DISSENTING OPINION OF JUDGE DE CASTRO

[Translation]

In its Order of 22 June 1973 the Court decided that the written pleadings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. The Court ought therefore to give a decision on these two preliminary questions.

Nevertheless, the majority of the Court has now decided not to broach them, because it considers, in view of the statements made by French authorities on various occasions concerning the cessation of atmospheric nuclear tests, that the dispute no longer has any object.

That may be described as a prudent course to follow, and very learned arguments have been put forward in support of it, but I am sorry to say that they fail to convince me. It is therefore, I feel, incumbent upon me to set out the reasons why I am unable to vote with the majority, and briefly to state how, in my view, the Court ought to have pronounced upon the questions specified in the above-mentioned Order.

I. Is the Dispute Now Without Object?

Attention should in my view be drawn to various points concerning the value to be attached to the French authorities' statements in relation to the course of the proceedings:

1. I think the Court has done well to take these statements into consideration. It is true they do not form part of the formal documentation brought to the cognizance of the Court, but some have been cited by the Applicant and others are matters of public knowledge; to ignore them would be to shut one's eyes to conspicuous reality. Given the non-appearance of the Respondent, it is the duty of the Court to make sure *proprio motu* of every fact that might be significant for the decision by which it is to render justice in the case (Statute, Art. 53). In matters of procedure, the Court enjoys a latitude which is not to be found in the municipal law of States (*P.C.I.J., Series A, No. 2*, p. 34; Statute, Arts. 30 and 48).

As in the *Northern Cameroons* case, the Court may examine ex officio the questions whether it is or is not "impossible for the Court to render a judgment capable of effective application" (*I.C.J. Reports 1963*, p. 33), and whether the dispute submitted to it still exists—in other words, it may enquire whether, on account of a new fact, there is no longer any surviving dispute.

Thus, in the case brought before the Court, there arises a "pre-preliminary" question (separate opinion of Judge Sir Gerald Fitzmaurice, *ibid.*, p. 103) which must be given priority over any question of jurisdiction (*ibid.*, p. 105); namely whether the statements of the French authorities have removed the legal interest of the Application, and whether they may so be relied on as to render superfluous any judgment whereby the Court might uphold the Applicant's claims.

2. I am wholly aware that the vote of the majority can be viewed as a sign of prudence. The "new fact" which the statements of the French authorities represent is of an importance which should not be overlooked. They are clear, formal and repeated statements, which emanate from the highest authorities and show that those authorities seriously and deliberately intend henceforth to discontinue atmospheric nuclear testing. The French authorities are well aware of the anxiety aroused all over the world by the tests conducted in the South Pacific region and of the sense of relief produced by the announcement that they were going to cease and that underground tests would hereafter be carried out. These statements are of altogether special interest to the Applicant and to the Court.

It is true that the French Government has not appeared in the proceedings but, in point of fact, it has, both directly and indirectly, made known to the Court its views on the case, and those views have been studied and taken into consideration in the Court's decisions. The French Government knows this. One must therefore suppose that the French authorities have been able to take account of the possible effect of their statements on the course of the proceedings.

It may be the confidence warranted by the statements of responsible authorities which explains why the majority of the Court has thought it desirable to terminate proceedings which it felt to be without object. An element of conflict *(lis)* is endemic in any litigation, which it seems only wise, *pro pace*, to regard as terminated as soon as possible; this is moreover in line with the peacemaking function proper to an organ of the United Nations.

3. Even so, it must be added that the Court, as a judicial organ, must first and foremost have regard to the legal worth of the French authorities' statements.

Upon the Court there falls the task of interpreting their meaning and verifying their purpose. They can be viewed as the announcement of a programme, of an intention with regard to the future, their purpose being to enlighten all those who may be interested in the method which the French authorities propose to follow where nuclear tests are concerned. They can also be viewed as simple promises to conduct no more nuclear tests in the atmosphere. Finally, they can be considered as promises giving rise to a genuine legal obligation.

It is right to point out that there is not a world of difference between the expression of an intention to do or not do something in the future and a promise envisaged as a source of legal obligations. But the fact remains

that not every statement of intent is a promise. There is a difference between a promise which gives rise to a moral obligation (even when reinforced by oath or word of honour) and a promise which legally binds the promiser. This distinction is universally prominent in municipal law and must be accorded even greater attention in international law.

For a promise to be legally binding on a State, it is necessary that the authorities from which it emanates should be competent so to bind the State (a question of internal constitutional law and international law) and that they should manifest the intention and will to bind the State (a question of interpretation). One has therefore to ask whether the French authorities which made the statements had the power, and were willing, to place the French State under obligation to renounce all possibility of resuming atmospheric nuclear tests, even in the event that such tests should again prove necessary for the sake of national defence: an obligation which, like any other obligation stemming from a unilateral statement, cannot be presumed and must be clearly manifested if it is to be reliable in law *(obligatio autem non oritur nisi ex voluntate certa et plane declarata)*.

The identification of the necessary conditions to render a promise *animo sibi vinculandi* legally binding has always been a problem in municipal law and, since Grotius at least, in international law also. When an obligation arises whereby a person is bound to act, or refrain from acting, in such and such a way, this results in a restraint upon his freedom *(alienatio cuiusdam libertatis)* in favour of another, upon whom he confers a right in respect of his own conduct *(signum volendi ius proprium alteri conferri)*; for that reason, and with the exception of those gratuitous acts which are recognized by the law (e.g., donation, *pollicitatio*), the law generally requires that there should be a *quid pro quo* from the benificiary to the promiser. Hence—and this should not be forgotten —any promise (with the exception of *pollicitatio*) can be withdrawn at any time before its regular acceptance by the person to whom it is made *(ante acceptationem, quippe iure nondum translatum, revocari posse sine iniustitia)*.

