ORAL ARGUMENTS ON JURISDICTION AND ADMISSIBILITY

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, on 10 and 11 July and 20 December 1974, President Lachs presiding

FOURTH PUBLIC SITTING (10 VII 74, 10.05 a.m.)

Present: President LACHS; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Judge* ad hoc Sir Garfield BARWICK; *Registrar* AQUARONE.

Also present:

For the Government of New Zealand:

Professor R. Q. Quentin-Baxter, of the New Zealand Bar, Professor of International Law, Victoria University of Wellington, *as Agent and Counsel*;

H.E. Mr. H. V. Roberts, Ambassador of New Zealand to the Netherlands, *as Co-Agent*;

Hon. Dr. A. M. Finlay, Q.C., Attorney-General of New Zealand,

Mr. R. C. Savage, Q.C., Solicitor-General of New Zealand,

Professor K. J. Keith, of the New Zealand Bar, Professor of International Law, Victoria University of Wellington,

Mr. C. D. Beeby, of the New Zealand Bar, Legal Adviser, New Zealand Ministry of Foreign Affairs,

Mrs. A. B. Quentin-Baxter, of the New Zealand Bar, *as Counsel.*

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court meets today to hear the oral arguments of the Parties on the questions of the jurisdiction of the Court and the admissibility of the Application [1] filed by New Zealand instituting proceedings against France in the *Nuclear Tests* case.

The Application of New Zealand was filed on 9 May 1973, and instituted proceedings against France in respect of a dispute as to the legality of atmospheric nuclear tests in the South Pacific region. The Government of New Zealand asked the Court to adjudge and declare that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radioactive fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests.

The Applicant seeks to found the jurisdiction of the Court on:

(a) Articles 36, paragraph 1, and 37 of the Statute of the Court and Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928 and the accessions of New Zealand and France to the General Act; and
(b) on Article 36, paragraphs 2 and 5, of the Statute of the Court and the declarations made by New Zealand and France under that Article.

By a letter [2] from the Ambassador of France to the Netherlands received on 16 May 1973, the Court was informed that the French Government considered that the Court was manifestly not competent in this case and that France could not accept its jurisdiction. The Annex to the letter set out the reasons for this view. The French Government stated that it did not intend to appoint an agent and requested the Court to remove the case from the List.

By an Order [3] dated 22 June 1973, the Court decided, *inter alia*, that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. By the same Order the Court fixed 21 September 1973 as the time-limit for the Memorial of the Government of New Zealand, and 21 December 1973 as the time-limit for the Counter-Memorial of the French Government.

By an Order [4] made by the President of the Court on 6 September 1973, these time-limits were extended to 2 November 1973 for the Memorial and 22 March 1974 for the Counter-Memorial.

The Memorial [5] of the Government of New Zealand was filed within the time-limit fixed therefor. No Counter-Memorial has been filed by the French Government; the written proceedings being thus closed, the case is ready for hearing on the issues of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application.

I note the presence in Court of the Agent and counsel of New Zealand; the Court has not been notified of the appointment of any agent for the French Government. No representative of the French Government is present in Court.

The Governments of Argentina and Australia have asked that the pleadings

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[1] See pp. 3-45, *supra*.
[2] See p. 347, *infra*.
[3] *I.C.J. Reports 1973*, p. 135.
[4] *I.C.J. Reports 1973*, p. 341.
[5] See pp. 145-246, *supra*.

and annexed documents in this case should be made available to them in accordance with Article 48, paragraph 2, of the 1972 Rules of Court [1]. No objection to this having been made by the Parties, it was decided to accede to these requests.

To the regret of the Court, Vice-President Ammoun is unable to be with us today. Some weeks ago he unfortunately suffered an accident and was obliged to spend some time in hospital. He has not yet been able to take part in the work of the Court.

I thus declare the oral proceedings open on the preliminary questions of jurisdiction of the Court and the admissibility of the Application.

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[1] See pp. 409, 418, *infra*.

ARGUMENT OF DR. FINLAY

COUNSEL FOR THE GOVERNMENT OF NEW ZEALAND

Dr. FINLAY: May I, Mr. President, take the liberty of prefacing my formal address with an expression of regret at the indisposition of Vice-President Ammoun and the hope for his speedy restoration to full health.

Mr. President and Members of the Court. Since I last had the privilege of appearing before this Court, more than a year has elapsed. I should like to express to the Court the gratitude of the New Zealand Government for its promptness in dealing with my country's request of 14 May 1973 for the indication of interim measures of protection, pending the Court's final decision in the present proceedings.

The Court's Order of 22 June 1973 enjoined the Governments of New Zealand and France to avoid actions which might aggravate the dispute or prejudice the rights of the other Party. It was stipulated in particular that France should not conduct nuclear tests which deposit radio-active fall-out on New Zealand territory. In the course of my address, I shall have to refer in more detail to the French Government's systematic disregard for the terms of the Court's Order.

My present task and that of counsel who appear with me, is to comply with the Court's direction to deal with and, of course I use its own words: "the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application". It falls to us to make affirmative submissions in regard to these matters because France still absents herself from the Court. She does so in the knowledge that Article 53 of the Court's Statute protects an absent Respondent, requiring the Court to satisfy itself that the Respondent suffers no injustice in consequence of her own unwillingness to assist the course of justice. The Applicant of course accepts whatever additional burdens flow from the frustration of the adversary process; but, in this contrived situation, there may be a need for me to explain in general terms the aims and the outlook of the New Zealand Government.

Our understanding is that the Court, in making its Order indicating interim measures of protection, has held to the standards of proof applicable in defended proceedings. We, for our part, have naturally accepted the obligation, which falls upon counsel in our own courts, to present facts and arguments fairly and to conceal nothing which may help the Court to arrive at an accurate assessment of the matters in issue. More generally, it is our purpose to ensure that the Respondent suffers no disadvantage except that which she incurs deliberately—that is, the disadvantage of not being heard in her own defence.

Moreover, although the Government of France has expressed its firm decision to stand apart from these proceedings, and to regard them as a nullity, this decision remains and will continue to remain revocable at the French Government's will. Under the Court's procedures and under the dispositions that the Court has made in the present proceedings, the Respondent receives notice of each development and the door is never closed to her participation. We, the Applicant, would not wish the position to be otherwise.

For the time being, however, the only statements made to the Court by the Respondent are those contained in the letter, with its Annex, of 16 May 1973, addressed to the Registrar of the Court by the French Ambassador to the

Netherlands and referred to in paragraph 7 of the Court's Order of 22 June 1973.

I should like to make it very clear, Mr. President, how the New Zealand Government views, and has viewed, the status and significance of the French Government's communication. When I addressed the Court on 24 May 1973, I emphasized—and the reference may be so found at pages 102 and 103, *supra*, of the verbatim record—the irregularity of these documents. I went on to point out that while the French documents contended that there was no case to answer, in the matter of jurisdiction, they in fact entered into a debate on some of the issues.

It is, of course, necessary and proper that, in the search for evidence of the French position, prominence should be given to this one substantial utterance from a Government which has otherwise bound itself by a self-imposed ordinance of silence in relation to the present proceedings. The Applicant recognizes that the French Ambassador's letter, and the document forwarded to the Court under cover of that letter, have to some extent, albeit irregularly, relieved the difficulties caused by the Respondent's unwillingness to plead. The consideranda in the Court's Order of 22 June 1973, and the points of reference in the Applicant's written and oral pleadings, are of necessity related to this "best" evidence of the French position. And I should interpolate to make it clear that I speak of the word "best" in inverted commas.

It was not in that context that we objected to the irregularity of the French documents. The New Zealand Government was not prepared, at a time when the Respondent's stance was delaying the publication of the Applicant's request for the indication of interim measures of protection, to consent to the publication of French documents that did not comply with the Rules of Court and that sought to stifle proceedings regularly brought. Article 53 of the Court's Statute recognizes that a respondent State cannot be obliged to plead its case, and provides that there shall not be a default judgment in the Applicant's favour. Article 53 does not, however, give the absent Respondent access to the Court on terms denied to the Applicant; and it does not operate in bar of relief to which the Court might otherwise find the Applicant entitled.

This, at least, is how we have interpreted the spirit and the letter of the Statute, and the policy of the Court. We conceive it to be our duty to approach the questions of jurisdiction, and any possible question of admissibility, as if the positions taken in the French Ambassador's communication to the Registrar had been asserted by way of preliminary objection in a regularly conducted defence. We would not at this stage have any objection whatever to the inclusion of the French Ambassador's communication in the public record of these proceedings.

We shall address ourselves to the issues raised by that communication within the compass indicated by the Rules of Court, and in accordance especially with the principles underlying Article 67, paragraph 7.

Mr. President, before I complete these introductory remarks, there are several other matters to which I would like to refer in passing. One such matter is the relationship between the cases brought against France by Australia and by New Zealand respectively.

Some emphasis has been placed upon the facts, acknowledged by me when I first addressed the Court, that New Zealand's case arises out of the same circumstances as that of Australia and has comparable objectives. It is for those reasons that the New Zealand Government has done everything in its power to consider the Court's administrative convenience, by willingly agreeing to synchronize dates of hearing, and by nominating as a judge *ad hoc* the same

eminent jurist who was nominated by the Government of Australia. We have accepted, in the same spirit, the additional delays entailed by Australian time-limits that were longer than those we asked for and obtained. We have, as this was the Court's ruling, again followed the Government of Australia in presenting oral argument.

I mention these matters only because it seems that arrangements made to meet practical convenience may be mistaken for indications of a lesser interest. The Governments of Australia and New Zealand do not have a joint approach to the presentation of their respective cases against the Government of France; nor did they bring these cases for the purpose of supporting each other. Actions taken in their region that may violate obligations *erga omnes*, or cause an identical threat to the well-being of the citizens of both their countries, are naturally of concern to both; but history and geography condition and differentiate their individual perceptions of a common threat. I shall therefore have occasion to remind the Court of the long diplomatic history of the dispute between New Zealand and France and of the close community of interest between New Zealand and the island countries and territories of the South Pacific.

There is, however, another kind of argument which may cast an unmerited doubt upon the validity—or even the sincerity—of New Zealand's complaints against the Government of France. The issues, it has been said, are political, not legal, and therefore are not suitable for adjudication by a Court. This contention may mean no more than an expression of scepticism about the existence of the legal norms invoked by the Applicant. It may, on another interpretation, invite the rebuke formulated by Sir Hersch Lauterpacht more than 40 years ago:

> "The doctrine of the inherent limitations of the judicial process among States, is, first and foremost, the work of international lawyers anxious to give legal expression to the State's claim to be independent of law." (*The Function of Law in the International Community*, Oxford, 1933, p. 6.)

Historically, as Lauterpacht points out, this doctrine has many different manifestations. It is connected with the notion that a State's vital interests are too important and too sensitive to be justiciable; and it is sustained by the undoubted rule that no sovereign State submits its interests to adjudication except by its own will. In a situation in which there is a prior obligation to submit disputes to judicial settlement, the reservation of an asserted vital interest may take the form of a refusal in advance to be bound by the Court's judgment. Rosalyn Higgins has discussed the ways in which this situation may arise, and may be misrepresented as an application of the distinction between political and legal disputes—"The International Judicial Process", *International and Comparative Law Quarterly*, Volume 17, at page 72, to which the Court is respectfully referred.

In a potentially emotive context such as this, where one Party seeks to avoid adjudication, the other Party's allegedly political aims may tend to be isolated, emphasized and then characterized as petty or insincere. So it may be though to disclose a flaw in the Applicant's case that he has impleaded one, but not all, of the States conducting nuclear experiments in the atmosphere; or the Applicant may be called to account for ignoring or suppressing evidence relating to the dangers from fall-out.

Mr. President, in the New Zealand Government's submission, accusations of this kind reflect a desire, whether conscious or unconscious, to transfer blame from a Respondent that rejects its legal duty to an Applicant that seeks to enforce that duty. The supposed distinction between political and legal disputes

has such varied and imprecise applications, and casts so little light on the issues which arise in the present proceedings, that I pursue it no further. The New Zealand Government, after many years of fruitless negotiation, brings these proceedings against the Government of France because that Government's actions pollute the air and the water of the part of the world in which we live, and cause the peoples of that area profound unease and discomfort.

Why, then, it has been asked, did New Zealand tolerate the larger and more dangerous British and American nuclear explosions of the 1950s? The plain answer is that an inter-temporal rule applies to fact as well as to law. In the world of the 1950s shoe shops in my country and in many others had X-ray machines through which the customer could see the bones of his feet in the shoes he was trying on. In the world of the 1970s we are appalled by, and forbid, these unnecessary exposures to the damaging effects of radiation. This may well be a case of acquiring wisdom by hindsight but it is also one of keeping in step with advances in scientific knowledge.

My Government has sometimes been accused of making too much of these risks, because of the moderate, matter-of-fact tone of our own professional literature. We did not invite the Court's attention to a report to the New Zealand Parliament about French nuclear testing, referred to in a pamphlet written by Nigel Roberts and published by the New Zealand Institute of International Affairs. We did not so invite the Court because that report, written before the French tests began, was no more than an estimate of what consequences might be expected. We did, however, provide the Court, at the time of hearing of our request for an indication of interim measures of protection, with the series of factual reports, published by the New Zealand National Radiation Laboratory, on environmental radio-activity and the results of the monitoring of fall-out from French nuclear tests in the Pacific. To complete this information, we have now furnished the Court with the most recent report[1] in the series, published in November 1973, though I do not foresee that the current phase of the present proceedings will call for any reference to the substance of that report.

