## SEPARATE OPINION OF JUDGE GROS

*[Translation]*

Although my opinion on this case is not based on the Court's reasoning as set out in the grounds of the Judgment, I voted in favour of the operative clause because the Judgment puts an end to the action commenced by the Applicant, and this coincides with the views of those who took the view, as long ago as the first phase of the Court's study of the case in June 1973, that there was no legal dispute. By finding that, today at least, the case between the two States no longer has any object, the Court puts an end to it by other means.

The Court has taken as legal basis of its Judgment the need to settle this question of the existence of the object of the dispute as absolutely preliminary, even in relation to questions concerning its jurisdiction and other questions relating to admissibility. The Judgment only deals with the disappearance of the object of the claim, and no decision has been taken on the questions concerning the Court's lack of jurisdiction or the inadmissibility of the claim; it is thus inappropriate to deal with these questions. But there remains the problem of the non-existence, from the outset of the case submitted to the Court, of any justiciable dispute, and on this point I find it necessary to make some observations.

1. In order to ascertain whether the proceedings were without foundation at the outset, the Application instituting proceedings, dated 9 May 1973, which defines the object of the claim, must clearly be taken as point of departure. The Applicant asked the Court to "order that the French Republic shall not carry out any further such tests" [sc., atmospheric tests of nuclear weapons in the South Pacific]. This request is based on 22 lines of legal argument which makes up for its brevity by observing finally that, for these reasons "or for any other reason that the Court deems to be relevant, the carrying out of further ... tests is not consistent with applicable rules of international law". I have had occasion in another case to recall that submissions, in the strict sense, have frequently been confused with reasons in support, a practice which has been criticized by Judge Basdevant (*I.C.J. Reports 1974*, pp. 137 ff.); such confusion still occurs however, and is particularly apparent in this case. In order to have these nuclear tests prohibited for the future, the Applicant had to base its contention, however elliptically, on rules of law which were opposable to the Respondent, rules which in its Application it left it to the Court to discover and select. But it is not apparent how it is possible to find in these few lines which precede the formulation of the claim, and which are both formally and logically distinct from it, a request for a declaratory judgment by the Court as to the unlawfulness of the tests. The question

raised is that of prohibition of French tests in the South Pacific region inasmuch as all nuclear tests, wherever and by whoever conducted, are, according to the Applicant, unlawful. Legal grounds, i.e., the unlawfulness of the tests, therefore had to be shown in order to achieve the object of the claim, namely a judicial prohibition. The submission, in the strict sense, was the prayer for prohibition, and the unlawfulness was the reasoning justifying it.

2. The rule is that the Court is seised of the precise object of the claim in the way in which this has been formulated. The present case consisted in a claim for prohibition of atmospheric tests on the ground that they were unlawful. This is a procedure for establishing legality *(contentieux de légalité)*, not a procedure for establishing responsibility *(contentieux de responsabilité)*, with which the Application does not concern itself. In order to succeed the Applicant had to show that its claim for prohibition of French atmospheric tests was based on conduct by the French Government which was contrary to rules of international law which were opposable to that Government.

But it is not sufficient to put a question to the Court, even one which as presented is apparently a legal question, for there to be, objectively, a dispute. The situation is well described by the words of Judge Morelli: "The mere assertion of the existence of a dispute by one of the parties does not prove that such a dispute really exists" (*I.C.J. Reports 1962*, p. 565; see also pp. 564 and 566-568), and even at the time of the Order of 22 June 1973 I had raised this question, when I referred to "an unreal dispute" (*I.C.J. Reports 1973*, p. 118) and "a dispute which [a State] alleges not to exist" (*ibid.*, p. 120). I then emphasized the preliminary nature, particularly in a case of failur to appear, of examination of the question of the real existence of the dispute before a case can be dealt with by the Court in the regular exercise of its judicial function. By deciding to effect such preliminary examination, after many delays, and without any reference to the voluntary absence of one of the Parties, the Court is endorsing the principle that examination of the question of the reality of the dispute is necessarily a matter which takes priority. This point is thus settled. There was nothing in the Court's procedure to prevent examination in June 1973 of the question whether the dispute described to the Court by the Applicant was, and had been from the outset, lacking in any real existence.

3. When several reasons are invoked before the Court in support of the contention that a case may not be judged on the merits—whether these reasons concern lack of jurisdiction or inadmissibility—the Court has always taken the greatest possible care not to commit itself either to any sort of classification of these various grounds, any of which may lead to dismissal of the claim, or to any sort of ranking of them in order. In the *Northern Cameroons* case, the Court refused to establish any system for these problems, or to define admissibility and interest, while analysing in detail the facts of the case which enabled it to arrive at its decision (cf. *I.C.J. Reports 1963*, p. 28):

> "The arguments of the Parties have at times been at cross-purposes because of the absence of a common meaning ascribed to such terms as 'interest' and 'admissibility'. The Court recognizes that these words in differing contexts may have varying connotations but it does not find it necessary in the present case to explore the meaning of these terms. For the purposes of the present case, a factual analysis undertaken in the light of certain guiding principles may suffice to conduce to the resolution of the issues to which the Court directs its attention."

And further on, at page 30: "... it is always a matter for the determination of the Court whether its judicial functions are involved."

Thus the principle which the Court applies is a common-sense one: if a finding is sufficient in itself to settle the question of the Court's competence, in the widest sense of the word, that is to say to lead to the conclusion that it is impossible to give judgment in a case, there is no need to proceed to examine other grounds. For there to be any proceedings on the merits, the litigation must have an object capable of being the subject of a judgment consistently with the role attributed to the Court by its Statute; in the present case, where numerous objections as to lack of jurisdiction and inadmissibility were raised, the question of the absence of any object of the proceedings was that which had to be settled first for this very reason, namely that if it were held to be well founded, the case would disappear without further discussion. The concept of a merits phase has no meaning in an unreal case, any more than has the concept of a jurisdiction/admissibility phase, still less that of an interim measures phase, on the fallacious pretext that such measures in no way prejudge the final decision (on this point, see dissenting opinion appended to the Order of 22 June 1973, p. 123). In a case in which everything depends on recognizing that an Application is unfounded and has no *raison d'être*, and that there was no legal dispute of which the Court could be seised, a marked taste for formalism is required to rely on the inviolability of the usual categories of phases. To do so would be to erect the succession of phases in examination of cases by the Court into a sort of ritual, totally unjustified in the general conception of international law, which is not formalistic. These are procedural practices of the Court, which organizes its procedure according to the requirements of the interests of justice. Article 48 of the Statute, by entrusting the "conduct of the case" to the Court, did not impose any limitation on the exercise of this right by subjecting it to formalistic rules, and the institution of phases does not necessarily require successive stages in the examination of every case, either for the parties or for the Court.

