MEMORIAL ON JURISDICTION AND ADMISSIBILITY SUBMITTED BY THE GOVERNMENT OF NEW ZEALAND

PART I

INTRODUCTION

1. This Memorial is submitted to the Court in pursuance of the Orders made by the Court on 22 June 1973 and 6 September 1973. These two Orders required the Government of New Zealand to submit, by 2 November 1973, a Memorial addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application.

2. In accordance with Article 35 of the Rules of Court, the Government of New Zealand specified in its Application instituting proceedings of 9 May 1973 the provisions on which it founded the jurisdiction of the Court. These were:

(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, done at Geneva on 26 September 1928; and, in the alternative,

(b) Article 36, paragraphs 2 and 5, of the Statute of the Court.

3. In the course of the oral proceedings relating to the Request for Interim Measures of Protection, and in a written answer to a question by a Member of the Court, the Government of New Zealand presented submissions in support of its claim to found the jurisdiction of the Court on these provisions. These submissions included consideration of points contesting the Court's jurisdiction made in the letter, together with its Annex, of 16 May 1973 from the French Ambassador to the Netherlands to the Registrar of the Court. In its treatment of the question of jurisdiction, this Memorial restates and develops the submissions on jurisdiction presented at the interim measures phase of the case. Part II deals with the question of jurisdiction under 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 [1]. Part III relates to jurisdiction under Article 36, paragraph 2, of the Statute. Part IV deals with the question of the relationship between the two sources of the Court's jurisdiction.

4. Part V of the Memorial is submitted in response to the Court's directive that the Government of New Zealand address itself to the admissibility of its Application. It is the understanding of the Government of New Zealand that, in relation to admissibility no less than in relation to jurisdiction, the Court is now concerned with an issue of a preliminary character, that is to say, one which, while it may be related to the merits of the dispute between New Zealand and France, is distinct from, and anterior to, the merits. This understanding is derived from a consideration of the settled jurisprudence and practice of the Court, the policy underlying the Rules of Court, notably Article 67, paragraph 7, of those Rules, and the terms of the Court's Order of 22 June 1973. All of these point plainly to the conclusion that the Court will wish to maintain the accepted distinction between the merits and preliminary phases of cases before it and to confine itself in the present phase to matters that are genuinely susceptible of determination at a preliminary stage.

[1] The text of the General Act is set out in Annex I.

5. The core of the legal dispute between New Zealand and France is disagreement as to whether the atmospheric testing of nuclear weapons undertaken by France in the South Pacific region involves violation of international law. The determination of this question will be the principal issue before the Court at the merits stage. In the light of the understanding referred to in the previous paragraph, the Government of New Zealand has not thought it appropriate in the present Memorial to expand and develop the material already presented to the Court—in its Application Instituting Proceedings, in the Request for Interim Measures of Protection of 14 May 1973 and in the statements made on its behalf in the oral proceedings at the interim measures stage—in support of its assertion that atmospheric nuclear testing necessarily involves violation of international law. Part V of the Memorial is shaped accordingly. It restates the nature of the claim made by New Zealand which is the subject of its dispute with France; analyses the nature of the legal rights for which New Zealand has sought protection in the present proceedings; and considers the question of admissibility identified in paragraph 24 of the Court's Order of 22 June 1973, namely, whether the Government of New Zealand is able to establish a legal interest sufficient to entitle the Court to admit its Application.

6. Part VI of the Memorial contains the final submissions of the Government of New Zealand.

PART II

THE JURISDICTION OF THE COURT UNDER THE GENERAL ACT OF 26 SEPTEMBER 1928

A. Introduction

7. The first ground of jurisdiction invoked by the Government of New Zealand consists of Articles 36 (1) and 37 of the Statute of the Court and Article 17 of the General Act for the Peaceful Settlement of International Disputes, done at Geneva on 26 September 1928.

Article 36 (1) of the Statute provides:

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

Article 37 of the Statute provides in turn:

> "Whenever a treaty or convention in force provides for a reference of a matter . . . to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

Article 17 of the General Act provides in part:

> "All disputes with regard to which the parties are in conflict as to their existing rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice . . ."

8. The New Zealand Government accordingly must satisfy the Court of three propositions:

—New Zealand and France are parties to the Statute within the meaning of Article 37 of it,
—the matter which it has referred to the Court is a matter provided for in Article 17 of the General Act, and
—the General Act is a treaty or convention in force between New Zealand and France within the meaning of Articles 36 (1) and 37 of the Statute.

B. New Zealand and France Are Parties to the Statute within the Meaning of Article 37 of It

9. This proposition can be dealt with very shortly for it is clear beyond dispute. The Permanent Court of International Justice was still in existence on 24 October 1945 when New Zealand and France became bound by the Statute by ratifying the Charter of the United Nations. Accordingly there was nothing to impede Article 37 having effect for New Zealand and France and obliging them to submit to the compulsory jurisdiction of this Court in lieu of that of the Permanent Court. As the Court put it in the *Barcelona Traction, Preliminary Objections*, case [1], the various processes provided for by the Statute had

[1] *I.C.J. Reports 1964*, p. 30.

already been completed as regards jurisdictional clauses binding on original Members of the United Nations and parties to the Statute before the extinction of the Permanent Court,—and the League. (That case of course goes further and holds that *all* parties to the Statute, regardless of the date of their becoming bound, are party to it within the meaning of Article 37.)

10. The proposition is simple and uncomplicated: New Zealand and France are and have been at all relevant times parties to the Statute within the meaning of Article 37.

11. This is a convenient point to consider the other effects of Article 37 of the Statute on the General Act, for one of the arguments made in the Annex to the letter from the French Ambassador to the Netherlands (referred to hereafter as the "French Annex") is that "there was a close link between the Act and the structures of the League of Nations: with the Permanent Court of International Justice, evidently . . .", and that the demise of the League brought with it the fall of the Act.

12. So far as parties to the Statute within the meaning of Article 37 are concerned, that provision may have updated at least some of the references to the Permanent Court in the General Act.

13. These references can be grouped. First there are the provisions which provide for a reference of matters to the Permanent Court and accordingly clearly fall within the scope of Article 37. These include (apart from Art. 17): (i) Article 19 (reference of matter to the Court if the arbitration process is impeded), (ii) Article 20 (reference of matter to the Court if conciliation fails), (iii) Article 33 (interim measures), and (iv) Article 41 (disputes about the interpretation or application of the Act). These, together with Article 17, are without doubt the most important provisions in the Act relating to the Permanent Court.

14. A second group of provisions makes a descriptive reference to the Statute of the Permanent Court. Thus Article 17 provides that the disputes referred to in its first paragraph include in particular those mentioned in Article 36 of the Statute; Articles 18 and 28 enjoin the arbitral tribunals to apply the sources of law specified in Article 38 of the Statute; and the Court in considering requests for interim measures under Article 33 is to act "in accordance with Article 41 of its Statute". The Court in the *Barcelona Traction, Preliminary Objections*, case [1], said of a provision in a bilateral treaty of peaceful settlement which contained a similar reference to Article 41 of the Statute of the Permanent Court that it should now be read as referring to Article 41 of the Statute of the present Court. It is submitted that the same attitude should be adopted in relation to the other provisions mentioned in this paragraph. But whether it is or is not would seem to be of little consequence since, first, the provisions in question are in substance identical in the two Statutes and, secondly, they could still be applied even if they do refer to provisions in an extinct treaty: parties to a treaty can, if they wish, describe their obligations by referring to a treaty which is not otherwise binding on them.

15. The third group of provisions is a little more heterogeneous. Article 23 (3) empowers the President of the Permanent Court to appoint members of an arbitral tribunal if three other methods of appointment have failed. Is this a provision "referring" a matter to "the Permanent Court of International Justice"? The view that it does not might be thought unduly formalistic and artificial; the provisions for devolution within Article 23 (3) of the General

[1] *I.C.J. Reports 1964*, p. 39.

Act confirm that the power is conferred on the office and not on the individual; and those who drafted the provision had no doubt that it was wide enough to cover this case [1]. Moreover the two parties can jointly approach the President [2].

16. Article 30 requires a conciliation commission to suspend its proceedings if the matter is already before the Permanent Court or a Tribunal until the Court or Tribunal has determined the conflict of competence. This provision might come within the scope of Article 37 or the Commission might interpret the reference to the Court (Chap. II) and the Tribunal (Chap. III) as indicating that it should defer to legal bodies on disputes about competence.

17. Finally, Articles 34 *(b)*, 36 and 37 provide for cases where more than two States are involved. The first makes a general reference to the Statute of the Permanent Court; if such a matter were to come before the present Court it would of course comply with its Statute which in any event does not differ in this respect from the provisions of the Permanent Court's Statute. Articles 36 and 37 deal with intervention. They (especially Art. 36) might also be read as coming within the scope of Article 37 of the Statute and in any event they are in substance identical to Articles 62 and 63 of the Statute.

18. This rather lengthy consideration of the references to the Permanent Court in the General Act has been included to meet, in part, the French argument that the tie with the League system, including the Permanent Court, is so close that the dissolution of the League and the Court would also cause the Act to lapse. It is submitted that the dissolution of the Court had only minimal effects on particular provisions of the Act and none at all on its continued force, whether between New Zealand and France or in general. This continuity, resulting from the fact that, as Article 92 of the Charter says, the Statute is based upon the Statute of the Permanent Court and the further fact that provision was made for the continuity of the bulk of its jurisdiction, is to be seen in the broader context of the continuity of the principal judicial organ of the international community.

C. The Matter which New Zealand Has Referred to the Court Is a Matter Provided for in Article 17 of the General Act of 26 September 1928

19. The General Act for the Pacific Settlement of International Disputes was opened for accession by the Assembly of the League of Nations in a resolution dated 26 September 1928. It entered into force on 16 August 1929, 90 days after the deposit of the second instrument of accession. Thereafter a further 21 States acceded to it.

20. The Act contains four chapters, the first three of which concern respectively conciliation, adjudication and arbitration: the fourth chapter contains the final clauses and general provisions applicable to the three preceding chapters.

21. The General Act gives a clear priority to procedures of judicial settlement in those cases in which "the parties are in conflict as to their respective rights". Article 17 of the Act, which contains these provisions, reads as follows:

"All disputes with regard to which the parties are in conflict as to their

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[1] *United Nations Conference on International Organisation*, Vol. 13, p. 528.

[2] E.g., *Yearbook of the International Court of Justice 1948-1949*, p. 40. This approach was made by Romania and Switzerland under a 1926 treaty of peaceful settlement.

respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

The prior character of this Article to the other provisions of the Act, and in particular to the Conciliation Chapter, is made clear beyond question by Article 20 (1). The provisions of Article 20 (1), and the reference to arbitration in Article 17, are paralleled by paragraph (7) of the resolution and recommendation of the League Assembly opening the Act to accession (Annex II) and by Article 29, both of which make reference to other procedures for settlement of the dispute in question.

22. Article 17 establishes that the disputes with which it deals include those mentioned in Article 36 of the Statute of the Permanent Court—a provision which must of course now be construed as referring to the Statute of the present Court. In the case of the *Mavrommatis Palestine Concessions* [1] the Permanent Court defined the dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons".

23. The matter at issue in these proceedings is of a legal character, and it entails a conflict of views or interests: New Zealand asserts, and France denies, that the atmospheric testing of nuclear weapons in the South Pacific is in violation of obligations at international law.

24. It remains to be shown that the dispute concerns what Article 17 of the General Act describes as "the respective rights" of the parties. This is the question of the legal interest of the Applicant, which is considered in Part V below.

D. The General Act Is a Treaty or Convention in Force between New Zealand and France within the Meaning of Articles 36 (1) and 37 of the Statute

25. The General Act need not be accepted as a whole: a party may in effect accept only the machinery relating to conciliation, or may exclude the machinery relating to arbitration from an otherwise general accession. An accession, whether partial or complete, may be subject to reservations which are "exhaustively enumerated" in the Act.

26. New Zealand and France—together with Australia, India and the United Kingdom—acceded to the Act as a whole on 21 May 1931; and they accordingly became bound by the Act on 19 August 1931. The New Zealand and French accessions were both subject to reservations which are set out, in Annexes V and VI respectively, to the Application Instituting Proceedings.

27. The Act provides (Art. 45) that it may be denounced, wholly or partially, and that additional reservations may be made, at the end of each five-year period from its initial entry into force, on the giving of six months' notice. The current five-year period ends on 15 August 1974.

28. In February 1939 New Zealand and France both exercised the power to make additional reservations. These reservations, each of which concerned an exclusion of disputes arising out of events occurring in time of war, are also set out in Annexes V and VI respectively to the Application. Neither New

[1] *P.C.I.J., Series A, No. 2*, p. 11.

Zealand nor France has taken any other formal action under the final clauses of the Act. In particular, neither has denounced it, in whole or in part.

29. Jurisdiction under Article 17 is limited by any reservations to which the accessions of the parties in question are subject. It is submitted that, with one exception, none of the reservations made by New Zealand or by France, either at the time of accession or in 1939, has any possible application to the facts of this case. The one exception is Condition (1) (v), which will be considered later in this Part of the Memorial. Conditions (2) and (3) will also be discussed later in this Part, in the context of the relationship between the General Act and the League of Nations. Subject to the foregoing, it is not proposed to make further reference to the various reservations in this Memorial unless the Court or any Member of it asks that this be done.

30. The French Government contends that the General Act is no longer in force for any of the States which acceded to it and that, if it is in force, it is not applicable in the relations between France and New Zealand. These broad contentions and the arguments given in support of them will be considered in six heads.

31. First, the General Act will be looked at in its context—a context which the French Government says has so changed as to bring about the lapse of the Act. This will involve an examination of the relationship between the League of Nations system and the Act.

32. This examination will lead to the second subsection relating to the effect of the dissolution of the League on specific provisions of the Act which confer powers on League organs, and on the Act as a whole.

33. The third subsection is related, and concerns the effect of the dissolution of the League of Nations on the reservations to the New Zealand accession referring to the League. In this subsection the only French argument bearing specifically on the application of the Act between New Zealand and France—as opposed to those arguments which relate to the continued force of the Act as a whole—will be considered.

34. The fourth subsection will discuss the significance of the action of the General Assembly in preparing the Revised General Act in 1948-1949.

35. State practice bearing on the continued force of the original General Act since 1946 will be brought together in the fifth subsection. The final subsection will review the preceding ones in the light of certain basic principles of the law of treaties.

1. The General Act in Context: its Relation to the League of Nations

36. The French Annex asserts that:

> "*The Act of Geneva was an integral part of the League of Nations system* in so far as the pacific settlement of international disputes had necessarily, in that system, to accompany collective security and disarmament. Corresponding to this ideological integration, there was a close link between the Act and the structures of the League of Nations: with the Permanent Court of International Justice, evidently, and also with the Council of the League, the Secretary-General of the League, the States Members of the Organization, or, then again, its secretariat."

This integration is evidenced, it is said, by the reservations in the New Zealand and French accessions and by the revision of the Act to substitute new terms for those referring to the defunct system. Since the demise of that system, the Act wants in effectivity and validity and has fallen into desuetude.

(a) *The Ideological Context*

37. It is true, as the French Annex says, that the Act was elaborated as part of the League's efforts concerning disarmament, security and arbitration. Thus, the initial work which led directly to the Act was carried out in the Committee on Arbitration and Security, a Committee which was set up late in 1927 by the Preparatory Commission for the Disarmament Conference. The Committee was to consider the measures capable of giving all States the guarantees of arbitration and security necessary to enable them to fix the level of their armaments at the lowest possible figures in an international disarmament agreement. The reasoning to which the Assembly had adhered in proposing the formation of the Committee was that the progressive extension of arbitration by means of special or collective agreements would extend to all countries the mutual confidence essential to the complete success of the proposed Conference on the Limitation and Reduction of Armaments. Moreover, the Committee's membership was essentially the same as that of the Preparatory Commission.