4. On the occasion of another unilateral statement—discontinuance—the Court established that an act of that kind must be considered in close relationship with the circumstances of the particular case (*I.C.J. Reports 1964*, p. 19). And it is with the circumstances of the present case in mind that one must seek an answer to the following questions:

Do those statements of the French authorities with which the Judgment is concerned mean anything other than the notification to the French people—or the world at large—of the nuclear-test policy which the Government will be following in the immediate future?

Do those statements contain a genuine promise never, in any circumstances, to carry out any more nuclear tests in the atmosphere?

Can those statements be said to embody the French Government's firm intention to bind itself to carry out no more nuclear tests in the atmosphere?

Do these same statements possess a legal force such as to debar the French State from changing its mind and following some other policy in the domain of nuclear tests, such as to place it vis-à-vis other States under an obligation to carry out no more nuclear tests in the atmosphere?

To these questions one may reply that the French Government has made up its mind to cease atmospheric nuclear testing from now on, and has informed the public of its intention to do so. But I do not feel that it is possible to go farther. I see no indication warranting a presumption that France wished to bring into being an international obligation, possessing the same binding force as a treaty—and vis-à-vis whom, the whole world?

It appears to me that, to be able to declare that the dispute brought before it is without object, the Court requires to satisfy itself that, as a fact evident and beyond doubt, the French State wished to bind itself, and has legally bound itself, not to carry out any more nuclear tests in the atmosphere. Yet in my view the attitude of the French Government warrants rather the inference that it considers its statements on nuclear tests to belong to the political domain and to concern a question which, inasmuch as it relates to national defence, lies within the domain reserved to a State's domestic jurisdiction.

I perfectly understand the reluctance of the majority of the Court to countenance the protraction of proceedings which from the practical point of view have become apparently, or probably, pointless. It is however not only the probable, but also the possible, which has to be taken into account if rules of law are to be respected. It is thereby that the application of the law becomes a safeguard for the liberty of States and bestows the requisite security on international relations.

II. Jurisdiction of the Court

In its Order of 22 June 1973 the Court considered that the material submitted to it justified the conclusion that the provisions invoked by the Applicant appeared, prima facie, to afford a basis upon which the jurisdiction of the Court might be founded. At the present stage of the proceedings, the Court must satisfy itself that it has jurisdiction under Articles 36 and 37 of the Statute [1].

[1] I believe that I am entitled to express my opinion on the jurisdiction of the Court and the admissibility of the Application. It is true that, in a declaration appended to the Judgment in the *South West Africa* cases (*I.C.J. Reports 1966*, pp. 51-57), President Sir Percy Spender endeavoured to narrow the scope of the questions with which judges might deal in their opinions. But he was actually going against the practice followed in the cases upon which the Court was giving judgment at the time. It was in the following terms that he stated his view: "... such opinions should not purport to deal with matters that fall entirely outside the range of the Court's decision, or of the decision's motiva-

1. Jurisdiction of the Court by Virtue of the French Government's Declaration of 20 May 1966 (Art. 36, para. 2, of the Statute)

The first objection to the jurisdiction of the Court is based on the reservation made by the French Government as to

> ". . . disputes arising out of a war or international hostilities, disputes arising out of a crisis affecting national security or any measure or action relating thereto, and disputes concerning activities connected with national defence".

This reservation certainly seems to apply to the nuclear tests. It is true that it has been contended that the nuclear tests do not fall within activities connected with national defence, because their object is the perfection of a weapon of mass destruction. But it must be borne in mind that we are dealing with a unilateral declaration, an optional declaration of adhesion to the jurisdiction of the Court. Thus the intention of the author of the declaration is the first thing to be considered, and the terms of the declaration and the contemporary circumstances permit of this being ascertained. The term "national defence" is broad in meaning: "Ministry of National Defence" is commonly used as corresponding to "Ministry of the Armed Forces". National defence also includes the possibility of riposting to the offensive of an enemy. This is the idea behind the "strike force". The expression used ("concerning activities connected with . . .") rules out any restrictive interpretation. Furthermore, it is well known that the intention of the French Government was to cover the question of nuclear tests by this reservation; it took care to modify reservation (3) to its declaration of 10 July 1959 [1] six weeks before the first nuclear test [2].

The Applicant contends that the French reservation is void because it is subjective and automatic, and thus void as being incompatible with the requirements of the Statute. This argument is not convincing. In reservation (3) of the French declaration, it is neither stated explicitly nor implied that the French Government reserves the power to define what is connected with national defence. However that may be, if the reser-

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tion" (*ibid.*, p. 55). In the present case, it does not seem to me that the questions of jurisdiction and admissibility fall outside the range of the Court's decision. They are the questions specified in the Court's Order of 22 June 1973, and they are those which have to be resolved unless the dispute is manifestly without object.

[1] By adding the words "and disputes concerning activities connected with national defence".

