dispute between the two of them. Clearly, if the Court were to uphold India's position on any of these grounds, it would no longer be necessary for the Court to rule on the others.

As the Court pointed out in the *Certain Norwegian Loans case*[3] when its jurisdiction was challenged on diverse grounds:

> the Court is free to base its decision on the ground which in its judgment is more direct and conclusive.

Thus, in the *Aegean Sea Continental Shelf case,*[4] the Court had ruled on the effect of a reservation by Greece to the General Act of 1928 without deciding whether that convention was still in force.

In the communication addressed by India to the United Nations Secretary-General on 18 September 1974, the Minister for External Affairs of India declared that India considered that it had never been party to the General Act of 1928 as an independent State. Therefore, the Court considered that India could not have been expected to denounce the Act formally. Even if, *arguendo,* the General Act was binding on India the communication of 18 September 1974 was to be considered in the circumstances of the present case as having served the same legal ends as the notification of denunciation provided in Article 45 of the General Act. It followed that India would have ceased to be bound by the General Act at the latest on 16 August 1979, the date on which a denunciation of the General Act under Article 45 would have taken effect. As a result, India could not be regarded as a party to the General Act at the date when Pakistan filed its Application in the present case. Thus, it followed that the Court had no jurisdiction to entertain Pakistan's Application on the basis of the provisions of Article 17 of the General Act and Article 37 of the Court's Statute.

---

[3] [1957] International Court of Justice Reports 9 (France v Norway).
[4] (Interim Protection) [1978] International Court of Justice Reports 3 (Greece v Turkey).

Declarations Accepting the Court's Jurisdiction (paras 29-46)

Pakistan had also sought to found the Court's jurisdiction on the declarations made by the Parties under Article 36(2) of the Court's Statute. Pakistan's current declaration was filed with the United Nations Secretary-General on 13 September 1960. India's current declaration was filed on 18 September 1974.

India disputed that the Court has jurisdiction in this case by relying on this declaration and invoked the reservations contained in Paragraph 1(2) and (7) of its declaration. Paragraph 1(2) referred to "disputes with the government of any State which is or has been a Member of the Commonwealth of Nations" (the Commonwealth reservation). Paragraph 1(7) referred to "disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction".

The Commonwealth Reservation (paras 30-31; 34-46)

On whether the Commonwealth reservation applied to States that were or had been Commonwealth members, Pakistan stated in its written Memorial that the reservation had "no legal effect" for the following reasons:

(1) it was in conflict with the "principle of sovereign equality" and the "universality of rights and obligations of members of the United Nations";
(2) it was in breach of "good faith"; and
(3) it was in breach of various provisions of the United Nations Charter and of the Statute of the Court.

In its oral pleadings, Pakistan claimed in particular that the reservation in question was "in excess" of the conditions permitted under Article 36(3) of the Statute. This provision was exhaustive on "the permissible conditions" under which a declaration could be made which were reciprocity by the other party or parties involved and the period of time indicated. It argued that reservations, such as the Commonwealth reservation, which did not fall within the categories authorised by that provision should be considered "extra-statutory". On this point, Pakistan argued that:

> an extra-statutory reservation made by a defendant State may be applied by the Court against a plaintiff State only if there is something in the case which allows the Court to conclude...that the plaintiff has accepted the reservation.

Pakistan argued further that the reservation was:

> in any event inapplicable, not because it [was] extra-statutory and unopposable to Pakistan but because it [was] obsolete.

Finally, Pakistan argued that India's Commonwealth reservation, having thus lost its *raison d'être,* could now be directed at Pakistan only.

India rejected Pakistan's line of reasoning. In its pleadings, India stressed the particular importance to be attached to ascertaining the intention of the declarant State. It contended that there was no evidence whatsoever that the reservation in question was *ultra vires* Article 36(3) of the Court's Statute. India stated that it was a fact that had "for long been recognized that within the system of the optional clause a State can select its partners".