38. The Assembly, at its 1928 session, considered several texts prepared by the Committee on Arbitration and Security: six model arbitration and conciliation conventions (three bilateral and three general) and an introductory resolution; a resolution on the optional clause of Article 36 of the Statute of the Permanent Court of International Justice; model treaties of non-aggression and mutual assistance and related resolutions; a resolution relating to Articles 10, 11 and 16 of the Covenant; a resolution concerning League communications in case of emergency; a resolution and report on financial assistance to States victims of aggression; and a model treaty with a view to strengthening the means of preventing war, together with an introductory note and a resolution. This catalogue is significant as indicating the range of issues in the field of peace and security which were seen as related. This point was to be repeated in the first paragraph of the first Assembly resolution which was adopted under the heading "Pacific Settlement of International Disputes, Non-Aggression and Mutual Assistance" and which opened the General Act for accession [1]:

> "The Assembly,
>
> Having considered the work of the Committee on Arbitration and Security;
>
> (1) Firmly convinced that effective machinery for ensuring the peaceful settlement of international disputes is an essential element in the cause of security and disarmament;".

39. The relationship stated in the passage quoted certainly existed but how precise was the understanding about it and what legal form, if any, did it take? One or two quotations from the debate on the report of the Committee on Arbitration and Security will show that the political understanding was at best a vague one: the report itself stated that it was premature to attempt to establish the connection which ought to exist between the treaties of mutual assistance and the limitation and reduction of armaments. The Rapporteur suggested, however, that the reduction of armaments was conditional on the conclusion of treaties of non-aggression and of mutual assistance. But the German delegate would not have this: the degree of security afforded by the Covenant itself was sufficient, he said, to allow of the reduction of armaments.

[1] The text of the resolution is contained in Annex II.

The French delegate commented that it was probably futile to renew the same old controversies at each meeting: the delegates' conceptions of the relations between security and the reduction of armaments varied [1].

40. More importantly, the relationship is not reflected in any way in the legal instruments. The General Act and the model bilateral conventions make no reference at all to security and disarmament issues. They do not, for instance, make their entry into force dependent on progress in these fields; the Geneva Protocol by contrast was to enter into force only after a plan for the reduction of armaments had been adopted by the proposed International Conference (Art. 21). While a connection was seen between the various matters, and while progress in one was seen as related in a broad sense to the others, there was no legal dependence. The General Act had a legal existence quite independent of the efforts in the security and disarmament areas.

(b) *The Methods for the Settlement of Disputes in the Covenant and in the General Act Compared*

41. Early in the debate on the drafts relating to the proposed General Act the British delegate in the First Committee criticized the apparent intention "that this General Act should be an instrument which would become an integral part of the structure of the League". Recalling events of 1923 and 1924, he warned delegates of the risks of creating instruments intended to be part of the structure of the League which were not accepted by a good many States [2].

42. His reason for this criticism was that he thought the drafts wrongly emphasized general (i.e., multilateral) instruments at the expense of bilateral ones. The Committee on Arbitration and Security in preparing both general and bilateral treaties had not, it was generally agreed, preferred one category to the other; for States were not all in the same position and would opt for different policies [3]. The view that bilateral and general treaties should be equally recommended was accepted within the Assembly and was reflected in amendments proposed by Sir Cecil Hurst and made to its resolution. Thus M. Politis reporting to the Assembly stated that—

> "it was quite understood . . . that the two classes of model treaties were on an equal footing and that the Committee did not intend to indicate any preference between them [4]".

Accordingly, as the Rapporteur said, the resolution was amended so that it did not, on the one hand, recommend the General Act nor, on the other, merely draw the attention of governments which might feel unable to accede to it to the possibility that they could accept the rules in the Act by special

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[1] *Records of the Ninth Ordinary Session of the Assembly, Minutes of the Third Committee*, pp. 18, 19 and 21.

[2] *Records of the Ninth Ordinary Session of the Assembly, Minutes of the First Committee*, p. 68.

[3] See, e.g., a United Kingdom memorandum, *League of Nations Official Journal 1928*, pp. 694-704.

[4] *Records of the Ninth Ordinary Session of the Assembly, Minutes of Plenary*, pp. 169-170. See, in addition, the views expressed by M. Politis at another meeting ("two doors to arbitration"), by M. Limburg (Netherlands) and by M. Cassin (France), and the amendments proposed by Sir Cecil Hurst, *Records of the Ninth Ordinary Session of the Assembly, Minutes of the First Committee*, pp. 68, 74, and 129-130.

agreement or by an exchange of notes [1]. Rather, it invited all States to accept obligations either by becoming parties to the annexed General Act or by concluding particular conventions with individual States in accordance with the model bilateral treaties annexed or in such terms as might be deemed appropriate.

43. Not only was Sir Cecil Hurst's view about the placing of equal emphasis on bilateral and general treaties accepted, but, in addition, his broader, critical comment about the Act becoming, in the mind of the Subcommittee, an integral part of the League structure was also met directly. M. Politis, as Rapporteur, affirmed in the First Committee:

> "As regards the supposition that the General Act was to be considered as a constitutional document, a sort of annex to the Covenant, its authors had never had any such intention. Its adoption would simply signify that the League of Nations would think well of any States which, being willing to accept collective engagements, should adhere to the Act [2]."

He returned to the theme in reporting to Plenary:

> "The General Act is not to be confounded with the instruments previously drawn up here. It may be well to point out that, while it has a certain affinity with the Geneva Protocol as regards its legal structure, it is in itself of quite a different character. I say this in order to calm certain apprehensions which might arise.
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> In the first place, the Act will not necessitate any amendment to the League Covenant. It is open to all States and needs no more than two adhesions to become effective. This difference is sufficiently characteristic to distinguish it from the Geneva Protocol [3]."

44. The General Act was not then seen as a constitutional document, as an amendment to the Covenant or as an integral part of the League system. But were its procedures such as to involve it inextricably in the League system? The parties to the Covenant of the League of Nations agreed to it "in order to promote international co-operation and to achieve international peace and security". The commitment to this purpose was reflected in a number of the Covenant provisions: in the *general* guarantee—against agression and of territorial integrity and political independence—in Article 10 (the exact scope of which was of course disputed); in the declaration in Article 11 (1) that any war or threat of war was a matter of concern to the whole League; in the right of any Member to refer to League organs such matters, or any circumstance whatever affecting international relations, which threatened to disturb international peace, or the good understanding between nations upon which peace depends; in the obligation of Members to submit any dispute arising between them, and likely to lead to a rupture, to inquiry by the Council—unless they submitted it to arbitration or adjudication; in the Council procedures; and, finally, in the sanction provisions. In all these

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[1] Compare the draft proposed in the First Committee, *Records of the Ninth Ordinary Session of the Assembly, Minutes of the First Committee*, p. 122, paras. 9 and 10.

[2] *Records of the Ninth Ordinary Session of the Assembly, Minutes of the First Committee*, p. 69.

[3] *Records of the Ninth Ordinary Session of the Assembly, Minutes of Plenary*, p. 169. See, similarly, M. Cassin (France) in the First Committee, *ibid., Minutes of the First Committee*, p. 75.

stipulations and others, the Members of the League recognized the interest of the organized world community in such disputes and matters.

45. Chapter II of the General Act dealing with judicial settlement had obvious similarities to, and areas in common with, Article 13 of the Covenant. If it is left to one side, the two instruments stand in sharp contrast. The Act provides in Chapter I for compulsory conciliation, but it is not compulsory conciliation by the Council; rather the conciliation commission is established on a bilateral basis by the two parties. "Disputes of every kind" between two or more parties can be submitted to the Commission which, with the assistance of the parties who are entitled to be heard, is charged with elucidating the matters in dispute, collecting all necessary information and attempting to bring the parties to an agreement. It has the right to propose terms of settlement. Unless otherwise agreed, the Commission meets in private, and its procès-verbal which states whether agreement has been achieved and, if need arises, the terms of the agreement, is published only at the decision of the parties. If this procedure is unsuccessful, any dispute that cannot be subjected to judicial settlement under Chapter II may be brought before an arbitral tribunal under Chapter III. This tribunal is again set up by the actions of the parties. In the absence of agreement to the contrary, it is subject to the provisions of the 1907 Hague Convention for the Pacific Settlement of International Disputes and, so far as the rules applicable to the dispute are concerned, to Article 38 of the Statute of the Permanent Court.

46. The essence of these two chapters on conciliation and arbitration is their bilateral, non-universal character. Disputes are to be resolved by bilateral institutions and procedures, established by and under the control of the pairs of parties. The bilateralism also appears from the provision for entry into force—two accessions—, from the reciprocal character of the accessions (the final sentence of Art. 38) and of the reservations (Art. 39 (3)), and from the expressly dispositive character of many provisions which allow the procedures and institutions of the Act to be modified by agreement. The rest of the world is not seen as having any interest at all in the disputes and in the procedures for resolving them, except to the extent that a particular State may be involved. Even in this final case the parties have a choice whether to invite a third State to intervene in conciliation (Art. 35).

47. M. Rolin (Belgium) made the point about the essential differences between the two systems very well in explaining why he thought Sir Cecil Hurst's original fears were unfounded:

> "If those fears had seemed to him well founded, he, M. Rolin, despite his desire to attain to a unification in arbitral matters, would have preferred to give up his idea for the interest of the League of Nations must come before everything else. But, in his view, no such danger existed. In point of fact, arbitration and conciliation had a much longer history than the League, though they had been much discussed in Geneva during the past eight years; nor were those procedures peculiar to the League. Arbitration and conciliation might be described as institutions concurrent with, but not competing against, the League of Nations, for they aimed at the same objects. Arbitration procedure had existed from the earliest antiquity and it would have been impossible for the Covenant not to make provision for it.
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> Mention had been made of the Statute of the Permanent Court of International Justice. That Court, though created by the League of Nations, was only in a partial sense one of its organs. It did indeed render

advisory opinions, but, in addition, it was an international organ appointed to give decisions on disputes between States. States not Members of the League had been invited to accede to it and they had not raised any objection of principle, for it would not entail for them legal relations with the League of Nations.

What was partly true of the Permanent Court was entirely true of arbitration. The intervention of the Council of the League was not implied as a matter of necessity in the General Act: the latter had been regarded as being of use in connection with the general work of the League, but it had no administrative or constitutional relation with it. Doubtless, the undertakings covered by Articles 13, 14 and 15 of the Covenant had been extended. It had been desired to give States the means of carrying to the extreme point their arbitration obligations, but it had not been proposed to annex this procedure to the League of Nations [1]."

48. Because the procedures are basically different it by no means follows that they have no impact on each other. It is possible, on the contrary, that they might be applicable to one and the same dispute, for the Act can be read as providing a procedure for the peaceful settlement of *all* international disputes. The relationship between other procedures and those laid down in the Act is indeed dealt with in several of its provisions (Arts. 17-19, 29, 30 and 31). As the Committee on Arbitration and Security stated [2], the Act's provisions are generally subsidiary to other procedures. The effect of the Act on League procedures is not dealt with by the Act itself. Rather, the Assembly resolution opening the Act for accession [3] declares—

> "that such undertakings [relating to the peaceful settlement of international disputes] are not to be interpreted as restricting the duty of the League of Nations to take at any time whatever action may be deemed wise and effectual to safeguard the peace of the world; or as impeding its intervention in virtue of Articles 15 and 17 of the Covenant, where a dispute cannot be submitted to arbitral or judicial procedure or cannot be settled by such procedure, or when the conciliation proceedings have failed".

The competence of the Council to intervene would seem to follow from this resolution and from the terms of the Covenant (especially Art. 20). Thus, there was never any doubt that the Council could continue to deal with the Ethiopian-Italian question during 1935 when aspects of it were being considered by a commission set up under a bilateral treaty of amity, conciliation and arbitration. On the other hand, the Council might refuse to intervene in a matter submitted to a bilateral procedure unless both parties or the institution sought its aid, as indeed it had done not long before the General Act was adopted [4].

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[1] *Records of the Ninth Ordinary Session of the Assembly, Minutes of the First Committee*, p. 71.

[2] *League of Nations Official Journal 1928*, p. 1146.

[3] Paragraph 7; text in Annex II. See also Model Convention a, Article 36, Model Convention b, Articles 24 and 29, Model Convention c, Article 23.

[4] The case of the *Cruiser Salamis*, *Records of the Ninth Ordinary Session of the Assembly, Minutes of Plenary*, p. 212. See also the Council resolution of 28 September 1923, quoted by M. Holsti, the Rapporteur within the Committee on Arbitration and Security who prepared an initial draft of the models incorporated in the General Act, *League of Nations Official Journal 1928*, p. 658.

49. The uncertainties arising in this area have been met in some cases by reservations made by the parties. This is the case with New Zealand and France, whose reservations on this point will be discussed below. Here it is sufficient to note that those preparing any type of procedure or institution established to deal with all international disputes in 1928 would have had to take account of the existence of the League and its procedures. But taking account of it and taking a tentative step towards reconciling the overlap of competence does not integrate one procedure with the other.

(c) *The General Act and Non-Members of the League*

50. Those responsible for drafting the Act contemplated throughout that non-members would be able to accede. They were therefore careful to avoid formulations which might increase the hesitancy of any non-member which was interested in acceding. Thus, the final sentence of Article 17 was added in preference to that to be found in the equivalent provisions of the Locarno treaties which referred to Article 13 of the Covenant [1]; references to Article 15 of the Covenant (which deals only with disputes between Members) were supplemented by the addition of references to Article 17 in anticipation of accession by non-members [2]; references to Articles 15 and 17 of the Covenant were removed from the text to the resolution [3]; and a proposal that the Acting President of the Council have a residual power to appoint members of arbitral tibunals and conciliation commissions was replaced, in respect of tribunals, by a procedure based on the 1907 Hague Convention [4].

51. Consistently with this approach, Article 43 (1) of the Act provides that the Act is open to accession by all—

> "Heads of States or other competent authorities of the Members of the League of Nations and the non-Member States to which the Council of the League of Nations has communicated a copy for this purpose".

On the very day the Act was opened for accession the Council decided to extend this invitation to nine non-member States [5]. Those States had the same rights to accede as the then 55 Members and they were not asked to commit themselves in any way to League procedures—for instance, those laid down in Article 17 of the Covenant. The nine, it would appear, were an almost complete group of non-members [6]. Moreover, according to the last list of Signa-

[1] *Records of the Ninth Ordinary Session of the Assembly, Minutes of First Committee*, p. 61.

[2] *Report of the Committee on Arbitration and Security, League of Nations Official Journal 1928*, pp. 1145, 1148.

[3] *Records of the Ninth Ordinary Session of the Assembly, Minutes of Plenary*, pp. 486, 488.

[4] *Report of the Committee on Arbitration and Security, League of Nations Official Journal 1928*, pp. 1145, 1147. See also the First and Third Committee Joint Meeting, *Records of the Ninth Ordinary Session of the Assembly, Minutes of First Committee*, pp. 82-83; see Art. 6 (3).

[5] *League of Nations Official Journal 1928*, pp. 1669-1672. For the letter of invitation see *ibid.*, *1929*, p. 352.

[6] Compare for example, the lists of States attending the conference and invited to accede to the International Convention Relating to Economic Statistics, of December 1928, *League of Nations Official Journal 1929*, pp. 509-510. They include in addition to those invited to accede to the General Act, Danzig, Iceland and the Sudan. Sometimes the small European States—Andorra, Liechtenstein, Monaco and San Marino—and the Hedjaz, were also included, e.g., *ibid.*, *1925*, pp. 489, 607.

tures, Ratifications and Accessions in respect of Agreements and Conventions concluded under the auspices of the League of Nations, published in 1944, the League Secretariat considered that 11 States, which were Members of the League when the Act was concluded but which were no longer Members, were still entitled to accede [1].

(d) *The Significance of the Powers Conferred by the General Act on Organs of the League of Nations*

52. The French Annex states that there was a close link between the Act and the structures of the League of Nations system. How close was the link and what was its significance? This question has already been dealt with in relation to the Permanent Court. So far as concerns League organs, powers are conferred by the General Act by five groups of provisions. Three are concerned with conciliation: the first with the appointment of the commission and the second and third with administrative services. The commissions are to consist of five members, three of whom are appointed by agreement. If the appointments are not made in the prescribed period, a third Power or the Acting President of the Council can be asked by the parties to make the appointment. If those procedures fail, two further methods are provided for. (The Rapporteur envisaged two sanctions as well [2].) The procedure, then, is but one of five or seven methods of appointment and it is, moreover, dependent on the agreement of the two parties.