4. To wait several years—more than a year and a half has already elapsed—in order to reach the unhurried conclusion that a court is competent merely because the two States are formally bound by a jurisdictional clause, without examining the scope of that clause, and then to join the questions of admissibility to the merits, only subse-

quently to arrive (perhaps) at the conclusion on the merits that there were no merits, would not be a good way of administering justice.

The observation that, on this view of the matter, a State which declined to appear would more rapidly be rid of proceedings than a State which replied by raising preliminary objections, is irrelevant; apart from the problem of non-appearance (on this point cf. paras. 23 to 29 below), when the hypothesis arises that the case is an unreal one, with the possible implication that there was a misuse of the right of seising the Court, there is no obvious reason why a decision should be delayed unless from force of habit or routine.

In the Judgment of 21 December 1962 in the *South West Africa* cases, (*I.C.J. Reports 1962*, p. 328), the Court, before examining the preliminary objections to jurisdiction and admissibility raised by the Respondent, itself raised *proprio motu* the problem of the existence of a genuine dispute between the Applicants and the Respondent (see also the opinion of Judge Morelli on this point, *I.C.J. Reports 1962*, pp. 564-568).

5. The facts of the case leave no room for doubt, in my opinion, that there was no dispute even at the time of the filing of the Application.

In the series of diplomatic Notes addressed to the French Government by the Australian Government between 1963 and the end of 1972 (Application, pp. 34-48), at no time was the argument of the unlawfulness of the French tests advanced to justify a claim for cessation of such tests, based on rules of international law opposable to the French Government. The form of protests used expresses "regrets" that the French Government should carry out such tests, and mention is made of the "deep concern" aroused among the peoples of the area (Application, pp. 42, 44 and 46). So little was it thought on the Australian side that there was a rule which could be invoked against France's tests that it is said that the Government of Australia would like "to see universally applied and accepted" the 1963 test ban treaty (Note of 2 April 1970, Application, p. 44; in the same terms exactly, Note of 20 April 1971, Application, p. 46, and Note of 29 March 1972, Application, p. 48). There is no question of unlawfulness, nor of injury caused by the tests and international responsibility, but merely of opposition in principle to all nuclear tests by all States, with complete consistency up to the Note of 3 January 1973, in which for the first time the Australian Government invites the French Government "to refrain from any further . . . tests", which it regards as unlawful (Application, Ann. 9, p. 51); this, then, was the Note which, by a complete change of attitude, paved the way to the lawsuit.

The reason for the change was given by the Australian Government in paragraph 14 of its Application:

> "In its Note [of 3 January 1973], the Australian Government indicated explicitly that in its view the French tests were unlawful and unless the French Government could give full assurances that no further tests would be carried out, the only course open to the Australian Government would be the pursuit of appropriate interna-

> tional legal remedies. In thus expressing more forcefully the point of view previously expounded on behalf of Australia, the Government was reflecting very directly the conviction of the Australian people who had shortly before elected a Labour Administration, pledged to a platform which contained the following statement: 'Labour opposes the development, proliferation, possession and use of nuclear, chemical and bacteriological weapons'." (Application, pp. 8-10.)

In the succeeding paragraph 15 the following will also be noticed: "The Government of Australia claimed [in its Notes of 3 January and 7 February 1973] that the continuance of testing by France is illegal and called for the cessation of tests."

6. Thus the basis of the discussion is no longer the same; it is "claimed" that the tests are unlawful, and France is "invited" to stop them because the Labour Party is opposed to the development, possession and use of nuclear weapons, and the Government is bound by its electoral programme. This reason, the change of government, is totally irrelevant; a State remains bound by its conduct in international relations, whatever electoral promises may have been made. If for ten years Australian governments have treated tests in the Pacific as unwelcome but not unlawful, subject to certain protests on principle and demonstrations of concern, an electoral programme is not sufficient argument to do away with this explicit appreciation of the legal aspects of the situation.

The Applicant, as it happens, perceived in advance that its change of attitude gave rise to a serious problem, and it endeavoured in the Application to cover it up by saying that it had done no more than express "more forcefully the point of view previously expounded on behalf of Australia". It can easily be shown that the previous viewpoint was totally different. Apart from the diplomatic Notes of the ten years prior to 1973, which are decisive, and which show that the Government of Australia did not invoke any legal grounds to oppose the decision of the French Government to conduct tests in the South Pacific region, it will be sufficient to recall that Australia has associated itself with various atmospheric explosions above or in the vicinity of its own territory, and that by its conduct it has expressed an unequivocal view on the lawfulness of those tests and those carried out by other States in the Pacific.

7. The first atmospheric nuclear explosion effected by the United Kingdom occurred on 3 October 1952 in the Montebello Islands, which are situated near the north-west coast of Australia. It was the Australian Minister of Defence who announced that the test had been successful, and the Prime Minister of Australia described it as "one further proof of the very important fact that scientific development in the British Commonwealth is at an extremely high level" (*Keesing's Contemporary Archives*, 11-18 October 1952, p. 12497). The Prime Minister of the United Kingdom sent a message of congratulation to the Prime Minister

of Australia. The Navy and Air Force and other Australian government departments were associated with the preparation and execution of the test; three safety-zones were forbidden for overflight and navigation, on pain of imprisonment and fines.

On 15 October 1953 a further British test was carried out at Woomera in Australia, with a new forbidden zone of 80,000 square miles. The British Minister of Supply, addressing the House of Commons on 24 June 1953, announced the new series of tests, which had been prepared in collaboration with the Australian Government and with the assistance of the Australian Navy and Air Force (*Keesing's Contemporary Archives* 1953, p. 13222).

