

INTERNATIONAL COURT OF JUSTICE

(1999)

The Case concerning the Aerial Incident of 10th August 1999.
(Pakistan v. India)

MEMORIAL OF THE GOVERNMENT OF PAKISTAN ON JURISDICTION

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Observations and Submissions of the Government of the Islamic Republic of Pakistan on the preliminary objections raised by the Government of India regarding the Jurisdiction of the International Court of Justice.

The Government of Pakistan denies the claim of the Government of India as contained⁹³ in their preliminary objections, inter alia, stating that the International Court of Justice has no jurisdiction and further denies all adverse claims and objections contained in the Government of India's preliminary objections as conveyed in their communication to the Court dated 2 November 1999. In the submission of the Government of Pakistan, the Government of India has no defence to offer for the shooting down of Pakistan's unarmed aircraft, 'the Atlantique' in Pakistan's territory and airspace and is therefore, resorting to frivolous technicalities with the clear intent to defeat the legitimate jurisdiction of the International Court of Justice in the present Case.

2. The Government of Pakistan has noted that, the Government of India has examined the application submitted by Pakistan in "the light of its traditional commitment to the purposes and principles of the Charter of the United Nations, and its respect for the role and functions of the International Court of Justice as the principal Judicial Organ of the United Nations as set out in its statutes" It is with the same considerations that the Government of Pakistan has sought judicial settlement of this Case by reference to the International Court of Justice in order to avoid a spiral of reprisals which could lead to further deterioration in the relations between the two countries and aggravate tensions in South Asia. Pakistan regards judicial settlement of the present dispute by reference to the International Court of Justice as an

appropriate method of peaceful settlement in accordance with the principles and purposes of the Charter.

Background

3. The brief facts of the case narrated in the application filed by the Islamic Republic of Pakistan on 21st September 1999 before the Court are as follows:

On the 10th day of August 1999 the unarmed 'Atlantique' aircraft of the Pakistan Navy was on a routine training mission with sixteen personnel on board. While flying over Pakistan airspace from 10:30 a.m. to 10:55 a.m. it was fired upon with air to air missiles by Indian air force planes, without warning. All sixteen personnel, mostly young naval trainees, on board the aircraft were killed. This act of blatant military aggression was unprovoked and in contravention of the rules of customary international law relating to sovereignty, inviolability of national borders and non-use of force, as also enshrined in the Charter of the United Nations.

The Atlantique aircraft was conducting scheduled instrument flight training in accordance with the standard operating procedures. The Karachi Civil Airport was informed of the flight plan of the aircraft. The plane took off at 0915 hrs (Pakistan time). Radar contact was maintained with the aircraft until it was lost sometime before 1055 hrs. The general area of operation was approximately 70 to 90 miles east of Karachi. All through the one hundred minutes of flying time the Pakistan Naval aircraft was visible on the radar within Pakistan airspace. Moreover, since the aircraft was flying at the height of 7000-9000 feet, it was visible on the Pakistan radar in Karachi and was apparently visible on Indian radar at Nalya Air Base, in Gujrat, throughout the flight time.

From 1030 to 1055 hrs, when 'the Atlantique' was shot down in Pakistan territory, the aircraft was in the same area while carrying various training exercises and manoeuvres of instrument flying within Pakistan airspace. The flight pattern during such training activities is generally circular.

Once radar contact was lost with the aircraft, an intensive search was undertaken by Pakistani aircraft and helicopters at about 1206 hrs. The wreckage of the Atlantique was discovered around 1455 hrs which was scattered across an area of one square kilometer. The wreckage of the plane was about 2 km inside Pakistan territory which is a clear proof that when the aircraft was shot down, it was well within Pakistan's airspace.

By the time the wreckage was found by Pakistan Navy's Sea King Helicopters, there was a gap of about two and a half hours. The Indian helicopters, knowing the actual position of the shooting down of Pakistan's aircraft, intruded into Pakistan's territory to pick up a few items from the debris. By this illegal act, India once again violated Pakistan's airspace and territorial sovereignty, by sending helicopters into Pakistan territory to remove parts of the wreckage, before Pakistan's search party discovered it, in order to manufacture "evidence" for its initial claim that the Atlantique had been shot down over Indian air space. Subsequently, because of the overwhelming evidence no shadow of doubt was left that the place of shooting down of the Aircraft was well within Pakistan's territory and airspace.