Mr. President, in these introductory remarks I have referred to contentions which, if allowed to pass unchallenged, would militate against a true appreciation of the New Zealand Government's position. It is of the essence of that position that governments should confront the menace of nuclear testing producing radio-active fall-out in the same spirit as is adopted by responsible scientists; that is to say, we should neither encourage inflammatory accounts of the scale and effects of French atmospheric nuclear testing in the Pacific nor should we allow political expediency to obscure the wrongfulness of French actions.

Three years ago my Government, in commenting on the role of the International Court of Justice, made this observation:

> "... we would note that the use of judicial settlement at a particular stage in a dispute or in regard to a particular aspect of the dispute need not exclude the use of other methods of peaceful settlement, such as negotiation and conciliation, in arriving at an over-all resolution of the dispute" (UN Doc. A/8382/Add.4 of 12 November 1971, p. 2).

The New Zealand Government initiated the present proceedings in that spirit. Issues of great legal and political importance were being canvassed at the

[1] See pp. 302-333, *infra*.

meetings of the United Nations political organs and in bilateral exchanges with France. The New Zealand Government desired that her disagreement with the French Government on a point of law, going to the root of these issues, should be considered and resolved by the principal judicial organ of the United Nations in the calm and disciplined atmosphere of a court of law.

We in New Zealand value our ties with France; we have sought and still seek to strengthen those ties, and I believe that this is also the wish of the French Government. Yet, for more than a decade the friendly relations between my country and France have been disturbed by the sharp difference arising from the decision of the French Government to carry out a programme of atmospheric testing of nuclear weapons in the South Pacific. Early in 1963 —ironically enough the year of the adoption of the Partial Test Ban Treaty— the first indications were received that, precluded by intense opposition from African countries from continuing to test its nuclear weaponry in the Sahara, France intended to establish a test site at Mururoa. New Zealand immediately made known to France the growing disquiet both in New Zealand and in other countries and territories of the South Pacific occasioned by these French plans. When, later in the same year, the French intentions had become quite clear, New Zealand firmly and unequivocally protested about the establishment of a test site in the South Pacific and urged that the decision be reconsidered.

The history of the next 11 years, which I dealt with in some detail at the hearing last year, is a consistent and unbroken record of opposition to, and protest at, the conduct by France of atmospheric tests in the South Pacific region. Over the whole period the protests by the New Zealand Government to the French Government stated, restated and developed the same themes. The New Zealand Government and people were concerned at the demonstrable evidence of the proliferation of nuclear weaponry with all the risks that the proliferation entailed; they were alarmed about the possible hazards to health from radio-active fall-out; they deeply resented the fact that a European power should choose to forge its weapons of war in the far-away, antipodean ocean region to which New Zealand belongs.

France did not accept the case made out by New Zealand as sufficient reason for abandoning its testing programme in the South Pacific. The dispute which grew out of this impasse was—and still is—a dispute between New Zealand and France. But it also had wider implications. In protesting to France New Zealand was reflecting the anxiety of all the countries and territories of the South Pacific region; and we appealed to universal standards proclaimed again and again, and with increasing urgency, by the United Nations and other international bodies.

The dispute between France and New Zealand is unmistakably of a legal character—a dispute about legal rights and legal obligations. New Zealand claims that the atmospheric testing of nuclear weapons by France in the South Pacific is undertaken in violation of legal obligations owed by France to New Zealand and of correlative rights vested in New Zealand. France has denied and continues to deny that claim.

The rights for which New Zealand seeks protection have been set out in the New Zealand Application instituting proceedings, in our request for interim measures of protection, and in the Memorial submitted to the Court last November. They have been stated in these documents in the following terms:

(a) the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fall-out be conducted;

(b) the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radio-active contamination of the terrestrial, maritime and aerial environment and, in particular, of the environment of the region in which the tests are conducted and in which New Zealand, the Cook Islands, Niue and the Tokelau Islands are situated;

(c) the right of New Zealand that no radio-active material enter the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing;

(d) the right, again, of New Zealand that no radio-active material, having entered the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing, cause harm, including apprehension, anxiety and concern, to the people and the Government of New Zealand and of the Cook Islands, Niue and the Tokelau Islands; and

(e) the right once more of New Zealand to freedom of the high seas, including freedom of navigation and overflight and the freedom to explore and exploit the resources of the sea and the seabed, without interference or detriment resulting from nuclear testing.

I shall have more to say later in my statement about the nature of these rights. I simply note here that they are not all of the same character, an argument I will develop.

The New Zealand Application beginning these proceedings was filed on 9 May 1973. On 14 May, believing that a further round of atmospheric testing at Mururoa was imminent, and that this would do irreparable damage to the rights for which it sought protection, New Zealand filed a request for interim measures of protection. On 22 June 1973 the Court made an Order indicating interim measures. To our regret, France did not comply with that Order. Between 22 July and 29 August last year a further series of atmospheric nuclear tests was held at Mururoa.

Measurements taken by the New Zealand monitoring system proved conclusively that these tests, like those in previous years, resulted in the deposit of radio-active fall-out on New Zealand territory. In short, as pointed out in a letter of 21 September 1973[1] from the New Zealand Co-Agent to the Registrar of the Court, there was a clear and unmistakable breach by France of the Court's interim measures Order.

The New Zealand monitoring of the 1973 series also produced further evidence of the inherently unpredictable and unavoidably risky nature of the explosion of nuclear weapons in the atmosphere. On two occasions, and despite the precautions taken by the French authorities, blow-back occurred. This is the phenomenon referred to in the New Zealand documentation already before the Court, whereby some of the radio-active debris from a nuclear explosion, instead of being carried eastwards from the test site as planned, is caught up in an anti-cyclonic eddy and carried westwards. The result is that radio-active material is deposited on some of the islands relatively close to the test site at Mururoa much sooner and at a higher level than expected.

When the 1973 series began, the New Zealand Government made an immediate protest to France. A Note of 22 July 1973, the text of which is set out in Annex XIII to the New Zealand Memorial, said that reports of a test at Mururoa had been received with profound dismay in New Zealand. The Note

[1] See p. 400, *infra*.

reaffirmed the strong opposition of the New Zealand Government to all such tests: it deplored the latest act by France in defiance of the renewed and most earnest representations of the people of the South Pacific and of many governments around the world. The Note also contained the following passage:

> "The New Zealand Government views with utmost concern and disquiet France's disregard for its obligations under the United Nations Charter in thus spurning a binding order of the International Court of Justice. The French Government has indicated that it does not consider that the Court has competence in this matter. The French Government is, however, well aware that it is a long and firmly established principle of international law that it is for international tribunals to establish their competence and not for the parties to the proceedings."

The Note went on to reaffirm that the New Zealand Government regarded the tests as a violation of international law. It urged France to fulfil its obligations to the International Court and to New Zealand and other countries in the South Pacific by refraining from any further nuclear weapons tests at Mururoa.

My Government also took other action. Some of the tests in the 1973 series were observed at close quarters by the personnel on board a specially protected New Zealand frigate stationed outside the territorial waters of Mururoa but inside the areas of high seas which the French authorities had purported to declare to be a security zone.

The purpose of this action was the wholly peaceful one of demonstrating the extent and depth of New Zealand's opposition to the tests and of focussing world public opinion on the issue in the hope that the French authorities might be persuaded to heed both the Court's Order and the urgings of the peoples and countries of the region. That hope was not fulfilled; but the large response by the news media in almost every country demonstrated once again and very clearly the extent to which our concern about atmospheric nuclear testing is shared.

The nature of the New Zealand purpose in sending a frigate to the testing area was made as clear as possible to everybody, including the French authorities. As was stated publicly in New Zealand at the time, the entry of a New Zealand frigate into the Mururoa area was delayed until there was no longer any room for doubt that, despite the Court's Order, France intended to carry on with its programme of atmospheric nuclear testing. If at any time after the departure of the frigate from New Zealand there had been an indication that France would comply with the Court's Order then it would immediately have been recalled to New Zealand. It was also made quite clear that there was no question of any Government ship entering the territorial sea around Mururoa. My Government took every precaution to avoid anything in the nature of a confrontation with the French authorities.

There was in fact no confrontation and indeed no incident of any kind involving a New Zealand frigate near Mururoa.

I should add that there were incidents near Mururoa involving not New Zealand ships but New Zealand citizens. The New Zealand Government had continued to discourage its people from sailing small boats to the vicinity of the test site. Some New Zealanders, however, still participated in private ventures of this kind. On 18 July and again on 15 August 1973 New Zealand citizens on board ships that were not of French nationality and which were on the high seas, were apprehended by French naval vessels, taken against their will to French territory and detained there for a period of days before being permitted to return to New Zealand. My Government protested to the French Government about each of these incidents which, in our view, involved a blatant inter-

ference with high seas' freedoms. The texts of the New Zealand protest Notes are set out in Annex XIII of the Memorial.

Nine New Zealanders were involved in the two incidents. Some of them, on returning to New Zealand, approached my Government for assistance in pursuing a claim against France for damage to or loss of their property and for their unlawful arrest on the high seas and subsequent false imprisonment. In accordance with its responsibilities to its citizens, my Government decided to take up with the French Government an appropriate claim on their behalf. In January this year the French Foreign Ministry was advised that a formal and composite claim would be presented to it in due course. At the present time the evidence in support of such a claim is still being collected and studied.

I mention this particular matter, Mr. President, because it obviously has some relationship to the dispute between New Zealand and France about the legality of the atmospheric testing of nuclear weapons, including the measures taken by France to enable those tests to be carried out. It also has a bearing—and I shall return to this point later—on the question of New Zealand's legal interest in the proceedings that it has brought before this Court. I would stress, however, that the claim to be brought by my Government on behalf of certain of its citizens, while related to the dispute before the Court, is also quite distinct from it. It will involve a claim for damages. In the proceedings now before this Court the relief that New Zealand seeks is a declaration that nuclear testing in the atmosphere that gives rise to radio-active fall-out is a violation of international law. My Government seeks a halt to a hazardous and unlawful activity and not compensation for its continuance.

To complete my review, I need only refer to the events of recent weeks in which we have seen the beginning of yet another round of atmospheric nuclear testing in French Polynesia.

On 10 June of this year, two days after a public pronouncement by the Office of the President of France, the French Embassy in Wellington sent a Note[1] to the Ministry of Foreign Affairs. That Note, copies of which have been lodged with the Registry, stated that a further series of atmospheric nuclear tests would be held this year. The Note also stated that:

> "France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground tests as soon as the test series planned for this summer is completed. Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type."

I emphasize two points: first, the most that France is offering is that in her own time she will cease to disregard an existing Order of the Court; and second, even that offer is qualified by the phrase "in the normal course of events". New Zealand has not been given anything in the nature of an unqualified assurance that 1974 will see the end of atmospheric nuclear testing in the South Pacific.

On 11 June the Prime Minister of New Zealand, Mr. Kirk, asked the French Ambassador in Wellington to convey a letter[2] to the President of France. Copies of that letter have been filed with the Registry. It urged among other things that the President should, even at that time, weigh the implications of any further atmospheric testing in the Pacific and resolve to put an end to an activity which has been the source of grave anxiety to the people of the Pacific region for more than a decade.

[1] See p. 298, *infra*.
[2] See p. 299, *infra*.

Despite this appeal, the 1974 test series began. My Government has good reason to believe that, in further violation of the Court's Order of 22 June 1973, France exploded an atmospheric nuclear device at Mururoa on 16 June and that there was a further explosion just four days ago.

Measurements taken by stations in the New Zealand monitoring system in the South Pacific strongly suggest that at least the first of these explosions produced yet another "blow-back" incident.

In the light of the public pronouncement made in France, and of the Note delivered by the French Ambassador in Wellington, further tests are to be expected in the coming weeks. The first test in the 1974 series was followed by an immediate protest on the part of my Government. Copies of a Note of 17 June 1974[1] from the New Zealand Embassy in Paris to the French Ministry of Foreign Affairs have been lodged with the Registry.

We have also lodged with the Registry at the beginning of this week copies of a letter[2] of 1 July 1974 from the President of France to the New Zealand Prime Minister in reply to the latter's letter of 11 June. I invite the Court's attention, in particular, to paragraph 3 of that letter which contains a statement of the reasons why France does not consider that it is bound by the Court's Order of 22 June 1973. With reference to that explanation, I need only say that it is for the Court and not for the Parties to decide the question of jurisdiction to entertain the dispute; that the fact that the Order of 22 June 1973 was made prior to a definitive finding on jurisdiction cannot detract from its force; and that my Government does not share the view that interim measures indicated under Article 41 of the Court's Statute lack obligatory character.

I turn now, Mr. President, to consider those matters to which the Court has ordered that New Zealand should address itself in this phase of its case against France, and which are argued in some detail in the Memorial submitted by my Government in November last year. Part I of that Memorial contains an Introduction, Parts II, III and IV relate to jurisdiction, Part V is concerned with admissibility, and Part VI contains the submissions of my Government.

As to jurisdiction, it is New Zealand's contention that the competence of this Court to entertain the dispute derives from two sources which are quite separate and independent of each other: the declarations made by New Zealand and France under Article 36, paragraph 2, of the Statute of this Court and of its predecessor; and the 1928 General Act for the Pacific Settlement of International Disputes.

Mr. Savage, the Solicitor-General, will consider, in his statement to the Court, the question, dealt with in Part II of the Memorial, of the Court's jurisdiction under the General Act. Professor Quentin-Baxter will deal with the questions discussed in Part III of the Memorial, which is designed to show that the dispute between New Zealand and France is not excluded from the Court's jurisdiction by the reservations in the French declaration made under Article 36, paragraph 2, of the Court's Statute. He will also deal with the relationship between the two sources of jurisdiction dealt with in Part IV of the Memorial and close the New Zealand case.

In anticipation of my colleagues' statements, I shall limit myself to making two general comments, one concerning the General Act as a source of the Court's jurisdiction, and the other concerning the relationship between the two sources of jurisdiction on which New Zealand relies.