53. The second provision states that the commission is to meet at the seat of the League unless it be otherwise agreed or the commission's President otherwise decides (Art. 9 (1)). Again the involvement of the League is not obligatory and an approach for assistance to another organization is not forbidden. This is true also of the third provision: the Commission can request the Secretary-General of the League of Nations to afford it his assistance (Art. 9 (2)).

54. The fourth provision—conferring power on the Council of the League to invite non-members of the League to accede—is perhaps of greater significance. This power (Art. 43 (1)) was exercised on the day the Act was opened for accession. In fact none of the States invited acceded.

55. The final group of provisions conferred on the Secretary-General of the League the regular range of depositary functions: to provide certified copies of the Act to Members and to those States invited to accede and to advise them of instruments deposited with him; to receive instruments of accession and declarations extending the scope of accessions or abandoning part or all of the reservations; to receive instruments of denunciation; to maintain lists of the parties; and to register the Act under Article 18 of the Covenant on its entry into force.

56. The significance of the demise of the League on these provisions and the resulting impact on the Act as a whole are considered below. For the moment, it is sufficient to notice their unimportance in themselves and in the

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[1] Annex to the *Report on the Work of the League for the Year 1942-1943. League of Nations Official Journal, Special Supplement No. 193*, C. 25, M. 25, 1943. V. Annex, p. 48. ("2. Open to Accession by: . . .".) Of those listed, only four States (Brazil, Costa Rica, the USSR, and the USA) had been invited. This listing accords with the general practice; para. 97, below.

[2] *Records of the Ninth Ordinary Session of the Assembly, Minutes of First Committee*, p. 60.

overall context of the Act. They do not, especially when taken with the material in the preceding section, put in doubt M. Rolin's conclusion that the General Act had no administrative or constitutional relationship with the work of the League [1].

(e) *The Significance of the New Zealand and French Reservations relating to the League of Nations*

57. The New Zealand and French accessions are subject to reservations which preserve certain of the powers of the Council of the League. The French Annex argues that the links between the Act and the League were emphasized by these and one other reservation. Were they? What was the significance of the reservations relating to the League?

58. The Australian, Canadian, Indian and United Kingdom accessions contain the same reservations as New Zealand's, and the Italian accession is similarly qualified. These reservations recognized that some disputes might fall under the jurisdiction of both the Council and the institutions established under the Act. But, once again, it does not follow that the reservations emphasize the links between the two instruments. Rather they attempt to keep the procedures separate and to establish in advance a method for determining which is to be applicable. This point can be made clearer by a consideration of the background to the reservations of this kind.

59. The possibility of such reservations being attached to declarations made under Article 36 (2) of the Statute of the Permanent Court was considered in the First Committee of the Assembly of the League in September 1924 in response to an Assembly resolution which, *inter alia*, raised the question of rendering "more precise" the limits of the terms of Article 36 (2) of the Statute so as to facilitate the more general acceptance of compulsory jurisdiction [2].

60. The First Committee (of which M. Politis (Greece) was Rapporteur) reported as follows:

> "Careful consideration of the article has shown that it is sufficiently elastic to allow of all kinds of reservations . . .
>
> We can imagine possible and therefore legitimate, reservations either in connection with a certain class of dispute or, generally speaking, in regard to the precise stage at which the dispute may be laid before the Court. While we cannot here enumerate all the conceivable reservations, it may be worth while to mention merely as examples those to which we referred in the course of our discussions.
>
> . . . . . .
>
> It might also be stated that the recognition of the compulsory jurisdiction of the Court does not prevent the parties to the dispute from agreeing to resort to a preliminary conciliation procedure before the Council of the League of Nations or any other body selected by them, or to submit their disputes to arbitrators in preference to going before the Court.

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[1] Para. 47 above.

[2] Resolution of 6 September 1924, *Resolutions and Recommendations of the Assembly adopted during its Fifth Session*, p. 47; see also the speeches by the two Prime Ministers, Mr. MacDonald and M. Herriot, which led to the draft resolution being submitted by the British and French delegations, *Records of the Fifth Ordinary Session of the Assembly, Minutes of Plenary*, pp. 41-45 and 51-54.

A State might also, while accepting compulsory jurisdiction by the Court, reserve the right of laying disputes before the Council of the League with a view to conciliation in accordance with paragraphs 1-3 of Article 15 of the Covenant, with the proviso that neither party might, during the proceedings before the Council, take proceedings against the other in the Court.

It will be seen, therefore, that there is a very wide range of reservations which may be made in connection with the undertaking referred to in Article 36, paragraph 2 [1]."

61. The Assembly adopted a recommendation reading as follows:

"Considering that the study of the said terms shows them to be sufficiently wide to permit States to adhere to the Special Protocol opened for signature in virtue of Article 36, paragraph 2, with the reservations which they regard as indispensable;

Convinced that it is in the interest of the progress of international justice and consistent with the expectations of the opinion of the world that the greatest numbers of States should, to the widest possible extent, accept as compulsory the jurisdiction of the Court,

Recommends

States to accede at the earliest possible date to the Special Protocol opened for signature in virtue of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice [2]."

62. This particular discussion proceeded in the context of a broader consideration of Arbitration, Security and Reduction of Armaments, a consideration which resulted in the preparation of the Protocol for the Pacific Settlement of International Disputes (the Geneva Protocol). Article 3 of that Protocol would have recorded the undertaking of the Parties to it to recognize the compulsory jurisdiction of the Court "but without prejudice to the right of any State . . . to make reservations compatible with the said clause".

63. On the very day the Protocol was opened for signature and the resolution adopted France made a declaration, subject to ratification, accepting the compulsory jurisdiction of the Court subject, *inter alia*, to the—

"... observations made in the First Committee of the Fifth Assembly to the effect that 'one of the parties to a dispute may summon the other before the Council of the League of Nations, with a view to an attempt to effect a pacific settlement as provided in paragraph 3 of Article 15 of the Covenant and, during this attempt to settle the dispute by conciliation, neither party may summon the other before the Court of Justice' [3]."

64. Reservations concerning the Council of the League subsequently appeared in 20 declarations made under Article 36 (2) of the Statute of the Permanent Court. They are to be found in the declarations made by Australia, Britain, Canada, Czechoslovakia (not ratified), France, India, Iran, Iraq (not

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[1] *Records of the Fifth Ordinary Session of the Assembly, Minutes of Plenary*, p. 484; see also, *ibid., Minutes of Third Committee*, pp. 194, 199; and *Minutes of First Committee*, pp. 15-23 for the discussions in that Committee.

[2] Recommendation of 2 October 1924, *Resolutions and Recommendations, op. cit.*, pp. 20-21; for Plenary discussion, especially M. Politis, at p. 192, see *Records of the Fifth Ordinary Session of the Assembly, Minutes of Plenary*, pp. 192-225.

[3] *P.C.I.J., Series E, No. 1*, p. 362.

ratified), Italy, New Zealand, Peru and South Africa. In making its initial commitment, the British Government, as in the 1924 Assembly debate, explained the provision in part by its concern about the state of the law of naval warfare and more generally by reference to its obligations under the Covenant.

65. Thus, the British Foreign Secretary stated at the time of the signature of the clause that—

> "[the proviso] is to cover disputes which are really political in character though juridical in appearance. Disputes of this kind can be dealt with more satisfactorily by the Council, so that the conciliatory powers of that body may be exercised with a view to arriving at a friendly settlement of the dispute. This formula places the United Kingdom in much the same position as a State which has agreed to a treaty of arbitration and conciliation providing for the reference of all disputes to a conciliation commission before they are submitted to judicial settlement. The formula is wide in character because the extent to which it operates depends on the Council itself. It would cease to operate from the moment when the Council decided that it was better that the question should be submitted to the Court, and therefore declined to keep the dispute under consideration. Within these limits, however, the provisio would apply to any justiciable dispute, whatever its origin. It would extend, for instance, to disputes arising out of cases where it had been necessary for the United Kingdom to take action at the instance of the Council in pursuance of its obligations as a member of the League [1]."

66. When the question of accession to the General Act was raised within the Commonwealth, the British Government, with general support, suggested that reservations similar to those applying to the optional clause should be included [2]. Thus acceptance of the General Act should not impair its right to bring disputes before the Council of the League [3]. Specifically, the United Kingdom Government (asserting that "any State" can accede to the Act) reasoned that—

> "while there is no difficulty, as against other members of the League concerned, in preserving our right to bring non-justiciable disputes before the Council in accordance with the provisions of the Covenant, this is by no means the case as regards non-members, who are not under any obligation to have any dispute brought before the Council at all. These considerations constitute in our view a strong argument for confining our acceptance of the General Act to States members of the League. Such a restriction would not in any way affect our obligation to

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[1] Quoted in the *White Paper on the signature by His Majesty's Government in the United Kingdom of the Optional Clause to the Statute, Command paper 3452*, para. 10; see also paras. 15-24, especially 24 (3).

[2] See, e.g., the view expressed at the 1930 Imperial Conference. *Summary of Proceedings, Part VII [United Kingdom] Command paper 3717; Appendices to the Journals of the [New Zealand] House of Representatives 1931, A6.* See also the *Memorandum on the proposed accession by His Majesty's Government in the United Kingdom to the General Act of 1928 for the Pacific Settlement of International Disputes, Command paper 3803*, para 8. See p. 404, *infra.*

[3] See telegrams of 8 January 1930, and of 4 July 1930, para. 2 in *Imperial Conference, 1930. The General Act for the Pacific Settlement of Disputes.* (Document printed for the Conference.) E. (30) 22, pp. 10, 11-12. In accordance with Article 47 of the Rules of Court, this document will be made available to the Court.

> have justiciable disputes with any non-member which might sign the Optional clause decided by the Permanent Court. Moreover, it would, of course, be no bar to the conclusion of bilateral arbitration treaties with non-members of the League, such as the United States and Russia. Such bilateral treaties are in fact the only kind of arbitral engagements which any State not a member of the League is likely to make. In the circumstances we are disposed to think that it would be best to exclude from the procedure of the General Act disputes with any State which is not a member of the League [1]."

This specific concern was embodied in reservation 1 (v) to the accessions of Australia, Canada, India, New Zealand and the United Kingdom: disputes with any party to the General Act which is not a member of the League of Nations are excluded.

67. The overall purpose of all three reservations—1(v), 2 and 3—was, then, to establish the general primacy of the Covenant system and to enable a party which had agreed to a different procedure to appeal to the League procedure, if it was applicable, in preference to the other. There was no suggestion of a link; quite the contrary.

2. The Effect of the Demise of the League of Nations on the Particular Provisions of the General Act conferring Powers on League Organs, and on the Act as a Whole

68. The French Annex asserts that so closely did the Act appear to be integrated into the structure of the League of Nations that after the demise of the Geneva organization the necessity was recognized of proceeding to a revision of the Act with a view to substituting new terms for those referring to a defunct system. The significance of the preparation of the Revised Act is considered later. Here the Memorial looks at two questions: what effect did the demise of the League have on the provisions of the Act referring to it? What is its significance for the Act as a whole?

69. The Government of New Zealand stated at the interim measures stage that the provisions relating to appointments by the Acting President of the Council and to the invitation power of the Council "will obviously have lapsed":

> "The considerations on which this view mainly depends [it was explained [2]] are the demise of the League itself, the absence of any action—whether taken in a United Nations context or otherwise—to effect or recognize a transfer of the powers reposed in the League Council and its acting President, and the decision of the United Nations General Assembly in 1949 to establish a revised General Act, which would confer powers on United Nations organs, but would leave undisturbed the provisions and operation of the 1928 Act.
>
> In the view of the New Zealand Government, therefore, Article 43 and Article 6 of the General Act, in so far as they purport to entrust powers to the League Council and to its acting President, are now without effect.
>
> The same attitude would apply to the provisions for administrative assistance to conciliation commissions, although as noted above the

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[1] *The General Act for the Pacific Settlement of Disputes, op. cit.*, p. 12.

[2] The written answer of 1 June 1973 to the question put by Judge Sir Humphrey Waldock. See p. 374, *infra*.

spirit of their provisions—as of that conferring the appointment power—could still be complied with."

70. The depositary provisions raise different issues since action has been taken with the purpose of transferring functions of a depositary character from the League to the United Nations. The resolutions adopted by the Assembly of the League and the General Assembly of the United Nations are set out in Annexes III and IV.

71. The Secretary-General has reported that pursuant to these resolutions "all multilateral treaties deposited with the League of Nations were transferred to the custody of the United Nations" and that, since then, "States have taken various actions (signature, ratification, accession, denunciation, etc.) in respect of a number" of them. Further, "in the exercise of depositary functions under the above-mentioned resolution, the Secretary-General has informed all interested States of new signatures, receipt in deposit of instruments of ratification or accession, and notifications of succession, as well as various other notifications communicated to him in accordance with the provisions of the treaties concerned [1]."

72. The practice of States and of the Secretary-General appears from the annual lists: thus he has received in excess of 200 instruments in respect of more than 30 treaties which either had not been formally amended or had not been formally amended for the States becoming party to them. It is, moreover, a practice which has been explained to United Nations organs and not challenged. Thus, in 1953 when the 1926 Slavery Convention was being amended:

> "Some delegations expressed the opinion that a protocol was desirable for the purpose of transferring to the United Nations the functions and powers exercised by the League of Nations under the International Slavery Convention so that non-member States which were Parties to the Convention might give their assent to such a transfer. The same delegations also pointed out that there were several precedents.
>
> 10. The Secretary-General's representative said that the Secretary-General considered himself bound by the terms of part A of section I of General Assembly resolution 24 (1) of 12 February 1946. In accordance with the provisions of that resolution, the Secretary-General had always confined himself to the exercise of purely administrative functions and there had never been any objections. Thus, he had accepted, and notified the States concerned of, the depositing with him of instruments relating to Conventions which entrusted the Secretary-General of the League of Nations with the functions of depositary and which had never been the subject of a protocol of transfer. The adoption of a protocol, which the General Assembly had frequently thought desirable, would nevertheless not reflect upon the status of States which, by depositing an instrument of accession or ratification with the Secretary-General, had become parties to such Conventions [2]."

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[1] *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions. List of Signatures, Ratifications, Accessions, etc., as at 31 December 1971*, introduction, paras. 6 and 15. See also *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (August 1959) ST/LEG/7*, pp. 65, 67, which identifies the League Treaties transferred by reference to the 1943 League List. This list, of course, included the General Act.

[2] United Nations, *Official Records of the Eighth Session of the General Assembly*, Annexes, Agenda Item 30, doc. A/2517.

Similarly, in 1955, in connection with the International Convention concerning the Use of Broadcasting in the Cause of Peace of 1936—

> "... a question arose in the Third Committee whether conventions concluded under the auspices of the League of Nations required a General Assembly decision in the form of a protocol of transfer in order to remain in force. The representative of the Secretariat replied that the General Assembly had decided the issue in resolution 24 (I), which provided that such conventions should have continuing effect and which authorized the Secretary-General of the United Nations to carry out the custodial functions of the Secretary-General of the League. The Secretary-General has acted as the depositary of League of Nations conventions even when there had been no protocol of transfer. He had received accessions and ratifications to a number of such instruments. All member States had been notified and in no case had any question of validity arisen [1]."

73. The General Assembly in resolution 841 (IX) also noted that, in accordance with resolution 24 (I), the custodial functions mentioned in the Convention had already been assumed by the Secretary-General and that the Convention was still in force [2].

74. The purely administrative and secretarial character of the depositary function, emphasized in the practice (for instance in General Assembly resolution 24 (I) referred to above), is confirmed by the opinion of the Court in the case concerning *Reservations to the Genocide Convention* [3], by the relevant provisions of the Vienna Convention on the Law of Treaties (Arts. 76 and 77), and by the work of the International Law Commission on which those provisions are based.

