DECISIONS OF INTERNATIONAL TRIBUNALS:

THE INTERNATIONAL COURT OF JUSTICE

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I. RECENT CASES

I. THE AERIAL INCIDENT OF 10 AUGUST 1999 (*PAKISTAN* v. *INDIA*), JUDGMENT ON JURISDICTION[1]

A. Introduction

On 21 September 1999 Pakistan filed an application instituting proceedings against India in respect of a dispute relating to the destruction in the previous month of a Pakistani military aircraft. According to Pakistan the aircraft, which was unarmed, was shot down by Indian fighter aircraft while in Pakistan air space and without warning. The 16 people aboard the aircraft, who were mostly naval trainees, were all killed. India denied all responsibility for the incident and rejected Pakistan's suggestion that a United Nations fact-finding mission should be sent to the area. Having unsuccessfully demanded some 60 million dollars compensation for India's allegedly illegal action, Pakistan then referred the matter to the Court.[2]

As the basis for the Court's jurisdiction Pakistan relied on declarations by the two States made under Article 36(2) of its Statute (the optional clause) and Article 17 of the 1928 General Act for Pacific Settlement of International Disputes (the General Act).[3] India, however, raised a number of preliminary objections which the parties agreed had to be dealt with separately before any proceedings on the merits. As neither State had a judge of its nationality on the bench, Pakistan chose Mr Syed Pirzada and India Mr Jeevan Reddy to sit as *ad hoc* judges in accordance with Article 31(3) of the Statute. The parties then

* The aim of this annual section is to provide a guide to the current work of the ICJ by summarising the essential aspects of recent cases and highlighting points of particular significance.

1. *Case concerning the Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction of the Court*, Judgment of 21 June 2000, I.C.J. Rep. 2000. All references are to the version of the text provided by the Registry of the Court and available on the Court's website.

2. For an account of the background and rival claims see the dissenting opinion of Judge Pirzada, paras 1 and 2, quoting Pakistan's counter-memorial.

3. Pakistan also put forward a subsidiary argument based on Art. 36(1) of the Statute which was rejected in paras 47 to 50 of the Judgment.

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presented their arguments on the issue of jurisdiction and these were dealt with by the Court in its judgment of 21 June 2000, to which the present note relates.

B. The Optional Clause Declarations

Pakistan's declaration under Article 36(2) was made in 1960 and includes a number of reservations and limitations.[4] However, India's declaration of 1974 is also qualified and it was on the reservations in its own acceptance that India relied in the present proceedings. Specifically, it invoked the exclusion in sub-paragraph 2 of its declaration of "disputes with the government of any State which is or has been a Member of the Commonwealth of Nations" and the exclusion in sub-paragraph 7 of "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 (*sic*) of India specially agrees to jurisdiction." In reply, Pakistan argued that the multilateral treaties reservation was inapplicable because its claim was based on customary international law, as well as on the United Nations Charter, and as regards the Commonwealth reservation, put forward a number of arguments denying that India was entitled to rely on it.

The Court dealt first with the Commonwealth reservation. Here, presented with the problem that, as a member of the Commonwealth, its disputes with India were *prima facie* covered by the reservation, Pakistan had boldly argued that because the Commonwealth reservation was not expressly authorised by Article 36(3) of the Statute,[5] it was "illicit". From this it was said to follow that the reservation, along with all other such "extra-statutory" reservations, was opposable only to States which had accepted it, either by using the reservation in their own declarations, or by not challenging its applicability. The obvious difficulty with this argument, as India was not slow to point out, was its startling novelty. For, as the Court explained, Article 36(3) has never been treated as exhaustive of permitted reservations, States employ many different reservations in practice, and their right to make them has been widely accepted. Pakistan's argument about "extra-statutory" reservations was therefore rejected.[6]

Next, Pakistan suggested that the Commonwealth reservation could not be relied on because it was obsolete. This too was a novel argument, supported only by the fact that Commonwealth States no longer owe common allegiance to the Crown and that a tribunal to resolve Commonwealth disputes, though once

4. In particular, Pakistan's declaration includes the multilateral treaties reservation in the formulation which requires all parties to the treaty "affected by the decision" to be parties to the case. As noted in the text, India's reservation, which it relied on in the present case, uses a wider formulation.