[2] In my opinion, the Court does not have to deal with the sophistical arguments of the Applicant on this point, ingenious though they be. The objective nature of the reservation does not require that the meaning of the expression "national defence", or what the French Government meant when it used it, be proved by evidence. The reservation should simply be interpreted as a declaration of unilateral will, should be interpreted, that is to say, taking into account the natural meaning of the words and the presumed intention of the declarer. What would require proof would be that it had a meaning contrary to the natural meaning of the terms used.

vation were void as contrary to law, the result would be that the declaration would be void, so that the source of the Court's jurisdiction under Article 36, paragraph 2, of the Statute would disappear along with the reservation. (In this sense, cf. separate opinion of Judge Sir Hersch Lauterpacht, *I.C.J. Reports 1957*, pp. 34 and 57-59; dissenting opinion of Judge Sir Hersch Lauterpacht, *I.C.J. Reports 1959*, p. 101; separate opinion of Judge Sir Percy Spender, *I.C.J. Reports 1959*, p. 59.) The reservation is not a statement of will which is independent and capable of being isolated. Partial nullity, which the Applicant proposes to apply to it, is only permissible when there is a number of terms which are entirely distinct ("*tot sunt stipulationes, quot corpora*", D. 45, 1, 1, para. 5) and not when the reservation is the "essential basis" of the consent (Vienna Convention on the Law of Treaties, Art. 44, para. 3 *(b)*) [1].

The controversy is really an academic one. The exception or reservation in the French declaration states, in such a way as to exclude any possible doubt, that the French Government does not confer competence on the Court for disputes concerning activities connected with national defence. There is no possibility in law of the Court's jurisdiction being imposed on a State contrary to the clearly expressed will of that State. It is not possible to disregard both the letter and the spirit of Article 36 of the Statute and Article 2, paragraph 7, of the United Nations Charter.

2. Jurisdiction of the Court by Virtue of the General Act of Geneva of 26 September 1928 (Art. 36, para. 1, and Art. 37 of the Statute)

The question which most particularly requires to be examined is whether the General Act is still in force. Article 17 thereof reads as follows:

> "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal."

Article 37 of the Statute provides that:

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the Parties to the present Statute, be referred to the International Court of Justice."

The French Government has informed the Court that it considers that the General Act cannot serve as a basis for the competence of the Court. It is therefore necessary to examine the various questions which have

[1] The separability of the reservation would have to be proved. Despite its efforts, the Applicant has not succeeded in bolstering this contention with convincing arguments.

been raised as to the efficacy of the Act of Geneva after the dissolution of the League of Nations.

(a) The General Act, like the contemporary treaties for conciliation, judicial settlement and arbitration, originated in the same concern for security and the same desire to ensure peace as underlay the system of the League of Nations. The question which arises in the present case is whether Article 17 of the General Act is no more than a repetition or duplication of Article 36, paragraph 2, of the Statute of the Permanent Court. If this is so, is Article 17 of the General Act subject to the vicissitudes undergone by Article 36, paragraph 2, of the Statute, and likewise to the reservations permitted by that provision?

The two Articles certainly coincide both in objects and means, but they are independent provisions which each have their own individual life. This appeared to be generally recognized. For brevity's sake, I will simply refer to the opinion of two French writers of indisputable authority. Gallus, in his study "L'Acte général a-t-il une réelle utilité?", reaches the above conclusion. He points out the similarities between the Articles, and goes on: "But it would not be correct to say that the General Act is no more than a confirmation of the system of Article 36 of the Statute of the Permanent Court of International Justice" (*Revue de droit international* (Lapradelle), Vol. III, 1931, p. 390). The author is also careful to point out the differences between the two sources of jurisdiction (members, conditions of membership, permitted reservations, duration, denunciation) and the complications caused by the co-existence of the two sources (*ibid.*, pp. 392-395). In his view, the General Act amounts to "a step further than the system of Article 36 of the Statute of the Court" (*ibid.*, p. 391).

In the same sense, René Cassin has said:

> "Does the recent accession of France to the Protocol of the aforesaid Article 36 not duplicate its accession to Chapter II of the General Act of arbitration? The answer must be that it does not." ("L'Acte général d'arbitrage", Questions politiques et juridiques, *Affaires étrangères*, 1931, p. 17.) [1]

(b) It has been said that the reservations contemplated by Article 39, paragraph 2 *(b)*, of the General Act, applicable between the Governments which are Parties to this case, may be regarded as covering reservation (3) of the French declaration of 1966.

This view is not convincing. The reservation permitted by the General Act is for "disputes concerning questions which by international law are solely within the domestic jurisdiction of States". This coincides with

[1] Chapter II of the General Act, which is entitled "Judicial Settlement", begins with Article 17. The individual and independent value of the Act, even after the winding-up of the League of Nations, is clear from the *travaux préparatoires* of resolution 268A (III) of the United Nations General Assembly, and from the actual text of that resolution.

reservation (2) in the French declaration of 1959, concerning "disputes relating to questions which by international law fall exclusively within the domestic jurisdiction". That reservation was retained (also as No. 2) in the French declaration of 1966; but it was thought necessary to add, in reservation (3), an exclusion relating to disputes concerning activities connected with national defence.

This addition to reservation (3) was necessary in order to modify its scope in view of the new circumstances created by the nuclear tests. The reserved domain of domestic jurisdiction does not include disputes arising from acts which might cause fall-out on foreign territory. The final phrase of reservation (3) of the French declaration of 1966 has an entirely new content, and one which therefore differs from Article 39, paragraph 2 *(b)*, of the General Act.

(c) Paradoxically enough, doubt has been cast on the continuation in force of the General Act in the light of the proceedings leading up to General Assembly resolution 268A (III) on Restoration to the General Act of its Original Efficacy, and in view also of the actual terms of the resolution.

It is true that ambiguous expressions can be found in the records of the preliminary discussions. It was said that the draft resolution would not imply approval on the part of the General Assembly, and that it would thus confine itself to allowing the States to re-establish "the validity" of the General Act of 1928 of their own free will (Mr. Entezam of Iran, United Nations, *Official Records of the Third Session of the General Assembly, Part I, Special Political Committee*, 26th Meeting, 6 December 1948, p. 302) [1]. The spokesmen for the socialist republics, for their part, vigorously criticized the General Act for political reasons, regarding it as a worthless instrument that had brought forth stillborn measures.