I hardly need to remind the Court that in considering whether it has juris-

[1] See p. 301, *infra*.
[2] See p. 334, *infra*.

diction under the General Act, it will come face to face with this central proposition, the very keystone of the law of treaties: *pacta sunt servanda*. The General Act contains a provision conferring jurisdiction on the Court. France and New Zealand became parties to it on the very same day in 1931; it is a treaty which provides a specific mechanism for its termination. On the date on which New Zealand filed its Application instituting proceedings, neither France nor New Zealand had taken any action to denounce the General Act in accordance with its provisions, nor, since 1939, to limit the scope of their original accessions. Until this case, and the comparable proceedings initiated by Australia were begun, neither France nor other countries had questioned the continued life of the General Act; on the contrary, there had been specific acknowledgements by France that the treaty remained in force and this is confirmed by a substantial quantity of practice on the part of other States. All of these factors point directly to the conclusion that, in application of the law of treaties, the General Act is a "treaty or convention in force" within the terms of Articles 31, paragraph 1, and 37 of the Court's Statute.

Now, pointing in the opposite direction are the various French arguments that the General Act is no longer in force or, at any rate, is no longer in force between France and New Zealand. It is the New Zealand submission that each of these arguments is of a shadowy kind which is inconsistent with both the facts of the situation and with legal principle. After this hearing it will, of course, be for the Court to assess their strength. I venture to suggest, however, that should the Court accept any one of those French arguments, a very severe blow will have been dealt to the law of treaties and to the stability of relations among States which that law protects.

No less serious in its implications is the remarkable suggestion put forward by France, that, if the General Act does have validity, it is inapplicable in situations excluded by France's unilateral declaration under Article 36, paragraph 2. The acceptance by the Court of this contention would have radical consequences, once again for the law of treaties and, also, for the scope of the jurisdiction conferred on the Court and its future role.

As to the law of treaties, the acceptance of the French contention would imply that an existing treaty relationship between two or more States of the kind created by adherence to the General Act can be amended by a subsequent and unilateral act of one of the parties to a treaty in a way other than those provided for in the treaty itself. Of perhaps even larger significance is the fact that acceptance of the argument advanced by France on this point would entail the virtual elimination of Article 36, paragraph 1, as a source of the Court's jurisdiction. Treaties conferring jurisdiction on the Court under that Article could be amended, qualified and negated by a flood of unilateral declarations made under the optional clause.

The Court will, I believe, wish to consider very carefully indeed not only the judicial precedent which rejects the French thesis but also the hazards of the kind I have mentioned that would be involved in its acceptance.

The Court adjourned from 11.15 a.m. to 11.35 a.m.

I come now to the question of admissibility and present our argument accordingly. This matter, as I have said, is dealt with in Part V of the New Zealand Memorial. The Court will have noted from an examination of this part of the Memorial, together with the Introduction in Part I, that we have limited ourselves to a consideration of New Zealand's legal interest in its dispute with France.

We have assumed—on the basis of the settled jurisprudence and practice of the Court, and the policy underlying the Rules of Court, especially Article 67, paragraph 7, of the Rules—that the Court would wish to retain the well-established distinction between the merits and preliminary phases of cases with which it deals; and, accordingly, that it would restrict itself at this stage to matters which are distinct from, and anterior to, the merits of the dispute, and which are genuinely susceptible of determination at a preliminary stage. This assumption was, it seemed to us, reinforced by the terms of the Court's Order of 22 June 1973, and, in particular, by paragraph 24 of that Order, which identified as a question of admissibility New Zealand's legal interest in its claims.

I begin my comments on the question of New Zealand's legal interest by noting that an international tribunal must frequently approach any question of legal interest in a context significantly different from that in which a municipal tribunal will normally be called on to consider the same kind of issue. When the question before the tribunal is whether the claimant—a State in one case and an individual or group of individuals in another—has a legal interest or standing in relation to the protection of rights which are shared with others and which are designed to protect a community interest, the difference between the situation of the two tribunals may be very marked indeed. The municipal tribunal is not often faced with a choice between, on the one hand, acknowledging the standing of a claimant and hence accepting that he has a procedural right to seek to protect community interests and, on the other hand, denying him standing with the result that there are no means available to anyone of protecting the rights in question. If—to take an example arising more and more often in many jurisdictions—a municipal tribunal decides that a claimant has no standing in a case designed to stop action having an adverse impact on the environment, it usually does so in the knowledge that there are others who will be able to test the legality of the action proposed. It may be possible for other individuals who are differently placed to sue; ratepayers' or local taxpayers' associations or groups interested in the protection of the environment may have standing, as may local and central government agencies. There may be other machinery available to protect the community interests which are the subject of dispute, for example, the relator action of English law; and, in the last resort, there is nearly always authority vested in a legislature to deal with the problem if the courts cannot do so.

As suggested by De Visscher and Abi-Saab, in the passages from their works quoted in paragraph 196 of the New Zealand Memorial, an international tribunal can take much less comfort from the organizational and institutional framework within which it makes decisions concerning the existence or non-existence of a sufficient legal interest. The international legal order has developed only to a certain point. Entities other than States do not have access in contentious cases to international tribunals or, to be more precise, they do not have access to the principal judicial organ of the organized international community. There is wholly lacking a central legislative authority which can fill any gaps in the enforcement of international law by international courts. The judicial protection of community interests is left in very large measure to the initiative of individual States. International tribunals, including this Court, may well confront the situation where a denial of standing to one or more States means, in effect, that substantive international law rules are wholly devoid of any means of judicial protection. This was, I believe, essentially the situation with which this Court had to grapple in the *South West Africa* cases.

There are here, I would submit, important policy considerations which this

Court will wish to weigh in any examination of the question of the existence of a legal interest in an applicant State. A narrow view of the notion of standing or legal interest—and especially one which denied an individual right of protection of rules reflecting community interests—would inevitably tend to inhibit the growth of substantive law.

It would run counter to the whole process of development, traced by many writers, whereby international law rules for the protection of individual State interests have been increasingly supplemented by rules for the protection of the general welfare and of community interests shared by all. But more than that, the adoption of a restrictive view of the procedural requirement that a claimant State establish its legal interest would also raise the possibility of tension, and even conflict, between an important objective of the United Nations Charter and the rulings of the principal judicial organ of the United Nations, which has often recognized a duty to co-operate within the Organization. One of the purposes of the Charter, as stated in Article 1, is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations that might lead to a breach of the peace". Article 2, paragraph 3, of the Charter enshrines the same notion by laying down as a principle for both the Organization and its members to follow that "all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".

Article 36, paragraph 3, contains a reminder to the Security Council that legal disputes should as a general rule be referred to this Court in accordance with the provisions of the Court's Statute. A broad view of the notion of legal interest will tend to give substance to these provisions in the Charter. Such a view will make it easier for disputes to be settled by judicial means at an early stage, and before they emerge as a potential threat to the peace. A narrow view of this procedural requirement must tend to detract from this Charter goal.

If we turn from a consideration of policy and principle to an examination of judicial precedent, we find that the Court's most recent pronouncement on this matter of legal interest—in the *Barcelona Traction* case—does not proceed on the basis of a narrow view. Indeed, the Court's observations in that case strongly suggest that it paid full regard to the wider implications of the decision then taken on standing. In that case the Court was required to consider the right of Belgium to exercise diplomatic protection of shareholders of Belgian nationality in Barcelona Traction, a company incorporated in Canada. In deciding that Belgium lacked the necessary standing the Court made it clear that it had taken into account the fact that Barcelona Traction had another avenue of protection open to it. It was not, in other words, a case where a denial of standing would have meant that there were no means available for the judicial protection of rights alleged to have been infringed by the respondent State. The point was made even more explicitly by Judge Lachs in a declaration concurring in the Court's Judgment. The relevant passages from the Court's Judgment and from the declaration by Judge Lachs are to be found in *I.C.J. Reports 1970*, page 50, and pages 52-53, and they are also set out for convenience in full in paragraphs 201 and 202 of the New Zealand memorial.

A statement made by the Court earlier in its Judgment is, I suggest, of even larger importance. That passage (*I.C.J. Reports 1970*, p. 32) is set out in full in paragraph 199 of the New Zealand Memorial, but it is worth repeating here:

> "... 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*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance."

There is in the passage I have just quoted nothing to suggest that the concept of legal interest constitutes a shackle on the litigation of the general range of international disputes. There is, moreover, explicit recognition of the right of individual States to bring legal action to protect community interests and ensure the performance of obligations owed to the international community as a whole.

This latter element in the passage quoted is, of course, directly in point in the present proceedings. It is central to the New Zealand case that the atmospheric testing undertaken by France necessarily involves a violation, *inter alia*, of obligations owed to the international community as a whole. I have already quoted the passage from the New Zealand Application instituting proceedings, repeated in paragraph 190 of the Memorial, in which we characterize the illegality of French testing by reference to its violation of five different categories of legal rights. We put at the head of this list two categories of rights which are central to the question of the legitimacy of France's actions and which are vested in New Zealand and in every other member of the world community.

New Zealand contends, under the first of these two heads, that customary international law prohibits atmospheric nuclear testing. The duty to refrain from such tests is, in our submission, conditional neither on adherence to the 1963 Partial Test Ban Treaty, nor on the deposit of radio-active material on the territory of other States, nor on the occurrence of any other effects. The prohibition is an absolute one which has its roots in a universal concern for, and community interest in, the preservation of the security, life and health of the individual human being. It is of the very essence of the law relating to atmospheric nuclear testing that the duty to refrain from this activity is owed to the international community as a whole and the corresponding right to be protected from it is shared by every member of that community.

The same is true of the right set forth in the second of the five categories of rights in the New Zealand Application. New Zealand contends under this head that the atmospheric testing undertaken by France, which always involves the release of radio-active material, necessarily results in an infringement of norms and standards of international law for the protection of the environment. It is not simply the effect on the environment of this country or of that country which is at issue here. Nuclear testing of the kind carried out by France inevitably

produces results in areas beyond the limits of national jurisdiction. In that sense, and in a broader sense as well, the common heritage of mankind is affected. If New Zealand is correct in its contention that French actions inevitably conflict with international environmental law—and this is also a matter for the merits phase—then the obligation imposed by that law is, once again, of a universal character, an obligation *erga omnes*.

The Court's observations in the *Barcelona Traction* case are, I submit, precisely applicable to the protection of the right to live in a world in which nuclear tests in the atmosphere do not take place and of the right to the preservation of the environment from unjustified radio-active contamination. Those rights are of a kind that, in the words of the Court, all States can be held to have an interest in their protection and in the observance of the corresponding obligation.

The Court did, of course, tend to suggest that rights which are shared and in the protection of which all members of the international community have an interest must be of an important nature. The illustrations mentioned by the Court of obligations *erga omnes*—those deriving from the outlawing of aggression and genocide and from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination—all of these have a certain fundamental character. They were illustrations only and it may be that the Court did not mean to suggest that all obligations in respect of which every State has a legal interest must have the same character. If, however, this was the Court's intention then the law with which we are concerned here manifestly fulfils this condition. Much of the material that New Zealand has already submitted to the Court has illustrated the overwhelming importance given at the national, regional and global levels to the problems of nuclear weaponry—and nuclear war—and to the protection of the human environment. Nobody who is familiar with the debates of the United Nations on these topics over the years can doubt that they rank very high indeed in the Organization's list of priorities. Each of them is a debate about survival.

In the *Barcelona Traction* case, the Court was concerned, when it examined the question of the Applicant's standing, to draw a sharp distinction between obligations owed to the international community as a whole and the very different legal duties arising in the field of diplomatic protection. A closer examination of the nature of obligations *erga omnes* might perhaps lead to the conclusion that within this category of obligations there is a further distinction to be drawn. What I am suggesting is that certain obligations, by their very nature, are owed to the whole of the international community, and it makes no sense to conceive of them as sets of obligations owed, on a bilateral basis, to each member of that community. In other cases this is not true.

Thus, to take one of the illustrations used by the Court in the passage quoted from the *Barcelona Traction* case, the international obligation that is ignored when a State, in dealing with its own citizens, violates fundamental human rights standards, is indivisible. It cannot be regarded as the sum of a series of discrete bilateral duties. On the other hand, the obligation to refrain from acts of aggression would seem to be of a different character. Under the system established by the United Nations Charter, State A's unprovoked attack on State B amounts to a violation of a legal duty owed to all. It is, however, possible to conceive of a more rudimentary world order than we now have in which State A's action is, as a matter of law, of concern to B alone. This was, in fact, essentially the position prior to the Covenant of the League of Nations and the Pact of Paris. In that era, if an act of aggression involved any violation of a legal obligation it was a bilateral obligation flowing from either a bilateral treaty or at any rate, a treaty with a restricted number of parties. As part of the process

of the development of a more ordered and interdependent world, an obligation in origin bilateral and private has become multilateral, universal and public. Obligations relating to the protection of diplomats may well now be undergoing a comparable process of transformation, if indeed that process has not already been completed with the adoption by the General Assembly last year of a convention reflecting a common interest in the protection of diplomats.

If this kind of distinction, reflected in Article 60, paragraph 2, of the Vienna Convention on the Law of Treaties, is to be drawn within the category of obligations *erga omnes*, then the universal obligations which, in New Zealand's submission, France violates by continuing its programme of atmospheric nuclear testing in the Pacific, are plainly in the first, rather than the second, sub-category. They are comparable with a failure to observe fundamental human rights standards rather than with a violation of the law concerning aggression. The duty to refrain from nuclear weapons tests giving rise to radio-active fall-out and the duty to avoid the unjustified artificial radio-active contamination of the global environment are wholly lacking in any bilateral character and cannot be conceived of or stated in bilateral terms.