Two further series of British tests took place in 1956, one in the Montebello Islands (on 16 May and 19 June), the other at Maralinga in South Australia (27 September, 4, 11 and 21 October). The acting Prime Minister of Australia, commenting on fall-out, stated that no danger to health could arise therefrom. Australian military personnel were present as observers during the second series of tests (*Keesing's Contemporary Archives*, 1956, p. 14940). The British Government stated on 7 August 1956 that the Australian Government had given full co-operation, and that various Australian government departments had contributed valuable assistance under the co-ordinating direction of the Australian Minister for Supply. The second test of this series was observed by that Minister and members of the Australian Parliament (*Keesing's Contemporary Archives*, 1956, p. 15248).

The British Prime Minister stated on 7 June 1956:

> "Her Majesty's Governments in Australia and New Zealand have agreed to make available to the task force various forms of aid and ancillary support from Australian and New Zealand territory. We are most grateful for this." (*Hansard*, House of Commons, 1956, Col. 1283.)

8. Active participation in repeated atmospheric tests over several years in itself constitutes admission that such tests were in accordance with the rules of international law. In order to show that the present tests are not lawful, an effort has been made to argue, first, that what is laudable on the part of some States is execrable on the part of others and, secondly, that atmospheric tests have become unlawful since the time when Australia itself was making its contribution to nuclear fall-out.

9. On 3 March 1962, after the Government of the United States had decided to carry out nuclear tests in the South Pacific, the Australian Minister for External Affairs said that:

> "... the Australian Government ... has already made clear its view that if the United States should decide it was necessary for the security of the free world to carry out nuclear tests in the atmosphere, then the United States must be free to do so" (Application, Ann. 3, p. 36).

A few days after this statement, on 16 March 1962, the Australian Government gave the United States its permission to make use of Christmas Island (where more than 20 tests were carried out between 24 April and 30 June, while tests at very high altitude were carried out at Johnston Island from 9 July to 4 November 1962).

In an aide-mémoire of 9 September 1963 the Australian Government likewise stated:

> "Following the signature of the Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water, the Australian Government also recognizes that the United States must take such precautions as may be necessary to provide for the possibility that tests could be carried out in the event, either of a breach of the Treaty, or of some other States exercising their right to withdraw from the Treaty." (*Ibid.*, p. 38.)

In contrast, five years later, with solely the French and Chinese tests in mind, the Australian Government wrote:

> "On 5 April 1968, in Wellington, New Zealand, the Australia-New Zealand-United States (ANZUS) Council, included the following statement in the communiqué issued after the meeting:
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> 'Noting the continued atmospheric testing of nuclear weapons by Communist China and France, the Ministers reaffirmed their opposition to all atmospheric testing of nuclear weapons in disregard of world opinion as expressed in the Nuclear Test Ban Treaty.' " (*Ibid.*, Ann. 5, p. 42.)

10. On another occasion the Australian Government had already evinced the same sense of discrimination. In 1954, in the Trusteeship Council, when certain damage caused the Marshall Islands by the nuclear tests of the administering authority was under consideration, the Australian delegate could not go along with the views of any of the delegations who objected to the tests in principle.

11. It is not unjust to conclude that, in the eyes of the Australian Government, what should be applauded in the allies who might protect it is to be frowned upon in others: *Quod licet Jovi non licet bovi.* It is at the time when the delegate of the United States has been revealing to the United Nations that his Government possesses the equivalent of 615,385 times the original Hiroshima bomb (First Committee, 21 October 1974) that the Australian Government seeks to require the French Government to give up the development of atomic weapons.

It remains for me briefly to show how this constant attitude of the Australian Government, from 1963 to the end of 1972, i.e., up to the change described in paragraph 5 above, forms a legal bar to the Applicant's appearing before the Court to claim that, among nuclear tests,

certain can be selected to be declared unlawful and they alone prohibited. Indeed the Court, in June 1973, already had a choice among numerous impediments on which it might have grounded a finding that the case was without object. For simplicity's sake let us take the major reason: the principle of the equality of States.

12. The Applicant's claim to impose a certain national defence policy on another State is an intervention in that State's internal affairs in a domain where such intervention is particularly inadmissible. The United Kingdom Government stated on this point on 2 July 1973 as follows:

> "... we are not concerned ... with the question of whether France should or should not develop her nuclear power. That is a decision entirely for France ..." (*Hansard*, col. 60).

In *The Function of Law in the International Community* (Oxford 1933, p. 188) Mr. (later Sir) Hersch Lauterpacht wrote:

> "... it means stretching judicial activity to the breaking-point to entrust it with the determination of the question whether a dispute is political in the meaning that it involves the independence, or the vital interests, or the honour of the State. It is therefore doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security or vital interests. As we have seen, the interests involved are of a nature so subjective as to exclude the possibility of applying an objective standard not only in regard to general arbitration treaties, but also in regard to each individual dispute."

The draft law which the French Government laid before its Parliament in 1929 to enable its accession to the General Act of Geneva of 26 September 1928 has been drawn to the Court's attention; this draft embodied a formal reservation excluding "disputes connected with claims likely to impair the organization of the national defence". On 11 July 1929 the rapporteur of the parliamentary Committee on Foreign Affairs explained that the reservation was unnecessary:

> "Moreover the very terms in which the *exposé des motifs* presents it show how unnecessary it is. 'In the absence of contractual provisions arising out of existing treaties or such treaties as may be concluded at the instigation of the League of Nations in the sphere of armaments limitation,' says the text: 'disputes connected with claims likely to impair the organization of the national defence.' But, precisely because these provisions do not exist, how could an arbitration tribunal rule upon a conflict of this kind otherwise than by recognizing that each State is at present wholly free to organize its own national defence as it thinks fit? Is it imagined that the action of some praetorian arbitral case-law might oust or at any rate range

> beyond that of Geneva? That would seem to be a somewhat chimaerical danger." (*Documents parlementaires: Chambre des deputés,* 1929, Ann. 1368, pp. 407 f.; Ann. 2031, p. 1143.)

The *exposé des motifs* of the draft law of accession, lays strong emphasis on the indispensability of the competence of the Council of the League of Nations for the "appraisal of the political or moral factors likely to be relevant to the settlement of certain conflicts not strictly legal in character", disputes "which are potentially of such political gravity as to render recourse to the Council indispensable" (*ibid.*, p. 407). Such was the official position of the French Government upon which the rapporteur of the Foreign Affairs Committee likewise sheds light here when he stresses the combination of resort to the Council and judicial settlement (*ibid.*, p. 1142).