Pakistan, in conformity with the purposes and principles enshrined in the Charter of the United Nations, did not resort to any retaliatory measures. Instead on 25 August 1999,

Pakistan requested the Secretary General of the United Nations, in view of the false and misleading claims made by the Indian side regarding the shooting down of the un-armed Naval aircraft, to send a "Fact Finding Mission" to the region to ascertain facts about the incident (Annex-A). The Secretary General in his Note dated 3 September 1999 informed the Government of Pakistan that the Indian Government did not see the need for any kind of third party investigations into the incident and, therefore, rejected the request. He regretted that he was unable to send a mission to the region since this was not possible without the full cooperation of all the parties (Annex-B).

Moreover, on August 30, 1999, the Government of Pakistan made a demarche to the Government of India, through its High Commission in Islamabad, demanding that the Government of India should pay an amount of US\$ 60.2 million as compensation for the loss of the Pakistani Aircraft and for the loss of lives of the personnel on board (Annex-C). India did not respond to Pakistan's demarche but publicly rejected (Annex 'D') Pakistan's claim closing the door to any possible negotiations, even under the Simla Accord. Nor did India launch any investigation into the incident to establish responsibility or inform Pakistan that it had done so under the existing obligations spelt out in the Agreement between the two countries dated 6th April 1991 on Prevention of Airspace Violations (Annex 'E').

In view of the Indian refusal to settle this dispute through acceptance of a Fact Finding Mission of the United Nations or any other third party intervention as well as direct bilateral negotiations, the Government of Pakistan has accordingly invoked, in the present Case, the jurisdiction of the International Court of Justice to adjudicate upon the dispute between the two countries and to establish the international responsibility of the Government of India, including the payment of compensation for shooting down the Pakistani aircraft and for the loss of human life, as a consequence of this illegal action.

Preliminary Comments

4. At the outset the Government of Pakistan wishes to emphasize that article 38, para. 2 of the Rules of Court clearly states that "The application shall specify as far as possible, the legal grounds upon which the Jurisdiction of the Court is to be based". This indicates that the correct stage to exhaustively spell out the basis of the Courts jurisdiction is the present Memorial relating to Jurisdiction, which the Government of Pakistan is hereby submitting.

The Government of India is obliged to accept the Jurisdiction of the International Court

5. The Government of Pakistan conveys that, notwithstanding its claim to the Jurisdiction of the Court under article 36 (1) and (2) of its Statute, as read with other provisions of the statutes and obligations under treaties and conventions in force, if the Government of India is at all mindful of the purposes and principles of the Charter, it must accept the Jurisdiction of the International Court and consent to the adjudication of the dispute on merits. This course of action is all the more appropriate for the peaceful settlement of the present dispute. Such a step would help to reduce tensions in the South Asian region and pre-empt any retaliatory action to which Pakistan may be entitled and justified under the rules of customary international law. In addition, the Government of Pakistan invites the Government of India to act in accordance with Article 36, para. 3 of the United Nations Charter whereby "legal disputes should as a general rule be referred to the International Court of Justice in accordance with the provisions of the Statute of the Court". The requirements of Justice must be considered by the Government of India and the need to establish responsibility for the

incident, taking into consideration that, apart from destruction of an expensive aircraft of the Government of Pakistan, all sixteen unarmed human beings on board the aircraft, who were mostly young naval trainees, met a tragic death with incalculable loss and grief to their families.

Jurisdiction of the International Court of Justice in the present case

6. Should the Government of India not find it possible to voluntarily submit to the Jurisdiction of the Court thus enabling the Court to proceed directly to the merits of the Case, the Government of Pakistan submits the following basis for invoking the Jurisdiction of the Court: (These submissions meet the preliminary objections raised in paragraph 2 sub-paras. (i to iii) of the Note dated 2.11.99 submitted by the Government of India).