75. The preceding paragraphs show that the impact of the demise of the League on particular provisions of the Act, as in the case of the demise of the Permanent Court, was very small indeed, and that the most substantial potential impact was forestalled by the transfer of the depositary functions.

76. The question still remains as to the effect of these minimal impacts on the Act as a whole. Practice relevant specifically to the continued force of the General Act is set out in the next two subsections. It is convenient here to note practice bearing on other treaties which have been affected in somewhat similar ways by the demise of the League, treaties, that is, which conferred administrative powers on the League, which provided for invitations by the Council, and which made the Secretary-General depositary.

77. As the General Assembly and League Assembly resolutions referred to earlier indicate, a number of League treaties in addition to creating depositary functions, also conferred powers of a technical or non-political character on League organs. The resolutions themselves demonstrate an understanding that the treaties will remain in force but that action may need to be taken to activate certain of their administrative provisions. This understanding was made express in a report by the Sixth Committee to the Third Committee on a

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[1] *Repertory of Practice of United Nations Organs*, Vol. 5, Art. 98, para. 40.

[2] For a convenient summary see United Nations *Official Records of the 20th Session of the General Assembly*, Annexes, Agenda Item 88, doc. A/5759, paras. 40-46. That document shows that all the five parties to the Convention that responded in 1964-1965 to suggestions that the Convention be opened to wider participation considered it still to be in force.

[3] *I.C.J. Reports 1951*, p. 15.

proposal for the assumption, by way of an amending protocol, by the United Nations of powers exercised by the League of Nations under narcotics conventions. The report, which was adopted without opposition on this issue, read in part as follows:

> "The question may be asked whether or not, as parties to the original instruments, those States which do not become parties to the protocol will still remain under any obligations, by virtue of the original instruments, vis-à-vis those other parties to the original instruments which do become parties to the protocol. The answer appears to be in the affirmative. It is clear that the actual machinery of international control set up by the original instruments will be altogether dissolved, at any rate from the date at which the protocol comes into force. Certain parts of the original instruments will thus be a dead letter, so far as concerns any State which is not a party to the protocol. But it may be pointed out that the protocol has plainly been drafted on the assumption that, despite the dissolution of the League, those parts of the original instruments which are not amended by the protocol are still in effective operation. This assumption appears to be correct. There are important obligations (e.g., under the Geneva Convention of 19 February 1925) which do not depend on the continuance of the machinery of international control established under the original instrument [1]."

78. The powers which were conferred on League organs by the narcotics conventions were, by any possible measure, much more extensive and important than those conferred in the General Act. Thus the 1925 convention to which the report refers set up a permanent central board which had close ties with the Council and the Secretary-General (e.g., the Council elected the Board's members and could consider matters arising from its work) and extensive supervisory functions; the Secretariat, in addition, was to receive copies of laws, the League Health Committee had a certain role, and the regular depositary functions were conferred. Other amending protocols proceeded on the same basis of continuity.

79. The Council of the League was given the power to invite non-members of the League to accede to more than 30 treaties. The question of opening those treaties which had not been formally amended 15 years earlier by the protocol method to accession by other States was discussed in the International Law Commission in 1962 and 1963 and in the General Assembly in those years and in 1965, and was the subject of consultations with governments and a report by the Secretary-General. All this activity clearly proceeded on the basis that the treaties had not lapsed simply because of the ineffectiveness of the invitation provision. On the contrary, the treaties—or some of them—were seen as being of possible interest to new States. The immediate problem was accordingly the technical one of reopening them for accession. So the Secretary-General's report, prepared in 1965, records the understanding of the parties to several of the treaties that they considered selected treaties still to be in force and of value; others were seen of less value and in need of adaptation; while still others were considered to be superseded or to have otherwise ceased to be of interest. The lapse of the invitation power was not seen in any case to be a factor in their opinions. The Assembly acted

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[1] United Nations, *Official Records of the Second Part of the First Session of the General Assembly*, Sixth Committee, Annex, doc. A/206 (Rapporteur, Mr. K. H. Bailey (Australia)).

on this report by authorizing the issuing of invitations in respect of 11 League treaties [1].

80. Finally, there has never been any suggestion that the demise of the League with its consequences for depositary functions has had any effect whatever on the continued force of the many treaties involved.

3. The Effect of the Demise of the League on the Reservations to the New Zealand Accession which Refer to the League of Nations

81. The French Annex discusses the effect of the demise of the League on the New Zealand reservations concerning the powers of the Council of the League and excluding disputes with parties not members of the League.

82. Before the impact of the dissolution of the League on these reservations is considered, a preliminary issue, raised in the Annex, should be considered. The French Government contends that—

> "if the Act were in force, there would be uncertainty as to the scope of the reservations by Australia and New Zealand, an uncertainty entirely to the advantage of the latter two countries and thus unacceptable".

This contention appears to be based on the proposition that the uncertainty as to the scope and significance of the reservations, said to result from the dissolution of the League, can be resolved and taken advantage of only by Australia and New Zealand. This proposition is in direct conflict with two uncontroverted principles which are, moreover, confirmed by the specific terms of the General Act. The first is that it is for the Court, and not for the parties, to interpret provisions relating to its jurisdiction and to decide disputes about its jurisdiction. This broad principle, declared in Article 36 (6) of the Statute, has been applied to disputes about the meaning of reservations; and this more specific power is also confirmed by Article 41 of the General Act, read with Article 37 of the Statute of the Court. The second principle is that, as the jurisdiction of the Court depends on the consent of the parties, the extent of that jurisdiction must be determined by considering the manifestations of that consent, in this case the *two* accessions and the conditions to which they are subject. As the Court put it in the *Anglo-Iranian Oil Co.* [2] case, if one acceptance is more limited than the other, it is to the more limited one that the Court must look. This principle—that one party can take advantage of the limits in the other party's acceptance—is sometimes referred to as the principle of reciprocity and, again, is expressly stated in the Act:

> "If one of the parties to a dispute has made a reservation, the other parties may enforce the same reservation in regard to that party." (Art. 39 (3).)

83. It is the Court, it is submitted, that must decide any question about the scope of the reservations, and it must apply that finding equally to the two parties—to the extent, of course, that a decision on such questions is necessary to its disposition of the present stage of the case.

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[1] General Assembly resolution 2021 (XX); see also United Nations, *Official Records of the 20th Session of the General Assembly*, Annexes, Agenda Item 88, doc. A/5759.

[2] *I.C.J. Reports 1952*, p. 103.

84. The purport of, and background to, the reservations—in the French accession as well as in the New Zealand one—relating to the powers of the Council of the League have already been indicated. Briefly they were designed to enable an appeal to be made, within defined circumstances, to League procedures in preference to those established in the Act. The reservation relating to membership in the League had the same purpose and effect.

85. In the letter of 1 June 1973, given in answer to Judge Sir Humphrey Waldock's question, the New Zealand Government recognized—

> "... that the impairment of the efficacy of the General Act, which stems from the demise of the League of Nations, extends to the reservations [2 and 3] that specifically relate to the League ...
>
> Among the reasons for maintaining the reservations are the following: they reflect an unchanging New Zealand policy; their wording is in keeping with the frame of reference in the text of the General Act itself; and no change in circumstances can have caused these reservations to become incompatible with the continued operation of the treaty instrument to which they relate.
>
> As the 1948 and 1949 debates in the General Assembly have shown, parties which had attached the same or similar reservations to their accessions to the General Act have not doubted the continuing force of these accessions since 1946. This has been true even of parties such as the United Kingdom and New Zealand which retained political doubts stemming from the fact that the Act lay outside the Covenant and Charter systems. The same position has been taken in relation to those declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice which were subject to a reservation relating to the Council of the League."

86. The first part of the final paragraph is elaborated later. The final sentence of the paragraph is evidenced by the invocation of such declarations in cases before this Court and by the express termination and replacement of such declarations since 1946.

87. The letter of 1 June concluded:

> "... the New Zealand Government believes that in these proceedings, it will never be necessary to resolve [the question of the exact effect of its reservations]. With this qualification, it may be helpful to indicate that the New Zealand Government inclines to the view that the reservations relating to the League must now be regarded as without legal effect.
>
> The grounds for this view are those already adduced in relation to the question of the proper construction of Articles 6 and 43 of the General Act. The very facts that the League Council no longer exists, and that no action has been taken—through the United Nations or otherwise—to effect or recognize a transfer of the Council's functions to a corresponding United Nations body, would seem to militate against any attempt to provide the reservations with a United Nations connotation. At the same time, the New Zealand Government would not be concerned to resist such a construction if it were urged in a bilateral context by another party, because that construction would accord with the spirit in which the reservations were made and have been maintained."

88. The condition excluding disputes with parties not members of the League of Nations was not specifically discussed in the letter of 1 June. It might now be viewed in four different ways:

(i) it might be said that because all parties to the Act are not now Members of the League, it excludes all disputes to which New Zealand is a party;
(ii) it might be said that it excludes disputes with States parties to the Act which were not members of the League when the League was in existence;
(iii) it might be said that it should now be read as excluding disputes with parties which are not members of the United Nations, the United Nations being, either by general law or agreement, a successor of the League in this context;
(iv) it might be said that, because it refers to a non-existent organization, it should be treated as not at present having any effect; either of two consequences might follow: *(a)* the whole accession would fall or *(b)* only the reservation would be treated as having no effect.

89. It is the contention of the Government of New Zealand that (ii) and (iv) *(b)* are the better views. Support for this contention is to be found in the wording of the reservation, its purpose, and relevant treaty practice of the League of Nations and the United Nations.

90. The reservation clearly presupposes, as does reservation 1 (iii), a positive membership category—that is to say, that there are Members of the League of Nations. It is only the disputes with those parties which did not come within that category when it existed which are now excluded. As Judge McNair has said in a related context, the reference to membership is descriptive, not conditional [1].

91. A similar issue has been before the Court in connection with Article 7 of the Mandate for South West Africa. It provided that disputes between the Mandatory and "another member of the League of Nations" relating to the interpretation or application of the Mandate could be referred to the Permanent Court. On two occasions the Court has concluded that the clause could still be invoked, notwithstanding the dissolution of the League. In its 1950 Advisory Opinion on the *International Status of South-West Africa*, the Court stated that:

> "Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of the opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions [2]."

The Court repeated this view in the formal part of its opinion in holding, by twelve votes to two, that the Union of South Africa continued to have the international obligations stated, *inter alia*, "in the Mandate . . ., the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute [3]." Sir Arnold McNair, one of the two Judges who dissented from this holding in so far as it recognized an obligation to accept the administrative supervision of the United Nations, nevertheless agreed that judicial supervision had been preserved, and went on to make explicit what had been implied in the Court's opinion:

> "The expression 'Member of the League of Nations' is descriptive, in

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[1] Next paragraph.
[2] *I.C.J. Reports 1950*, p. 138.
[3] *Ibid.*, p. 143.

> my opinion, not conditional, and does not mean 'so long as the League exists and they are Members of it' [1]."

Judge Read, the other judge who dissented from the majority holding, was also of the opinion that the judicial but not the administrative supervision continued:

> "No problem exists, as regards the compulsory jurisdiction of the Permanent Court, which was transferred to this Court by Article 37 of the Statute [2]."

Part of Judge Read's summary of the position after the termination of the existence of the League reads:

> "The legal rights and interests of the Members of the League, in respect of the Mandate, survived with one important exception—in the case of Members that did not become parties to the Statute of this Court, their right to implead the Union before the Permanent Court lapsed."

Finally, Judge Read, in explaining that a mandated territory is not left to the uncontrolled administration of the Mandatory Power, pointed, *inter alia*, to the fact that the Union was subject to the compulsory jurisdiction of the Court under Article 7 of the Mandate and Article 37 of the Statute [3]: thus, the Court was unanimous in holding that the judicial supervision of the Mandate survived the dissolution of the League and the Permanent Court. The inescapable implication is that, as Sir Arnold McNair put it, former Members of the League were "Members of the League" for the purposes of the jurisdiction clause.

92. The second occasion for a ruling on this matter was provided by the *South West Africa* cases in which South Africa, as Respondent, challenged the right of Ethiopia and Liberia to bring proceedings under Article 7 on the ground that they were not "Members of the League of Nations". Again the Court held that the dissolution of the League did not mean that there were no "Members of the League of Nations" within the meaning of the jurisdictional clause, *South West Africa, Preliminary Objections* [4].

The majority judgment declared at the outset of its discussion of this objection that:

> "This [South African] contention is claimed to be based upon the *natural and ordinary meaning of the words employed in the provision.* But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it [5]."

It then turned to a consideration of the spirit, purpose and context of the clause (including the actions taken at the time of the dissolution of the League); and, following that examination, it held that those States which were Members of the League at the time of its dissolution continued to have the right to invoke the compulsory jurisdiction of the Court. It accordingly rejected the preliminary objection.

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[1] *I.C.J. Reports 1950*, pp. 158-159.
[2] *Ibid.*, p. 166.
[3] *Ibid.*, p. 169.
[4] *I.C.J. Reports 1962*, p. 319.
[5] *Ibid.*, p. 336.

93. What, then, was the spirit, purpose and context of the identical reservations made by Australia, Canada, India, New Zealand and the United Kingdom? It will be recalled that, in discussions of the compulsory jurisdiction of the Permanent Court under Article 36 (2) of the Statute and in the preparation of the General Act, the question of the relationship between the two sets of procedures—the Court and the Act on the one hand and the League on the other—had caused some anxiety. The concern that the League procedures should be available resulted in general understandings—reflected, for instance, in the 1924 and 1928 Assembly resolutions relating to the compulsory jurisdiction of the Court under Article 36 (2), and in paragraph (7) of the resolution relating to the General Act—that the Covenant procedures were available in parallel, and that States could make their position clearer by making a specific declaration or reservation protecting these procedures.

94. Taking account of the spirit, purpose and context of the reservation, what attitude should now be adopted to it? How should it be interpreted and applied, so that the Act's procedures cannot be used arbitrarily to displace those established in the constitution of the universal organization? The concern that non-members might be able to avoid the procedures of the universal organization and to employ the General Act provisions is now met by the different conceptions of the Charter and its different provisions relating to non-members. While Article 17 of the Covenant underlined the rule that non-members could not be subjected to its procedures for peaceful settlement unless they agreed [1], the Charter asserts a world-wide concern, a universal jurisdiction. The Charter [2], the practice of United Nations organs [3] and an opinion of the Court [4], affirm that the political organs of the United Nations can become involved in matters affecting non-members, whether the latter agree or not.

95. Accordingly, the possibility that the reservation would no longer protect the procedures of the universal political organization, either because a one-time Member of the League was not a Member of that organization or because the reservation was no longer effective, disappears: the Charter itself provides the protection.

96. Many League treaties were and are open to acceptance by "Members of the League". Could States which had been Members when the treaty was adopted or later, but which were Members no longer—either because they had withdrawn or because the League no longer existed—exercise the powers? Both principle and practice (and in particular the purely secretarial functions under General Assembly resolution 24 (1)—functions which do not affect the operation of the instruments or relate to the substantive rights and obligations of the parties) make it clear, to quote the International Law Commission, that in the case of closed treaties, including those where the closure has resulted

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[1] See, e.g., *Status of Eastern Carelia, P.C.I.J., Series B, No. 5*, a case under Art. 17, for a statement of the general principle.

[2] Charter, Arts. 10 (read with Art. 1), 11, 14, 33, 34, 36, 39, 40, 41 and 42.

[3] E.g., General Assembly resolutions 272 (III), 294 (IV) and 409 (VI).

[4] The three non-member States involved were invited to participate in the debates which finally resulted in the General Assembly request for the Advisory Opinion in the *Interpretation of Peace Treaties* case, *I.C.J. Reports 1950*, p. 65. They all refused. Various objections to the Assembly's competence were put forward before the Court (among them the argument that the three States were not Members of the United Nations and had expressly rejected the Assembly's proceedings, *Pleadings, Oral Arguments and Documents*, p. 204), but the Court rejected them and went on to give the opinion requested, *I.C.J. Reports 1950*, pp. 70-71.

solely from the disappearance of the Council of the League, the Secretary-General has not considered it within his powers under the terms of the resolution to accept signatures, ratifications, or accessions from States not covered by the participation clause [1].