13. It is not unreasonable to believe that the present-day world is still persuaded of the good sense of the observations quoted in the preceding paragraph (cf. the Luxembourg arrangement of 29 January 1966, between the member States of the European Economic Community, on "very important interests"). But there is more than one negative aspect to the want of object of the Australian claim. The principle of equality before the law is constantly invoked, reaffirmed and enshrined in the most solemn texts. This principle would become meaningless if the attitude of "to each his rule" were to be tolerated in the practice of States and in courts. The proper approach to this matter has been exemplified in Sir Gerald Fitzmaurice's special report to the Institute of International Law: "The Future of Public International Law" (1973, pp. 35-41).

In the present case the Applicant has endeavoured to present to the Court, as the object of a legal dispute, a request for the prohibition of acts in which the Applicant has itself engaged, or with which it has associated itself, while maintaining that such acts were not only lawful but to be encouraged for the defence of a certain category of States. However, the Applicant has overlooked part of the statement made by the Prime Minister of the United Kingdom in the House of Commons on 7 June 1956, when he expressed his thanks to Australia for its collaboration in the British tests (para. 7 above). The Prime Minister also said:

> "Certainly, I do not see any reason why this country should not make experiments similar to those that have been carried out by both the United States and Soviet Russia. That is all that we are doing. I have said that we are prepared to work out systems of limitation. Personally, I think it desirable and I think it possible." (*Hansard,* col. 1285.)

On 2 July 1973, the position of the British Government was thus analysed by the Attorney-General:

> "... even if France is in breach of an international obligation, that obligation is not owed substantially to the United Kingdom, and there is no substantive legal right of the United Kingdom which would seem to be infringed" (*Hansard*, col. 99).

And that despite the geographical position in the Pacific of Pitcairn Island.

The Applicant has disqualified itself by its conduct and may not submit a claim based on a double standard of conduct and of law. What was good for Australia along with the United Kingdom and the United States cannot be unlawful for other States. The Permanent Court of International Justice applied the principle "allegans contraria non audiendus est" in the case of *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, page 25.

14. In the arguments devised in 1973 for the purposes of the present case, it was also claimed that the difference in the Australian Government's attitude vis-à-vis the French Government was to be explained by the fact that, at the time of the explosions with which the Australian Government had associated itself and which it declared to be intrinsically worthy of approval, awareness of the danger of fall-out had not yet reached the acute stage. One has only to read the reports of the United Nations Scientific Committee on the Effects of Atomic Radiation, a committee set up by the General Assembly in 1955, to see that such was not the case. While it is true to say that more abundant and accurate information has become available over the years, the reports of this committee have constantly recalled that: "Those [tests of nuclear weapons] carried out before 1963 still represent by far the largest series of events leading to global radio-active contamination." (UNSCEAR Report 1972, Chap. I, p. 3.)

As for awareness of particular risks to Australia, the National Radiation Advisory Committee was set up by the Australian Government in May 1957 for the purpose of advising on all questions concerning the effects of radiation on the Australian population. The Court has had cognizance of the reports of 1967 (two reports), 1969, 1971 and 1972; the report of March 1967 indicates that the previous report dated from 1965, and that it dealt in detail with the question of fall-out over the Australian environment and the effects upon man:

> "The Committee at that time was satisfied that the proposed French nuclear weapons tests in the South Pacific Ocean were unlikely to lead to a significant hazard to the health of the Australian population." (Report to the Prime Minister, March 1967, para. 3.)

This same form of words is repeated in paragraph 11 of the March 1967 report, in reference to the first series of French tests, which took place in the period July-October 1966, and also in paragraph 11 of the report for December 1967, issued following a study of the effects of the second series

of tests (June-July 1967) and taking radiation doses from both series into account. The report which the Australian NRAC addressed to the Prime Minister in March 1969 concerned the French tests of July-September 1968 and repeated in its paragraph 12 the conclusions cited above from paragraph 3 of the March 1967 report. The Committee's March 1971 report recalls in its paragraph 3 that fall-out from all the French tests, in 1966, 1967 and 1968, did not constitute a hazard to the health of the Australian population. The form of words used in paragraph 12 of that report comes to the traditional conclusion as to the tests held in 1970. The absence of risk is again recognized in the report issued by the NRAC in July 1972 (paras. 8, 9 and 11). When, however, the new administration took office in Australia, this scientific committee was dissolved. On 12 February 1973 the Prime Minister requested a report of the Australian Academy of Science, the Council of which appointed a committee to report on the biological effects of fall-out; the conclusions of this report were considered at a joint meeting with French scientists in May 1973, shortly before the filing of the Application instituting proceedings. It appears that the debate over this last-mentioned report is continuing even between Australian scientists.

15. For the similar experiments of the French Government to be the subject of a dispute with which the Court can deal, it would at all events be necessary that what used to be lawful should have become unlawful at a certain moment in the history of the development of nuclear weapons. What is needed to remove from the Applicant the disqualification arising out of its conduct is proof that this change has taken place: what Australia presented between 1963 and the end of 1972 as a conflict of interests, a clash of political views on the problems of the preparation, development, possession and utilization of atomic weapons, i.e., as a challenge to France's assertion of the right to the independent development of nuclear weapons, cannot have undergone a change of legal nature solely as a result of the alteration by a new government of the formal presentation of the contention previously advanced. It would have to be proved that between the pre-1963 and subsequent explosions the international community effected a passage from non-law to law.

16. The Court's examination of this point could have taken place as early as June 1973, because it amounts to no more than the preliminary investigation of problems entirely separate from the merits, whatever views one may hold on the sacrosanctity of the distinction between the different phases of the same proceedings (cf. para. 3 above). The point is that if the Treaty of 5 August 1963 Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water is not opposable to France, there is no dispute which Australia can submit to the Court, and dismissal would not require any consideration of the contents of the Treaty.