5. Art.36(3) of the Statute permits declarations to be made "unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time". On the reasons for this formulation see J.G. Merrills, "The Optional Clause Revisited" (1993) 64 B.Y.B.I.L. 197 at pp.200–201.

6. In this connection the Court also rejected Pakistan's argument that India's reservation was an abuse of right because its only purpose was to prevent Pakistan from bringing an action against India. See para. 40 of the Judgment.

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mooted, never came into being.[7] On the other hand, eight Commonwealth States still include this reservation in their declarations under Article 36(2)[8] and as recently as 1998 the Court indicated that the intentions of a State as expressed in the text of its declaration are the key to determining its effect.[9] Since India had made it clear that it wished to limit the scope of its acceptance *ratione personae*, Pakistan's argument about "obsolescence" was also rejected.

Pakistan's third and final argument on this point was that even if the reservation was valid, India was estopped from relying on it by Article 1 of the 1972 Simla Accord under which Pakistan and India have agreed to settle their differences by peaceful means. As the Court pointed out, however, this was no more than an undertaking to use peaceful means to be mutually agreed. Consequently, it in no way modified the specific rules governing recourse to any particular procedure. Thus it did not prevent India from relying on the Commonwealth reservation in its declaration under Article 36(2). The estoppel argument too was therefore rejected.

Since the Court ruled that the Commonwealth reservation had been validly invoked by India, it concluded that it had no jurisdiction to entertain the application on the basis of the States' optional clause declarations. It therefore also held that it was unnecessary to consider India's multilateral treaties reservation.

Before leaving Article 36(2) it is worth noting that India's declaration contains two other reservations with a possible relevance to this case. Sub-paragraph 4 of the declaration excludes "disputes related to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence …", and sub-paragraph 10(d) excludes disputes concerning or relating to "the airspace superjacent to its land and maritime territory". India, however, chose not to rely on these reservations, presumably in order to avoid having to discuss the subject matter of the dispute. Accordingly, these reservations were not examined in the parties' pleadings and are not referred to in the judgment.

C. The General Act of 1928

Article 17 of the General Act, which was the alternative basis of jurisdiction relied on by Pakistan, provides:

> All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice.

7. In 1992 these considerations led Judge Ago to suggest that the Commonwealth reservation was obsolete. See *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objection*, Judgment, I.C.J. Rep. 1992, 240 at p.327, para. 5, separate opinion of Judge Ago.

8. See Merrills, *op. cit. supra* n.5 at pp.221–222.

9. See *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court*, Judgment, I.C.J. Rep. 1998 at p.454, para. 49.

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British India acceded to the General Act in 1931 and, according to Pakistan, remained a party on achieving independence in 1947, at which date Pakistan also became a party by automatic succession. Since Article 37 of the Court's Statute provides for treaties conferring jurisdiction on the Permanent Court to carry over to the present Court, Pakistan maintained that jurisdiction in the present case could be based on the General Act.

India rejected this conclusion on a number of grounds. It maintained first that the General Act is no longer in force, having passed into history with the League of Nations. Then it argued that even if the General Act had survived the demise of the League, neither India nor Pakistan had succeeded to it in 1947 because it was an agreement of a political character. Finally, India pointed out that in 1974 it had indicated to the Secretary-General of the United Nations that it had never regarded itself as bound by the General Act, action which in India's view confirmed the conclusion that Pakistan could not rely on it.

In previous cases in which the General Act has been in issue the Court has managed to avoid dealing with the question of its current validity, but has disposed of the matter on another ground.[10] It adopted the same approach here, refraining from ruling on whether the Act was in force in 1947 and, if so, whether Pakistan and India had acquired obligations under it, and dealing instead only with India's final point. In the Court's view even if the General Act was binding on India in 1974, India's communication to the Secretary-General, though not in terms a denunciation, must be treated as equivalent to denunciation as provided in Article 45 of the Act. From this it followed that India must have ceased to be bound by the General Act by at the latest 16 August 1979, when a denunciation under Article 45 would have taken effect. The Court therefore concluded that the General Act did not provide a basis of jurisdiction in the case.