97. Therefore, in some cases, former Members of the League could become party only as "Members of the League of Nations". And in fact in several cases they have done so. Annex V lists 11 cases of accessions, and an equal number of ratifications, by States which had been Members of the League to treaties which were open, in the relevant case, only to "Members of the League of Nations". In about a third of the cases listed the State was no longer a Member because it had withdrawn from the still existing organization; and in the remaining cases it was not a Member because the League no longer existed. The Annex also notes that consistently with this practice the League Secretariat used to list former Members of the League as States entitled to accede to closed treaties.

98. If it be thought that, in the light of the foregoing, the appropriate interpretation of the reservation is that it should be treated as no longer having any effect, it is the contention of the Government of New Zealand that *only* the reservation should be treated as having no effect: the accession would continue to stand. There are three distinct reasons for this position:

(i) the continued force of the accession, without the reservation, is consistent with the purpose which the reservation was designed to achieve;
(ii) as noted above, the declarations under the optional clause, as well as accessions to the General Act, which were subject to reservations relating to the League of Nations, have been considered as remaining in force notwithstanding its dissolution; and
(iii) the reservation is of no effect—it is not invalid—and the question of its invalidating the accession as a whole does not arise.

99. The New Zealand Government therefore submits that the reservation should not be seen as excluding the operation of the General Act in respect of the dispute which has arisen between New Zealand and France. Either France, a country which was a Member of the League of Nations from its founding to its dissolution, should be considered to be a "Member of the League of Nations" within the meaning of the reservation, interpreted in its context and in the light of its object and purpose; or the reservation should be treated as not at present having any effect at all and, accordingly, as irrelevant to the present case.

4. The Significance of the General Assembly's Revision of the General Act in 1948 and 1949

100. The French Annex asserts that the present want of validity of the General Act is also to be inferred from the preparation, in 1948 and 1949, of the Revised General Act. This statement is based on the proceedings in the General Assembly and on the wording of resolution 268 A (III) (Annex VI).

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[1] Report of the Commission on its Fifteenth Session, *Yearbook of the International Law Commission*, 1963, Vol. II, p. 187, para. 26. See similarly ST/LEG/7, p. 68: "Some agreements . . . are closed to further action of any kind, and in such cases the Secretary-General cannot accept signatures, ratifications or accessions." For a specific example of a refusal, see United Nations, *Official Records of the 20th Session of the General Assembly*, Annexes, agenda item 88, doc. A/5759, para. 111.

This section will accordingly consider in turn the proceedings which led to the resolution and the resolution itself.

101. The initial proposal was made in February 1948 by the Belgian delegation in the Interim Committee of the General Assembly. The proposal was aimed, according to the later Belgian commentary on it, "at restoring to the General Act . . . its original efficacy, impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared". It proposed a resolution of the General Assembly as a means of achieving this result [1]. The draft resolution it proposed was finally adopted with two relevant changes which are noted later [2].

102. In introducing the initial proposal in the Interim Committee the Belgian delegate, M. Joseph Nisot, stated that—

> "The General Act was still in force, but its effectiveness was decreased owing to the disappearance of certain essential parts of the machine, i.e., the Secretary-General, the Council of the League and the Permanent Court of International Justice. The aim of the Belgian proposal was the transfer to the organs of the United Nations, including the International Court of Justice, of the functions which the Act accorded to the organs of the League of Nations and the Permanent Court. The proposal was practical and simple; it could be carried out without delay by a protocol consisting of a few articles; and it would result in the complete re-establishment of one of the most important collective treaties which existed up to the present in the field of the peaceful settlement of international disputes [3]."

103. The same position was adopted in a preliminary report of a subcommittee of which M. Ordonneau (France) was Chairman and Mr. Jessup (United States) Rapporteur:

> "The [Belgian] proposal does not aim at remoulding the General Act, which is still in force and to which the Belgian Government is still a party. Its sole object is to provide for the effective operation of the Act under present conditions by arranging for the transfer of the above-mentioned functions [of organs of the League of Nations and the Permanent Court of International Justice] [4]."

104. A "Note on the proposal of the Belgian Delegation" annexed to this report states flatly:

> "The General Act for the pacific settlement of international disputes of 26 September 1928 is still in force. A great number of States have acceded to it. The aim of the Belgian proposal is to secure that certain adjustments should be made which would restore it to complete efficacy [5]."

105. The Interim Committee's report, incorporating the report of the

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[1] *United Nations* docs. A/AC. 18/18 (11 February 1948) and Add. 1 (10 May 1948).
[2] Paras. 105.1 and 105.2 below.
[3] *United Nations* doc. A/AC. 18/SR. 11, p. 5 (2 March 1948).
[4] *United Nations* doc. A/AC. 18/48, para. 36 (19 March 1948).
[5] *Ibid.*, Annex A. The Secretariat in a History and Analysis of the General Act prepared for the Interim Committee also stated that the Act was in force. *United Nations* doc. A/AC. 18/56, para. 26 (4 May 1948).

relevant subcommittee [1], and proposing the draft which became resolution 268A (III), contains several significant points:

1. The Interim Committee did not propose [2] that the Assembly approve the Revised General Act which was to be prepared. This position was adopted in reaction, at least in part, to the position of the British delegate who, it seems, shared Sir Cecil Hurst's doubts of 20 years before:

   "*While his Government was a party to the General Act, it had acceded* with reservations and now had doubts concerning the value of some of its provisions. He did not object to the draft resolution because it had been made clear that no Assembly approval of the Act as public policy of the Organization was implied."

2. The Committee did not propose that the General Act itself be revised; rather an entirely independent instrument was to be established:

   "*It was noted that, by a resolution of 12 February 1946, the General* Assembly had decided to assume certain non-political functions and activities of the League of Nations and that in this resolution it had determined that it would itself examine, or submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments of a political character.

   The question arose whether, in the light of this, the General Assembly should be advised to adopt the proposed resolution only at the request of a specific number of the parties. In the view of the Belgian representative, the consent of the parties was unnecessary, since, in its final form, his proposal did not suppress or modify the General Act, as established in 1928, but left it intact as also, therefore, whatever rights the parties to that act might still derive from it [3]."

3. The principal Belgian purpose was repeated: the Act would be restored to its original efficacy for those States acceding to it. This was spelled out as follows:

   "Thanks to a few alterations, the new General Act would, for the benefit of those States acceding thereto, restore the original effectiveness of the machinery provided in the Act of 1928, an act which, though still theoretically in existence, has become largely inapplicable.

   It was noted, for example, that the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of parties which are not Members of the United Nations or parties to the Statute of the International Court of Justice."

106. The comment might be made that the Committee's view that the Act "has become largely inapplicable" overstates the case. As was seen earlier, the conciliation and arbitration chapters are scarcely affected by the demise of the League and the depositary functions had been transferred under General

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[1] *United Nations* doc. A/AC. 18/73. The relevant part of the Committee's report is set out in Annex VII.

[2] Cf. *United Nations* doc. A/AC. 18/48, para. 43 and the Belgian and other proposal referred to there.

[3] The resolution referred to is General Assembly resolution 24 (I). The question and the Belgian response might be said to assume that there are still parties to the Act who could be asked to consent.

Assembly and League Assembly resolutions. So far as the Court is concerned, the second paragraph does state the position correctly except for those parties, not bound by the Statute, which might act under Article 35(2) of it. That paragraph also clearly implies, however, that the provisions of the Act relating to the Court were still effective for parties to the Statute [1].

107. The General Assembly then considered the report at its Third Session and adopted the draft resolution proposed. Most of the contributions to the debate in the *Ad Hoc* Political Committee and in the Assembly itself were concerned with the political value of the Act's procedures and with their historical effectiveness, rather than with the Act's continued legal force. Thus, the New Zealand representative expressed doubts about the historical effectiveness of the Act while the French representative, in a statement which may be thought to have some relevance to the continued force of the Act, said that it was a valuable document inherited from the League and it had only to be brought into concordance with the new organization [2]. Once again the Belgian delegation stated on several occasions that the Act was still in force [3]. As the initiator of the proposal, its views are obviously worth considerable weight.

108. It remains only to consider the provisions of resolution 268A (III) itself. The French Annex focusses on two of the preambular paragraphs. The first is that which states that the amendments mentioned "are of a nature to restore to the General Act its original efficacy". This expression, which is to be found in the earliest Belgian proposal, clearly proceeds on the basis, stated in the preceding preambular paragraph and manifest from the drafting history, that the effectiveness of the Act is *impaired* ("diminuée"); it cannot be read as suggesting that the Act was totally ineffective.

109. The second paragraph discussed in the French Annex is that which states that—

> "these amendments will only apply as between States having acceded to the General Act as thus amended and, as a consequence, will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative [4]."

It is said that the final phrase—"in so far as it might still be operative"—is "very dubitative". It is submitted that it is quite clear. The Act has been impaired in various respects; its operation is affected by those impairments.

110. The French Annex then asserts that "the resolution allows for the eventuality of the Act's operating if the parties agreed to make use of it". There is nothing in the resolution which requires agreement to make the General Act binding although the resolution does, of course, provide that the Revised Act can bind only those States which accede to it.

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[1] The French Annex at pp. 349-350 seems to agree; but compare p. 350.

[2] United Nations, *Official Records of the First Part of the Third Session of the General Assembly*, Ad Hoc *Political Committee*, 27th meeting, p. 320 (New Zealand) and *Plenary*, 199th meeting, p. 193 (France).

[3] *Ibid.*, Ad Hoc *Political Committee*, 28th meeting, p. 323 ("still valid"); and *Plenary*, 198th meeting, pp. 176 and 177 ("the rights of the Parties to that Act remained intact"; "the effectiveness [of the Act] had diminished since some of its machinery had disappeared"; and "it would remain in force unchanged").

[4] It is relevant that the particular expressions discussed in the Annex were included in the original draft of the Belgian delegation which had no doubt about the continued force of the Act.

111. This final comment also provides the answer to the third argument that—

> "if the 1928 Act were still in force at the moment when the Revised Act was concluded, it is somewhat difficult to understand the above-cited passage of the General Assembly resolution to the effect that the amendments 'will only apply as between States having acceded to the General Act as thus amended'."

The explanation again is straightforward: a treaty is binding only on the parties to it. Accordingly only those States which accede to the Revised Act are bound by it, and, equally, the rights of those which are parties to the original Act remain unaffected by the revised instrument.

112. The conclusion is clear. Those States involved in the preparation of the Revised General Act proceeded on the basis that the original General Act was still in force. Their task was to prepare an independent, rather more effective, instrument, which would be binding on the parties to it and which would—and could—have no effect on the original instrument.

5. State Practice relating to the Continued Force of the General Act

113. The French Annex states:

> "an examination of the positions adopted by international tribunals and the conduct of States gives further reasons for concluding that the 1928 Act lacks present validity".

114. This proposition and the arguments supporting it will be considered under four heads:

(a) non-action under the final clauses of the General Act;
(b) French practice relating to the continued force of the General Act;
(c) other practice relating directly to the continued force of the General Act;
(d) practice relating to the continued force of bilateral treaties of peaceful settlement containing obligations similar to those in the General Act.

The French contentions relating to the alleged parallelism in States' acceptances under the General Act and the optional clause are considered in Part IV of this Memorial. The attitude adopted by the parties when the Revised General Act was being prepared in 1948 and 1949 has already been reviewed (paras. 100 to 112 above).

(a) *Non-action Under the Final Clauses*

115. "Since the early years of the Second World War, i.e., since the bankruptcy of the League of Nations system became evident, there has no longer been anything to note in this domain [of formalities which characterize the 'life' of a treaty: adherences, reservations, amendment of reservations, withdrawals, etc.]."

116. This silence, the French Annex suggests, cannot be an argument in favour of continuity. What is the significance of this silence? How should it be interpreted?

117. In the first place it should be noted that the final clauses of the Act require action, not silence, for termination. In the event of silence, in the

absence of action, the Act by its very terms "shall remain in force for further successive periods of five years".

118. Secondly, League of Nations and United Nations treaty records include a number of multilateral treaties in respect of which no formal action has been taken for many years and which are nevertheless considered still to be in force. Thus the last formal action relating to the Declaration regarding the Teaching of History (Revision of School Textbooks), of 1937, appears to be the eighteenth definitive signature affixed on 24 June 1939. And yet when the Secretary-General of the United Nations made inquiries about it in 1964-1965 two of the three parties which commented stated that they considered it still to be in force, one expressing the view that it preserved its value and meaning and that it appeared desirable to invite additional States to become parties thereto [1]. The third party thought that it had ceased to be of interest for participation by additional States. The Secretary-General had similar responses in relation to other treaties in respect of which there had been no action of a formal kind for 25 or 30 years [2].

119. Further, formal action has been taken in respect of some League treaties after a lapse of many years. Thus Malawi filed a declaration of succession to the Convention and Statute on the International Régime of Railways and Protocol of Signature of 1923 in 1969, more than 30 years after the last formal action relating to the treaty; and Yugoslavia in 1967 acceded to three 1935 conventions concerning various agricultural questions, thereby becoming the first State to take formal action under the conventions for 25 years [3]. A year or two earlier the Secretary-General had reported that the Statute and Conventions were not of interest for further accession [4].

120. Finally, interpreting silence in terms of intention, especially the intention of States, is hazardous. Fortunately, in the present case there are positive acts as well.

(b) *French Practice Relevant to the Continued Force of the General Act*

121. Three pieces of practice may be recalled. First, France in 1956 and 1957, in the course of the *Case of Certain Norwegian Loans*, referred to the General Act as a treaty binding on France and Norway [5]. Norway did not at any point deny the continued force of the treaty—in fact it had indicated elsewhere that it considered it to be in force [6]. Instead it noted that the Act had not been invoked until the stage of the observations on the Norwegian preliminary objections (and not in the Application or Memorial); that neither the Application nor the Memorial did, as required by the rules, make any

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[1] United Nations, *Official Records of the 20th Session of the General Assembly*, Annexes, Agenda item 88, A/5759, paras. 48-54.

[2] International Convention concerning the use of Broadcasting in the Cause of Peace, 1936 (also para. 72 above); Convention and Statute on the International Régime of Railways, and Protocol of Signature, 1923; International Agreements and Protocols relating to the Exportation of Bones, and of Hides and Skins, Geneva, 1928, *ibid.*, A/5759, paras. 34-47, 91-95 and 119-125 and Add. 1, paras. 3-4, 10 and 16.

[3] ST/LEG/SER. D/5, pp. 453, 447-449.

[4] A/5759, paras. 91-95, 126-132, 136 *(b)* and 137 *(f)-(h)*.

[5] *I.C.J. Pleadings*, Vol. I, pp. 172, 173 and 180 (observations on the Norwegian preliminary objections; 31 August 1956), 301 (note of 17 September 1956 to Norwegian Ambassador); and Vol. II, p. 60 (French Agent in oral hearings, 14 May 1957).

[6] Para. 133 below.

reference to the "grounds" related to the Act; that France, in the observations, had made only a limited reference to the Act; and that its arguments based on it could constitute only a new dispute distinct from that relating to the loans [1]. France made no reference to the Act in its reply, a fact to which Norway drew attention [2], but it did at the oral stage, through its Agent, appeal to Norway to agree to jurisdiction, recalling Norway's formal obligations under a bilateral treaty of arbitration and under the General Act [3].

122. The Court's reference to the Act needs to be repeated to show that the Court was not, as the Annex suggests, holding the Act not to be in force:

> "The French Government also referred to the Franco-Norwegian Arbitration Convention of 1904 and to the General Act of Geneva of September 26th, 1928, to which both France and Norway are parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate.
>
> These engagements were referred to in the Observations and Submissions of the French Government on the Preliminary Objections and subsequently and more explicitly in the oral presentations of the French Agent. Neither of these references, however, can be regarded as sufficient to justify the view that the Application of the French Government was, so far as the question of jurisdiction is concerned, based upon the Convention or the General Act. If the French Government had intended to proceed upon that basis it would expressly have so stated.
>
> As already shown, the Application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, paragraph 2, of the Statute. In these circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court [4]."