17. The multilateral form given to the Treaty of 5 August 1963 is of course only one of several elements where the legal analysis of the extent of its opposability to States not parties to it is concerned. One need only say that the preparation and drafting of the text, the unequal régime as

between the parties for the ratification of amendments, and the system of supervision have enabled the Treaty to be classified as, constructively, a bi-polar statute, accepted by a large number of States but not binding on those remaining outside the Treaty. There is in fact no necessity to linger on the subject in view of the subsequent conduct of the States assuming the principal responsibility for the Treaty. None of the three nuclear Powers described as the "Original Parties" in Article II of the Treaty has ever informed the other nuclear Powers, not parties thereto, that this text imposed any obligation whatever upon them; on the contrary, the three Original Parties, even today, call upon the Powers not parties to accede to the Treaty. The Soviet delegate to the Disarmament Conference declared at the opening of the session on 20 February 1974 that the negotiations for the termination of nuclear tests "required the participation of all nuclear States". On 21 October 1974, in the First Committee of the General Assembly, the delegate of the United States said that one of the aims was to call for the co-operation of States which had not yet ratified the 1963 Treaty. Statements to the same effect have been made on behalf of the Government of the United Kingdom; on 2 July 1973 the Minister of State for Foreign and Commonwealth Affairs stated during a parliamentary debate:

> "As far back as 1960, however, the French and the Chinese declined to subscribe to any international agreement on testing. They are not bound, therefore, by the obligations of the test ban treaty of 1963 ...
>
> In 1963 Her Majesty's Government, as well as the United States Government, urged the French Government to sign the partial test ban treaty.
>
> As initiators and signatories of the treaty, we are seriously concerned at the continuation of nuclear tests in the atmosphere, and we urge that all Governments which have not yet done so should adhere to it. This view is well known to the French and Chinese Governments. It has been stated publicly by successive Governments." (*Hansard*, cols. 58 and 59.)

18. The conduct of the Original Parties which laid down the rules of the present nuclear statute by mutual agreement shows that those nuclear States which have refused to accede to this statute cannot be considered as subjected thereto by virtue of a doctrinal construction contrary to the formally expressed intentions of the sponsors and guardians of the Statute. The French Government, for its part, has always refused to recognize the existence of a rule opposable to it, as many statements made by it show.

19. The Treaty which the United States and the Union of Soviet Socialist Republics signed in Moscow on 3 July 1974, on the limitation of underground nuclear testing (United Nations, *General Assembly Official Records*, A/9698, 9 August 1974, Ann. I) contains the following preambular paragraph:

"Recalling the determination expressed by the Parties to the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water in its preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time, and to continue negotiations to this end." (Cf. the second preambular paragraph of the 1963 Treaty.)

Like the 1963 Treaty, the Treaty of 1974 embodies the right of each party to withdraw from the treaty if extraordinary events jeopardize "its supreme interests".

20. To determine whether a rule of international law applicable to France did or did not exist was surely an operation on the same level as the ascertainment of the non-existence of a justiciable dispute. To find that the Treaty of 1963 cannot be relied on against France requires merely the determination of a legal fact established by the text and by the consistent conduct of the authors of the legal statute in question. Similarly, to find that no custom has come into being which is opposable to those States which steadfastly declined to accept that statute, when moreover (as we have seen in the foregoing paragraphs) the existence of such customary rule is disproved by the positions adopted subsequent to the treaty supposed to give it expression, would merely be to verify the existence of a source of obligation.

By not proceeding, as a preliminary, to verification of the existence of any source of obligation opposable to the French Government, the Court refused to render justice to a State which, from the very outset, manifested its categorical opposition to proceedings which it declared to be without object and which it requested the Court to remove from the list; an action which the Court was not to take until 20 months had elapsed.

21. The character of the quarrel between the Australian Government and the French Government is that of a conflict of political interests concerning a question, nuclear tests, which is only one inseparable element in the whole range of the problems to which the existence of nuclear weapons gives rise and which at present can be approached and settled only by means of negotiations.

As the Court said in 1963, "it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved" (*Northern Cameroons, I.C.J. Reports 1963*, p. 37).

In the absence of any rule which can be opposed to the French Government for the purpose of obtaining from the Court a declaration prohibiting the French tests and those alone, the whole case must collapse. I shall therefore say nothing as to the other grounds on which the claim can be dismissed at the outset on account of the Applicant's want of standing, such as the inadmissibility either of an *actio popularis* or of an action *erga omnes* disguised as an action against a single State. The accumulation of fall-out is a world-wide problem; it is not merely the last straw which

breaks the camel's back (cf. the refusal of United States courts to admit the proceedings brought by Professor Linus Pauling and others who claimed that American nuclear tests in the Pacific should stop[1]).

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22. I have still certain brief observations to make as to the conduct, from the very outset, of these proceedings before the Court, in relation to certain general principles of the regular functioning of international adjudication, for the conduct of the proceedings gave rise to various problems, concerning Articles 53 and 54 of the Statute of the Court, whose existence will not be evident to the reader of the Judgment, given the adopted grounds of decision.

23. What happened, in sum, was that a misunderstanding arose when the questions of jurisdiction and admissibility were written into the Order of 22 June 1973 as the prescribed subject-matter of the phase which had been decided upon "to resolve [them] as soon as possible"; for the separate and dissenting opinions of June 1973 reveal on the one hand that, for certain Members of the Court, the problem of the existence of the object of the dispute should be settled in the new phase, whereas a majority of judges, on the other hand, had made up their minds to deal in that phase solely with the questions of the jurisdiction of the Court *stricto sensu*, and of the legal interest of the Applicant, and to join all other questions to the merits, including the question whether the proceedings had any object. At best, therefore, the jurisdiction/admissibility phase could only result in a decision on jurisdiction and the legal interest of the Applicant, and if that decision were positive, all the rest being joined to the merits, the real decision would have been deferred to an extremely remote phase. A settlement would therefore have been possible "sooner" if jurisdiction/admissibility and merits had not been separated. The reason for this refusal in 1973 to decide on the "preliminary" character of the question concerning the existence of a justiciable dispute is to be found in an interpretation of Article 53 consisting of the application to a default situation of Article 67 of the Rules of Court, governing preliminary objections in adversary proceedings, the analogy thus provoking a veritable breach of Article 53 of the Statute.

24. The misunderstanding on the scope of the phase decided on by the Order of 22 June 1973 was not without effect before the Court: the apparent contradiction between paragraph 23 and paragraph 35 of the Order enabled the Applicant to say to the Court, at the hearing of 6 July 1974, that the only question of admissibility was that of "legal interest", subject to any indication to the contrary from the Court. That indication was given by the President on 9 July: "The Court will of course appre-

[1] District Court for the District of Columbia, 31 July 1958, 164 Federal Supplement, p. 390; Court of Appeals, 12 April 1960, 278 Federal Reporter, Second Series, pp. 252-255.

ciate the question of admissibility in all the aspects which it considers relevant."