What consequences does such a distinction have for the judicial enforcement of universal obligations and for the judicial protection of the rights which correspond to them? The answer may well be that it has no consequences at all and that in every case where an obligation can be said to be owed to all States, every State has a legal interest in its observance. That, in fact, is the very thrust of the comments made by the Court in the *Barcelona Traction* case. Let us suppose, however, that further refinements in respect of standing are to be introduced. In that case, are there not compelling reasons for preserving, as a first priority, a universal legal interest in the performance of obligations which, by their very nature, are owed to the international community as a whole and cannot be conceived of or stated in other terms? A denial of a universal legal interest in respect of this class of obligations would necessarily entail acceptance of the unhappy situation, to which I have already referred, where rules of substantive law would be wholly devoid of any means of judicial protection.

Mr. President, even if the doctrine stated in the *Barcelona Traction* case were to be qualified so that it was necessary for the Applicant to show an interest different from the international community at large, then there would still be the strongest reasons to recognize a New Zealand legal interest. New Zealand has been specially affected by the French disregard of community standards. We have been specially affected because we are located in a region which suffers in a way that other parts of the world do not from the unwanted physical product of French nuclear weapons tests. The South Pacific has been chosen as the proving ground to establish French capacity for nuclear warfare. As was the case in Africa in the late 1950s, the South Pacific region has repeatedly made known a specifically regional concern and anxiety about this activity. In each case, the Sahara and the South Pacific, the United Nations has taken note of the concern of the region.

Within the South Pacific area, New Zealand has had responsibilities in relation to some of French Polynesia's nearest neighbours, the Cook Islands, Niue, the Tokelau Islands and Western Samoa. The New Zealand record of protest, on its own behalf, and on behalf of those other countries and territories, is at least as lengthy, as consistent, and as vigorous, as that of any country in the area. There is no other country in which, over the years, French nuclear testing has assumed quite such importance as a dominating public issue.

I can now deal more briefly with the question of New Zealand's interest in the three remaining categories of rights for which we seek protection. The third and

fourth categories of rights are clearly not shared with every other member of the international community. New Zealand contends that the entry of radio-active debris from French nuclear testing into its territory, waters and air space and the territory, waters and air space of the Cook Islands, Niue and the Tokelau Islands is a violation of its sovereignty. It also claims that the fact that this debris causes harm constitutes a further violation of its sovereignty. The link in each case between the French tests and New Zealand is a direct one. The activity at Mururoa produces inevitable and measurable consequences in New Zealand, the Cook Islands, Niue and the Tokelau Islands. It is proven beyond any doubt, and France itself does not contest this, that each series of tests results in the entry of radio-active materials into our territory.

Each year the basic principle that there should be no exposure to radiation without a compensating benefit is denied by France to the people of New Zealand, the Cook Islands, Niue and the Tokelau Islands. Each year they are exposed to the somatic and genetic effects of increased levels of radio-activity—effects that may not be readily quantifiable but which in the view of responsible scientists, must be assumed to be harmful; and there is not the slightest doubt that this occasions anxiety and alarm.

I find it difficult to believe that there is any real question about New Zealand's standing in relation to these two claims. How could we be denied a legal interest in matters which directly concern the protection of our sovereignty and the preservation of the physical and mental well-being of our people?

The fifth right for which New Zealand seeks protection, the right to freedom of the high seas, seems to have elements in common with both of the previous groups of rights which I have been discussing—those which are held in common and those which pertain specifically to New Zealand. There is an overlap in substance between this right and that to the preservation of the marine and aerial environment, and this may help to give the right a dual character when it comes to determining who may enforce it.

Undoubtedly the duty to respect the freedom of the high seas is one owed to all members of the international community. This is not, of course, to deny that some breaches of that duty may concern only the State or States specifically affected. But there may also be interferences with high seas freedoms whose consequences are so serious and far-reaching that the international community in general should be entitled to pursue any available remedies. Those which, in our view, result from the activities of France at Mururoa appear to fall within this category. Over a period of years, ships and aircraft of every nationality have been told to stay clear of dangerous zones, so labelled, in the high seas around Mururoa. In addition, the right vested in every country to explore and exploit the resources of the high seas, which are open to all, and of the sea-bed, declared by the General Assembly to be the common heritage of mankind, have been restricted in respect of a substantial area of the Pacific Ocean.

Whether the Law of the Sea obligations ignored by France are viewed as universal or bilateral, New Zealand's interests are specially affected. This is so, first, because the denial in the South Pacific of the right of navigation and of over-flight and of the right to exploit fisheries and sea-bed resources has its most obvious and immediate impact on the countries of the region. Secondly, within the last year a new dimension has been given to the concern of New Zealand and its citizens with this aspect of French nuclear testing. As detailed in paragraph 204 of the Memorial, the French Government purported last year to declare a "security zone" to a distance of 60 nautical miles from Mururoa and to suspend maritime navigation in that zone from 11 July to 15 September 1973. Acting under the terms of the decrees set out in Annex XII to the Memorial, the French

authorities, in two separate instances to which I have already referred, forcibly denied the right of New Zealand citizens to exercise high seas freedoms. I do not feel it is necessary for me to say more to support the contention that New Zealand has a legal interest in this element of its claim against France.

I conclude my statement, Mr. President, by urging on the Court the view that New Zealand has a legal interest in the protection of each of the rights it invokes and that in this and every other respect its Application is admissible.

ARGUMENT OF MR. SAVAGE

COUNSEL FOR THE GOVERNMENT OF NEW ZEALAND

Mr. SAVAGE: Mr. President and Members of the Court. As the Attorney-General indicated, it will be my task to establish that the Court has jurisdiction under the General Act of 26 September 1928 to deal with the dispute submitted to it in the New Zealand Application. We are, of course, fully aware of the fact that the questions I will be considering have already been dealt with from a number of points of view and at some length in the French Annex, in the oral statements made on behalf of New Zealand and Australia at the interim measures stage of the two cases, and in the written and oral statements already presented to the Court at the present stage of the two cases. I would not wish to weary the Court with a repetition of the details of the argument—and indeed, the Rules enjoin me not to do so.

Thus, I do not propose to present arguments in support of the first two of the three propositions stated in paragraph 8 of the Memorial which New Zealand must satisfy to establish that the Court has jurisdiction. Those two are: first, that New Zealand and France are parties to the Statute of the Court within the meaning of Article 37 of that instrument; and second, that the matter which is referred to the Court is a matter provided for in Article 17 of the General Act.

Those two propositions are, in our submission, demonstrated beyond doubt in paragraphs 9-24 and 88-99 of the Memorial.

What I do intend to address myself to is the third proposition, namely that the General Act is a treaty or convention in force between New Zealand and France within the meaning of Articles 36, paragraph 1, and 37 of the Statute. In a framework provided by the law of treaties, I will draw on the main element and some of the detail of the General Act and its history.

We begin with the central and undisputed fact that New Zealand and France acceded to, and became bound by the Act, on the same day in 1931. However, the Act and the general law alike recognize that that initial commitment might not be perpetual and unchanging. Both provide a variety of ways whereby the parties might increase or might reduce or might terminate their rights and obligations under it.

As to the means provided by the Act itself, my reference can be brief. The Act provides an elaborate range of methods available to a party to limit its obligations in the first instance and subsequently to limit or extend those obligations. Both New Zealand and France imposed certain limits on their commitments in the first instance and then further narrowed them in 1939. They had at the time when these proceedings were commenced taken no further formal action under these provisions either to denounce the Act or to limit their obligations further. It is our submission that the limits imposed in 1931 and 1939 are not relevant to this case and accordingly the Act, by its own terms, is fully applicable in relations between New Zealand and France.

As to the general law, however, the position is different and requires further consideration. Does the general law provide a means whereby France can be released from its rights and obligations under the Act which, on its face, is still in force and fully applicable?

The French Annex does not clearly identify the possible grounds. It is not obvious what specific issues divide the parties. But four possible grounds which

might be invoked to terminate the obligations and the rights created in the General Act are perhaps suggested: first, a fundamental change of circumstances in that the Act was an integral part of the system of the League of Nations and fell with it; second, the supervening impossibility of performance, again resulting from the collapse of the League; third, a termination or withdrawal by consent of all the parties, as evidenced by their actions or failure to act; and, fourth, desuetude, again based on the failure of the parties to act.

I begin this examination of the law relating to these possible grounds with the Vienna Convention on the Law of Treaties, and, in particular, with Part V, which is concerned with the invalidity, termination and suspension of the operation of treaties. I do this, not because the Government of New Zealand, which is a party to the Convention, would contend that Part V is in all respects declaratory of the existing law, but rather it is put at the forefront of our argument because we do contend, first, that in large part it is declaratory, and second, that to the extent that it may not be declaratory, it provides more, rather than less, extensive powers to the parties to plead that their treaty rights and obligations are at an end.

As to the first point, the Convention's declaratory character can be demonstrated, quite briefly, by the references which have already been made to it by the Court and by mentioning the processes which led to its elaboration.

The Court has already made use of three of the provisions of Part V: first, Article 60, relating to the termination of a treaty as a consequence of its breach, in its *Legal Consequences for States of the Continued Presence of South Africa in Namibia* Opinion, *I.C.J. Reports 1971*, at pages 46-47, and also in the *Appeal relating to the Jurisdiction of the ICAO Council* Appeal, *I.C.J. Reports 1972*, at page 67; second, Article 62, relating to fundamental change of circumstances, in the *Fisheries Jurisdiction* cases at the jurisdiction stage, *I.C.J. Reports 1973*, at pages 18 and 63; and third, Article 52, relating to coercion in the same two cases, reported in the same volume at pages 14, 58 and 59.

These provisions and the others of Part V have been seen as being in many respects a codification of existing customary law. The reasons for this are to be found in the processes which led to the adoption of the Convention—the putting of State practice before the International Law Commission by governments and by the series of special rapporteurs; the elaboration of draft articles by the rapporteurs and the Commission which based themselves in large part on that practice; the comments of States in the Legal Committee of the General Assembly and in written statements made directly to the Commission; the reconsideration by the Commission of its drafts and the preparation of a final set of articles in the light of these comments; the deliberations, votes and decisions of the diplomatic conference which adopted the Convention; and the subsequent actions of States in citing the Convention in practice and in becoming parties to it. Each aspect of this process could be considered at length to determine the customary force of the Convention. We need not enter into such a lengthy consideration for a number of reasons: because the process is well known, because the Court has already had an opportunity to pass on elements of the question, and because of our second proposition relating to Part V—that is that to the extent that it is not declaratory it confers more extensive powers on the parties to resile from their treaty rights and obligations.

Accordingly, I will look at just one aspect of the deliberations of the Vienna Conference. That is the elaboration, late in the Conference when the substantive provisions of the Convention had been settled, of Article 4 on non-retroactivity. This Article provides that the Convention is to apply "only to treaties which are concluded by States after the entry into force of the present Convention with

regard to such States". This stipulation is made however "without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention". The proviso itself—like Article 3 *(b)* of the Convention—suggests that the Convention in part at least declares the existing law. And this view was expressed with authority at the Conference by Sir Humphrey Waldock, the Expert Consultant to the Conference. He stated that:

> "... he had been very comforted to hear many representatives at the Conference speak of the convention as essentially a codifying instrument. That was the right view if the convention was regarded essentially as a consolidating instrument which took account of differences of opinion but found a common agreement as to the lines to be followed in the law of treaties. From that point of view the convention had, of course, a very great significance in international law..."
>
> "He had been very glad to hear the representative of Switzerland emphasize the inter-temporal element in international law, because that element was his particular preoccupation. Conventions such as the one under consideration had their consolidating force, and even matters which might or might not have been international law at the time of the codifying convention... might be so considered at a later date." (*Official Records of the United Nations Conference on the Law of Treaties*, Vol. II, p. 337.)

The Swedish representative, Mr. Hans Blix, would have been one of those the Expert Consultant had in mind, for Mr. Blix in introducing the text which became Article 4 had earlier declared that: "It was generally agreed that most of the contents of the present convention were merely expressive of rules which existed under customary international law." (*Ibid.*, p. 321.) Similar statements, are recorded at pages 324, 325 and 334, being made by the representatives of Czechoslovakia, Iraq and Cyprus.

The main cause of disagreement with this view of the declaratory force of the Convention is Part V—that is the part which we are inviting the Court to take into account. There were and are those who differ from the general opinion, and who consider that Part V states too broadly and with insufficient precision exceptions to the *pacta sunt servanda* rule.

Two examples of this view are enough. The French Government, consistently with earlier statements on the work of the International Law Commission, voted against the Convention for that very reason: to the extent that the Conference undertook innovation, rather than declaration, serious difficulties almost always arose, and with fatal results. The difficulties were, it said, particularly noticeable in Part V. My reference is to *Notes et études documentaires n° 3622* of 25 September 1969; a quotation to similar effect from the French delegation's final speech at the conference is given in paragraph 144 of the Memorial. My second example is drawn from the book on *The Vienna Convention on the Law of Treaties* by Mr. I. M. Sinclair, Second Legal Adviser to the British Foreign and Commonwealth Office, and a member of the British delegation at the Conference. In his first chapter—mainly concerned with the relationship of the Convention to customary international law—he expresses the view that in a number of its aspects Part V of the Convention involves the relaxation of the grounds for termination rather than the codification of existing law.

It is because any criticisms of Part V are almost always criticisms of the fact that it allows too wide a freedom to parties to release themselves from their obligations that I do not consider it necessary to pursue any further the question

of the declaratory force of its provisions. For we submit—as we have submitted in paragraphs 143-151 of the Memorial—that even under the supposedly relaxed rules stated in the Convention none of the four possible grounds which appear to have been put forward by France about the continued force of the General Act can possibly be accepted. I now turn to consider the rules stated in Part V, and to apply them to the facts of our case.