India queried the correctness of the theory of "extra-statutory" reservations put forward by Pakistan, pointing out that any State against which the reservation was invoked could escape from its application by merely stating that it was extra-statutory in character. India also rejected Pakistan's alternative arguments based on estoppel in relation to the Simla Accord of 2 July 1972 and on obsolescence.

The Court began by addressing Pakistan's claim that the Commonwealth reservation was an extra-statutory reservation going beyond the conditions allowed under Article 36(3) of the Court's Statute. According to Pakistan, the reservation was not applicable or opposable to it in the absence of its acceptance in this case. The Court stated that Article 36(3) was never regarded as laying down the conditions under which declarations might be made in an exhaustive manner. According to the League of Nations Assembly resolution on 26 September 1928, it indicated that:

> reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specifically to certain classes or lists of disputes, and...these different kinds of reservation can be legitimately combined.

Further, when the Statute of the present Court was drafted, the right of a State to attach reservations to its declaration was confirmed, and this right had been recognised in the practice of States. Thus, the Court rejected Pakistan's argument that a reservation such as India's Commonwealth reservation might be regarded as "extra-statutory" because it contravened Article 36(3). As a result, the Court did not have to pursue the matter of extra-statutory reservations any further.

In addition, the Court rejected Pakistan's argument that India's reservation was a discriminatory act constituting an abuse of right because the only purpose of the reservation was to prevent Pakistan from bringing an action against India before the Court. The Court noted the reservation referred generally to States that were or had been members of the Commonwealth. It added that in any event, States were free to limit the scope *ratione personae* when they accepted the Court's compulsory jurisdiction.

The Court then addressed Pakistan's contention that the Commonwealth reservation was obsolete because members of the Commonwealth of Nations were no longer united by a common allegiance to the British Crown and the modes of dispute settlement contemplated originally had never come into being. Thus, the Court stated that it would:[5]

> interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court.

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

---

[5] Fisheries Jurisdiction (Spain v Canada) [1998] International Court of Justice Reports 454 at para 49.

The Court then turned to Article 1 of the Simla Accord. *Inter alia,* Article 1(ii) provided that:

> the two countries [we]re resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them... .

Therefore, and generally speaking, there was an obligation on both India and Pakistan to settle their differences by peaceful means to be mutually agreed upon by them. Since this provision in no way modified the specific rules governing recourse to any such means, including judicial settlement, the Court rejected this estoppel argument relied upon by Pakistan.

Continuing, the Court found that the Commonwealth reservation contained in Paragraph 1(2) of India's declaration of 18 September 1974 could be validly invoked in the present case. Since Pakistan was a member of the Commonwealth of Nations, the Court held that it had no jurisdiction to entertain the Application under Article 36(2) of its Statute. Hence, the Court held that it was unnecessary to examine India's objection based on the reservation concerning multilateral treaties contained in Paragraph 1(7) of its declaration.

Article 36(1) of the Statute of the Court (paras 47-50)

Pakistan had also sought to found the Court's jurisdiction on Article 36(1) of the Court's Statute. The Court noted that although Article 1(i) of the Simla Accord contained an obligation entered into by both States to respect the principles and purposes of the United Nations Charter in their mutual relations, they had no obligation to submit their disputes to the Court. The Court held that the Charter contained no specific provision that conferred compulsory jurisdiction on the Court. In particular, there was no such provision in Articles 1(1), 2(3-4), 33, 36(3) and 92 of the Charter. Therefore, it followed that the Court had no jurisdiction to entertain the Application on the basis of Article 36(1) of the Court's Statute.

Obligation to Settle Disputes by Peaceful Means (paras 51-55)

Concluding, the Court stated that its lack of jurisdiction did not relieve States from the obligation to settle their disputes by peaceful means. Although the means to be used rested with the parties under Article 33 of

the United Nations Charter, States were still bound to settle in good faith according to Article 2(2) of the Charter. In the present case, the obligation had been restated more particularly in the Simla Accord. Further, the Lahore Declaration of 21 February 1999 had reiterated "the determination of both countries to implementing the Simla Agreement". Accordingly, the Court reminded the Parties of their obligation to settle their disputes by peaceful means, especially the dispute arising out of the aerial incident of 10 August 1999 in conformity with their obligations.