But the signatories of the Act, when they spoke of regularizing and modifying the Act, were contemplating the restoration of its full original efficacy, and were not casting doubt on its existing validity. Mr. Larock (Belgium) explained that the General Act "was still valid, but needed to be brought up to date" (*ibid.*, 28th Meeting, p. 323). Mr. Ordonneau (France) stated that "the Interim Committee simply proposed practical measures designed to facilitate the application of provisions of Article 33 [of the Charter]" (*ibid.*, p. 324). Mr. Van Langenhove (Belgium) said that "the General Act of 1928 was still in force; nevertheless its effectiveness had diminished since some of its machinery [i.e., machinery of the League of Nations] had disappeared" (United Nations, *Official Records of the Third Session of the General Assembly, Part II*, 198th Plenary Meeting, 28 April 1949, p. 176). Mr. Viteri Lafronte (Ecuador), the rapporteur, explained that "there was no question of reviving the Act of 1928 or of making adherence to it obligatory. The Act remained binding on those

[1] Mr. Entezam was perhaps using the word "validity" in the sense of "full efficacy".

signatories that had not denounced it" (*ibid.*, p. 189). Mr. Lapie (France) also said that the General Act of 1928, which it was proposed "to restore to its original efficacy, was a valuable document inherited from the League of Nations and it had only to be brought into accordance with the new Organization" (*ibid.*, 199th Plenary Meeting, 28 April 1949, p. 193). To sum up, and without there being any need to burden this account of the matter with further quotations, it would seem that no-one at that time claimed the Act had ceased to exist as between its signatories, and that on the contrary it was recognized to be still in force between them.

Resolution 268A (III) of 28 April 1949, on the Restoration to the General Act of its Original Efficacy, gives a clear indication of what its object and purpose is. It considers that the Act was impaired by the fact that the organs of the League of Nations and the Permanent Court had disappeared, and that the amendments mentioned were of a nature to restore to it its original efficacy. The resolution emphasizes that such amendments

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

(d) Are Articles 17, 33, 34 and 37 of the General Act, which refer to the Permanent Court of International Justice, still applicable by the operation of Article 37 of the Statute? Solely an affirmative answer would appear to be tenable.

The Court answered the question indirectly in the *Barcelona Traction, Light and Power Company, Limited* case (*Preliminary Objections* stage); Judge Armand-Ugon demonstrated that the bilateral treaties of conciliation, judicial settlement and arbitration of the time were of the same nature as the General Act, a multilateral treaty. He said of the Hispano-Belgian treaty of 1927 that it "is nothing other than a General Act on a small scale between two States". That is true. He then reasoned as follows: resolution 268A (III) seemed to him to show, beyond all possible doubt, that the General Assembly did not think it could apply Article 37 of the Statute of the Court to the provisions of the General Act relating to the Permanent Court, because for such a transfer "a new agreement [the 1949 Act] was essential. This meant that Article 37 did not operate" (dissenting opinion, *I.C.J. Reports 1964*, p. 156). The Court did not accept Judge Armand-Ugon's reasoning as sound, and impliedly denied his interpretation of the 1949 Act and found Article 37 of the Statute applicable to the 1928 General Act [1]. The doctrine of the Court was that the real object of the jurisdictional clause invoking the Permanent Court (under Art. 37) was not "to specify one tribunal rather than another, but to create an obligation of compulsory adjudication" (*I.C.J. Reports 1964*, p. 38).

[1] It held that the Hispano-Belgian treaty was still in force, because of the applicability to it of Article 37 of the Statute.

(e) The question which would appear to be basic to the present discussion on the continuance in force of the General Act is whether or not that instrument has been subjected to tacit abrogation.

International law does not look with favour on tacit abrogation of treaties. The Vienna Convention, which may be regarded as the codification of *communis opinio* in the field of treaties (*I.C.J. Reports 1971*, p. 47), has laid down that the "termination of a treaty" may take place only "as a result of the application of the provisions of the treaty or of the present Convention" (Art. 42, para. 2), and that the termination of a treaty under the Convention may take place: "*(a)* in conformity with the provisions of the treaty; or *(b)* at any time by consent of all the parties after consultation with other contracting States" (Art. 54).

The General Act laid down the minimum period for which it should be in force, provided for automatic renewal for five-year periods, and prescribed the form and means of denunciation (Art. 45). Like the Vienna Convention, the Act did not contemplate tacit abrogation; and this is as it should be. To admit tacit abrogation would be to introduce confusion into the international system. Furthermore, if tacit abrogation were recognized, it would be necessary to produce proof of the *facta concludentia* which would have to be relied on to demonstrate the *contrarius consensus* of the parties, and proof of sufficient force to relieve the parties of the obligation undertaken by them under the treaty.

(f) It seems to me to be going too far to argue from the silence surrounding the Act that this is such as to give rise to a presumption of lapse [1]. Digests and lists of treaties in force have continued to mention the Act; legal authors have done likewise [2].

In the Court also, Judge Basdevant affirmed that the General Act was still in force and that it was therefore in force between France and Norway, which were both signatories to it. He drew attention to the fact

[1] The non-invocation of a treaty may in fact be due to its efficacy in obviating disputes between the parties—and thereby constitute the best evidence of its continuance in force.