A. Jurisdiction of the Court is founded on Article 17 of the General Act for Pacific Settlement of International Disputes as read with Article 36(1) and Article 37 of the Statute of the Court

A. 1) As the General Act for the Pacific Settlement of International disputes of 1928 continues to apply to India and Pakistan the jurisdiction of the Court is founded on Article 17 thereof as read with Article 37 of the Statute of the International Court of Justice. The General Act for Pacific Settlement of international disputes applied by succession to India and Pakistan by virtue of the Indian independence (International Arrangements) Order of 1947 and the Agreement as to the Devolution of International Rights and Obligations upon the Dominions of India and Pakistan (see Annex 'F') as well as the principles of public international law concerning State succession. Pakistan re-affirmed its continued succession and adherence to the said Convention vide its communication to the Secretary General dated 30th May 1974 . The Secretary General of the United Nations also received a communication from the Government of India on 18th September 74, setting out India's view why it could not have succeeded to the Convention. It is the contention of the Government of Pakistan that the arguments conveyed in India's Communication are erroneous and India continues to be a party to the said Convention by succession. The Indian Communication (received on 18th September 74) does not amount to a denunciation of the Convention in accordance with the procedure allowed under the Convention but is an unjustified and untenable contention on the question of its succession to the said convention. (communications of the Government of Pakistan and Government of India regarding succession to the general act of 1928 are placed at Annex 'G'). The jurisdiction of the Court in the submission of Pakistan is based on Article 37 of the Statute and Article 17 of the General Act of 1928 which provides 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.2) The Government of Pakistan also contends that the reservations made by India while becoming a party to the General Act on 21st May 1931 do not fall under the permissible

reservations exhaustively set out in Article 39 of the General Act. They are inadmissible and have no legal effect.

A.3) Assuming, but not conceding that the Indian Communication to the Secretary General, received on 18th September 74 amounts to a denunciation of the Convention, the means of peaceful settlement of disputes under the Convention by reference to the Court has been preserved by Article I, paragraph 2 of the Agreement on Bilateral Relations between the Government of Pakistan and the Government of India, of 2nd July 1972 (The Simla Accord Annex 'H'). This provides 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... ." [Emphasis Added]

The terms "any other peaceful means mutually agreed upon between them" on their plain meaning refer to any procedure for peaceful settlement, whether in a bilateral or multilateral treaty agreed upon before 2nd July 1972 or which may have been available by agreement after that date. As chapter II of the General Act for Pacific Settlement of Disputes (1928) was a 'peaceful means' already "agreed upon" by both parties before the relevant date (2nd July 1972) and created mutually binding obligations between them, the aforementioned provision of the Simla Accord reaffirms and makes the procedure under Article 17 of the General Act of 1928 truly efficacious. In any case, the communication of the Government of India conveying that it had not succeeded to the Convention was received by the UN Secretary General on 18 September 1974, whereas the agreement for bilateral relations between India and Pakistan (the Simla Accord) was signed on 2nd July, 1972. In view of the above, the procedure under Article 17 of the General Act for peaceful means of settlement continued to be available, in any case till 18 September 1974 and was hence preserved by Article 1 para. 2 of the Simla Accord, as between the parties.

The Court's Jurisdiction is founded and invoked by Pakistan under

Article 36(1) of the Statute of the Court, read with chapter-IT (Article 17) of the General Act and Article 37 of the Statute of the Court, notwithstanding any purported "denunciation" by the Government of India of the General Act-1928 through the communication of the Government of India of 18th September 1974; indeed if there was such a denunciation, which Pakistan denies.

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

B(1). Article-1 paragraph-1 of the United Nation's Charter provides as follows:

"The purposes of the United Nations are:

"To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;" (Emphasis added)

There is therefore, a fundamental obligation on the part of the member states to settle disputes which could lead to a breach of peace, by peaceful means in conformity with principles of justice and International Law. This obligation has to be carried out meaningfully and in good faith and precludes parties from excluding all means of peaceful settlement which, unfortunately, is the stance of the Government of India. In this context, it is significant that the Government of India has not come out with any positive step for pacific settlement of the dispute.

Purposes and Principles — peaceful settlement

"All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered."

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."

As regards the pacific settlement of disputes, Article-33 of the Charter lays down basic obligations of the Member States and provides as follows:

Pacific Settlement of disputes

"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

This means that the use of force in the form of reprisals under customary international law is not available to the parties by virtue of the aforesaid Article and there is a clear obligation to settle disputes in good faith by at least one of the peaceful means indicated in Article-33 of the Charter. No party to a dispute has, therefore, the freedom to obstruct and deny all peaceful means of settlement indicated in Article-33 of the Charter.