Although Part V is concerned with the ways in which treaty rights and obligations can be brought to an end, it begins with a reaffirmation of the *pacta sunt servanda* rule. Article 42, paragraph 2, of the Convention provides that a treaty may be terminated, denounced, withdrawn from or suspended only as a result of the provisions of the treaty itself or of the Convention. Thus it was the intention that the Convention should state the grounds exhaustively and require a prescribed orderly procedure for their application. The International Law Commission explained that the provision which became Article 42, paragraph 2, was included in its draft:

> "... as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the... continuance in force of a treaty is the normal state of things which may be set aside, only [as a result of the terms of the treaty or] on the grounds and under the conditions provided for in the present articles" (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions*, p. 56, Art. 39, paras. (1) and (3) of the Commentary).

We have already seen that the continuance in force of the General Act has not been set aside under the terms of the Treaty.

I now turn to consider the four possible grounds I identified a little earlier—fundamental change of circumstances, supervening impossibility, termination or withdrawal by consent of all the parties and desuetude.

The Court has recently addressed itself to the question of invoking fundamental change of circumstances as a ground for the termination or suspension of a treaty. In the *Fisheries Jurisdiction* cases, at the jurisdictional stage, it stated as follows:

> "International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances." (*I.C.J. Reports 1973*, pp. 18 and 63.)

Has there been a fundamental change in the circumstances which determined the parties to accept the General Act? Has there been a radical transformation of the extent of the obligations still to be performed under it? The answers to these questions can be determined in part by an examination of the provisions of the Act in the light of the demise of the League of Nations and the Permanent Court, and in part by considering the more general relationship between the Act and the League.

As to the first—the specific references in the Act to the League and the Permanent Court. The Act consists of four chapters. Chapter I provides for conciliation. It makes but two slight references to the League of Nations. The

first concerns the Conciliation Commissions that are to be set up by the actions of the parties. If they are unable to agree on the members who are to be jointly appointed, then no fewer than four methods of appointment are provided for—the first two are that, by agreement, a third State or the Acting President of the Council of the League could be requested to make the appointment. If there was no agreement on using those methods, there were two others. The second reference to the League is similarly residual and of limited significance: in the absence of agreement to the contrary, the Commission is to meet at the League's headquarters or at some other place selected by its President; the Commission was empowered to request the Secretary-General of the League to provide assistance. While, as we say in paragraph 69 of the Memorial, these unimportant provisions have now lapsed, their spirit could still be complied with—a presiding officer of an appropriate United Nations organ could be asked to make the appointments and the administrative assistance of the United Nations Secretary-General could be sought. That their lapse had no significant impact on the continued operation of Chapter I is illustrated by the fact that it was by express reference to those very provisions of the General Act regulating the constitution and working of a conciliation commission that the French-Siamese Conciliation Commission was established in 1947.

Those Governments were not deterred by the facts that the Acting President of the League Council could not help them appoint the three neutral members of the Commission, that the Commission could not meet at the League's headquarters and that the League Secretariat could not be asked to provide the Commission with administrative assistance. That instance of the use of the provisions of Chapter I by itself provides a complete answer to the allegation in the Annex that the Chapter fell with the League. More generally, the lapse of much more extensive continuing administrative powers conferred on League organs by other treaties had no effect on their continued force, as paragraphs 77 to 78 of the Memorial demonstrate.

Chapter II of the Act contains a number of references to the Permanent Court. We have already shown in paragraphs 9 to 18 of the Memorial that as between parties to the Statute of the present Court all the important references, and some of the less important ones as well, are, by virtue of Article 37 of the Statute, to be read as references to the present Court. This is also true of the major references, and again some of the minor ones, to the Permanent Court in Chapters III and IV.

The Court rose at 1 p.m.

FIFTH PUBLIC SITTING (11 VII 74, 10.05 a.m.)

Present: [See sitting of 10 VII 74.]

Mr. SAVAGE: Mr. President and Members of the Court. When the Court rose at the end of yesterday's session I was addressing myself to the first of the four grounds which the French Annex perhaps suggests might be invoked to terminate the obligations and the rights created in the General Act. That first ground, the Court will recall, was fundamental change of circumstances in that the Act was an integral part of the League of Nations and fell with it. I had divided my discussion of that possible plea into two parts and had begun the first part—an examination of those particular provisions of the Act which refer to the League and to the Permanent Court. I had dealt with the references in the first three chapters, and I now turn to consider the remaining references—those in Chapter IV.

Two of the references—in Articles 46 and 47—were executed, so far as the League was concerned, on the original entry into force of the Act. A third provision—Article 43, paragraph 1—empowered the Council to invite non-members to accede; this power was exercised on the adoption of the Act but, as was usual, the power was not exercised again. As a massive amount of practice in the past 28 years has shown, the lapse of such a power of invitation has had no effect at all on the continued force of the treaty for the parties to it; or indeed on the rights of subsequent accession of those covered by the accession clause. Some of that practice is mentioned in paragraph 79 of, and Annex V to, the Memorial. A fourth group of provisions in Chapter IV conferred depositary functions on the Secretary-General of the League of Nations. Again, practice pursuant to the League Assembly and General Assembly resolutions, set out in Annexes III and IV to the Memorial, makes it clear that these provisions create no problem.

That unbroken and undisputed practice, some of which is mentioned in paragraphs 70 to 75 of the Memorial and which was demonstrated in relation to the General Act itself earlier this year, is to the effect that the Secretary-General of the United Nations is able to exercise the depositary functions originally conferred on the League of Nations. Thus the circular note from the Legal Counsel advising of France's action taken in relation to the Act in January expressly recalls:

> "... that the General Act is one of the international instruments concluded under the auspices of the League of Nations, for which the United Nations, under resolution 24 (I) of 12 February 1946 has accepted the custody and in respect of which the Secretariat has been charged with the task of performing the functions pertaining to a Secretariat, formerly entrusted to the League of Nations" (Circular Note 3, 1974, Treaties-1 of 6 February 1974).

If then we look at the text of the Act, the rights and obligations under it have scarcely been affected at all by the demise of the League and of the Permanent Court. The references involving those bodies are, except in Chapter II, not extensive; those in Chapter II and some in other chapters have been modified to refer to existing institutions; and the few that remain are inconsequential. The lack of impact of the events of 1946 on the continued force of the General Act is illustrated in a more general way by the fact that similar and more extensive

references to the League in other treaties—by way of conferring wide-ranging administrative powers, of powers to invite accessions, and of depositary functions—have not been held to be fatal to their continued force. On the contrary, the evidence—some of which is contained in paragraphs 70-80 of the Memorial—shows that these treaties have remained in force.

It cannot therefore possibly be said, to return to the wording of the Vienna Convention, endorsed by the Court, that there has been a radical transformation of the extent of the obligations still to be performed. Indeed, has there even been a fundamental change of the circumstances that constituted an essential basis of the parties' consent to the treaty? The Government of New Zealand would submit that there has not—principally for the reason already indicated, that is that the Act makes so little reference, and inconsequential reference at that, to the League. But the French argument is also a broader one, seeking to put the General Act in the ideological context of the League system, and I now turn to consider this second, wider aspect of the possible contention that there has been a fundamental change of circumstances.

The pacific settlement of disputes, says the Annex, had necessarily, in that system, to accompany collective security and disarmament. The Memorial, in paragraphs 36-67, brings together material which shows beyond dispute that the continued existence of the League and the Permanent Court was not, because of the general relationship between the Act and the League system, in any way an essential basis of the consent of the Parties to be bound by the Act. More specifically, that material shows four things, among others.

1. That while there was some link between peaceful settlement on the one hand and collective security and disarmament on the other, the nature of the link was never put in legal form and is not manifested in any way in the Act. I would remind the Court in this context of the comparison made between the Act and the ill-fated Geneva Protocol of 1924 by the Agent of New Zealand, Professor Quentin-Baxter, at the interim measures stage last year. The Protocol made explicit the links between disarmament, collective security and the League's procedures for peaceful settlement; the Act by deliberate contrast does not.

2. The basic approaches to dispute settlement in the Covenant and in the Act were separate and distinct. While the Act was private and bilateral, the League system was public and recognized a more general interest. The Act was not in its wording or in the opinion of its draftsmen a constitutional document. It was not, said Mr. Politis, the Rapporteur of the First Committee, "a sort of annex to the Covenant"; it regulated, said Mr. Rolin, procedures older than, concurrent with but not competing against, those of the League; the relevant passages appear more fully in paragraphs 43 and 47 of the Memorial.

3. This separate character was emphasized by the fact that non-members were invited and, indeed, encouraged by various actions to accede, or to conclude similar bilateral treaties, as some of them did. The Act could in fact have come into force between two non-members alone.

4. The major concern of the draftsmen and of the parties about the relationship between the Act and the League system was to see to it that complications were not caused by the possible applicability of both of them to the one dispute and accordingly rules and methods should be available to prefer one—usually the League—to the other.

To conclude this consideration of a possible invocation of the fundamental change of circumstances principle I make three points:

1. The specific references to the League and the Permanent Court in the Act and the more general relationship between the League and the Permanent Court

and the Act cannot possibly justify a conclusion that the continued existence of the League and the Permanent Court constituted an essential basis of the consent of the parties to be bound by the Act.

2. The extent of the obligations of the parties to the Act have not been radically transformed; indeed the obligations in essence are unchanged.
3. There has been no express invocation of the principle and the appropriate procedures have not even been initiated by France.

In short a plea of fundamental change of circumstances is completely without foundation.

I now turn, Mr. President, to the second of the four possible grounds which the Annex suggested might be invoked, namely supervening impossibility of performance. I have included this as a possible ground for two reasons: first, because of the repeated references in the French Annex to the lack of effectiveness of the Act resulting from the demise of the League system and, secondly, because of the interesting failure of the Annex to refer explicitly to the doctrine of fundamental change of circumstances. The explanation of that failure seems to lie in a reluctance to invoke the broad doctrine and a wish to depend on a related, narrower rule, less inimical to the stability of treaty relationships. That narrower rule could only be supervening impossibility. The Vienna Convention in Article 61 permits the invocation of impossibility of performance as a ground for termination or withdrawal: "if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty." The League and the Permanent Court have permanently disappeared. But, Mr. President, for the reasons which appear clearly from my consideration of the fundamental change of circumstances argument, it would be nonsense to suggest either that the Act cannot now be performed or that the League was indispensable for its execution.

So much then for this second possible ground. I now come to the third and fourth which, for a reason which will appear, can be conveniently considered together. The grounds, the Court will recall, are termination or withdrawal by consent of all the parties, as evidenced by their actions or failure to act, and desuetude, again based on the failure of the parties to act.

The first of these grounds is expressly recognized by the Vienna Convention. Article 54 provides for termination of a treaty or withdrawal from it either in accordance with the treaty's terms or by consent of all the parties after consultation with the other contracting States. The International Law Commission considered it important to underline that when a treaty is terminated otherwise than under its provisions, the consent of all the parties is necessary. The termination of a treaty, it said in paragraph 3 of its commentary to Article 51 of the 1966 draft (now Article 54), necessarily deprives all the parties of all their rights and, in consequence, the consent of all of them is necessary. The facts, some of which I will review in a moment, are in flat contradiction of any such consent having been asked for, let alone given. The strict standard of proof of such consent, if it is to be found in the non-explicit practice of the parties, is emphasized by the refusal of the Vienna Conference to allow even the modification of treaties by conduct, a matter mentioned in paragraph 147 of the Memorial.

The final possible ground—desuetude—is not recognized in the Vienna Convention as a separate ground for the termination of a treaty. Rather, as the International Law Commission pointed out in the statement quoted in paragraph 148 of the Memorial, the legal basis for a plea of desuetude is the consent of the parties to abandon the treaty, a matter dealt with in what is now Article 54. The two arguments—termination by consent and desuetude—require us then to search for the parties' intention.

What do the facts show? Do they show a consent of all the parties to terminate the General Act? It is submitted that on no possible construction can they be said to show that consent. Indeed they cannot be said even to provide evidence of an opinion on the part of any of the parties, not involved in litigation, that the Act is no longer in force. There is much evidence to the contrary.

The French Annex considers the debates in, and the action of, the General Assembly in 1948 and 1949 in preparing the Revised General Act; the *Certain Norwegian Loans* case; the lack of action under the final clauses of the Act in the past 34 years; and the practice relating to the optional clause system.

These matters have all been considered in the Memorial in paragraphs 100-112, 121-123, 115-120 and 181-187 respectively. Some of them were also discussed at the interim measures stage. I therefore do not propose to cover their details. Rather, I will look more broadly at three matters—the 1948 and 1949 United Nations action, other practice concerning the Act and related bilateral treaties of peaceful settlement, and third, the optional clause practice.

The action taken in 1948 and 1949 to establish the text of the Revised General Act was, in one respect, unlike that taken in relation to the other League treaties, which were considered with a view to their amendment to take account of the demise of the League and the setting-up of the United Nations. In those other cases, protocols were drawn up by various United Nations organs with the purpose of amending, for the parties to them, the League treaty to which they related. The Revised General Act, on the other hand, is not, despite its title, a revised or amended version of the original General Act. This appears quite clearly from the report of the Interim Committee set out in Annex VII to the Memorial. The different action resulted from a distinction made in the resolutions, contained in Annexes III and IV, adopted by the United Nations Assembly and the League Assembly in connection with the transfer of certain functions and powers of the League. The distinction thus drawn was between functions and powers of a technical and non-political character and those having a political character. The resolutions generally favoured the transfer to the United Nations organs of the former group of powers, but a neutral position was adopted on the latter. Under the United Nations Assembly resolution, the Assembly would examine or would refer to the appropriate United Nations organ any request from the parties that the United Nations assume functions of a political character. As the Report on the Revised Act shows, the contention was put forward that, accordingly, a request from the parties was needed before a Revised Act could be established.