[2] It has been cited as being still in force by the most qualified writers in France and in other countries. Nonetheless, the doubts of Siorat should be noted, as to the validity of the Act after the winding-up of the League of Nations. He raises the problem whether the General Act might not have lapsed for a reason other than the winding-up of the Permanent Court: impossibility of execution, as a result of the disappearance of the machinery of the League of Nations, might be asserted. But for termination to have occurred, it would be necessary to prove that the functions laid on the League of Nations have not been transferred to the United Nations, and that the situation would both make execution literally impossible and create a total, complete and permanent impossibility. Generally accepted desuetude might also be asserted. This writer mentions that the attitude of the parties towards the Act is difficult to interpret, and points out that for there to be desuetude it would be necessary to prove indisputably that the parties had adopted a uniform attitude by acting with regard to the Act as though it did not exist, and that they had thus, in effect, concluded a tacit agreement to regard the Act as having terminated ("L'article 37 du Statut de la Cour internationale de Justice", *Annuaire français de droit international*, 1962, pp. 321-323). It should be observed that the data given by this writer are somewhat incomplete.

that the Act had been mentioned in the Observations of the French Government and had later been explicitly invoked by the Agent of that Government as a basis of the Court's jurisdiction in the case: he likewise pointed out that the Act had also been mentioned by counsel for the Norwegian Government (*I.C.J. Reports 1957*, p. 74). This is an opinion of considerable authority. But it seems to me relevant also to observe that, when the Court (despite Judge Basdevant's opinion) dismissed the French claim in the *Certain Norwegian Loans* case, it did not throw doubt on the validity and efficacy of the General Act [1].

The dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, in the case concerning *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, also referred to the 1928 General Act and to the Revised Act (*I.C.J. Reports 1951*, p. 37) [2].

In my view, one can only agree with the following statement, taken from a special study of the matter:

> "In conclusion it may be affirmed that the General Act of Geneva is in force between twenty contracting States [3] which are still bound by the Act, and not only in a purely formal way, for it retains full efficacy for the contracting States despite the disappearance of some organs of the League of Nations [4]."

(g) The continuance in force of the General Act being admitted, it has still been possible to ask whether the French declaration recognizing the compulsory jurisdiction of the Court, with the 1966 reservation as to national defence, might not have modified the obligations undertaken by France when it signed the Act, in particular those contained in Chapter II. In more general terms, the question is whether the treaties and conventions in force in which acceptance of the Court's jurisdiction is specially provided for (the hypothesis of Art. 36, para. 1, of the Statute), are sub-

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[1] The Court said that the French Government had mentioned the General Act of Geneva, but went on to say that such a reference could not be regarded as sufficient to justify the view that the Application of the French Government was based upon the General Act. "If the French Government had intended to proceed upon that basis it would expressly have so stated." The Court considered that the Application of the French Government was based clearly and precisely on Article 36, paragraph 2, of the Statute. For that reason, the Court felt that it would not be justified in seeking a basis for its jurisdiction "different from that which the French Government itself set out in its Application and by reference to which the case had been presented by both Parties to the Court" (*I.C.J. Reports 1957*, p. 24 f.). It seems that it would not have been in the interest of the French Government to place emphasis on the General Act, because the latter, in Article 31, required the exhaustion of local remedies.

[2] The Act is also cited in *I.C.J. Reports 1961*, p. 19. Pakistan invoked it as basis of the Court's jurisdiction in its Application of 11 May 1973 against India (a case which was removed from the list by an Order of 15 December 1973 following a discontinuance by Pakistan).

[3] France and the United Kingdom have denounced the Act since the institution of the present proceedings.

[4] Kunzmann, "Die Generalakte von New York und Genf als Streitschlichtungsvertrag der Vereinten Nationen", 56 *Die Friedens-Warte* (1961-1966), Basle, p. 22.

ordinate to the unilateral declarations made by States accepting the compulsory jurisdiction of the Court (the hypothesis of Art. 36, para. 2), or depend on those declarations, with the result that the abrogation of that obligation to be subject to the Court's jurisdiction, or its limitation by the introduction of additional reservations, also entails the abrogation or limitation of the obligations undertaken under a previous bilateral or multilateral convention.

The respect due to the sovereignty of States, and the optional nature of the Court's jurisdiction (Art. 2, para. 7, of the Charter), would not seem to warrant setting aside the principle of *pacta sunt servanda*, an essential pillar of international law. Once submission to the Court's jurisdiction has been established in a treaty or convention (Art. 36, para. 1, of the Statute), the parties to the treaty or convention cannot of their own free will and by unilateral declaration escape the obligation undertaken toward another State. Such declaration does not have prevailing force simply because it provides for the jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute, or because it is made subject to reservations, or enshrines a possibility of arbitrarily depriving the Court of jurisdiction. To undo the obligation undertaken, it will always be necessary to denounce the treaty or convention in force, in accordance with the prescribed conditions.

Even if it be thought that a declaration filed under Article 36, paragraph 2, of the Statute gives rise to obligations of a contractual nature, the answer would still be that such declaration cannot free the declarant State from all or any of the obligations which it has already undertaken in a prior agreement, otherwise than in accordance with the conditions laid down in that agreement. For there to be implied termination of a treaty as a result of the conclusion of a subsequent treaty, a primary requirement is that "all the parties to it conclude a later treaty relating to the same subject-matter" (Vienna Convention, Art. 59).

It should also be noted that there is not such incompatibility between declarations made by virtue of Article 36, paragraph 2, of the Statute, and the General Act, as to give rise to tacit abrogation as a result of a new treaty. The Act operates between the signatories thereto, a closed group of 20 States, and imposes special conditions and limitations on the parties. The Statute, on the contrary, according to the interpretation which has been given of Article 36, paragraph 2, opens the door to practically all States (Art. 93 of the Charter), and permits of conditions and reservations of any kind whatever being laid down.