This process of covert and contradictory allusions, in which the conflicts of views expressed in the opinions sometimes reappear, is not without its dangers. This is evident both as regards this Order of 22 June 1973 and as regards the attempts to make use of paragraphs 33 and 34 of the Judgment in the *Barcelona Traction* case without taking account of the existence of paragraphs inconsistent with these, i.e., paragraphs 89 to 91, which were in fact intended to qualify and limit the scope of the earlier pronouncement. That pronouncement was in fact not directly related to the subject of the judgment, and was inserted as a sort of bench-mark for subsequent use; but all bench-marks must be observed.

25. Article 53 of the Statute has had the Court's attention from the outset of the proceedings, i.e., ever since the receipt on 16 May 1973 of a letter from the French Government declaring its intention not to appear and setting forth its reasons; but, in my view, it has been wrongly applied. A further general examination of the interpretation of the rule embodied in Article 53 is required.

To speak of two parties in proceedings in which one has failed to appear, and has on every occasion re-affirmed that it will not have anything to do with the proceedings is to refuse to look facts in the face. The fact is that when voluntary absence is asserted and openly acknowledged there is no longer more than one party in the proceedings. There is no justification for the fiction that, so long as the Court has not recognized its lack of jurisdiction, a State which is absent is nevertheless a party in the proceedings. The truth of the matter is that, in a case of default, three distinct interests are affected: that of the Court, that of the applicant and that of the respondent; the system of wholly ignoring the respondent's decision not to appear and of depriving it of effect is neither just nor reasonable. In the present case, by its reasoned refusal to appear the Respondent has declared that, so far as it is concerned, there are no proceedings, and this it has repeated each time the Court has consulted it. Even if the Court refrains for a time from recording that default, the fact remains that the Respondent has performed an act of default from which certain legal consequences flow. Moreover, the applicant is entitled under Article 53 to request immediately that judicial note be taken thereof and the consequences deduced. That is what the Applicant did, in the present instance, when it said in 1973 that the Court was under an obligation to apply its rules of procedure, without indicating which, and to refuse to take account of views and documents alleged by the Applicant to have been irregularly presented by the Respondent. And the Court partially accepted this point of view, in not effecting all communications to the Respondent which were possible.

The result of not taking account of the Respondent's default has been the granting of time-limits for pleadings which it was known would not be forthcoming, in order to maintain theoretical equality between the parties, whereas in fact the party which appeared was favoured. There was

nothing to prevent the Court from fixing a short time-limit for the presumptive Respondent—one month, for example—the theoretical possibility being left open of a statement by the State in default during that time, to the effect that it had changed its mind and requested a normal time-limit for the production of a Memorial.

26. When it came to receiving or calling in the Agent of the Applicant in the course of the proceedings in 1973, there was a veritable breach of the equality of the Parties in so far as some of these actions or approaches made by the Applicant were unknown to the presumptive Respondent. (On this point, cf. paras. 31 and 33 below.)

On this question of time-limits the Court has doubtless strayed into paths already traced, but precedents should not be confused with mandatory rules; each case has its own particular features and it is mere mechanical justice which contents itself with reproducing the decisions of previous proceedings. In the present case the Court was never, as in the *Fisheries Jurisdiction* cases, informed of negotiations between the Parties after the filing of the Application, and the double time-limits accorded did not even have the justification, which they might have had in the above-mentioned cases, of enabling progress to be made in such negotiations; and there was never the slightest doubt, from the outset, on the question of the existence of a genuine legal dispute.

27. It is not my impression that the authors of Article 53 of the Statute intended it to be interpreted as if it had no effect of its own. It is not its purpose to enable proceedings to be continued at leisure without regard to the positions adopted by the absent respondent; it is true that the applicant is entitled to see the proceedings continue, but not simply as it wishes, with the Court reliant on unilateral indications of fact and law; the text of Article 53 was designed to avoid such an imbalance in favour of the applicant. When the latter calls upon the Court to decide in favour of its claim, which the present Applicant did not do explicitly on the basis of Article 53 but which resulted from its observations and submissions both in June 1973, at the time of the request for interim measures of protection, and in the phase which the Judgment brings to a close today, it would be formalistic to maintain that the absence of any explicit reference to Article 53 changes the situation. It must needs be realized that the examination of fact and law provided for in Article 53 has never begun, since the Court held in 1973 that the consequences of the non-appearance could be joined to the questions of jurisdiction and admissibility, and that, in the end, the question of the effects of non-appearance will not have been dealt with. Thus this case has come and gone as if Article 53 had no individual significance.

28. If we return to the sources, we note that the rapporteur of the Advisory Committee of Jurists (PV, p. 590) stated that the Committee had been guided by the examples of English and American jurisprudence in drafting what was then Article 52 of the Statute on default. Lord Phillimore, a member of the Committee, had had inserted the sentence which in large measure has survived: "The Court must, before [deciding in

favour of the claim], satisfy itself that the claim is supported by conclusive evidence and well founded in fact and law." The words which disappeared in the course of the consideration of the text by the Assembly of the League of Nations were regarded as unnecessary and as merely overlapping the effect of the formula retained. The matter was clarified in only one respect by the Court's 1922 discussion, on account of the personality of the judges who expressed their views on a draft article proposed for the Rules of Court by Judge Anzilotti:

> "If the response to an application is confined to an objection to the jurisdiction of the Court, or if the State affected fails to reply within the period fixed by the Court, the latter shall give a special decision on the question of jurisdiction before proceeding further with the case." (*P.C.I.J., Series D, No. 2*, p. 522.)

Judge Huber supported the text. Lord Finlay did not feel that the article was necessary, because,

> "... even if there was no rule on the subject, the Court would always consider the question of its jurisdiction before proceeding further with the case. It would have to be decided in each particular case whether the judgment with regard to the jurisdiction should be delivered separately or should be included in the final judgment" (*ibid.*, p. 214).