For the above reasons, by 14:2 votes, the Court held in paragraph 56 of the Judgment that it had no jurisdiction to entertain Pakistan's Application filed on 21 September 1999: per Guillaume P, Shi V-P, Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Buergenthal JJ, Reddy J *ad hoc*; Al-Khasawneh J and Pirzada J *ad hoc* dissenting.

SEPARATE OPINION OF ODA J

Oda J fully supported the decisions reached by the Court in concluding that it had no jurisdiction to entertain Pakistan's Application. However, he disagreed with the Court's reasoning when the Court rejected the General Act of 1928 argument used by Pakistan as the basis for the Court's jurisdiction. The Court had rejected Pakistan's submission on the ground that India was not, in any event, a party to the Act on the date of Pakistan's current Application to the Court in 1999. The Court had so concluded after analysing India's accession to and denunciation of the General Act and Pakistan's possible succession as a party to that Act.

Next, Oda J analysed the drafting of the General Act of 1928 during the League of Nations era and the development in the 1920s of the Permanent Court of International Justice's compulsory jurisdiction. He suggested that the General Act itself could not be considered to be a document that conferred compulsory jurisdiction upon the Court independently from or in addition to the "optional clause" under Article 36(2) of the Statute of either the Permanent Court or the present Court.

Oda J pointed out that all States that had acceded to the General Act of 1928 had accepted the compulsory jurisdiction of the Court by making declarations under the "optional clause" pursuant to Article 36(2) of the Court's Statute. However, the States did not intend to assume any new

obligations regarding the Court's jurisdiction unless they agreed otherwise. Therefore, Oda J held that the Court's jurisdiction was conferred pursuant to Article 36(1) or (2) of the Court's Statute *only* and that the General Act of 1928 could *not* have conferred that jurisdiction. On this point, he did not disagree with the reasoning of the majority of the Court.

SEPARATE OPINION OF KOROMA J

Koroma J stated that although he agreed entirely with the Court's findings and the underlying reasoning, the Judgment should have responded to the issue of justiciability and jurisdiction raised during the proceedings. These were important issues in the present case. He acknowledged that the acts Pakistan complained of and their consequences raised legal issues involving a conflict of the Parties' rights and obligations. However, for a matter to be brought before the Court, the Parties must consent to it either prior to the start of proceedings or during the proceedings. He elaborated on this by drawing a distinction between justiciability and jurisdiction.

In relation to justiciability, the issue was whether there was a conflict of legal rights and obligations between the parties to a dispute and whether international law applied. In relation to jurisdiction, the issue was whether the parties to a dispute had vested the Court with the necessary authority to apply and interpret the law that governed the dispute. He stated that where the parties had not consented, the Court's Statute and jurisprudence prevented the Court from exercising jurisdiction in the matter.

Koroma J also stated that the Court's Judgment should not be seen as an abdication of its role. Rather, it was a reflection of the system within which it had been called upon to render justice. As an integral part of the United Nations system, it was entitled to contribute to the peaceful settlement of disputes and be guided by that organisation's jurisprudence and Charter. Consequently, it had acted judiciously in reminding India and Pakistan of their obligation to settle their disputes by peaceful means.

SEPARATE CONCURRING OPINION OF REDDY J *AD HOC*

Although Reddy J *ad hoc* voted in favour of all parts of the Judgment's *dispositif,* he emphasised the observation contained in paragraphs 47-51 of the Judgment. In particular, he stressed the element of "good faith" that was required of States wishing to settle their disputes by peaceful means. In

this connection, he referred to the Simla Agreement and the Lahore Declaration under which both India and Pakistan had agreed to settle all their differences by peaceful means bilaterally. Further, both States had condemned "terrorism in all its forms and manifestations" and restated "their determination to combat this menace".