The relationship between the General Act and subsequent acceptance of the compulsory jurisdiction of the Court has been explained in a concise and masterly fashion by Judge Basdevant:

> "A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be closed or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its fresh

acceptance of compulsory jurisdiction stated in its Declaration of 1949. This restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway. The clause is not sufficient to set aside the juridical system existing between them on this point. It cannot close the way of access to the Court that was formerly open, or cancel it out with the result that no jurisdiction would remain." (*I.C.J. Reports 1957*, pp. 75 f.)

(h) There still remains a teasing mystery: why did the French Government not denounce the General Act at the appropriate time and in accordance with the required forms, in exercise of Article 45, paragraph 3, of the Act, at the time in 1966 when it filed its declaration recognizing the jurisdiction of the Court subject to new reservations? It seems obvious that the French Government was in 1966 not willing that questions concerning national defence should be capable of being brought before the Court, and we simply do not know why the French Government preserved the Court's jurisdiction herein vis-à-vis the signatories to the Act [1]. But this anomalous situation cannot be regarded as sufficient to give rise to a presumption of tacit denunciation of the General Act by the French Government, and to confer on such denunciation legal effectiveness in violation of the provisions of the Act itself. To admit this would be contrary to the most respected principles of the law of treaties; it would be contrary to legal security and even to the requirements of the law as to presumptions.

III. The Admissibility of the Application

1. The Order of 22 June 1973 decided that the written pleadings should be addressed both to the question of the Court's jurisdiction to entertain the dispute and to that of the admissibility of the Application. The Court has thus followed Article 67 of its Rules.

The term "admissibility" is a very wide one, but the Order, in paragraph 23, throws some light on the meaning in which it uses it, by stating that it cannot be assumed *a priori* that the Applicant "may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application".

The question is whether the Applicant, in its submissions, has or has not asserted a legal interest as basis of its action. At the preliminary stage contemplated by the Order, the Court has first to consider whether the Applicant is entitled to open the proceedings *(legitimatio ad processum, Rechtsschutzanspruch)*, to set the procedural machinery in motion, before turning to examination of the merits of the case. Subsequently the question would arise as to whether the interest alleged was, in fact and in law,

[1] Though various hypotheses have been put forward to explain this apparently contradictory conduct.

worthy of legal protection [1]. But that would belong to the merits of the case, and it therefore does not fall to be considered here.

The Applicant refers to violations by France of several legal rules, and endeavours to show that it has a legal interest to complain of each of these violations. It will therefore be necessary to examine the interest thus invoked in each case of alleged violation, but it would be as well for me first of all to devote some attention to the meaning of the expression "legal interest".

2. The idea of legal interest is at the very heart of the rules of procedure (cf. the maxim "no interest, no action"). It must therefore be used with the exactitude required by its judicial function. The General Act affords a good guide in this respect: it distinguishes between "disputes of every kind" which may be submitted to the procedure of conciliation (Art. 1), the case of "an interest of a legal nature" in a dispute for purposes of intervention (Art. 36), and "all disputes with regard to which the Parties are in conflict as to their respective rights" (Art. 17); only the latter are disputes appropriate to judicial settlement, and capable of being submitted for decision to the Permanent Court of International Justice in accordance with the General Act [2].

As is apparent, Article 17 of the General Act does not permit of an extensive interpretation of the "legal interest" which may be asserted before the Court. What is contemplated is a right specific to the Applicant which is at the heart of a dispute, because it is the subject of conflicting claims between the Applicant and the Respondent. Thus it is a

[1] Judge Morelli once pointed out that the distinction between a right of action and a substantive interest is proper to municipal law, whereas it is necessary in international law to ascertain whether there is a dispute (separate opinion, *I.C.J. Reports 1963*, pp. 132 f.). I do not find this observation particularly useful. To hold an application inadmissible because of the applicant's want of legal interest, or to reach the same conclusion because for want of such interest there is no dispute, comes to one and the same thing. Judge Morelli felt bound to criticize the 1962 *South West Africa* Judgment because in his view it confused "the right to institute proceedings" (which has to be examined as a preliminary question) and the existence of "a legal right or interest" or "a substantive right vested in the Applicants" (which has to be regarded as a question touching the merits) (separate opinion, *I.C.J. Reports 1966*, p. 61).

[2] Sir Gerald Fitzmaurice has shed light on the meaning to be given to the term "dispute". He says that a legal dispute exists

> "only if its outcome or *result, in the form of a decision of the Court*, is capable of affecting the *legal* interests or relations of the parties, in the sense of conferring or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction or a prohibition for the future, or as a ruling material to a still subsisting legal situation" (separate opinion, *I.C.J. Reports 1963*, p. 110).

The point thus made is not upset by the fact that proceedings can be instituted to secure a declaratory ruling, but in that connection it must be noted that what may properly fall to be determined in contentious proceedings is the existence or non-existence of a right vested in a party thereto, or of a concrete or specific obligation. The Court cannot be called upon to make a declaratory finding of an abstract or general character as to the existence or non-existence of an objective rule of law, or of a general or non-specific obligation. That kind of declaration may be sought by means of a request for an advisory opinion.

right in the proper sense of that term *(ius dominativum)*, the nature of which is that it belongs to one or another State, that State being entitled to negotiate in respect thereof, and to renounce it.

The Applicant however seems to overlook Article 17, and considers that it is sufficient for it to have a collective or general interest. It has cited several authorities to support its view that international law recognizes that every State has an interest of a legal nature in the observation by other countries of the obligations imposed upon them by international law, and to the effect also that law recognizes an interest of all States with regard to general humanitarian causes.