Although the Court decided that neither the General Act, nor the parties' declarations under Article 36(2) gave it jurisdiction, it recalled in the final part of its judgment that States remain responsible for their actions in international law and have an obligation to settle their disputes by peaceful means. For India and Pakistan that obligation was underscored by the 1972 Simla Accord, and more recently by the 1999 Lahore Declaration, reiterating "the determination of both countries to implementing the Simla Agreement".[11] Accordingly, the Court concluded by reminding the parties of their general obligation and its bearing on the present dispute.

D. The Dissenting and Separate Opinions

The Court's decision that it had no jurisdiction on the basis of either the optional clause or the General Act was taken by a majority of 14 votes to two and Judge Al-Khasawneh and Judge *ad hoc* Pirzada, who constituted the minority, explained their votes in dissenting opinions. The former supported the Court's conclusion on the General Act and agreed that the Commonwealth reservation could not be regarded as obsolete. However, he regarded the reservation as

10. For discussion of the earlier cases see J. G. Merrills, "The International Court of Justice and the General Act of 1928" (1980) 39 C.L.J. 137.

11. See para. 54 of the Judgment.

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invalid because he accepted the applicant's argument that India's only motive in making it had been to remove disputes with Pakistan from the Court's jurisdiction. Since he also held that the reservation in question was severable, Judge Al-Khasawneh concluded that jurisdiction had been established on the basis of Article 36(2).

Judge Pirzada put his dissent on a broader basis, finding that both States had succeeded to the General Act, which he considered had not been denounced by India, agreeing with his colleague that the Commonwealth reservation was invalid and severable, and adding for good measure that it was also obsolete. Given their position on the Commonwealth reservation, both dissenting judges held it was necessary to examine the multilateral treaties reservation. Here too they upheld Pakistan's argument, holding that it could not be employed because the claim that India had used unlawful force was grounded in customary international law, as well as in the law of the United Nations Charter. This is, of course, similar to the position which the Court itself adopted in the *Nicaragua* case[12] and is the only point in the present case on which the dissenting opinions are persuasive.

Three other members of the Court gave short separate opinions. Judge Koroma and Judge *ad hoc* Reddy stressed the parties' obligation to settle their international disputes peacefully and reinforced the observations to this effect in the judgment. Judge Oda, on the other hand, went into the history of the General Act in an attempt to show that when seen in context the provisions of the Act could not be treated as giving the Court jurisdiction independently from, or in addition to, Article 36(2). This is an unconventional view of the General Act which, if accepted, would prevent any State from relying on the Act in future cases.

E. Conclusion

This is the third case in recent years in which the Court has been presented with far-fetched arguments relating to its jurisdiction and has studiously rejected them. In the *Land and Maritime Boundary* case[13] in 1998 the disappointed State was the respondent, attempting to prove that despite two unconditional acceptances of Article 36(2), no jurisdiction had been established. In the brief *Fisheries Jurisdiction* case,[14] on the other hand, as in the present case, the hopeful party was the applicant, trying to persuade the Court that it had jurisdiction under the optional clause, despite a reservation by the respondent which plainly excluded it. No doubt in all three cases the party with the weaker case anticipated the outcome which in the latest case, as in its predecessors, has the effect of confirming established principles. Thus, apart from establishing that the General Act is no longer binding on India, the interest of the judgment in the *Aerial Incident* case is

12. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *U.S.A.), Merits*, Judgment, I.C.J. Rep. 1986, 14. For discussion of this point see Merrills, *op. cit. supra* n.5 at pp.230–232.

13. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria) Preliminary Objections*, Judgment, I.C.J. Rep. 1998, 275. For comment see the author's case-note in (1999) 48 I.C.L.Q. 651.

14. See n.9 *supra*. For comment see the case-note by L. De La Fayette in (1999) 48 I.C.L.Q. 664.

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to be found in its endorsement of the right of States to include reservations in declarations under Article 36(2) and the prudent unwillingness of the Court to find artificial ways of avoiding them.

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