Judge Anzilotti's text was rejected by 7 votes to 5. The general impression given by the influence English jurisprudence was recognized to possess, and by the observations first of Lord Phillimore and then of Lord Finlay, is that the Court intended to apply Article 53 in a spirit of conscientious verification of all the points submitted by the applicant when the respondent was absent from the proceedings, and that it would have regard to the circumstances of each case. As is well known, in the British system important precautions are taken at a wholly preliminary stage of a case to make sure that the application stands upon a genuinely legal claim, and the task of ascertaining whether this is so is sometimes entrusted to judges other than those who would adjudicate (cf. Sir Gerald Fitzmaurice's opinion in the *Northern Cameroons* case (*I.C.J. Reports 1963*, pp. 106 f.), regarding "filter" procedures whereby, as "part of the inherent powers or jurisdiction of the Court as an international tribunal", cases warranting removal can be eliminated at a preliminary stage).

Between this interpretation and that which the Court has given of Article 53 in the present case, there is all the difference that lies between a pragmatic concern to hold a genuine balance between the rights of two States and a procedural formalism that treats the absent State as if it were a party in adversary proceedings, which it is not, by definition.

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29. On 22 June 1973, before the Court's decision had been read at a public sitting, a public statement which had been made by the Prime Minister of Australia on 21 June at Melbourne, and which had been widely reported by the Australian press[1], reached Europe; in it the Prime Minister stated that the Court had acceded by 8 votes to 6 to Australia's request.

30. It must first be explained that, whether by inadvertence or for some other reason, the Court was not aware of that disclosure until after its decision had been read out at the public sitting of 22 June; it can be imagined that the Court would otherwise have postponed the reading of the Order on 22 June. As the aftermath of this incident has only been dealt with in two communiqués, one issued on 8 August 1973 and the other on 26 March 1974, it would be difficult to describe it if the Court had not finally decided on 13 December 1974 that certain documents would be published in the volume of *Pleadings, Oral Arguments, Documents* to be devoted to this case[2]. Taking into account certain press items and these public documents or communiqués, I find it necessary to explain why I voted on 21 March 1974 against the Court's decision, by 11 votes to 3, to close its investigations on the scope and origins of the public disclosure by the Prime Minister of Australia of the decision of 22 June 1973. The Court's vote was on a resolution reproduced in the press communiqué of 26 March 1974.

It is to be hoped that no-one will dispute the view that, if the head of government of a State party to a case discloses a decision of the Court before it is made public, there has been a breach of the prescriptions of Article 54, paragraph 3, of the Statute: "The deliberations of the Court shall take place in private and remain secret." At the moment of the disclosure, on 21 June, the decision was as yet no more than a text which

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[1] A Melbourne newspaper printed on 22 June the following article:

> "*The Prime Minister: We've won N-test case.* The Prime Minister (Mr. Whitlam) said last night that Australia would win its appeal to the International Court of Justice by a majority of eight votes to six. Mr. Whitlam said he had been told the Court would make a decision within 22 hours. The Prime Minister made the prediction while addressing the annual dinner of the Victorian Law Institute. He said: 'On the matter of the High Court, I am told a decision will be given in about 22 hours from now. The majority in our favour is going to be eight to six.' When asked to elaborate on his comments after the dinner, Mr. Whitlam refused to comment, and said his remarks were off the record. The dinner was attended by several hundred members of the Law Institute, including several prominent judges. While making the prediction that the Court would vote eight to six, Mr. Whitlam placed his hand over a microphone. The microphone was being monitored by an ABC reporter."

[2] Four documents are to be published in this way. Two (see para. 31 below) have already been communicated to the French Government; the others are reports to the Court.

had been deliberated and adopted by the Court and was covered by the rule of secrecy embodied in Article 54. In a letter of 27 June 1973[1], the Prime Minister of Australia referred to the explanations furnished on that same date by a letter from the Co-Agent of Australia[1] and expressed his regret "at any embarrassment which the Court may have suffered as a result of my remarks". According to the Co-Agent, the Prime Minister's statement of 21 June had been no more than a speculative comment, inasmuch as a view had been current among Australian advisers to the effect that the decision could be in Australia's favour, but by a small majority, while press comment preceding the Prime Minister's remarks had speculated in some instances that Australia would win by a narrow margin.

31. But whatever endeavours may have been made to explain the Prime Minister's statement, whether at the time or, subsequently, by the Agent and Co-Agent of Australia on various occasions, the facts speak for themselves. The enquiry opened at the request of certain Members of the Court on the very afternoon of 22 June 1973 was closed nine months later without the Court's having given any precise indication, in its resolution of 21 March 1974, as to the conclusions that might have been reached in consequence. The only elements so far published, or communicated to the Government which was constantly regarded by the Court as the Respondent and had therefore the right to be fully informed, which was by no means the case, are: the Australian Prime Minister's letter of 27 June 1973 and the Co-Agent's letter of the same date[2]; the text of a statement made by the Attorney-General of Australia on 21-22 June 1973[2]; the communiqué of 8 August 1973; the reply by the Prime Minister to a question put in the Australian House of Representatives on the circumstances in which he had been apprised of the details of the Court's decision (Australian *Hansard*, 12 September 1973); a resolution by which the Court on 24 January 1974 decided to interrogate the Agent of Australia[2] (the minutes of these conversations were not communicated to the Respondent and will not be published); the communiqué of 26 March 1974[3].

I found it contrary to the interests of the Court, in the case of so grave an incident, one which lays its 1973 deliberation open to suspicion, to leave that suspicion intact and not to do what is necessary to remove it. I will merely observe that the crystal-gazing explanation relied on by the Prime Minister and the Agent's statements enlarging thereon, with the attribution of an oracular role to the Australian advisers, brought the Court no positive enlightenment in its enquiry and should be left to the sole responsibility of their authors.

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[1] Communicated to the French Government, by decision of the Court, on 29 March 1974.

[2] Documents communicated to the French Government with a letter of 29 March 1974.

[3] A letter of 28 February 1974 from the Agent of Australia to the Registrar is to be reproduced in the *Pleadings, Oral Arguments, Documents* volume; it is connected with the interrogation.

32. Were it maintained that a head of government did not have to justify to the Court any statements made out of court and that moreover, even if his statement was regrettable, the harm was done and could not affect the case before the Court, I would find these propositions incorrect. The statement in question concerned a decision of the Court and could lead to a belief that persons privy to its deliberations had violated their obligation to keep it secret, with all the consequences that supposition would have entailed if confirmed.

33. In concluding on 21 March 1974 that it could not pursue the matter further, and in making this publicly known, the Court stigmatized the incident and indirectly signified that it could not accept the excuse that its decisions had been divined, but it recognized that, according to its own assessment, it was not possible to uncover anything further as to the origins of the disclosure.