If the texts which have been cited are closely examined, a different conclusion emerges. In *South West Africa (Preliminary Objections)* Judge Jessup showed how international law has recognized that States may have interests in matters which do not affect their "material" or, say, "physical" or "tangible" interests. But Judge Jessup also observes that "States have asserted such legal interests on the basis of some treaty"; in support of this observation he mentions the minorities treaties, the Convention for the Prevention and Punishment of the Crime of Genocide, conventions sponsored by the International Labour Organisation, and the mandates system (separate opinion, *I.C.J. Reports 1962*, pp. 425 ff.). Judge Jessup's opinion in the second phase of the *South West Africa* cases, in which he criticizes the Court's Judgment, which did not recognize that the Applicants or any State had a right of a recourse to a tribunal when the Applicant does not allege its own legal interest relative to the merits, is very subtly argued. Judge Jessup took into account the fact that it was a question of "fulfilment of fundamental treaty obligations contained in a treaty which has what may fairly be called constitutional characteristics" (dissenting opinion, *I.C.J. Reports 1966*, p. 386). More specifically, he added: "There is no generally established *actio popularis* in international law" (*ibid.*, p. 387). In the same case Judge Tanaka stated:

> "We consider that in these treaties and organizations common and humanitarian interests are incorporated. By being given organizational form, these interests take the nature of 'legal interest' and require to be protected by specific procedural means." (Dissenting opinion, *I.C.J. Reports 1966*, p. 252).

In reply to the argument that it should allow "the equivalent of an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest", the Court stated:

> ". . . although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, paragraph 1 *(c)*, of its Statute" (*I.C.J. Reports 1966*, p. 47, para. 88).

On the other hand the Court has also said that:

> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." (*I.C.J. Reports 1970*, p. 32, para. 33.)

These remarks, which have been described as progressive and have been regarded as worthy of sympathetic consideration, should be taken *cum grano salis*. It seems to me that the *obiter* reasoning expressed therein should not be regarded as amounting to recognition of the *actio popularis* in international law; it should be interpreted more in conformity with the general practice accepted as law. I am unable to believe that by virtue of this dictum the Court would regard as admissible, for example, a claim by State A against State B that B was not applying "principles and rules concerning the basic rights of the human person" (*I.C.J. Reports 1970*, p. 32, para. 34) with regard to the subjects of State B or even State C. Perhaps in drafting the paragraph in question the Court was thinking of the case where State B injured subjects of State A by violating the fundamental rights of the human person. It should also be borne in mind that the Court appears to restrict its dictum on the same lines as Judges Jessup and Tanaka when referring to "international instruments of a universal or quasi-universal character" (*I.C.J. Reports 1970*, p. 32, para. 34) [1].

In any event, if, as appears to me to be the case, the Court's jurisdiction in the present case is based upon Article 17 of the General Act and not on the French declaration of 1966, the Application is not admissible unless the Applicant shows the existence of a right of its own which it asserts to have been violated by the act of the Respondent.

3. The claim that the Court should declare that atmospheric nuclear tests are unlawful by virtue of a general rule of international law, and that all States, including the Applicant, have the right to call upon France to refrain from carrying out this sort of test, gives rise to numerous doubts.

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[1] The expression "obligations *erga omnes*" calls to mind the principle of municipal law to the effect that ownership imposes an obligation *erga omnes*; but this obligation gives rise to a legal right or interest to assert ownership before a tribunal for the benefit of the owner who has been injured in respect of his right or interest, or whose right or interest has been disregarded. Even in the case of theft, one cannot speak of an *actio popularis*—which is something different from capacity to report the theft to the authorities. It should also be borne in mind that a decision of the Court is not binding *erga omnes*: it has no binding force except between the parties to the proceedings and in respect of the particular case decided (Statute, Art. 59).

Can the question be settled in accordance with international law, or does it still fall within the political domain? There is also the question whether this is a matter of admissibility or one going to the merits. A distinction must be made as to whether it relates to the political or judicial character of the case (a question of admissibility), or whether it relates to the rule to be applied and the circumstances in which that rule can be regarded as part of customary law (a question going to the merits) [1]. This is a difficulty which could have been resolved by joining the question of admissibility to the merits.

But there is no need to settle these points. In my opinion, it is clear that the Applicant is not entitled to ask the Court to declare that atmospheric nuclear tests are unlawful. The Applicant does not have its own material legal interest, still less a right which has been disputed by the other Party as required by the General Act. The request that the Court make a general and abstract declaration as to the existence of a rule of law goes beyond the Court's judicial function. The Court has no jurisdiction to declare that all atmospheric nuclear tests are unlawful, even if as a matter of conscience it considers that such tests, or even all nuclear tests in general, are contrary to morality and to every humanitarian consideration.

4. The right relied on by the Applicant with regard to the deposit of radio-active fall-out on its territory was considered in the Order of 22 June 1973 (para. 30). We must now consider whether reliance on this right makes the request for examination of the merits of the case admissible. The Applicant's complaint against France of violation of its sovereignty by introducing harmful matter into its territory without its permission is based on a legal interest which has been well known since the time of Roman law. The prohibition of *immissio* (of water, smoke, fragments of stone) into a neighbouring property was a feature of Roman law (D. 8, 5, 8, para. 5). The principle *sic utere tuo ut aliaenum non laedas* is a feature of law both ancient and modern. It is well known that the owner of a property is liable for intolerable smoke or smells, "because he oversteps [the physical limits of his property], because there is *immissio* over the neighbouring properties, because he causes injury [2]".

In international law, the duty of each State not to use its territory for acts contrary to the rights of other States might be mentioned (*I.C.J. Reports 1949*, p. 22). The arbitral awards of 16 April 1938 and 11 March

[1] The idea that the Moscow Treaty, by its nature, partakes of customary law or *ius cogens* is laid open to some doubt by its want of universality and the reservation in its Article IV to the effect that "Each Party shall ... have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject-matter of this Treaty, have jeopardized the supreme interests of its country".