Legal Disputes

Article-36, sub-para.-3 of the UN Charter deals with Legal disputes and provides as follows:

"In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International court of Justice in accordance with the provisions of the Statute of the Court."

There is, therefore, an implied obligation that legal disputes should as a general rule be referred to the International Court of Justice which, under Article-92 of the Charter, is the principal judicial organ of the United Nations and whose Statute constitutes" an integral part of the present charter".

Jurisdiction of the International Court of Justice under the United Nations Charter

Article-36(i) of the Statute of the Court which, by virtue of Article-92 of the Charter constitutes a part of the UN Charter, provides:

The jurisdiction of the Court comprises all cases which the parties refer to it *and all matters specially provided for in the Charter of the United Nations* or in treaties and conventions in force" (Emphasis added).

The framers of the UN charter could not have added the emphasized words in the said provision of the Statute of the Court without any meaning. The spirit and underlying obligations of the UN Charter, in any case, raise the presumption of a residual jurisdiction of the International Court of Justice in the case of legal disputes, in circumstances when one party has refused to resort to any of the other peaceful means of settlement enumerated in Article-33 of the Charter.

In the instant Case regarding the Aerial Incident of 10 August 1999, the refusal of India to accept all peaceful methods of settlement has ominous significance and constitutes a basis for the Court to exercise its residual jurisdiction as the principal judicial organ of the United Nations . In its response to Pakistan's application, India has recognized the role the International Court as the Principal Judicial organ of the United Nations and accepted to abide by the purposes and principles of the Charter, referred to above. As to whether the International Court of Justice has an implied residual jurisdiction in the circumstances of the instant case, the decision on this question must rest with the Court itself by virtue of Article-36(6) of its Statute.

Relevant Provisions of the Simla Agreement

B(2). Notwithstanding the above submissions, Article-i of the Simla Agreement, read with Article-i; Article-2 paras-3 and 4; Article-33; Article-36(3); and Article -92 of the UN Charter, as well as Article-36 (i) of the Statute of the Court, further affirms the jurisdiction of the International Court of Justice in the instant Case.

The agreement on bilateral relations between India and Pakistan provides in Article-i thereof as follows:

"1. The government of Pakistan and the Government of India are resolved that the two countries put an end to the conflict and confrontation that have hitherto marred their relations and work for the promotion of a friendly and harmonious relationship and the establishment of durable peace in the sub-continent, so that both countries may henceforth devote their resources and energies to the pressing task of advancing the welfare of their peoples."

In order to achieve this objective, the Government of Pakistan and the Government of India have agreed as follows:-

i) That the principles and purposes of the Charter of the United Nations *shall govern the relations between the two countries; (Emphasis added)*.

ii) 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 peaceful and harmonious relations".
(Emphasis added)

It is clear that the two parties have undertaken and reaffirmed that the principles and purposes of the Charter of the United Nations *shall govern the relations between the two countries* This includes the obligations under Article-i para.-1, Article-2, paras-3 and 4; Articles-33; and 36(3) of the Charter; in so far as these are specific provisions serving those principles and purposes. The implementation of the obligations under the Simla Accord, in good faith would imply that all pacific means of settlement cannot be excluded by India vis-à-vis Pakistan and in the instant case a residual jurisdiction of the International Court of Justice is relied upon in view of the facts of the Case. The alternative conclusion would be to permit the customary international law remedy of reprisals which would negate the very purposes and principles referred to in the Charter of the United Nations as well as the Simla Accord.

C. Universality of application of the United Nations Charter and the Statute of the International Court

C.(1) India and Pakistan, as members of the United Nations, are bound by Articles 92 and 93 of the UN Charter. Article 92 provides that, "the International Court of Justice shall be the principal judicial organ of the United Nations" and hence necessarily open to all its members, on the basis of the principle of sovereign equality and on an equal footing. Article 93 of the UN Charter provides that "All members of the United Nations are ipso-facto parties to the Statute of the International Court of Justice". This implies that all members are entitled to rely on the provisions for Jurisdiction and other matters set out in the Statute on a nondiscriminatory and equal basis. This concept is further reinforced by Article 35 paragraph 1 of the Statute of the Court which provides "The Court shall be "to the States parties to the present Statute". A unilateral reservation of the nature of the Indian 'commonwealth reservation' which is specifically designed to exclude one or more parties from the operation of the Compulsory Procedure for settlement is contrary to the above provisions and the basic norms of the United Nations System. By virtue of Article 103 of the Charter the grund norms underlying the Charter system must prevail. The reservation being in conflict with the principle of sovereignty equality and the express provisions referred to above has no legal effect.