123. Of the five judges who wrote separate and dissenting opinions, the only one to refer to the Act was Judge Basdevant. He disagreed with the Court's view that the Act had not been adequately invoked. He also said—and there is nothing in the majority judgment to conflict with this—that—

> "At no time has any doubt been raised as to the fact that this Act is binding on both France and Norway [5]."

124. Secondly, the French Foreign Minister, on 11 December 1964, in explaining in the National Assembly why the French Government did not then envisage becoming a party to the European Convention for the Peaceful Settlement of Disputes, pointed out that France was already bound by numerous obligations of peaceful settlement. Among them was the General Act of 1928 as revised in 1949 (Annex VIII). The reference to the revision is of course erroneous and, as the French *Livre Blanc sur les Expériences Nucléaires* suggests [6], the reference to the Statute of the Permanent Court can have only an historic significance. But the reference to the Act must be read as it stands

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[1] Counter-Memorial of 20 December 1956, *I.C.J. Pleadings*, Vol. I, pp. 220-221.
[2] *Ibid.*, p. 429.
[3] *Ibid.*, Vol. II, p. 60.
[4] *I.C.J. Reports 1957*, pp. 24-25.
[5] *Ibid.*, p. 74.
[6] (1973), p. 109, note (i).

—as a declaration that France considers itself bound. This is the obvious meaning of the passage; and it gains added force from a comparison of the very similar contents of the Act and the European Convention. As the Minister said, there would be a very real risk of duplication.

125. Thirdly, France and Siam in November 1946 made provision for the establishment of a conciliation commission in accordance with the provisions of the General Act. The background to this matter is that in 1937 France and Siam (which has never been a party to the Act) concluded a Treaty of Friendship, Commerce and Navigation, Article 21 of which reads—

> "In accordance with the principles embodied in the Covenant of the League of Nations, the High Contracting Parties agree to apply the provisions of the General Act . . . [1]."

The November 1946 agreement provides in its Article 3 that immediately after its signing—

> "France and Siam shall set up, by application of Article 21 of the [1937 Treaty] . . ., a Commission of Conciliation composed of two representatives of the parties and three neutrals, in conformity with the General Act of Geneva of September 26th, 1928, for the pacific settlement of international disputes, which regulates the constitution and working of the Commission . . . [2]"

126. The Parties proceeded to set up the Commission. The Government of Siam then requested it, in the words of its Agent, to take all necessary measures with a view to arriving at a satisfactory solution of the matters in question following the provisions of the General Act [3]. The request was made and communicated, according to both Governments, in conformity with Article 7 of the Act [4]. The report of the Commission also refers to the Act—its powers were determined by the 1946 agreement and Chapter 1 of the Act and in accordance with Article 10, it decided that its work would not be public—and the general procedure followed was basically that established in the Act [5]. There appears to be nothing in the conduct of either party to suggest that they believed themselves to be reviving the procedures of a lapsed treaty.

(c) *Other Practice Relating Directly to the Continued Force of the General Act*

127. Evidence that the General Act has continued in force after the demise of the League and the adoption of the Revised General Act in 1949 is also to be found in the treaty lists, official and unofficial, of States which adhered to the General Act.

128. In some cases, publications listing treaties of these countries do not purport to record treaties in force for the country in question but simply those to which it has adhered in the past. Publications of this sort are obviously of little, if any, evidentiary value. Other treaty lists, however, do purport to record treaties in force for the country in question as at the date of

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[1] *League of Nations Treaty Series*, Vol. 201, p. 113.
[2] *I.C.J. Pleadings, Temple of Preah Vihear*, Vol. I, pp. 20, 141.
[3] *Ibid.*, p. 37.
[4] *Ibid.*, pp. 37 and 44.
[5] *Ibid.*, pp. 21-94.

publication of the list or as at some point in time shortly before publication.

129. The available evidence from this source is summarized in Annex IX. All of it is positive. No publication has been located which purports to list all international treaties in force for a country which adhered to the General Act and fails to include the General Act; eight such publications (relating to seven countries) which list the General Act have been found. This is wholly inconsistent with the view which France now advances that the General Act has lost its force.

130. So, too, is the practice of four of the States—Denmark, the Netherlands, Norway and Sweden—which have adhered to both the 1928 General Act and the 1949 Revised General Act:

(a) *Denmark*

131. Denmark became party to the Revised General Act on 22 March 1952. An official legal announcement ("Lovtidende") of 22 April 1952 [1] which gave public notice of the fact of Denmark's adherence to the Revised General Act concluded with the following (translation from the Danish):

> "The General Act of 26 September 1928 which was made public through the announcement of 19 June 1930 by the Ministry of Foreign Affairs is still applicable for those States which have adhered to this instrument only."

(b) *The Netherlands*

132. The Netherlands became party to the Revised General Act on 9 June 1971. On 3 March 1971, the Revised General Act was submitted for parliamentary approval under cover of a letter from the Minister of Foreign Affairs to the President of the Second Chamber of the States General. An explanatory note annexed to this letter discussed the nature and the history of the Revised General Act [2]. The explanatory note begins as follows (translation from the Dutch):

> "The text of this Agreement was drawn up by resolution of the Third General Assembly of the United Nations at New York (resolution 268 (III) A, dated 28 April 1949). This resolution contains some alterations in the General Act for the Pacific Settlement of International Disputes of 1928—as adopted by the Assembly of the League of Nations on 26 September 1928 at Geneva, *to which agreement the Kingdom is party as far as Chapters 1, 2 and 4 are concerned* [3]."

A further passage in the explanatory note, which summarizes the nature of the changes made in 1949 to the 1928 General Act and the reasons for them, concludes with the following (translation from the Dutch):

> "For the rest, the substance of the Agreement has remained the same as that of the General Act of 1928, *which is still in force for 22 States, including the Kingdom* [3]."

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[1] Published in *Lovtidende For Kongeriget Danmark* (1952), Afdeling C, Danmarks Traktater.

[2] This material is to be found in BIJL. HAN. *II 1970-71-11 202* (R 780 No. 1).

[3] Emphasis added.

(c) *Norway*

133. In 1949 the Minister of Foreign Affairs of Norway tabled before the Norwegian Parliament a paper recording, for Parliament's information, Norway's participation in the United Nations Second Special General Assembly and in the first part of the Third Ordinary General Assembly session [1]. The paper contained, *inter alia*, a discussion of the Assembly's revision of the 1928 General Act, including the following passage (translation from Norwegian):

> "The changes from the 1928 General Act consist in changes in the references in the General Act to the different organs of the League to corresponding references to the organs of the United Nations. It is accepted that the General Act in its new form will be binding only for those States which become party to it. *The General Act itself will remain valid in the old form—in so far as it is still applicable—between the original parties not acceding to the General Act as revised* [2]."

134. Further light is thrown on the attitude of the Government of Norway in the note of 26 October 1973, attached at Annex X, from the Permanent Mission of Norway to the United Nations to the Permanent Mission of New Zealand to the United Nations. It will be seen that the note contains further material bearing on the Norwegian attitude to the General Act and states explicitly that "Norway considers the 1928 General Act binding vis-à-vis those States having acceded to the Act but not explicitly acceded to the Revised General Act of 1949, provided that the State concerned has not denounced the original General Act".

(d) *Sweden*

135. Sweden became party to the Revised General Act on 22 June 1950. The question of Sweden's accession to the Revised General Act was put to Parliament by a proposal ("proposition") by the King-in-Council, No. 105 of 10 March 1950. The proposal which described the nature of the Revised General Act and its history included the following passages (translated from Swedish):

> "Owing to the dissolution of the League of Nations and the Permanent Court of International Justice, which by virtue of the General Act of 1928 have been given certain functions, this General Act, although still in force with respect to those States which became parties to it, has to a large extent lost its effectiveness.
>
> . . . It is for the King-in-Council to consider whether, and at what time, Sweden should terminate the General Act of 1928 after accession to the Revised General Act [3]."

136. Finally the reliance of Cambodia on the General Act, as a successor to France under the Act and a treaty between France and Siam, in the *Temple of Preah Vihear* case, can be recalled. Neither party asserted that the Act had lost its force; rather Thailand stressed that it had never acceded to it and that Cambodia was not bound by succession [4]. The Court did not reach the issues

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[1] The paper is to be found in *St Meld Nr. 32* (1949).

[2] Emphasis added.

[3] This material is to be found in *Svensk Författningssamling* (1950).

[4] E.g., *I.C.J. Pleadings, Temple of Preah Vihear*, Vol. I, pp. 140-145, Vol. II, pp. 22-25 and 103.

involved in the reference to the General Act, as it held that an alternative source of jurisdiction existed.

(d) *Practice relating to the Continued Force of Bilateral Treaties of Peaceful Settlement containing Obligations Similar to Those in the General Act*

137. More than 200 bilateral treaties for the peaceful settlement of international disputes were concluded in the 1920s and 1930s [1]. Many of these bilateral treaties contain obligations similar to those in the Act and are based on the model bilateral treaties which were brought to the attention of governments along with the General Act. The similarity of obligations appears from a comparison of the contents of particular treaties and from the analysis prepared by the Secretariats of the League of Nations and the United Nations in 1927 and 1949.

138. The fact that the treaties came from the same ideological context, that they set up the same procedures, that they contain similar or identical obligations, that they often confer jurisdiction on the Permanent Court, and that, in some cases, they contain the same limited provisions relating to League organs, suggest that their continued force is relevant to the continued force of the General Act. Such evidence as has been discovered of the bilateral invocation of these treaties does suggest that the particular parties have no doubt that they have remained in force unaffected by the dissolution of the League and by the change in ideological context:

1. *Romania-Switzerland:* The 1926 Treaty of Conciliation, Compulsory Arbitration and Judicial Settlement was invoked in 1948-1949 in respect of a dispute about diplomatic status [2].

2. *Belgium-Denmark:* The 1927 Treaty of Conciliation, Judicial Settlement and Arbitration was invoked in 1952 in respect of a dispute about Danish ships [3].

3 and 4. *France-Switzerland:* The 1925 treaty of peaceful settlement was invoked in 1954-1955 in respect of two matters: customs irregularities and internment fees [4].

5. *Italy-Switzerland:* The 1924 Treaty of Conciliation and Judicial Settlement was invoked in 1950 to consider a dispute about the application to Swiss nationals of an Italian tax. According to the Conciliation Commission's Secretary, its competence was not questioned [5].

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[1] See, e.g., the League of Nations collection, *Arbitration and Security—Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security deposited with the League of Nations* (1927) and the United Nations *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948* (1949); compare the much smaller number of such treaties included in the United Nations *Survey of Treaty Provisions for the Pacific Settlement of International Disputes 1949-1962* (1966).

[2] See *Re Vitianu*, 16 *International Law Reports* 281; Cot, *La conciliation internationale* (1968), p. 97; International Law Association, *Report of the Fifty-Third Conference 1968*, p. 37, n. 15; *I.C.J. Yearbook 1948-1949*, p. 40 (appointment by the President of the International Court in lieu of President of Permanent Court of Members of the Commission).

[3] See Rolin, 1953 *R.G.D.I.P.*, p. 353; Cot, *op. cit.*, pp. 97-98.

[4] Bastid, 1956 *Annuaire français de droit international*, p. 436; Cot, *op. cit.*, p. 98.

[5] Breton-Jokl, 1957 *Annuaire français de droit international*, p. 210 at 211; see also 25 *International Law Reports*, p. 313.

6. *Greece-Italy:* The 1928 Treaty of Friendship, Conciliation and Judicial Settlement was invoked in 1955 in respect of the Roula case [1].

7. *France-Spain:* The two States agreed in 1956, in application of the Convention of Arbitration of 1929, to submit the *Lac Lanoux* case to arbitration [2].

8. *Belgium-Spain:* The *Barcelona Traction* case was brought before this Court pursuant to a 1927 treaty of conciliation, judicial settlement and arbitration. Although Spain argued that the provision conferring jurisdiction on the Court was not effective (because Article 37 of the Statute did not apply, it said, to States which became bound by the Statute after the demise of the Permanent Court), the parties were in agreement that the treaty as a whole had not fallen.

139. The above would appear to be a complete list of cases brought since 1945 under bilateral treaties for peaceful settlement of a general character concluded since 1919. It accordingly does not include conciliations under more limited treaties (such as the France-Siam conciliation of 1947), arbitrations under older treaties (such as the Argentina-Chile boundary dispute), or peaceful settlement procedures agreed to *ad hoc* [3].

140. The only cases of formal invocation of such treaties before 1945 seem to be the *Wal-Wal* Incident (Ethiopia-Italy) under a 1935 treaty, the *Electricity Company of Sofia and Bulgaria* case [4] under a Belgium-Bulgaria bilateral treaty (and the optional clause), and the *Société Commerciale de Belgique* case [5] under a Belgium-Greece bilateral treaty.

141. Other limited bilateral practice suggests unquestioned continuity: thus Finland and Denmark and Finland and Sweden in 1953 amended their 1926 bilateral treaties of peaceful settlement (both integrally linked with conciliation conventions) to take account of the fact that their articles conferring jurisdiction on the Permanent Court were no longer applicable because that Court was not in existence and because Finland was not a party to the Statute. The articles were amended to confer jurisdiction on this Court. The amendments proceeded on the basis that the treaties were in force and were in other respects applicable [6].

142. The above pieces of bilateral practice may appear very sparse, given the large numbers of treaties concluded in the 1920s and 1930s. But the numbers of cases under these treaties or any other at any time since the 1920s is small in any event. The important point in this context is that the continued force of bilateral treaties similar to the General Act was not apparently ever in doubt.

6. The General Act and the Principles of the Law of Treaties

143. The five foregoing subsections have been concerned to set out the French arguments that the General Act is no longer in force—or, at any rate,

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[1] International Law Association, *op. cit.*, p. 37, n. 11; Cot, *op. cit.*, pp. 99-100.

[2] United Nations *Reports of International Arbitral Awards*, Vol. 12, p. 281; 24 *International Law Reports*, p. 101.

[3] The list is based on the Index volumes of the *International Law Reports*; Cot, *op. cit.*; and the 1968 report of *International Law Association Committee on International Conciliation*, *op. cit.*, p. 33.

[4] *P.C.I.J., Series A/B, Nos. 77* and *79*.

[5] *P.C.I.J., Series A/B, No. 78*.

[6] *United Nations Treaty Series*, Vol. 118, p. 283 and Vol. 198, p. 61.

is no longer in force between New Zealand and France—and to meet those arguments by reference to the birth and life of the General Act. In this final subsection, the Government of New Zealand would like to refer, quite briefly, to certain basic principles of the law of treaties and to relate them to the facts of this case.

144. At the centre, undisputed, is "the fundamental principle of the law or treaties" [1]:

> "*Pacta sunt servanda*
>
> Every treaty in force is binding upon the parties to it and must be performed by them in good faith [2]."

The French delegation, along with many others, saw this provision as—

> "the keystone of the draft convention, the essential objective of which was to ensure that treaty relations which were the very basis of all international relations should be established on sound and clear foundations. The principle of good faith in the performance of a treaty must be stated without reticence and without restriction [3]."

Indeed, one of the principal reasons which led the French delegation to cast the only vote against the draft Vienna Convention as a whole was its concern that certain of the treaty provisions were liable "to jeopardize the stability of treaty law, which was a necessary safeguard of inter-State relations [4, 5]".

145. International law does, of course, acknowledge the dynamism of the international community; it must reconcile heritage with heresy, continuity with change [6]. What are the relevant means by which it achieves this in the area of treaty obligation?

146. In the first place are the provisions of the treaty itself. The parties, in drafting the treaty, are free to provide for its termination and modification—and, of course, the General Act does make such provision. These provisions were included to give the instrument elasticity, so that States would be able to review their commitments in the light of their experience of the Act. Thus accession can be to the whole Act, to three chapters, or to two; the accession can be subject to reservations; a limited accession can be widened by being extended to other chapters or by the restriction or abandonment of reservations; and, at specified intervals, the Act can be denounced in whole or in part. An elaborate range of methods is therefore available to the party to the Act to terminate or modify its obligations under it. France has not, since 1939, taken advantage of these methods.