On the preconditions for the birth of a rule of customary law, cf. my separate opinion, *I.C.J. Reports 1974*, pp. 89 ff.

[2] Mazeaud, *Traité théorique et pratique de la responsabilité civile*, 3rd ed., 1938, Vol. I, pp. 647 f., para. 597.

1941 given in a dispute between the United States and Canada mention the lack of precedents as to pollution of the air, but also the analogy with pollution of water, and the Swiss litigation between the cantons of Solothurn and Aargau [1]. The conflict between the United States and Canada with regard to the *Trail Smelter* was decided on the basis of the following rule:

> "No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the case is of serious consequence and the injury is established by clear and convincing evidence." (*Trail Smelter* arbitration, 1938-1941, *United States of America* v. *Canada*, *UNRIAA*, Vol. III, p. 1965 [2].)

If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes [3], the consequence must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory.

The question whether the deposit of radio-active substances on the Applicant's territory as a result of the French nuclear tests is harmful to the Applicant should only be settled in the course of proceedings on the merits in which the Court would consider whether intrusion or trespass into the territory of another is unlawful in itself or only if it gives rise to damage; in the latter hypothesis, it would still have to consider the nature of the alleged damage [4], its existence [5] and its relative import-

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[1] The Swiss Federal Tribunal laid down that, according to the rules of international law, a State may freely exercise its sovereignty provided it does not infringe rights derived from the sovereignty of another State; the presence of certain shooting-butts in Aargau endangered areas of Solothurn, and the Tribunal forbade use of the butts until adequate protective measures had been introduced (*Judgments of the Swiss Federal Tribunal*, Vol. XXVI, Part I, pp. 449-451, Recital 3, quoted in Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public*, Neuchâtel 1958, p. 121).

[2] The Award reaches that conclusion "under the principles of international law, as well as of the law of the United States". The award has been regarded as "basic for the whole problem of interference. Its bases are now part of customary international law", A. Randelzhofer, B. Simma, "Das Kernkraftwerk an der Grenze—Ein 'ultra-hazardous activity' im Schnittpunkt von internationalem Nachbarrecht und Umweltschutz", *Festschrift für Friedrich Berber*, Munich, 1973, p. 405. This award marks the abandonment of the theory of Harmon (absolute sovereignty of each State in its territory with regard to all others); Krakan, *Die Harmon Doktrin: Eine These der Vereinigten Staaten zum internationalen Flussrecht*, Hamburg, 1966, p. 9.

[3] I.e., the continuance of the emission of harmful fumes, or the renewed emission of fumes if it is to be feared *(ad metuendum)* that harm will result. *Damnum infectum est damnum nondum factum, quod futurum veremur*, D. 39, 2, 2.

[4] It would have to say, for example, whether or not account should be taken of the fact that continuation of the nuclear tests causes injury, in particular by way of apprehension, anxiety and concern, to the inhabitants and Government of Australia.

[5] This raises the question of evidence (Arts. 48 and 50 of the Statute; Art. 62 of the Rules).

ance [1], in order to pronounce on the claim for prohibition of the French nuclear tests [2].

5. A third complaint against France is based upon infringement of the principle of freedom of the high seas as the result of restrictions on navigation and flying due to the establishment of forbidden zones. This raises delicate legal questions.

Is the carrying-out of nuclear tests over the sea, and the establishment of forbidden zones, part of the other freedoms "which are recognized by the general principles of international law" or is it contrary to the freedoms of other States? Are we dealing with a case analogous to that of the establishment of forbidden zones for firing practice or naval manoeuvres? The interpretation of Article 2, paragraph 2, of the Convention on the High Seas requires that in each case reasonable regard be had to the interests of other States in their exercise of their freedom of the high seas; the nature and the importance of the interests involved must be considered, as must the principle of non-harmful use (*prodesse enim sibi unusquisque, dum alii non nocet, non prohibetur*, D. 39, 3, 1, para. 11), of the misuse of rights, and of good faith in the exercise of freedoms.

The question of nuclear tests was examined by the 1958 Conference on the Law of the Sea. A strong tendency to condemn nuclear testing was then apparent, yet the Conference accepted India's proposal; it recognized that there was apprehension on the part of many States that nuclear explosions might constitute an infringement of freedom of the high seas, and referred the matter to the General Assembly for appropriate action.

The complaint against France on this head therefore raises questions of law and questions of fact relating to the merits of the case, which should not be examined and dealt with at the preliminary stage of proceedings contemplated by the Order of 22 June 1973.

It seems to me that this third complaint is not admissible in the form in which it has been presented. The Applicant is not relying on a right of its own disputed by France, and does not base its Application on any material injury, responsibility for which it is prepared to prove lies upon France [3]. The Applicant has no legal title authorizing it to act as spokesman for the international community and ask the Court to condemn France's conduct. The Court cannot go beyond its judicial functions and determine in a general way what France's duties are with regard to the freedoms of the sea.

(Signed) F. DE CASTRO.

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[1] The relative importance of the interests of the Parties must be assessed, and the possibility of reconciling them (question of proximity and innocent usage).

[2] In its Order of 22 June 1973, the Court alluded to the possibility that the tests might cause "irreparable damage" to the Applicant; this is a possibility which should be kept in mind in relation to the indication of interim measures (in view notably of their urgent character) but not where admissibility is concerned.

[3] Regarding the conditions on which a claim for damages can be entertained, c *I.C.J. Reports 1974*, pp. 203-205, especially para. 76, and see also *ibid.*, p. 225.