C.(2) The reservation has also not been made in good faith or to serve any rational purpose and is obviously designed to exclude Pakistan from participating in the Compulsory jurisdiction procedure of the Court vis-à-vis India. As good faith is an underlying condition in the performance of International Obligations, the reservation in question, apart from being invalid, ab initio, cannot for the above reason be relied upon to oust the jurisdiction of the Court.

C(3) By virtue of their membership of the United Nations and being parties to the Statute, the contents of Articles 36, 37 and 38 of the Statute are binding legal obligations on both parties, as also other relevant Articles of the Court's Statute. The implication of this is that no unilateral act, such as the 'commonwealth members' reservation can violate the obligations set out in these Articles or reserve to the party making it the liberty to cross the limits set in the said Articles since they are provisions of a multilateral convention equally binding on all parties to that convention. Thus India cannot by its unilateral reservation in its declaration under Article 36(2), render the Statute inapplicable to Pakistan in so far as the compulsory jurisdiction arrangements are concerned. As a party to the Statute, Pakistan is entitled to the compulsory jurisdiction arrangements against any other state that has made a Declaration under Article 36(2) (including India) whether or not Pakistan is or has been a member of the Commonwealth. Article 36(2) of the Statute relates to all parties to the Statute and hence cannot be wholly excluded a priori in relation to particular parties by unilateral reservations appended to declarations under Article 36 (2). It can only be made on condition of reciprocity on their part.

C(4). Article-2, paras-1 and 2 of the United Nations Charter are particularly significant in this context and provide:

"ARTICLE-2"

"The Organization and its Members, in pursuit of the Purposes stated in Article-I, shall act in accordance with the following principles:

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

Article-2 para.-I reaffirms the grund norm of sovereign equality between all members of the United Nations and para.-2 of the Article lays a clear obligation on members to ensure to "all of them rights and benefits resulting from membership." Further, that these obligations have to be fulfilled in 'good faith.' The Government of India cannot, therefore, deprive Pakistan of its rights under Article-36(2) of the Statute of the Court, which is an integral part of the Charter by virtue of Article-92 of the Charter. In consequence, the 'Commonwealth Members' reservation, being contrary to the grund norm of the U.N. Charter, namely the principle of sovereign equality and universality of rights and obligations of members of the United Nations, has no legal effect.

In this context, Article-I para. (v) of the Simla Accord provides as follows "that they (India and Pakistan) *shall always* respect each other's national Unity, Territorial integrity, Political independence *and Sovereign equality*" (Emphasis added). India is therefore estopped from invoking reservations or conditions in its declaration under Article-36(2) of the Statute which would deny sovereign equality to Pakistan under the compulsory procedure for settlement of dispute established under that Article.

D. Conflict of the 'commonwealth members' reservation with Article 36(3) and its legal effect

D(1) Declarations under Article 36(2) of the Statute can be made unconditionally or under specified conditions. The permissible conditions have exhaustively been set out in Article 36(3) as (i) On condition of reciprocity on the part of several or certain states or (ii) for a certain time. The reservation of the Government of India excluding all disputes with " Any State which is or has been a member of the Commonwealth of Nations " is in excess of the conditions permitted under Article 36(3) of the Statute which is a binding obligation between India and Pakistan and indeed between all, commonwealth members. This condition, being ultra vires of Article 36(3), has no legal effect. However, to the extent that the Declaration of the Government of India is in accordance with Article 36(3), it stands and confers compulsory jurisdiction on the Court. The "commonwealth member's reservation" is not so central as to constitute ' an essential basis of the consent of India' to be bound by its declaration under the optional clause. It serves no rational or legitimate purpose as there exists no separate procedure for the compulsory jurisdiction of disputes between commonwealth countries. Hence its illegality does not affect the validity of India's declaration, under Article 36(2) of the Statute.