According to Reddy J *ad hoc,* India and Pakistan were obliged "to create an atmosphere" whereby bilateral negotiations could be conducted with meaning. He concluded by expressing the hope that both countries would settle all their differences in the above spirit and devote their energies to developing their economies as well as friendly relations between them.

DISSENTING OPINION OF AL-KHASAWNEH J

Al-Khasawneh J reiterated that lack of jurisdiction did not in itself mean that the dispute was not justiciable. He joined the Court in calling upon Pakistan and India to settle this and other disputes between them through peaceful means. He stated that this call was urgent in view of the possible dangerous escalation of the dispute and felt that it was pertinent since India had rejected other modes of peaceful settlement before this case came before the Court.

Al-Khasawneh J agreed with the Court's majority view that no comprehensive system of jurisdiction derived from the United Nations Charter. With considerable hesitation, he agreed that the General Act of 1928 did not provide a basis for jurisdiction in the light of the 1974 Indian communication. While not a formal denunciation of the Act, the Secretary-General had treated this communication as a "notification", especially when there was no reaction from the other parties to the Act, including Pakistan, assuming that the latter was itself a party.

Nevertheless, Al-Khasawneh J thought that the Court had ignored other pertinent and interrelated issues such as India and Pakistan's status as parties to the General Act of 1928, the transmissibility of the General Act, and the question of whether it was still in force. As such, the Court's decision did not attain the requisite certainty that would fortify it against any recurring doubts that might occur.

On the issue of the Court's jurisdiction based on the optional clause, Al-Khasawneh J noted that the declarations of India and Pakistan contained a

number of conditions and reservations, two of which concerned the present case. They were the multilateral treaty reservation and the Commonwealth reservation. However, he felt that the first reservation was irrelevant since the actions that were complained of were also breaches under customary international law. He then dealt with the second reservation, the Commonwealth reservation, since Pakistan had alleged that it was both obsolete and discriminatory in nature.

On obsolescence, Al-Khasawneh J acknowledged that the existing doubts were justifiable given the fundamental changes in the Commonwealth that had occurred since 1930 when such reservations were first introduced. However, he thought that Pakistan had not argued its case on obsolescence conclusively and there were two reasons for this. First, a small number of Commonwealth States had included the reservation in their declarations in one form or another. Secondly, India had maintained the reservation with modifications in its successive declarations, a practice from which the existence of a conscious will, including a degree of importance for India, could be firmly inferred.

However, Al-Khasawneh J noted that the reservation had undergone a change in wording that led to the inescapable conclusion that it was to operate against one State only, which was Pakistan in this case. This was confirmed by analysing the circumstances that had led to this change. While not all reservations that were extra-statutory were invalid, it was nonetheless open to the Court to pronounce on the validity of a reservation allegedly tainted by arbitrariness or discrimination. Al-Khasawneh J felt that the Indian declaration fell outside the purview of permissibility because it was directed against one State only, thereby denying that State the benefits of reasonable expectations of adjudication. Further, unlike other reservations *ratione personae,* the Indian reservation had no rationale or reasonably defensible justification. As a consequence, Al-Khasawneh J concluded that the Indian reservation was invalid.

On the consequential issue of separability, Al-Khasawneh J stated that much guidance could be gained from the precedents due to their paucity and the fact that they had not been followed. He agreed that concepts from major systems of law were relevant and analysed a case decided by the Indian Supreme Court in 1957,[6] which revealed a complex and less severe

[6] RMD Chamarbaugwalla v The Union of India [1957] Supreme Court Reports 950-951.

test for separability than was suggested by India in the present case. He noted that in this regard, India had not adduced supporting evidence to show that the Commonwealth reservation was a crucial element of its acceptance of compulsory jurisdiction. He further held that this conclusion could not be reached from the terms of the reservation, as the terms related to a group of States. Unlike the French reservation on domestic jurisdiction in the *Norwegian Loans case,*[7] which defined a general attitude to the very concept of jurisdiction, India's reservation could not be said to define such an attitude.