147. Secondly, the parties to a treaty might all consent to its termination

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[1] Para. (1) of the International Law Commission's commentary on its provision on *pacta sunt servanda* in Article 23 of its draft articles on the Law of Treaties included in its report on the work of its 18th session, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 172.

[2] Vienna Convention on the Law of Treaties, Article 26. Proposed amendments which were seen by some as weakening the text were not adopted; see *United Nations Conference on the Law of Treaties, Official Records, First Session 1968*, 28th, 29th and 72nd meetings of the Committee of the Whole.

[3] *Ibid.*, p. 156, para. 55.

[4] *Ibid., Second Session 1969*, p. 203, para. 15.

[5] It may be noted that the French accession to the General Act itself affirmed that "respect for rights established by treaty or resulting from international law" is obligatory for the arbitral tribunals established under the Act.

[6] The phrase is Paul Freund's, *On Law and Justice* (1968), p. 23.

or modification or to a party withdrawing [1]. There has of course been no such consent given by any formal or express means in respect of the General Act. But, it might be said, the consent could be implied from the conduct of States. It is submitted that the history of this Act, as reviewed in the preceding parts of this section, shows that no such consent can be implied: indeed the conduct of the parties is consistent only with the continued force of the Act unmodified. Moreover, the proposition that treaties can be modified by conduct is one which is by no means unquestioned. Thus, of the 75 draft articles on the law of treaties prepared by the International Law Commission, the only one which was not included in the Vienna Convention (in its original or amended form) was that which provided that "a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions" [2]. One of those who opposed this provision was the French delegate. Among his objections, shared by other delegations, were that—

> "many international agreements contained specific provisions on the conditions of their revision: to admit that the parties could deviate from those clauses merely by their conduct in the application of the treaty would deprive those provisions of all meaning, . . .
>
> Moreover, it was doubtful whether the precise and strict conditions laid down in Article 6 and the following articles of the draft [3], on consent to be bound by a treaty, would retain any meaning if the treaty could be subsequently modified in the manner provided for in Article 38 [4]."

He was nevertheless prepared to give the rule a limited validity for technical treaties—but not, *inter alia*, if the treaty itself specified the manner in which it could be revised [4]. The Conference voted to delete the Article by 53 (New Zealand) to 15 with 26 (France) abstentions [5].

148. The French Annex uses the word "désuétude". Is there a doctrine of desuetude which, in recognition of the changes in international society, permits treaties to lapse independently of the operation of their provisions for termination, of the consent of the parties and of the rule relating to fundamental changes of circumstances? It is submitted that there is not. Although, as Lord McNair said in 1961, "Not a great deal of authority on the matter exists [6]", such authority as there is suggests that there is no independent doctrine of desuetude. The International Law Commission, in preparing its articles concerning the invalidity, termination and suspension of the operation of treaties stipulated first—in a provision which is, in substance, now Article 42 (2) of the Vienna Convention—that the termination of a treaty, its denunciation or the withdrawal of a party, can take place only as a result of the provisions of the treaty or of the Convention. This provision was included—

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[1] See, e.g., Art. 54 of the Vienna Convention on the Law of Treaties; see also Arts. 40 and 41.

[2] Draft Art. 38.

[3] Now Arts. 7-17 of the Convention.

[4] *United Nations Conference on the Law of Treaties, Official Records, First Session 1968*, pp. 208-209, paras. 63-64. The French Annex at one point adopts much the same position: "There is no need to emphasize the essential nature, in the system of the General Act, of the provision excluding modification of reservations within each five-year period" (p. 9; compare pp. 10-11).

[5] *Ibid.*, p. 215, para. 60.

[6] McNair, *The Law of Treaties* (1961), p. 516.

> "as a safeguard for the stability of treaties, to underline . . . 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 [1]".

It follows from the provision, as well as from this explanation, that the grounds of termination, denunciation and withdrawal provided for in the Convention are, along with any grounds in the treaty itself, exhaustive [2]. The Commission continued:

> "In this connexion, the Commission considered whether 'obsolescence' or 'desuetude' should be recognized as a distinct ground of termination of treaties. But it concluded that, while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty. In the Commission's view, therefore, cases of 'obsolescence' or 'desuetude' may be considered as covered by Article 51, paragraph *(b)*, under which a treaty may be terminated 'at any time by consent of all the parties' [3]."

As noted above, there is no evidence that the parties have consented to the termination of the General Act and a substantial quantity of evidence to the contrary.

149. The final rule of the law of treaties which might conceivably be relevant is that of fundamental change of circumstances. As the Court stated in the *Fisheries Jurisdiction* cases at the jurisdictional stage:

> "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 [4]."

150. Among the relevant elements of the rule, as stated by the Court and in the Vienna Convention, are: the change of circumstances must be fundamental; there must be a radical transformation of the extent of the obligations still to be performed; and certain procedures are to be followed. It is submitted that none of these requirements is met in the present case. First, the demise of the League of Nations and of the Permanent Court did not amount to a fundamental change of circumstances with regard to those existing when the Act was concluded. Their existence was not an essential basis of the consent of the parties; for, as the preceding subsections show, the Act's provisions, system and operation had little to do with the League, and the

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[1] Paras. (1) and (3) of commentary to draft Art. 39.
[2] *Ibid.*, para. (5).
[3] *Ibid.*, Art. 51 *(b)* became Art. 54 *(b)* of the Convention; see para. 147 above.
[4] *I.C.J. Reports 1973*, pp. 18 and 63.

Permanent Court's jurisdiction is now exercisable by this Court. Secondly, the obligations under the Act remain in substance unchanged: to submit to the various procedures for peaceful settlement. And, thirdly, France has not formally invoked the doctrine or suggested that its applicability be subjected to a peaceful settlement procedure (such as that provided by Article 41 of the Act) [1]. Moreover, principles of preclusion and waiver would, it is submitted, rule out an appeal to this doctrine by a State which has been aware of the alleged changes for a long period, which has affirmed in a number of different contexts that the treaty is still in force, and which has taken no steps, until the institution of the present proceedings, to question the treaty's continued force [2].

151. The Government of New Zealand therefore submits that basic principles of the law of treaties and the history of the General Act are in accord in showing that the Act is in force as between New Zealand and France.

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[1] Cf. *Fisheries Jurisdiction* cases, *I.C.J. Reports 1973*, pp. 21 and 65-66.

[2] See also Article 45 of the Vienna Convention on the Law of Treaties.

PART III

JURISDICTION UNDER ARTICLE 36, PARAGRAPH 2, OF THE STATUTE OF THE COURT

152. New Zealand and France have each declared that they recognize the compulsory jurisdiction of the International Court of Justice under Article 36 (2) of its Statute. The New Zealand declaration was made under Article 36 of the Statute of the Permanent Court of International Justice on 1 April 1940, and deposited with the Secretary-General of the League of Nations on 8 April 1940. Under Article 36 (5) of the Statute of the International Court of Justice, it is deemed to be an acceptance of the compulsory jurisdiction of the International Court of Justice in accordance with its terms. The French declaration was made on 16 May 1966, and deposited with the Secretary-General of the United Nations on 20 May 1966. It has been shown in Part II that the issues raised in these proceedings also constitute a dispute within the meaning of the Statute [1]; and the question of legal interest is considered in Part V below.

153. It would appear that none of the reservations or conditions attached to the New Zealand declaration is in issue in the present case, and that, of those attached to the French declaration, only the following calls for consideration:

> "(3) disputes arising out of a war or international hostilities, disputes arising out of a crisis affecting national security or out of any measure or action relating thereto, and disputes concerning activities connected with national defence;".

In paragraph 16 of its Order of 22 June 1973, the Court refers to a letter of 16 May 1973 handed to the Registrar by the French Ambassador to the Netherlands which draws attention to the "formally expressed will" of the Government of France "to remove disputes concerning activities connected with national defence from the purview of the Court". The relevant portion of the Ambassador's letter reads as follows:

> ". . . in its declaration of 20 May 1966, the Government of the Republic excluded from its acceptance of the compulsory jurisdiction of the Court 'disputes concerning activities connected with national defence' (declaration, paragraph 3).
>
> The Court will certainly have observed that this phrase constitutes the essential difference between this text and the preceding French declaration, dated 10 July 1959.
>
> Now it cannot be contested that the French nuclear tests in the Pacific, which the Government of New Zealand considers to be unlawful, form part of a programme of nuclear weapon development and therefore constitute one of those activities connected with national defence which the French declaration of 1966 intended to exclude."

This Part of the Memorial will be concerned with the meaning and effect to be given the French reservation in the light of the Court's jurisprudence.

[1] Paras. 21-23.

154. In its judgment in the case concerning *Right of Passage over Indian Territory, Preliminary Objections*, the Court drew attention to the nature of the relationships established by declarant States under Article 36 (2) of the Statute:

> ". . . by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the optional clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration [1]."

There are two important corollaries. First, as the Court indicated in the same judgment, the validity of the conditions of acceptance made by declarant States depends upon their consistency with the Statute [2]. Secondly, although declarations of acceptance are unilaterally drafted, they are, in the words of Judge Sir Hersch Lauterpacht, "a manifestation of intention to create reciprocal rights and obligations" [3], and in general they share the character of other kinds of jurisdictional clause.

155. In the *Phosphates in Morocco* case, the Permanent Court observed that a jurisdictional clause "must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it" [4]. This fundamental rule requires that consent to jurisdiction shall, if disputed, always be strictly proved. In its judgment in the *Chorzów Factory, Jurisdiction*, case the Permanent Court stated that it should "only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant" [5]. This dictum was applied in reference to a declaration made under the optional clause by President Sir Arnold McNair in his individual opinion in the *Anglo-Iranian Oil Co.* [6], case.

156. The last-mentioned case has given rise to learned discussion as to whether the Court's concern to avoid an *excès de pouvoir* may in some cases entail a presumption against jurisdiction [7]. Certainly the Court, in admitting extrinsic evidence of the intention of the Respondent State, had emphasized the fact that declarations under the optional clause are, unlike treaty texts, the result of unilateral drafting [8]. There is, however, no indication in this Judgment that the Court believed itself to be acting upon a rule of restrictive interpretation; and, in his dissenting opinion, Judge Read remarked:

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[1] *I.C.J. Reports 1957*, p. 146.

[2] *Ibid.*, p. 144.

[3] *Certain Norwegian Loans*: separate opinion of Judge Sir Hersch Lauterpacht, *I.C.J. Reports 1957*, p. 49.

[4] *P.C.I.J., Series A/B, No. 74*, p. 24.

[5] *P.C.I.J., Series A, No. 9*, p. 32.

[6] *I.C.J. Reports 1952*, p. 117.

[7] See, for example, Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 338-341; Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure" in 34 *B. Y.I.L.* (1958), pp. 86-97; Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", *Académie de Droit International: Recueil des cours* (1958—I, p. 288).

[8] *Ibid.*, p. 105.

"I have been unable to find any case in which either Court relied upon a restrictive interpretation to a jurisdictional clause as a basis for its judgment [1]."

157. It seems clear that the Court, being guided by the principle of equality between the parties, will not allow any presumption or rule of construction to dominate its assessment of the parties' intentions. In the *River Oder Commission* case [2], the Permanent Court indicated that the Court would resort to the rule of restrictive interpretation only if the application of other rules had failed to establish the intention of the parties. This dictum gave added definition to the test propounded by the Court several years earlier in the *Chorzów Factory, Jurisdiction*, case: an incomplete proof would not eliminate "the doubt nullifying its jurisdiction" [3], but completeness of proof would not entail the rebuttal of a presumption against competence. The matter has been summed up by Charles De Visscher in these words:

"Le juge international respecte une volonté qui se restreint: il est sans complaisance pour une souveraineté qui se dérobe.

Moins justifiée encore est l'idée d'une présomption d'incompétence qui conduirait aisément à éteindre chez le juge tout esprit de recherche de la véritable intention des Parties [4]."

158. The other aspect of the interpretation of declarations of acceptance under the optional clause is that of their consistency with the Statute. In a celebrated passage from his individual opinion in the *Norwegian Loans* case, Judge Lauterpacht described this relationship in the following way:

"In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result there may be little left in the Acceptance which is subject to the jurisdiction of the Court. This the Governments, as trustees of the interests entrusted to them, are fully entitled to do. Their right to append reservations which are not inconsistent with the Statute is no longer in question. But the question whether that little that is left is or is not subject to the jurisdiction of the Court must be determined by the Court itself. Any conditions or reservations which purport to deprive the Court of that power are contrary to an express provision of the Statute and to the very notion, embodied in Article 36 (6), of conferment of obligatory jurisdiction upon the Court. As such they are invalid. It has been said that as Governments are free to accept or not to accept the optional clause, they are free to accept the very minimum of it. Obviously. But that very minimum must not be in violation of the Statute [5]."

159. Neither the present Court nor the Permanent Court has pronounced upon a question of inconsistency *ratione materiae* between its Statute and the terms of a declaration of acceptance made under Article 36 (2). In the *Norwegian Loans* case [6], and again in the *Interhandel* case [7], declarations

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[1] *Ibid.*, p. 143.
[2] *P.C.I.J., Series A, No. 23*, p. 26.
[3] *P.C.I.J., Series A, No. 9*, p. 32.
[4] C. De Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), pp. 201-202.
[5] *I.C.J. Reports 1957*, p. 46.
[6] *I.C.J. Reports 1957*, p. 9.
[7] *I.C.J. Reports 1959*, p. 6.

which the Court was asked to consider contained conditions which expressly reserved to the declarant State the right to determine whether any matter in dispute fell within a category excluded from the acceptance of compulsory jurisdiction. Although the Court did not find it necessary, in either of these cases, to reach a decision about the validity of the "self-judging" reservation, five members of the Court expressed the opinion that such reservations are not compatible with Article 36 of the Statute [1].

160. The outcome of the *Norwegian Loans* case, and the thrust of the judicial observations to which reference has just been made, have had a far reaching influence. The Secretary-General of the United Nations, in his annual report to the General Assembly for the year 1956-1957 noted the tendency to make reservations that "may render the whole system of compulsory jurisdiction virtually illusory" [2]. At its 1959 meeting, the Institute of International Law adopted by a unanimous vote resolutions which, *inter alia*, referred to the judgments given and the opinions expressed in the *Norwegian Loans* and *Interhandel* cases and urged the withdrawal of reservations of the kind there in question [3]. Several countries, including France and the United Kingdom, later withdrew overtly "self-judging" reservations which they had for some years maintained.

161. In the *Right of Passage, Preliminary Objections*, case [4], the Court had had occasion to consider other facets of the question of consistency between the Statute and declarations of acceptance. As Rosenne has noted [5], the test which the Court then applied did not appear to differ in substance from the compatibility test, applied by the Court in the *Reservations to the Genocide Convention* [6] case to determine the validity of reservations to a multilateral treaty. The same analogy is emphasized in Judge Lauterpacht's individual opinion in the *Norwegian Loans* case:

> "It is irrelevant for the purpose of the view here outlined whether the instrument of acceptance of the obligation of the optional clause is a treaty or some other mode of creating obligations. In the *Anglo-Iranian Oil Company* case the Court observed that 'the text of the Iranian declaration is not a treaty text resulting from negotiations between two or more States' but that 'it is the result of unilateral drafting by the Government of Iran' (*I.C.J. Reports 1952*, p. 105). The statement means no more than that the declaration is the result not of negotiations but of unilateral drafting. Whether it is a treaty or a unilateral declaration, it is—if it is to be treated as a legal text providing a basis for the jurisdiction of the Court—a manifestation of intention to create reciprocal rights and obligations. It will be noted that Article 36 (2) refers to the acceptance of

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[1] See, in the *Norwegian Loans* case, the separate opinion of Judge Sir Hersch Lauterpacht and the dissenting opinion of Judge Guerrero, and, in the *Interhandel* case, the separate opinion of Judge Sir Percy Spender and the dissenting opinions of President Klaestad, Judge Armand-Ugon and Judge Sir Hersch Lauterpacht.