D(2) There is no practice or procedure under the Statute of the Court to raise an objection to a reservation, as being contrary to Article 36 (3), until it is invoked by the party making it in a preliminary objection as to the jurisdiction of the Court or in its counter memorial. As the Government of India has now invoked this illegal and invalid 'reservation' the appropriate stage has been reached for the Government of Pakistan to challenge its validity, without prejudice to the extent of compulsory jurisdiction otherwise established by the Declarations of India and Pakistan under Article 36(2) of the Statute.

E. The Government of India is estopped from invoking the 'commonwealth members' reservation specifically against Pakistan

Assuming, but not conceding, that the exclusion of disputes with members of the commonwealth, in India's declaration, can limit the operation of Article 36 (2) and (3) of the Statute, such effect cannot be held against Pakistan by virtue of the obligation undertaken by the Government of India under Article I para. (2) of the Agreement on bilateral relations of July 2nd 1972 whereby the parties have agreed to settle their differences by negotiations or" by any other peaceful means mutually agreed upon between them". As the compulsory procedure for settlement under Article 36(2) constitutes a "peaceful means agreed upon between them", a unilateral 'reservation' cannot be invoked by India to defeat this peaceful means of settlement in the case of Pakistan, whatever may be its effect against other commonwealth members. Article I para. (ii) of the Simla Accord creates an estoppel against the Government of India from invoking this "reservation" against the Government of Pakistan.

The meaning of the words "peaceful means mutually agreed upon between them" have to be interpreted effectively in the light of the general objects and purposes of the Simla Accord which has set out, in Article-I that the principle and purposes of the Charter of the United Nations" shall govern" the relations between the two parties. This formulation includes the peaceful methods of settlement of disputes indicated in the Charter, and the Statute of the International Court, including the compulsory procedure. under Article-36 (2) of the Court's Statute, to which both parties have agreed. The intention of the parties was not to oust these peaceful methods of settlement available to them but to reinforce the same, in view of the clear objective of the Simla Accord to promote harmonious relations and the establishment of durable peace between them.

It is also clear that accession of India and Pakistan to the U.N. Charter and hence to the Statute of the Court creates mutual obligations between them which render Article 36(2) of the Statute "a peaceful means of settlement mutually agreed upon between them" within the terms of the Simla Accord.

The principles of estoppel, preclusion and acquiescence therefore, apply to sustain the submission that the Indian "Commonwealth Members" reservation cannot be relied upon and has no legal effect.

F. Effect of Article 103 of the United Nations Charter on the Indian "Commonwealth members" reservation

F(1) If the concept expounded in the Electricity Company of Sofia

Case, that as a result of the Declarations under Article 36(2) of the Statute of the Court an agreement comes into existence between the two states accepting the jurisdiction of the Court, then the effect of Article 103 of the UN Charter on such an agreement is of direct relevance. Article 103 provides:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

F(2) For the reasons already stated in ground (B) above; the principle of sovereign equality, universal application of the Statute and the obligations under Articles 92 and 93 of the Charter are in conflict with the "commonwealth members" reservations of India. The obligations under these provisions must therefore prevail over that "reservation". The reservation in question can therefore not be invoked or recognized by the Court.

G. Effect of Article 19 of the Vienna Convention on the Law of Treaties 1969

G(1) Should the Declarations under Article 36(2), accepting the compulsory jurisdiction of the Court, be treated as treaty obligations the principles applicable in Article 19 of the Vienna Convention on the Law of Treaties would also apply. Article 19 states 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 sub-paragraphs (a) and (b), the reservation is inconsistent with the object and purpose of the treaty.

Article 19(b) would clearly indicate the exclusion and illegality of the 'commonwealth members' reservation of India since it is not specified, in Article 36(3) and because it is

inconsistent with the object and purpose of the Statute as well as the compulsory Jurisdiction procedure for the reasons already stated.