Al-Khasawneh J observed that the other major legal systems also admitted of separability. Under Islamic law, the concept seemed to be reflected in the maxim: that which cannot be attained in its entirety should not be substantially abandoned. Analogies from the law of treaties were also relevant and Article 44 of the Vienna Conventions of 1969 and 1986 admitted of separability arising out of invalidation, albeit in suitably guarded terms. Applying the test in Article 44, Al-Khasawneh J held that the Commonwealth reservation was both invalid and separable from India's declaration.

DISSENTING OPINION OF PIRZADA J *AD HOC*

Although Pirzada J felt obliged to dissent from the Court's reasoning and conclusion, he agreed with paragraphs 51-55 of the Court's Judgment. He held that the 1947 Indian Independence Act and the 1947 Indian Independence (International Arrangements) Order had divided British India into two independent States, India and Pakistan. The British Prime Minister then, Mr Atlee, had stated:

> With regard to the status of the two Dominions, the names were not meant to make any difference between them. They were two successor States.

Referring to *Right of Passage over Indian Territory,*[8] Pirzada J stated that the list of treaties in Volume III of the Partition Proceedings was not exhaustive and found that *Messrs Yangtze (London Ltd) v Barlas Bros (Karachi) Ltd*[9] relied upon by India was distinguishable. He also referred to

[7] [1957] International Court of Justice Reports 9 (France v Norway).
[8] [1960] International Court of Justice Reports 6 (Portugal v India).
[9] (1961) 34 International Law Reports 27; All Pakistan Legal Decisions 1961, Supreme

a later case, *Superintendent, Land Customs (Khyber Agency) v Zewar Khan*[10] where the Supreme Court of Pakistan held that Pakistan was accepted and recognised as a successor government pursuant to the statement of the Secretary of State for Commonwealth Relations and under international law. He found that the General Act of 1928 had devolved upon and continued to apply to India and Pakistan. Further, India and Pakistan had signed an Air Services Agreement in June 1948 that provided for recourse to the International Court if no tribunal was competent to decide disputes even though both were dominions at the time.

Referring to the water dispute between Pakistan and India, Mr Liaquat Ali Khan, then Prime Minister of Pakistan, had made the following statement in a letter dated 23 August 1950:

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

Pandit Nehru, then Prime Minister of India, in a letter dated 27 October 1950 had stated that India preferred to refer the dispute to a tribunal. If there was deadlock, India proposed to settle the disputes by negotiation. If it failed, they would be submitted to arbitration or to the International Court. In fact, between 1947 and 1999, India and Pakistan had settled their disputes (i) by negotiations, (ii) through mediation of third parties, and (iii) through judicial tribunals. Further, there was access to the Court through Appeal or Application. In the circumstances, Pirzada J held that India's conduct was covered by the doctrine of estoppel.

Pakistan had argued that India, in its communication of 18 September 1974, had asserted that the General Act of 1928 never bound India. The communication was to counter Pakistan's declaration of 30 May 1974 and

---

Court 573.

[10] All Pakistan Legal Decisions 1969, Supreme Court 485.

dispel any doubts that the General Act applied to Pakistan, which had previously raised similar pleas in the Court in *Trial of Pakistani Prisoners of War.*[11] Therefore, Pakistan argued the communication was *mala fides* and could not be treated or deemed to be a denunciation of the General Act.

Pakistan had alleged that India did not comply with Article 45 of the General Act of 1928. Pakistan had argued that mere affirmation by India that the General Act was not binding on India was a unilateral act. As such, the validity of India's action could not be determined at the preliminary stage of proceedings in view of the finding of the Court in the appeal by India against Pakistan in *Appeal Relating to the Jurisdiction of the ICAO Council,*[12] which would be *res judicata.*

Further, Pakistan had argued that India's Commonwealth reservation was obsolete, having regard to the view of Ago J in *Certain Phosphate Lands in Nauru.*[13] India's Commonwealth reservation was only aimed at Pakistan, and as such was discriminatory and arbitrary. It did not fall under the permissible reservations exhaustively set out in Article 39 of the General Act 1928. Therefore, the reservation was invalid.