It was met by the argument that such a request was unnecessary since in its final form the Revised Act did not supplement or modify the 1928 Act which it left intact; an entirely new and independent contractual relationship was being created. This contention and answer assumed, of course, that there were existing parties to an existing treaty who could be asked. This distinction between the Revised Act and the other amending protocols is also recognized in the way they are recorded in the annual volumes of the United Nations publication, *Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions, List of Signatures, Ratifications, Accessions, etc.*

This action of establishing an instrument quite separate from the original treaty, which was left intact, was accompanied, as the Memorial evidences in paragraphs 101-107, by a completely consistent series of statements, especially by the sponsor of the proposal, the delegation of Belgium, to the effect that the General Act remained in force. It was impaired in some minor respects, but it remained in force. On a proper interpretation, such as that proposed in paragraphs 108-112 of the Memorial, the resolution adopted by the General

Assembly also adhered to this view. It is true, as the Annex points out, that some States, mainly States not party to the Act, expressed critical views about it. But their views were not concerned with its legal force; they were concerned with its historical efficacy and, as in 1928, with its general compatibility with the existing universal organization. They had nothing to do with the continued legal force of the General Act.

In this context it is not surprising that when Judge Hudson in 1949 prepared his 28th annual article on the World Court, he stated, after referring to the Revised General Act, that:

> "The original General Act remains in force for some twenty States which became parties thereto, and under Article 37 of the Court's Statute the jurisdiction conferred on the Permanent Court of International Justice is applicable to the International Court of Justice." (*American Journal of International Law*, Vol. 44, p. 34.)

The strong impression reflected by the proceedings of the Assembly in 1948 and 1949 that the Act continued in force after 1949 can be confirmed and put in wider context by other State practice relating to the Act and to similar bilateral treaties dating from the time of the League. Some of this practice is reviewed in paragraphs 113-142 of the Memorial, and again I would wish to do no more than call attention to one or two aspects of it.

The Memorial mentions, in paragraphs 137-142, the cases—rather limited in number—in which bilateral treaties of peaceful settlement have been invoked. This information was included because the treaties in issue were very similar to the General Act, and because they had their origins in the same ideological context. Two other cases, the *Continental Shelf* cases before this Court, might be added to the list. In those cases we see eight of the parties to the General Act proceeding in the 1950s and 1960s without any doubt that the bilateral treaties similar to the Act remain in force. In commentaries on the proceedings—often by distinguished participants in them, including Mr. Rolin who, of course, had a hand in drafting the Act—there is no expression of doubt about the continued effect of the agreements. Not only have some of the treaties been invoked on a bilateral basis, some have also been the subject of other bilateral diplomatic action, including the naming of members of conciliation commissions, and have been included in national treaty lists.

This general attitude towards the treaties of peaceful settlement of the League era appears once again in the steps taken in the Council of Europe which led to the elaboration of the European Convention for the Peaceful Settlement of Disputes. Evidence of the attitude is to be seen, for instance, in paragraphs 221-225 of the Australian Memorial in the companion case and in Professor O'Connell's statement. And, of course, the same attitude, together with the opinion that a surplus of repetitive obligations was being created by new agreements being added to old, comes through strongly in the reason given by the French Foreign Minister in 1964 for France's not accepting the European Convention.

The Court will recall the Minister's catalogue of treaties, including the General Act and bilateral treaties of peaceful settlement, by which France was bound. Accepting this new treaty created the risk of overlapping with them. The full answer to the question addressed to the Minister is set out in Annex VIII to the Memorial; it is briefly discussed in paragraph 124.

And that, of course, was not the only time or the first time that France had indicated that it considered itself bound. I will not recall the details of the French-Siamese Commission of 1946 or the *Certain Norwegian Loans* case.

They are mentioned in paragraphs 121 to 123 and 125 to 126 of the Memorial.

But it is not only France which has indicated in the period since the demise of the League that it considered itself bound by the General Act. At least another six of the parties have indicated in their treaty lists and in other formal actions that they consider the General Act still to be in force. The relevant practice is collected in Annex IX to the Memorial, and also in paragraphs 127 and 136 of the Memorial. At least another two, that is Belgium and the United Kingdom, expressed the same view in the proceedings which led to the preparation of the Revised General Act. Before these proceedings no party had ever suggested that the Act was not in force.

So much for the positive practice relating to the Act: it supports absolutely without exception the view that the Act remains in force.

The French Annex also calls attention to the silence of the parties, to the fact that there had been no formal action taken by the parties under the final clauses of the Act since 1939. Such action has, of course, subsequently been taken by two States. But in any event how significant is that silence? First, the Act requires action not silence to bring it to an end. Second, similar silence in other cases, some of which are mentioned in paragraphs 118 and 119 of the Memorial, has not been evidence of lapse, and, third, the evidence gathered in the Memorial and briefly recalled here shows that several of the parties have, especially since 1946, taken action and made statements indicating that they consider the Act still to be in force: there has not been silence.

Finally, in this examination of State practice, bearing on the question whether all the parties have consented to the Act's termination, I would refer to the practice under the optional clause. The French contention is that so long as the Act was clearly in force the scope of the acceptance of the Court's jurisdiction under the two sources by individual States was always similar. But, it is said, after 1940 this parallelism is broken. This alleged practice is interpreted as indicating that the Act is considered by the parties to be no longer in force. The Agent will touch on some legal aspects of this argument. I would like to make just four factual points which are based on the material in paragraphs 182 to 185 of the Memorial and Annex XI.

1. During the 1930s no fewer than five States, bound by the General Act, were at various points of time not bound by declarations under the optional clause.
2. All the pairs of instruments were subject to different time-limits and conditions for termination.
3. Because of the differing reservations attached to them, many of the pairs of instruments committed the party in question to differing areas of jurisdiction.
4. All the declarations made under the optional clause purported to be no more than just that; they did not purport in any way to relate to the Act which, the Court hardly needs reminding, sets out specific methods for modifying and terminating its provisions.

The factual basis for the contention just does not exist.

I would submit in conclusion, Mr. President, that none of the four possible grounds for arguing that the Act is not in force can be sustained. It does provide this Court with jurisdiction to deal with the dispute referred to the Court in the Application filed by New Zealand.

ARGUMENT OF PROFESSOR QUENTIN-BAXTER

AGENT FOR THE GOVERNMENT OF NEW ZEALAND

Professor QUENTIN-BAXTER: Mr. President, Members of the Court. When one asks the Court to turn its attention from the system of the General Act to that of the optional clause, there is inevitably some sense of moving from a major to a minor premise. The General Act, read in conjunction with Article 36, paragraph 1, of the Statute, stands four-square and self-contained as a source of jurisdiction: no reservation blurs its bearing upon the present dispute between New Zealand and France. In the case of the optional clause, on the other hand, there is, as we all know, a broadly worded and laconic reservation of undoubted relevance to the question of establishing the Court's jurisdiction under Article 36, paragraph 2, of the Statute.

Naturally, the New Zealand Government does rely more heavily on the source of jurisdiction that is not qualified by any material reservation and we could with confidence take our stand on that firm ground alone. We might then set aside the task of construing and applying the reservation made by France under the optional clause as to "disputes concerning activities connected with national defence". We do not take that course. We plead as a separate and alternative source of jurisdiction the bond created by the declarations made by France and by New Zealand respectively under the optional clause; and we do not make this plea perfunctorily.

Before I begin to discuss the meaning and effect of the French reservation, I should like to look briefly at the French contention that the two sources of jurisdiction are intertwined and then to develop some larger considerations which may provide a frame of reference for more detailed submissions. The French Ambassador's letter of 16 May 1973 to the Registrar insists, after referring to the French reservation, that:

> "... in the presence of this formally expressed will to remove disputes concerning activities connected with national defence from the purview of the Court, no opposite conclusion as to its consent to the jurisdiction of the Court for such disputes can be drawn from the General Act of 1928".

The last section of the Annex to the French communication develops this contention and the arguments there raised are reviewed in Part IV of the New Zealand Memorial.

The French argument assumes that the dispute which is the subject of the present proceedings falls within the ambit of the reservation contained in its declaration under the optional clause. We do not admit the assumption, except for the purpose of testing the propositions built upon it. In so far as the argument alleges the neglect and desuetude of the General Act, it has been answered by the Solicitor-General who spoke before me. He has also summarized the proofs, set out in paragraphs 181 to 186 of the New Zealand Memorial, that there is no foundation in fact for the notion of a parallelism before 1946 between commitments under the systems of the General Act and of the optional clause.

The Solicitor-General has, moreover, shown that during the lifetime of the United Nations and even when itself the subject of discussion at meetings of the United Nations, the system of the General Act has been regarded in the same way that its founders had conceived it—that is, as a separate source of obliga-

tion, distinct from and additional to other methods of peaceful settlement, including the system of the optional clause. What, then, remains of this argument, which in one formulation entails an almost metaphysical conception that reservations under the optional clause could silently attach themselves to the General Act at the expiration of the five-yearly periods after which reservations to that Act may be varied?

In our submission, Mr. President, all that remains of the French legal argument is a curious and unsolicited testimonial to the validity of the General Act. It was a desperate expedient to suggest that in some way there could have been a fusion of the two distinct methods of approaching the Court provided for in paragraphs 1 and 2 respectively of Article 36 of the Court's Statute. It affronts all legal principle to contend that engagements between States, arising under treaty instruments, may be varied at the will of individual parties, except under the conditions and in the manner prescribed by the treaty instrument in question. If it were necessary to incur those risks to assail the General Act from without, that is surely an indication of the Act's inner strength.

Nevertheless, Mr. President, I think it right to recognize that this French argument may have another motivation. Sometimes there may lie behind the forms of legal pleading a kind of *cri de coeur*, complaining of a real or imagined grievance for which the law provides no remedy. So, in the *Right of Passage* case, the Government of India may well have felt it to be unjust that the Government of Portugal should take it by surprise by filing in quick succession a declaration under the optional clause the scope of which could be drastically reduced at any time and an Application to commence proceedings against the Government of India whose declaration had already been in force for 15 years.

Even in this extreme situation, the Court rejected by overwhelming majorities the Indian Government's first four preliminary objections. One brief quotation will suffice. The Court, in dealing with the second preliminary objection said "it is clear that the notions of reciprocity and equality are not abstract conceptions. They must be related to some provision of the Statute or of the Declarations" (*I.C.J. Reports 1957*, p. 145). In short, no treaty creating a system of jurisdiction can, if it allows each party to determine unilaterally the extent of its own commitment, achieve conditions of absolute justice: it can work fairly only within the limits that its own rules prescribe.

For this reason, even if the French Government should feel that, at some level of justice or morality, it ought to be excused the performance of the duties that its treaty obligations create, that is not a feeling which can weigh with the Court. Moreover, the situation of the French Government is, from a strictly equitable point of view, hardly as compelling as that of the Indian Government in the *Right of Passage* case. That will emerge as we review the changing French position, paying special attention to contemporary French accounts. Part III of the New Zealand Memorial, dealing with the question of the Court's jurisdiction under the optional clause, as far as possible relies on unimpeachable French sources to chronicle the changing attitudes of France, so that there is the less risk of our misunderstanding the absent Respondent.

Paragraphs 170 and 171 of the Memorial recall that, after the failure of the French Application against Norway in the *Certain Norwegian Loans* case, France—and a number of other countries—soon abandoned their so-called "self-judging" reservations. In the new French declaration of 1959, reservations, including one relating to national security in time of crisis, were objectively formulated. In 1966 the reservation as to activities connected with national defence was added, prompting Feydy's remark, referred to in the Memorial at the references I have given, that France was tending to take away little by little

with one hand what she had given to international justice with the other hand by renouncing her "self-judging" reservation.

Mr. President and Members of the Court, I do not suggest that this French behaviour was in any way abnormal. States come to the International Court of Justice through their own consent, given specially for the occasion, or more generally by prior acceptance of an obligation to submit a certain range of disputes to judicial settlement. The point I am concerned to make is that sovereign States, by the exercise of their own free will, create the situations in which there may sometimes seem to be a discrepancy between law and justice.

Any system of prior acceptance of the Court's jurisdiction to an extent determined by unilateral declaration bears most heavily on the States which are most generous in the obligations they accept. It is a natural consequence that the system makes no appeal to many States, and that most others pepper their acceptances with an assortment of reservations. It is also only a small step from the policy that accepts, for its own sake, an obligation to adjudicate, to that which seeks to ensure that other declarants are caught by the bond of jurisdiction, while the first State maintains its avenues of escape in areas of special vulnerability. It was in this sort of manœuvre—the gladiatorial art of the net-thrower with the trident—that France appears to have been engaged in all the changes in her declarations under the optional clause from 1947 until 1974. In this there was nothing unusual, nothing that fell below contemporary standards.

The Australian and New Zealand Applications in the present proceedings have, unfortunately, been met by France with a response that has a new and more disturbing quality. It is, of course, the French Government's right, recognized by Article 53 of the Statute, not to appear in these proceedings; but that Government has an undoubted legal obligation to comply with the decisions that the Court reaches in the Respondent's self-imposed absence. She has not done so in the case of interim measures, and it is her future willingness to meet that obligation that France now places in doubt. The Government and people of New Zealand have too high a regard for France to believe that she will ever allow matters to reach that pass. My Government will persist, through these proceedings and in other peaceful and unemotional ways, to resolve the present dispute. It must, however, be noted that the whole principle of international adjudication is jeopardized if the desire to escape the bond of jurisdiction becomes a determination to break that bond.