I voted against this declaration and the closure of the enquiry because I consider that the investigation should have been pursued, that the initial results were not inconsequential and could be used as a basis for further enquiry, especially when not all the means of investigation available to the Court had been made use of (Statute, Arts. 48, 49 and 50). Such was not the opinion of the Court, which decided to treat its investigations as belonging to an internal enquiry. My understanding, on the contrary, was that the incident of the disclosure was an element in the proceedings before the Court—which is why the absent Respondent was kept partly informed by the Court, in particular by a letter of 31 January 1974—and that the Court was fully competent to resolve such an incident by judicial means, using any procedure it might decide to set up (cf. the Court's decision on "the competence required to enable [the] functions [of the United Nations] to be effectively discharged" (*I.C.J. Reports 1949*, p. 179)). How could one suppose *a priori* that pursuit of the enquiry would have been ineffectual without having attempted to organize such an enquiry? Even if circumstances suggested that refusals to explain or evasions could be expected, to note those refusals or evasions would not have been ineffectual and would have been a form of censure in itself.

34. Symptomatic of the hesitation to get to the bottom of the incident was the time taken to begin looking into the disclosure: six weeks, from 22 June to 8 August 1973, were to elapse before the issue of the mildest of communiqués, palliative in effect and not representing the unanimous views of the Court. For more than six months, all that was produced was a single paper embodying a documented analysis of the successive press disclosures on the progress of the proceedings before the Court up to the dramatic public disclosure of the result and of the Court's vote by the Prime Minister on 21 June in Melbourne[1]. This analysis of facts publicly known demonstrates how the case was accompanied by a succession of rumours whose disseminators are known but whose source is not

[1] This is one of the documents which the Court, on 13 December 1974, decided to publish in the *Pleadings, Oral Arguments, Documents* volume.

unmasked. On 21 March 1974 the investigation was stopped, and the various paths of enquiry and deduction opened up by this analysis as also by the second report will not be pursued.

I consider that the indications and admissions that had already come to light opened the path of enquiry instead of closing it. A succession of mistakes, forgettings, tolerations, failures to react against uncalled-for overtures or actions, each one of which taken in isolation could have been considered devoid of particular significance, but which assume such significance by their accumulation and impunity; unwise conversations at improper moments, of which no minutes exist: all this combines to create a sense of vagueness and embarrassment, as if a refusal to acknowledge and seek to unravel the facts could efface their reality, as if a saddened silence were the only remedy and the sole solution.

35. The harm was done, and has been noted (report of the Court to the United Nations 1973-1974, para. 23; debate in the Sixth Committee of the General Assembly, 1 October 1974, A/C.6/SR.1466, p. 6; parliamentary answers by the French Minister for Foreign Affairs on 26 January 1974, *Journal Officiel* No. 7980, and 20 July 1974, *Journal Officiel* No. 11260). Even if it is not, at the present moment, possible to discover more concerning the origin and development of the process of disclosure, as the Court has stated in its resolution of 21 March 1974, I remain convinced that a judicially conducted enquiry could have elucidated the channels followed by the multiple disclosures noted in this case, the continuity and accuracy of which suggest that the truth of the matter was not beyond the Court's reach. Such is the meaning of my refusal of the resolution of 21 March 1974 terminating an investigation which was begun with reluctance, conducted without persistence and concluded without reason.

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36. Among the lessons to be learned from this case, in which a conflict of political interests has been clothed in the form of a legal dispute, I would point to one which I feel to merit special attention. Before these proceedings were instituted, the General Act, ever since 1939, had been dwelling in a kind of chiaroscuro, formally in force if one took account only of express denunciation, but somewhat dormant:

> "So far as the General Act is concerned, there prevails, if truth be told, a climate of indifference or obliviousness which casts some doubt on its continuance in force, at least where the Act of 1928 is concerned." (H. Rolin, *L'arbitrage obligatoire: une panacée illusoire*, 1959, p. 259.)

After the General Act had, with great elaboration, been presented to the Court as a wide-open basis of possible jurisdiction, the behaviour of the States formally considered as parties thereto is noteworthy. The French Government was the first to denounce the General Act, on 2 January 1974, then on 6 February 1974 the Government of the United

Kingdom did likewise. The Government of India, since June 1973, has informed the Court and the United Nations of its opinion as to the General Act's having lapsed (see also the new declaration by which India, on 15 September 1974, accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute). Thus we see that States with substantial experience of international adjudication and arbitration have only to note that there is some possibility of the General Act's being actually applied, instead of declarations less unreservedly accepting the jurisdiction of the Court, to announce either (in two cases) that they are officially putting an end to it or (in the other) that they consider it to have lapsed. The cause of international adjudication has not been furthered by an attempt to impose the Court's jurisdiction, apparently for a formal reason, on States in whose eyes the General Act was, quite clearly, no longer a true yardstick of their acceptance of international jurisdiction.

Mr. Charles De Visscher had already shown that courts should take care not to substitute doctrinal and systematized views for the indispensable examination of the intentions of States. This is how he defined the obligation upon the international judge to exercise reserve:

> "The man of law, naturally enough, tends to misunderstand the nature both of political tensions and of the conflicts they engender. He is inclined to see in them only 'the object of a dispute', to enclose within the terms of legal dialectic something which is pre-eminently refractory to reasoning, to reduce to order something wholly consisting of unbridled dynamism, in a word, to try to depoliticize something which is political of its essence. Here it is not merely a question, as is all too often repeated, of a deficiency in the mechanism of law-transformation, or of gaps in the legal regulation of things. We are dealing with a sphere into which, *a priori*, it is only exceptionally that law penetrates. Law can only intervene in the presence of elements it can assimilate, i.e., facts or imperatives possessing a regularity and at least minimum correspondence with a given social order that enable them to be subjected to reasoned analysis, classified within some known category, and reduced to an objective value-judgment capable of serving in its turn as a basis for the application of established norms." (*Théories et réalités en droit international public*, 1970, p. 96.)

There is a certain tendency to submit essentially political conflicts to adjudication in the attempt to open a little door to judicial legislation and, if this tendency were to persist, it would result in the institution, on the international plane, of government by judges; such a notion is so opposed to the realities of the present international community that it would undermine the very foundations of jurisdiction.

*(Signed)* A. GROS.

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