H. The 'multilateral convention' reservation invoked by India cannot oust the Compulsory jurisdiction of the International Court

H(1) The Government of India has also invoked an exclusion clause to its Declaration concerning "any dispute arising from the interpretation or the application of a multilateral treaty, unless at the same time all the parties are also joined as parties to the case before the Court". In India's contention the reference to the UN Charter, which is a multilateral treaty, is a basis for Pakistan's claim and falls within the ambit of this reservation. Pakistan has, in fact, invoked a number of principles of customary and general international law that have been violated by the Government of India, apart from a bilateral treaty on the subject (The Agreement between Pakistan and India on prevention of Air Space Violations dated 6th April 1991). The Court cannot reject Pakistan's claim under principles of customary and general international law or under the aforementioned bilateral treaty simply because some of these principles have been enshrined in the Charter of the United Nations. The fact is that such principles as non-use of force, non-intervention, respect for territorial integrity of States etc. do not cease to exist as customary international law applying to states, merely because of their codification in a multilateral convention, or treaty like the United Nations Charter. Apart from the above, the dispute between India and Pakistan involves direct International Responsibility of India and Pakistan relies on much wider rules of customary International Law, as well as those codified in the United Nations Charter.

H(2) The International Court of Justice in its judicial practice delivers judgements with binding force as between the parties in accordance with Article-59 of the Statute, and States which consider they may be affected by the decision are free to institute separate proceedings or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an indispensable parties" rule which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. None of the other States parties to the United Nation's Charter can in the instant case be regarded as being in a position such that their presence would be truly indispensable to the pursuance of the proceedings of the Court.

H(3) In any case the Court has a right to notify states who are parties to the UN Charter under Article 63 of the Statute and they can intervene if they so desire, within the terms of Article 62 of the Statute of the Court. In addition, Article-40 of the Statute of the Court provides that a case can be brought before the Court by notification of a special agreement or by written application addressed to the Registrar of the Court. The Registrar is required to notify the members of the United Nations through the Secretary General and also any other States entitled to appear before the Court. Any other Member of the United Nations or States who are entitled to appear before the Court can thus take part in the proceedings in this case. The Government of the Islamic Republic of Pakistan is not opposed to any such State being made a party or being provided an opportunity to take part in the proceedings of this case under Article-40 of the Statute.

H(4) Apart from the above, this particular exclusion clause is ultra vires of Article 36(3) for the reasons already set out and is also in conflict with Article 38 of the Statute which provides that "the Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States"

b) It would be a mockery of the system of compulsory jurisdiction if the Court could be divested of its mandatory function by a unilateral reservation aimed at excluding one of its principal functions, as set out in Article 38 of its Statute.

7. The Government of Pakistan does not concede to the Government of India any procedural right to amend, alter or supplement its preliminary objections to the Jurisdiction of the Court or to invoke any new grounds in an attempt to oust the jurisdiction of the Court. The Court is requested not to entertain any additional communication which does not fall within the agreed procedure applicable between the parties. In Pakistan submission, the Government of India is bound to appear and answer Pakistan's claim before the International Court of Justice.

8. In view of the above submissions, the Government of Pakistan respectfully requests the Court to exercise jurisdiction and proceed to decide the Case on merits. The Government of Pakistan reserves the right to file an appropriate Rejoinder, after perusal of the Counter Memorial of the Government of India.

9. The contents of this Memorial are without prejudice to the rights claims and contentions of the Government of Pakistan as set out in the original Application instituting proceedings before the International Court of Justice, while reserving to themselves all rights and remedies

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LIST OF THE ANNEXURES

1. Annexure-A - Letter of the Pakistan Foreign Minister to the Secretary General, United Nations.
2. Annexure-B - Reply of the Secretary General, United Nations to Pakistan Foreign Minister.
3. Annexure-C - Note Verbale of the Government of Pakistan to the Government of India regarding shooting down of an unarmed Pakistan Navy aircraft.
4. Annexure-D - Report in the Times of India regarding Pakistan's complaint to the ICJ on the incident.
5. Annexure-E - Agreement between Pakistan and India on prevention of air space violations and for permitting over flights and landings by military aircraft.
6. Annexure-F - 944 Constitutional Documents. The Indian Independence (International Arrangements) Order, 1947.
7. Annexure-G - 11 .29: General Act of Arbitration of 1928

8. Annexure-H - Agreement, on bilateral relations between the Government of India and the Government of Pakistan.

THE INDIAN INDEPENDENCE (INTERNATIONAL ARRANGEMENTS) :
ORDER, 1947.

(G. G. O. No. 17)

[14th August, 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:—

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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, 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 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.