Mr. President, when States consent to the jurisdiction of this Court they in effect accept an obligation to look into a mirror, to know the truth about the legality of their own actions and to share that knowledge with the world. Few indeed are the States that are prepared to accept that obligation generally. So it is that France and New Zealand, and the others big and small, operate at fluctuating levels, sometimes agreeing to submit their actions to independent scrutiny, more often seeking refuge in their sovereign right not to be judged.

The Court itself cannot be responsible for this situation. It can only offer its services to those who accept them and, in doing so, mirror the truth as clearly as the truth can be revealed by a large and representative bench of eminent jurists. More often than not in its contentious jurisdiction the first question the Court must answer is whether the Respondent is bound. That enquiry may engender resentments, and a tortuous passage through a thicket of reservations, so that it seems quite out of key with the solemn issues of substance that the case entails. Even so, the Court's course of action cannot be deflected by the pettinesses and discouragements it may encounter. It has to hold the balance exactly, impleading no State without its consent, and allowing no State that has consented to resile from its commitment.

I am now in a position to make more extensive use of the material gathered in *Part III of the New Zealand Memorial. The enquiry into the meaning of the* French reservation can throw no light upon the status of the jurisdictional tie between the Applicant and the Respondent under the system of the General Act: it can, if my submissions are sustained, only add a second and quite separate source of jurisdiction. Yet this study has, as I have already tried to *indicate, a good deal to do with our general appreciation of the nature of this* dispute and the positions of the respective parties. Moreover, the effort to interpret the reservation will lead me into paths which have not been travelled by the Court in any previous case though it may well be necessary for the Court to travel these paths if it becomes the fashion for States to make their acceptance *of the optional clause dependent on reservations couched in such condensed* language that there may appear to be a wide margin of appreciation as to their true meaning.

We may take as our starting-point the clues which the French Ambassador's letter offers us. The phrase, "disputes concerning activities connected with *national defence*", added to the French declaration of acceptance on 20 May 1966, certainly constitutes the essential difference between the present text and the text of the declaration filed on 10 July 1959. It must indeed be assumed that the additional words were intended to extend the area of the French reservation; the Applicant also sees no reason to contest the French Ambassador's *contention that the French nuclear tests in the Pacific form part of a programme* of nuclear weapons development. There the helpfulness of the French communication ends. The Ambassador says that, because the French nuclear tests in the Pacific form part of a programme of nuclear weapons development, they must: "constitute one of those activities connected with national defence which *the French declaration of 1966 intended to exclude.*" We cannot make that leap.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

As one begins to look at the commentaries on the French reservation, one is immediately struck by two things. First, the writers are concerned about the lack of precision, and in this paragraph, I am citing material from paragraphs 167 and 172 of the New Zealand Memorial. Even before the 1966 reservation was added, Vignes speaks disapprovingly of the vague and imprecise domain of the 1959 reservation. Feydy records that the 1966 amendment could leave the bystander perplexed: the meaning of the reservation is not at first sight absolutely clear. Rousseau also refers to the far-reaching and imprecise terms in which the reservation is formulated. Secondly, the writers record that in 1966, as in 1959, the reservations were launched in an atmosphere of tight-lipped official silence.

If one adopts a textual approach to the reservation, one reaches the same impasse as the French commentators. No rules of construction can determine for a wide range of situations the meaning of such terms as "national security" and "national defence". If the Court concludes, as we conclude and as the French commentators have concluded, that it is not possible to fix the meaning of the 1966 reservation simply by reference to the words it uses, the Court will, in accordance with the ordinary rules of treaty interpretation, look to the context, including the surrounding circumstances. Moreover, as the text in question is a unilateral declaration and there is no element of mutuality in the choice of the words it uses, it is to contemporary evidence of French intention that the Court's enquiry will principally be directed. Yet here also there is a road-block.

As far as our own researches and the witness of the learned French commentators reveal, there are no contemporary statements from French Government sources about the meaning of the 1959 declaration or the 1966 amendment.

Another important lead is given by the French commentators. They have no doubt in their own minds that both the 1959 and 1966 reservations were related to contemporary events—I am now referring to paragraph 171 of our Memorial. Although the 1959 reservation about crises affecting national security was quite general in its wording, it was, the commentators say, well-known to be related to events in Algeria. Similarly, the 1966 reservation was believed to be related to France's changed attitude towards NATO, and to opposition to the impending French nuclear tests in the Pacific. Rousseau, writing about these projected tests, and noting their proximity in time to the lodging of the new French amendment, concludes that there cannot be much doubt that the two things are connected.

I should pause to acknowledge that, for want of better evidence, we are using the testimony of these learned writers in a matter in which they were not expert and had no special means of knowledge. It is implicit in all they say that they share our difficulties. They can make no sense of the reservations, unless they first lend an ear to conjecture. Yet we need not rely on this detective work undertaken by the jurists. It is, I submit, inherently probable that the general formulations, used without explanation by the French Government in its 1959 and 1966 reservations, were in each case related to specific areas of heightened sensitivity in French policy at that time.

I shall return to this theme and follow more closely the sequence of events in 1966, but there are several other points which I should first mention. Whenever we approach the problem of the French reservation, we are asked to make a prodigious leap without much in the way of legal support. We are invited, in complete suspension of disbelief, to apply the reservations under the optional clause to the General Act. We are asked to conclude, as if the matter were self-evident, that a programme of nuclear weapons development must fall within a reservation relating to national defence, and Rousseau, in his account of French nuclear testing in the Pacific, is confronted by the same sort of obstacle. At first sight he seems to be saying, in a passage quoted in paragraph 171 of the New Zealand Memorial, that on a proper construction, the 1966 reservation must be regarded as covering French nuclear testing in the Pacific. Yet that is not the thrust of his article, "Chronique des faits internationaux", which appears in the *Revue générale de droit international public*, Volume LXX, 1966, page 1032. Rousseau begins by saying that while public opinion, in France and elsewhere, has been particularly sensitive to the political, scientific, military and financial aspects of the French tests, the problem of the international legality of such tests has usually been passed over in silence. He concludes, after examining the evidence:

> "Remembering that during the 'Lotus' affair in 1927 the French Government categorically denounced before the Permanent Court of International Justice the argument whereby everything that is not expressly forbidden in international law is therefore implicitly authorised, it will be seen how relative are the principles of legal techniques, which too often, for the Great Powers, are just the clothing with which—in defence of their supposed interests—they cover their highly variable political positions."

It is against that background, and not on the basis of an analysis of the French reservation, that Rousseau leaps to his conclusion: in anticipation of the tests, he says, and with the obvious intention of evading in advance any legal debate

concerning its responsibility, France had in good time changed its declaration under the optional clause.

We are left with the gap in the logic—and with that peculiar and persistent notion that the case has to be argued backwards. The French commentators tend to find, as the Applicant finds, that there is no way to make this reservation yield an ascertained meaning without resort to extrinsic evidence; and the choice of an extrinsic measuring-rod is difficult. As I shall go on to show, the most obvious choice leads to subjectivity and consequent invalidity; and there is nothing in the record of contemporary public statements or documents to fix the meaning of "national defence" within a more modest compass. Nevertheless, as is pointed out in paragraph 172 of the New Zealand Memorial:

> "It would . . . be wrong to discount the strength of the French Government's intention to achieve, by replacing the 'self-judging' reservation, a more secure bond between France and other States parties to the optional clause. In general, the commentators acknowledge and applaud this intention, while expressing an undertone of anxiety about the countervailing intention to maintain extensive and ill-defined areas of reservation."

Already in 1959, Vignes, and here I am quoting again from paragraphs 167 and 173 of the Memorial, was expressing a fear that the reservation as to national security in time of crisis might be so wide as to encompass invalidity—though he reaches in the end a more reassuring conclusion. Feydy—I refer to paragraph 172 of the Memorial—characterizes the 1966 reservation as a further retreat behind the protective shield of sovereignty: neither he nor Rousseau find a method of defining the extent of the encroachment upon the Court's competence. The conclusion is weak: it must be supposed that the reservation is broad enough to cover nuclear tests in the Pacific, because that is what the French authorities must have wanted.

In Part III of the Memorial, the Applicant has considered ways in which the gap in logic could be bridged. If one looks at the policies of the Fifth Republic, there is certainly a concept of "national defence" that is clearly delineated, and that features the development of nuclear weapons. It appears to be well described in a speech made by President de Gaulle, quoted at some length in paragraph 169 of the New Zealand Memorial. As described then, and on many other occasions before and after the making of the 1966 reservation, "national defence" was used in a sense commensurate with the will and destiny of France. In that sense, the term "national defence" must have procured the invalidity of the reservation in which it was used.

Mr. President, Members of the Court, by a process of elimination I return to the one avenue of enquiry which has not been exhausted—that is, the suggestion that the 1966 reservation was related to France's changed attitude towards the North Atlantic Treaty Organization, as well as to the plan for Pacific nuclear testing. Between 8 and 10 March 1966, France gave formal notice to her NATO allies that she had, in effect, decided to precipitate a revision of the organization created pursuant to the North Atlantic Treaty; and, in this connection, the French aide-mémoire addressed to other States members of the North Atlantic Treaty Organization referred to "all the agreements, arrangements, and decisions made after the signature of the treaty, whether multilateral or bilateral in form". The aide-mémoire went on to say:

> "Undoubtedly, the possibility of undertaking negotiations to modify by common accord the arrangements in force could have been entertained. The French Government would have been happy to propose this if it had

had reason to think that such negotiations could lead to the result that it itself has in view." (*Department of State Bulletin*, Vol. LIV, p. 617.)

As, however, the attitudes of France's partners precluded such a belief, France was prepared "... to take in its own behalf the measures which seem to it to be essential and which are, in its view, in no way incompatible with its participation in the Alliance" *(ibid.)*.

In the aide-mémoires addressed to some individual NATO countries, France referred to the agreements or other arrangements with those countries which France wished to be revised. Thus, the aide-mémoire sent to the United States referred to a list of bilateral agreements between the two countries which the French Government considered "... no longer correspond to present conditions, which lead it to resume in French territory the complete exercise of its sovereignty" (*ibid.*, p. 618).

Correspondence between France and some other NATO countries continued at least for some months; and, while most of France's partners appear to have been persuaded to meet her wish for renegotiation, there were occasions on which they were disposed to remind France of their legal rights. On such occasions, France adhered to the view that the matters outstanding should be dealt with on a different footing, saying, for example, in a Note of 18 May 1966, addressed to the Federal Republic of Germany: "Of course, various considerations of a legal character can be brought up by both sides, but the essential question does not lie there." (*International Legal Materials*, 1966, Vol. 5, p. 683.)

It seems to the Applicant that, against this background, the French reservation of 20 May 1966 comes suddenly to life. The circumstances of France's treaty relationships with her NATO partners fall exactly into focus as "activities connected with national defence": there is hardly a conceivable aspect of these relationships that could be regarded as falling outside that definition. It is very difficult to resist the conclusion that the French reservation was tailor-made to meet precisely this contemporaneous need, which the 1959 reservation would not have met. It is still more difficult to believe that, if one of France's treaty partners had had a mind to take her to Court after 20 May 1966, invoking the system of the optional clause as a source of jurisdiction, the new reservation could not have been pleaded successfully.

The NATO Treaty example would seem to prove conclusively that the 1966 reservation need not, in all circumstances, fall on grounds of subjectivity. It is another matter to mark out the boundaries of its area of application; but at least it provides a new means of analysing the problems that surround the application of the 1966 reservation to the issue of nuclear testing. How, for example, would the reservation fare if it were pleaded in relation to a claim on behalf of a foreign company for supplying army boots, or for repairing windows broken by a gun salute in port? On a literal interpretation, either of these cases would appear to involve activities connected with national defence; but these cases differ from the NATO ones, because the matter in issue is not exclusively, or even primarily, one which relates to national defence. The Court, if faced with such a question, must chart the outer limits of the reservation by placing a construction on the words "activities connected with".

Let us suppose, on the other hand, that a State subsidizes its merchant shipping in breach of treaty obligation, but pleads that one of the purposes was to ensure a better supply of fleet auxiliaries, in case of war. In such an example, it is the meaning of the phrase "national defence" that comes under stress. No longer are we dealing with a subject-matter which falls obviously within the ordinary man's conception of a soldiering or sailoring activity. We have entered

that indeterminate area to which Briggs referred when, speaking in reference to a former British reservation, he said that: "no rules of international law can determine whether a question affects the national security of a State" (Memorial, para. 166).

Vignes, quoted in the same section of the New Zealand Memorial and writing in reference to the French declaration of 1959, makes the same point when he says that the application of the reservation on national security will be well-founded, only if the attack on the security of the nation is unmistakeable. Otherwise, there is a danger that the reservation will be extended excessively and in a manner difficult to control. In short, we are once again trembling on the brink of subjectivity: the question whether the reservation is applicable entails a factual appraisal which is peculiarly within the province of the State concerned, but the Court must be in a position to judge that the State's appraisal meets some test of objectivity.

Perhaps the 1959 reservation does exactly meet these requirements: it is peculiarly within the province of the State concerned to judge whether a situation affecting national security is one of crisis; but it is probably possible for the Court to make an objective appraisal of the State's judgment that the crisis requirement has been fulfilled. The 1966 reservation offers the Court no corresponding means of regulating the way in which the reservation is applied, unless the term "national defence" has, in the particular context, a meaning so ordinary and undebatable that the necessary element of objectivity is inherent in the definition itself.

If one applies this differential analysis to the cases of the NATO treaties and of nuclear testing, the following conclusions seem justified. The 1966 reservation appears to be exactly applicable to the case of the NATO treaties, first, because the notion of national defence has in this context such a conventional and ordinary meaning that it satisfies the test of objectivity; and, secondly, because the activity in question is wholly and exclusively a matter of national defence. The case of nuclear testing, on the other hand, scarcely satisfies either criterion: whether or not it is regarded as a matter of national defence will depend largely on the attitude of the State concerned; and it certainly is not only a matter of national defence. Indeed, as we have already seen, in the policies of the Fifth Republic nuclear weapons development has a significance transcending any normal or ordinary meaning of national defence.