Pirzada J held that in any case, India's Commonwealth reservation was severable from the Indian declaration pursuant to Article 44 of the 1969 Vienna Convention on the Law of Treaties. He relied on the opinions of Lauterpacht J in *Certain Norwegian Loans,*[14] Klaestad P and Armand-Ugon J in *The Interhandel*[15] and the dissenting opinion of Bedjaoui J in *Fisheries Jurisdiction (Spain v Canada).*[16] He referred to the rules of interpretation laid down by the Supreme Court of India in *Harakchand v Union of India*[17] and *RMD Chamarbaugwalla v The Union of India.*[18] Consequently, the Court was competent to exercise jurisdiction under Articles 17 and 41 of the General Act of 1928.

---

[11] [1973] International Court of Justice Reports 328 (Pakistan v India).
[12] [1972] International Court of Justice Reports 46.
[13] [1992] International Court of Justice Reports 240, 260 (Nauru v Australia).
[14] [1957] International Court of Justice Reports 56-57.
[15] (Preliminary Objections) [1959] International Court of Justice Reports 6, 78, 90-94, 101-119 (Switzerland v United States).
[16] (Jurisdiction) [1998] International Court of Justice Reports 454 at para 60.
[17] All India Reporter 1970 (Supreme Court) 1453.
[18] [1957] Supreme Court Reports 950-951.

Although the Court in *Military and Paramilitary Activities in and against Nicaragua*[19] had stated that the declarations to accept its compulsory jurisdiction were facultative and unilateral engagements, it had held that:[20]

> [j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.

Consequently, Pirzada J found that these principles were applicable to the Indian declaration as well.

Pirzada J referred to Pakistan's claims that India had breached customary international law by an incursion into Pakistani airspace and shooting down Pakistan's naval aircraft on 10 August 1999 killing 16 persons. Customary international law required a State not to use force against another State and not to violate a State's sovereignty. As a result, he found that the Court had jurisdiction to hear Pakistan's Application.

Pirzada J relied on the Court's finding in *Military and Paramilitary Activities in and against Nicaragua*[21] and referred to the separate and dissenting opinions of Weeramantry, Vereshchetin and Bedjaoui JJ in *Fisheries Jurisdiction (Spain v Canada).*[22] He observed that as the principal guardian of international law, the Court's role was to ensure respect for this body of law. Recalling the Court's consensual nature and jurisdiction, including the separate opinion of Lachs J in *Case Concerning Questions of Interpretation and Application of the Montreal Convention Arising out of the Aerial Incident at Lockerbie,*[23] he stated that the Court usually showed judicial caution and restraint. However, this did not prevent the Court from evolving principles of constructive creativity and progressive realism.

For the above reasons, Pirzada J concluded that the Court should reject India's preliminary objections to its jurisdiction and entertain Pakistan's

---

[19] (Jurisdiction and Admissibility) [1984] International Court of Justice Reports 392, 551 (Nicaragua v United States).
[20] Ibid 418 para 60.
[21] (Jurisdiction and Admissibility) [1984] International Court of Justice Reports 392, 551.
[22] (Jurisdiction) [1998] International Court of Justice Reports 454.
[23] (Preliminary Objection) [1998] International Court of Justice Reports 3 (Libyan Arab Jamahiriya v United Kingdom).

Application instead. Further, he emphasised that Pakistan and India were under an obligation to settle their disputes in good faith. This included the dispute concerning Jammu and Kashmir, especially the dispute currently before the Court arising out of the aerial incident of 10 August 1999. He referred to the rule of law and justice and called upon India and Pakistan to keep in mind the ideals of Mahatma Gandhi and Quaid-e-Azam Mohamed Ali Jinnah and take effective measures to secure peace, security and justice in South Asia.