Other considerations reinforce these distinctions. First, the lack of any contemporaneous official comment upon the meaning of the 1966 reservation does not matter in the case of the NATO treaties; and the reason for the official silence is readily comprehended. In the case of nuclear testing, however, the lack of contemporaneous official explanation deprives the reservation of an extra dimension, which might possibly have vindicated its applicability. Secondly, while the questions of substantive law which arise in the case of the NATO treaties concern only obligations between State and State, nuclear testing raises additional and more far-reaching questions concerning the observance of universal obligations.

Before I resume the argument up to this point I should take notice of another range of questions, which I shall have to deal with later on. For example, it weighed heavily with Rousseau, who may not have been conscious of the NATO treaty context, that the reservation had been lodged only six weeks before France's first nuclear explosion in the Pacific. What implications are to be drawn from this conjunction of events? Similarly it bothers the French commentators that the reservation appears to be such a shapeless thing, biting into the Court's jurisdiction to an unforeseeable extent, and yet balanced recklessly

on the edge of subjectivity. Why, if the French Government intended this reservation to apply to its Pacific testing programme, did it execute its intention so inefficiently? It was, after all, entirely within French competence to lodge a special reservation saying in terms that the Court should have no jurisdiction in relation to the nuclear testing programme which France intended to carry out in the Pacific for years ahead.

Mr. President, I believe this analysis has already shown that the French reservation of 20 May 1966 does not apply in relation to the present dispute between New Zealand and France. It simply does not fit the case of French atmospheric nuclear testing in the Pacific. It is a reservation with a comparatively shallow focus that works well enough in relation to such a matter as the NATO treaties. Any attempt to extend the range of the reservation blurs its edges and its focus. In particular, if the expression "national defence" is given an extended meaning, it passes out of the Court's power to exercise a proper jurisdictional control and the reservation fails for want of objectivity. This result is made more certain by the absence of contemporaneous official comment, which might have helped to fix the meaning of the reservation and to provide the means for its control.

It was not the content of the reservation but the surrounding circumstances that led to a belief in its effectiveness in the sphere of nuclear testing. If the reservation was not intended to exclude the Court's jurisdiction in the matter of nuclear testing, why had it been made at all? The answer surely is that it had been designed to meet the case of the NATO treaties and this would also provide one reason why the making of the reservation had been given so little publicity. Was there, then, no special significance, as Rousseau had supposed, in the timing of the reservation which had been lodged about six weeks before the scheduled date of the first nuclear explosion in the atmosphere above the French Polynesian atoll of Mururoa? This relationship in time is no longer compelling when it is realized that the making of the reservation coincided with the continuing debate about the re-organization of NATO.

Finally, what about Rousseau's belief that a policy of atmospheric nuclear testing inevitably entails avoidance of international adjudication? "France", he says, at the end of his chronicle, "is acting today in the same off-hand manner as other Powers with regard to the settlement of international matters. It is, alas, not only the atmosphere that atomic weapons are polluting today." (*Revue générale de droit international public*, Volume LXX, 1966: Charles Rousseau, "Chronique des faits internationaux", *op. cit.*, p. 1040.) The French Government, however, was not free to enunciate that view. It then held, and it still holds, that its actions entail no illegality. On that point I quote from the English translation of a letter of 1 July of this year from the President of France, Mr. Giscard d'Estaing, to the Prime Minister of New Zealand, Mr. Kirk. A certified copy of the original French text has been filed in the Registry of the Court:

> "I wish to underline the fact that, in acting as they have done, the French authorities are not contravening international law any more than they threaten the environment and the health of the peoples of the region."

The last piece of the puzzle now fits into place. The pages of Rousseau's chronicle record foreign and domestic reaction to the prospect of French atmospheric nuclear testing in the Pacific:

> "International reaction to the French explosions in the Pacific was very different to what it had been at the time of the tests in the Sahara, which began on 13 February 1960. At that time only the Algerian Government

> was directly affected, as the explosions took place on its territory and radio-activity emissions were almost non-existent. There seemed at the time to exist a *modus vivendi* whereby the Algerian Government refrained from protesting as long as the explosions were not publicized. The Pacific explosions, on the other hand, affected a large number of bordering countries and a relatively large number of protests were made at quite an early date—at least before the first explosion on 2 July 1966." (*Ibid.*, pp. 1033-1034.)

There follow in Rousseau's chronicle the details of the protests made at that time by Australia, Brazil, Chile, Colombia, Japan, New Zealand, Peru and Uruguay. Rousseau adds:

> "Even in France protests were made, notably on 1 June by the Movement for Nuclear Disarmament, led by Jean Rostand, and on 7 June by the Council of the French Protestant Federation, etc." (*Ibid.*, pp. 1034-1036.)

Mr. President, Members of the Court, should it still surprise us that the French Government, which professed a serene confidence in the legality of its programme to promote nuclear weapons development by atmospheric nuclear testing in the Pacific, did not, in the teeth of this gale of international and domestic protest, make a brand-new reservation, stating unequivocally its rejection of the jurisdiction of this Court in matters pertaining to its nuclear weapons development or nuclear testing programmes? Should it even surprise us that no official statement was made as to the relationship between the 1966 reservation and the nuclear testing programme or that the reservation itself was not re-modelled to make it applicable to the nuclear testing programme? It may well have seemed to those who had the duty of taking into account all of their Government's conflicting sensitivities, that the best course was to do nothing which might excite public and international interest but instead to use as camouflage the enigmatic reservation of 20 May 1966.

I have been concerned to show that, in the context of the dispute between New Zealand and France, this reservation is only camouflage, a form of words that people tend to take on trust, because the words resist analysis, and because the people are expecting to find an applicable reservation. I have tried both to provide the analysis and to dispel the illusion. The out-of-focus reservation, which blurs and obscures the rights and obligations of the Parties, is easy to manufacture or to plead, and difficult to combat. If it were to meet with any success in international adjudication, it could rather easily become a new discouragement to the acceptance of the Court's jurisdiction.

Mr. President, at the beginning of my address it was necessary for me to examine one of the less attractive aspects of the behaviour of States—what I might call their Jekyll-and-Hyde approach to international adjudication. So often they adopt in principle an attitude of boundless respect for the law; but, at the first sign that the law may touch their own affairs, they opt for anarchy. To balance that impression, I should also note that, when the immediate stress has passed, Dr. Jekyll reasserts himself, and the ugly countenance of Mr. Hyde is seen no more. The demand of men and nations for the law is insatiable. The bond of adjudication, which is resisted and scorned by the party to which it is unwelcome, leads to expressions of judicial opinion which can exert a vast and beneficial influence on human affairs.

One last word. The Charter of the United Nations, to which, in their several capacities, the Court and the States Parties to these proceedings all belong, emphasizes that States are composed of people, and that governments exist for the benefit of people. More and more, in the contemporary world, the readiness

of States to assume international obligations is conditioned by an enlightened public opinion, in their own country and in other countries. There is a necessary tension between the prudence of governments, sometimes descending to unrelieved selfishness in their zeal to protect the narrow interests of their own peoples, and the inherent generosity of those peoples themselves. Sometimes the spirit of altruism bubbles over, causing Governments to act in a wider interest than their own.

So, too, in the affairs of the Court. If France now finds herself bound by the Court's jurisdiction, and by the Court's neglected Order indicating interim measures of protection, it is not because of any trick or clerical oversight or other mischance. It is because, at a critical time in the history of this dispute, a regard for public opinion conditioned and inhibited the course of action which the French Government might have wished to take upon a narrower appraisal of immediate self-interest. It is also because the cause of the law is universal; and because French scholarship, French intellectual integrity, have provided the Applicant with the bones of its argument.

It is the submission of the Government of New Zealand that Article 36, paragraph 2, no less than Article 36, paragraph 1, confers jurisdiction on the Court to deal with the dispute between New Zealand and France.

Mr. President, Members of the Court, there is little more I need say in closing the New Zealand case. The Applicant has offered proofs of the Court's jurisdiction under the systems both of the General Act and of the optional clause. Recalling the long history of its dispute with France, the Applicant has shown that the dispute concerns a point of law, and has not been resolved. The Applicant has asserted its legal interest in relation to each of the five categories of rights which it claims to be violated by French actions. It has discussed the nature of each category of these rights, to the extent that that seems appropriate in the present phase of the proceedings, consistently with the Court's procedures and without touching upon the merits of the case.

I should like to remind the Court of the importance that the New Zealand Government attaches to rights that are of a universal character, closely related to the mainsprings of the United Nations Charter, and that cannot be vindicated in any court unless this Court recognizes them at the suit of a member of the international community. The Attorney-General, who discussed that matter when he opened the New Zealand Government's case, spoke also of the Applicant's special interest in matters that affect most closely the well-being of its own region of the world and its own people.

Mr. President, if it is the wish of the Court, I can now present the final submissions of the Government of New Zealand. Those submissions are that the Government of New Zealand is entitled to a declaration and judgment:

(a) that the Court has jurisdiction to entertain the Application filed by New Zealand and to deal with the merits of the dispute; and

(b) that the Application is admissible.

QUESTIONS BY JUDGE SIR HUMPHREY WALDOCK

Sir Humphrey WALDOCK: I have two questions connected with the issue of admissibility on which I would ask the Agent and Counsel for New Zealand to assist the Court.

The first concerns the right claimed by New Zealand in paragraph 190, subparagraph *(c)*, of the Memorial that "no radio-active material enter the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing".

I noted the presence in Court of representatives of New Zealand at the public sitting held on 9 July in the case brought by Australia against France, at the end of which I addressed a question to the Agent of Australia. The text of the question is set out on page 524 (I), and I should be glad if the Agent of New Zealand would kindly regard that question as addressed also to New Zealand.

My second question, which is of a similar kind, concerns the right claimed by New Zealand in paragraph 190, subparagraph *(e)*, of the Memorial to "freedom of the high seas, including freedom of navigation and overflight and the freedom to explore and exploit the resources of the sea and the seabed, without interference or detriment resulting from nuclear testing".

I should be glad if the representatives of New Zealand would state whether they draw any line between lawful and unlawful interferences with the freedom of the seas for military purposes in time of peace, and if so what line. Do they, for example, draw a legal distinction between a declaration of a temporary submarine exercise area or temporary missile testing area and a declaration of a temporary nuclear testing zone? If so, what are the elements which they consider make an interference with the freedom of the seas of such a temporary kind unlawful?

The PRESIDENT: Well, the Agent of New Zealand may answer immediately, but if he is not ready the Court will afford him the necessary time to do so. He may answer orally at a special sitting of the Court on Monday morning or in writing[1].

Professor QUENTIN-BAXTER: May it please Mr. President, and may it please the Court, I think we would prefer to answer in writing if we may.

The PRESIDENT: In writing. You would be ready then to give us a reply by Monday. I thank the Agent, the Attorney-General and the Solicitor-General of New Zealand for their presentation of their case and the sitting in the case *New Zealand* v. *France* is closed.

The Court rose at 12.34 p.m.

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[1] See pp. 429-431, *infra*.

SIXTH PUBLIC SITTING (20 XII 74, 4.15 p.m.)

Present: [See sitting of 10 VII 74, Vice-President Ammoun, Judges Petrén, de Castro, Morozov, Nagendra Singh, Ruda, and Judge *ad hoc* Sir Garfield Barwick absent.]

READING OF THE JUDGMENT

The PRESIDENT: The Court resumes its sitting for the reading in open Court, pursuant to Article 58 of the Statute, of its Judgment in the present phase of the *Nuclear Tests* case brought by New Zealand against the French Republic. That phase was opened by the Court's Order of 22 June 1973, by which it was decided that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application.

I have already mentioned, at the earlier sitting[1] of this afternoon, the absence from today's sitting of Vice-President Ammoun, Judges Petrén, de Castro, Morozov, Nagendra Singh and Ruda, and Judge *ad hoc* Sir Garfield Barwick.

I shall now read the Judgment of the Court. The opening recitals of the Judgement which, in accordance with the usual practice, I shall not read, set out the procedural history of the case and the submissions, and then refer to a letter addressed to the Court by the French Ambassador to the Netherlands, dated 16 May 1973.

The Judgment then continues:

[The President reads paragraphs 14 to 62 of the Judgment[2].]

I shall now ask the Registrar to read the operative clause of the Judgment in French.

[Le Greffier lit le dispositif en français[3].]

Judges Forster, Gros, Petrén and Ignacio-Pinto append separate opinions to the Judgment.

Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock append a joint dissenting opinion, and Judge de Castro and Judge *ad hoc* Sir Garfield Barwick append dissenting opinions to the Judgment.

It will be recalled that, by Application dated 18 May 1973, the Government of Fiji applied for permission to intervene in the present proceedings, and by Order of 12 July 1973, the Court decided to defer its consideration of that Application until it had pronounced on the questions of jurisdiction and admissibility in respect of New Zealand's Application. In view of the decision of the Court contained in the Judgment I have just read, the Court decides, by an Order dated today, which will not be read out, that the Application of the Government of Fiji for permission to intervene lapses and that no further action thereon is called for on the part of the Court.

Owing to exceptional technical difficulties, only the official sealed copies of the Judgment for the Parties, have been prepared for today's sitting and it will

[1] I, p. 528.
[2] *I.C.J. Reports 1974*, pp. 460-477.
[3] *Ibid.*, pp. 477-478.

not be possible to carry out the usual distribution of the stencilled text of the Judgment and of the appended declarations, separate opinions and dissenting opinions. The usual printed edition will however become available some time in January 1975.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.