[2] Introduction to the Annual Report of the Secretary-General on the Work of the Organization 16 June 1956-15 June 1957. United Nations, *Official Records of the Twelfth Session of the General Assembly*, Supplement No. 1A (A/3594/Add. 1), p. 5.

[3] Resolutions adopted by the Institut de Droit International at its Neuchâtel Session, September 3-12, 1959 (English translation by C. W. Jenks published in 54 *A.J.I.L.* (1960), p. 135).

[4] *I.C.J. Reports 1957*, p. 125.

[5] *The Law and Practice of the International Court* (1965), Vol. I, p. 391.

[6] *I.C.J. Reports 1951*, p. 24.

the jurisdiction of the Court in relation 'to any other State accepting the same *obligation*'. In fact there is no difficulty in visualizing the Declaration of Acceptance as an accession to a multilateral treaty in the same way as, in the case of various conventions concluded under the auspices of the United Nations, Governments accede to a text established by the General Assembly. However that may be, the acceptance of the optional clause is an instrument purporting to bring about, as between the accepting State and any other State which has accepted or may accept that text, reciprocal rights and obligations. If the acceptance does not, in law, amount to an assumption of an obligation effectively binding upon the Government concerned, it is not a valid instrument upon which the accepting State can rely and of which the Court can take cognizance [1]."

162. The opinions of the judges in the *Norwegian Loans* and *Interhandel* cases do not attach decisive importance to the overtly "self-judging" form of the reservations there under consideration. The essential question is whether it is the declarant's intention—to be derived from the wording of its reservation and from any legitimate recourse to extrinsic evidence—to allow the Court to discharge its statutory duty of determining the extent of its own jurisdiction. Thus, in the following passage from his dissenting opinion in the *Interhandel* case, Judge Lauterpacht takes into account, not only the express reservation of the declarant's right unilaterally to decide whether a matter falls within its "domestic jurisdiction", but also the all-embracing nature of the latter concept. In rejecting the notion that the Court could in these circumstances exercise an effective control by applying the test of good faith, Judge Lauterpacht leaves open the possibility that a reservation, though formulated as "self-judging", might yet comply with the requirements of the Statute:

> "There is no question here of ruling out altogether the abiding duty of every State to act in good faith. The decisive difficulty is that in view of the comprehensiveness of the notion of domestic jurisdiction—coupled in the case of the United States with a uniform insistence on the right of unilateral determination—that right assumes in effect the complexion of an absolute right not subject to review by the Court. This might not necessarily be the case if, for instance, a government were to make a reservation of matters arising in the course of hostilities as determined by that government and if subsequently it were to proceed to determine as such an event which arose in time of peace undisturbed by any armed contest, whether amounting to war or not [2]."

163. On the other hand, a reservation which does not purport to be "self-judging", may yet, because of vagueness, be found inconsistent with the requirements of the Statute. In such a case, the defect will tend to present itself, not as a challenge to the Court's authority, but as a failure to establish a basis of obligation. The root cause and its consequences are the same. "If the acceptance", said Judge Sir Hersch Lauterpacht, in a passage from the *Norwegian Loans* case already quoted, "does not, in law, amount to an assumption of an obligation effectively binding upon the Government concerned, it is not a valid instrument upon which the accepting State can rely and of which the Court can take cognizance" [3]. The 1959 resolutions of the Institute of

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[1] *I.C.J. Reports 1957*, pp. 48-49.
[2] *I.C.J. Reports 1959*, pp. 113-114.
[3] *I.C.J. Reports 1957*, p. 49.

International Law, referred to above, emphasize that imprecision may in itself give rise to the risk of invalidity:

> "It is of the highest importance that engagements to accept the jurisdiction of the International Court of Justice undertaken by States should be effective in character and should not be illusory. In particular, States which accept the compulsory jurisdiction of the Court in virtue of Article 36, paragraph 2, of the Statute should do so in precise terms which respect the right of the Court to settle any dispute concerning its own jurisdiction in accordance with the Statute and do not permit States to elude their submission to international jurisdiction [1]."

164. It has been suggested that the Court, though unwavering in its concern to ensure the equality of the parties, has shown itself to be less firm in asserting its control over declarations which may bear directly or indirectly on its judicial competence [2]. There can, however, be no doubt of the Court's commitment to the principle of the effective interpretation of treaties, or of the applicability of that principle in interpreting declarations of acceptance under the optional clause. Moreover, as the Court observed in the *Right of Passage, Preliminary Objections*, case:

> "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it [3]."

In the same Judgment the Court said, in reference to a condition of acceptance of the optional clause, that it regarded itself as bound to "determine the meaning and effect of the Third Condition by reference to its actual wording and applicable principles of law" [3].

165. In its Advisory Opinion, *Admission to the United Nations*, the Court described its approach to questions of interpretation:

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words [4]."

Although the intention of the declarant State is to be derived primarily from the words used, the Court and individual judges, when addressing themselves to the meaning of reservations or conditions, have not infrequently found it necessary to consider other evidence bearing on the intention of the declarant

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[1] Resolutions adopted by the Institut de Droit International at its Neuchâtel Session, September 3-12, 1959 (English translation by C. W. Jenks published in 54 *A.J.I.L.* (1960), p. 136).

[2] C. De Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), p. 204.

[3] *I.C.J. Reports 1957*, p. 142.

[4] *I.C.J. Reports 1950*, p. 8.

State at the time its declaration was made [1]. In the present case, it is proposed to consider, in turn, the words used in the French reservation and the circumstances which may have influenced their use.

166. A purely textual approach to the third French reservation must raise doubts which it cannot wholly resolve. Briggs has said, in reference to the "self-judging" reservation made by the United Kingdom in its declaration of 18 April 1957, that "no rules of international law can determine whether a question affects the national security of a State" [2]. It has also been pointed out that the answer to such a question entails a factual appraisal which is peculiarly within the province of the State concerned:

> "Pour juger du bien-fondé de la mise en jeu de la réserve relative à la sécurité, la Cour ne pourra guère que se rapporter aux éléments qui lui auront été fournis par l'Etat si elle ne veut pas s'immiscer dans des problèmes de politique interne; . . . [3]"

The same remarks might be made in regard to the term "national defence" which is of comparable generality, except that it would seem to relate only to external threats. There is, however, one other noteworthy difference between these terms: "national security" describes a situation, while "national defence" denotes action taken in response to a situation.

167. If one examines these terms in their respective contexts, a further distinction emerges. In reference to the phrase "disputes arising out of a crisis affecting national security or out of any measure or action relating thereto", Vignes has pointed out:

> "Le domaine vague et imprécis d'une telle réserve ne peut manquer d'être souligné. Il est à noter toutefois que l'exigence d'une 'crise' laisse supposer qu'une atteinte à la sécurité de la nation ne sera prise en considération que lorsqu'elle sera caractérisée; ce qui malgré tout restreint le danger d'une extension démesurée et difficilement contrôlable de la réserve [4]."

In the phrase "disputes concerning activities connected with national defence" there is no limitation corresponding to the words "arising out of a crisis". Moreover, as the French Ambassador has stressed in his letter of 16 May 1973 to the Registrar, the inclusion of the phrase "disputes concerning activities connected with national defence" constitutes an essential difference between this text and that of the preceding French declaration. It must follow that the new reservation is designed to exclude the Court's jurisdiction in a class of cases not covered by the earlier reservation, because these cases are in no way related to a crisis of national security. It is, no doubt, in that sense that a commentator on the 1966 declaration has spoken of a progressive

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[1] Cf., especially, the *Anglo-Iranian Oil Co.* case, *I.C.J. Reports 1952*, p. 93 and the dissenting opinion of Judge Lauterpacht in the *Interhandel* case, *I.C.J. Reports 1959*, pp. 107 ff.

[2] Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", *Académie de Droit International: Recueil des cours* (1958—I), p. 229 at p. 302.

[3] Vignes, "Observations sur la nouvelle déclaration française d'acceptation de la juridiction obligatoire de la Cour internationale de Justice", *Revue générale de droit international public*, troisième série—tome XXXI; tome LXIV—1960, p. 52 at p. 70.

[4] *Ibid.* at pp. 69-70.

accumulation of specific reservations in areas more and more difficult for the Court to control [1].

168. As has been noted, the test of consistency with the requirements of the Statute is one of substance, not of form. The fact that a declarant State has avoided a patently subjective formulation of its reservations may, indeed, provide an indication of intention; but this interpretation must yield if the Court should find that the scope of the reservation cannot objectively be determined. It is not uncommon in certain kinds of international agreement to make provision for a right of derogation in time of emergency. Similarly, it may be that the governing words "arising out of a crisis" offer an acceptable guarantee of the objectivity of the French reservation relating to national security. In the case of the newer reservation, on the other hand, the means of control must, if they exist at all, be inherent in the meaning of "national defence". It therefore becomes necessary to consider the extrinsic evidence which may help to fix the meaning of that term, and to test the strength of the declarant State's commitment to compliance with the requirements of the Statute.

169. As to the meaning of "national defence", and its place among the policies of the French Government in the period up to and including the making of the declaration of 20 May 1966, there can be no voice of authority comparable with that of President de Gaulle. The following passage from a celebrated address, made to the French Military School on 3 November 1959, is quoted because it appears to bring together, in one statement of moderate length, elements of policy which remained constant during the period in question:

> "Il faut que la défense de la France soit française. C'est une nécessité qui n'a pas toujours été très familière au cours de ces dernières années. Je le sais. Il est indispensable qu'elle le redevienne. Un pays comme la France, s'il lui arrive de faire la guerre, il faut que ce soit sa guerre. Il faut que son effort soit son effort. S'il en était autrement, notre pays serait en contradiction avec tout ce qu'il est depuis ses origines, avec son rôle, avec l'estime qu'il a de lui-même, avec son âme. Naturellement, la défense française serait, le cas échéant, conjuguée avec celle d'autres pays. Cela est dans la nature des choses. Mais il est indispensable qu'elle nous soit propre, que la France se défende par elle-même, pour elle-même et à sa façon.
>
> S'il devait en être autrement, si on admettait pour longtemps que la défense de la France cessât d'être dans le cadre national et qu'elle se confondît, ou fondît, avec autre chose, il ne serait pas possible de maintenir chez nous un Etat. Le Gouvernement a pour raison d'être, à toute époque, la défense de l'indépendance et de l'intégrité du territoire. C'est de là qu'il procède. En France, en particulier, tous nos régimes sont venus de là.
>
> Si vous considérez notre histoire — qu'il se soit agi des Mérovingiens, des Carolingiens, des Capétiens, du Premier ou du Second Empire, des Première, Deuxième, Troisième, Quatrième, Cinquième Républiques — vous discernez, qu'à l'origine de l'Etat et à celle des régimes qui l'ont, tour à tour, assumé, il y eut toujours des préoccupations ou des néces-

[1] Feydy, "La nouvelle déclaration française d'acceptation de la juridiction obligatoire de la Cour internationale de Justice" (1966), 12 *Annuaire français de droit international*, p. 155 at p. 159.

sités de défense. Inversement, toute invasion, tout désastre national, ont amené, infailliblement, la chute du régime du moment. Si donc un gouvernement perdait sa responsabilité essentielle, il perdrait, du même coup, sa justification. Dès le temps de paix, il serait bientôt admis qu'il ne remplit pas son objet.

Quant au commandement militaire, qui doit avoir la responsabilité incomparable de commander sur les champs de bataille, c'est-à-dire d'y répondre du destin du pays, s'il cessait de porter cet honneur et cette charge, s'il n'était plus qu'un élément dans une hiérarchie qui ne serait pas la nôtre, c'en serait fait rapidement de son autorité, de sa dignité, de son prestige devant la nation et, par conséquent, devant les armées.

C'est pourquoi, la conception d'une guerre et même celle d'une bataille dans lesquelles la France ne serait plus elle-même et n'agirait plus pour son compte avec sa part bien à elle et suivant ce qu'elle veut, cette conception ne peut être admise. Le système qu'on a appelé 'intégration' et qui a été inauguré et même, dans une certaine mesure, pratiqué après les grandes épreuves que nous avions traversées, alors qu'on pouvait croire que le monde libre était placé devant une menace imminente et illimitée et que nous n'avions pas encore recouvré notre personnalité nationale, ce système de l'intégration a vécu.

Il va de soi, évidemment, que notre défense, la mise sur pied de nos moyens, la conception de la conduite de la guerre, doivent être pour nous combinées avec ce qui est dans d'autres pays. Notre stratégie doit être conjuguée avec la stratégie des autres. Sur les champs de bataille, il est infiniment probable que nous nous trouverions côte à côte avec des alliés. Mais, que chacun ait sa part à lui!

Voilà un point capital que je recommande à vos réflexions. La conception d'une défense de la France et de la Communauté qui soit une défense française, cette conception-là doit être à la base de la philosophie de vos centres et de vos écoles.

La conséquence, c'est qu'il faut, évidemment, que nous sachions nous pourvoir, au cours des prochaines années, d'une force capable d'agir pour notre compte, de ce qu'on est convenu d'appeler 'une force de frappe' susceptible de se déployer à tout moment et n'importe où. Il va de soi qu'à la base de cette force sera un armement atomique — que nous le fabriquions ou que nous l'achetions — mais qui doit nous appartenir. Et, puisqu'on peut détruire la France, éventuellement, à partir de n'importe quel point du monde, il faut que notre force soit faite pour agir où que ce soit sur la terre [1]."

170. National defence, therefore, had an enlarged meaning. It could not be equated with the ordinary role and activities of the French armed services; nor could it be said that its goals were in any strict sense military or defensive. It included and gave special prominence to a programme for the development of nuclear weapons. The possession of a nuclear deterrent was thought of, not only as an insurance against nuclear attack, but also as a pre-requisite of great power status. National defence was no less than an integral and indivisible aspect of French vital interests, honour and independence. Clearly it is not in this unlimited sense that the expression "national defence" can offer the

[1] Allocution prononcée à l'Ecole Militaire, 3 novembre 1959, published in *Charles de Gaulle; Discours et Messages: Avec le Renouveau — mai 1958–juillet 1962* (1970), pp. 126-127.

Court a means, which is effective and not illusory, of controlling the reservation in which the words occur. Vignes, writing in reference to the 1959 declaration, had already observed:

> "Le Gouvernement français ne donne pas compétence à la Cour pour connaître des différends ayant une incidence sur la vie de la Nation, aussi bien sur le plan international que sur le plan interne. C'est ainsi que sont réservés non seulement les différends nés d'une guerre ou d'hostilités internationales, mais aussi ceux mettant en jeu la sécurité de la Nation [1]."

Feydy, in reference to the 1966 declaration, notes:

> "une certaine tendance à retirer petit à petit d'une main ce qu'elle avait donnée de l'autre à la justice internationale en renonçant à apprécier unilatéralement l'étendue de sa compétence nationale [2]."

171. The commentaries in the *Revue générale de droit international public* and in the *Annuaire français de droit international* place the declarations against their political background. The declaration of 1947, containing a "self-judging" reservation similar to that of the United States, had been drawn up and ratified at a time when the French Parliament was acutely sensitive to the notion of any encroachment upon national independence and sovereignty [3]. A new situation was created by the Court's decision in the *Norwegian Loans* case [4], and by the general disfavour into which the "self-judging" reservation had fallen. The French declaration of 1959 abandoned the "self-judging" reservation, and replaced it with specific reservations which were objectively formulated [5]. The reservation as to national security, though general in its terms, was well known to be designed specifically to exclude disputes arising from events in Algeria [6]. The French declaration of 1966, importing the new reservation as to national defence, was also couched in general terms, but was believed to be related to France's changed policies towards the North Atlantic Treaty Organization, and to opposition to the projected programme of French nuclear tests in the Pacific. Rousseau has commented:

> "En prévision de ces expériences et dans le dessein manifeste de se dérober par avance à tout débat juridictionnel concernant la mise en cause éventuelle de sa responsabilité internationale au regard d'un Etat lié par les *(sic)* clause facultative de juridiction obligatoire, le gouvernement français avait pris soin de modifier en temps utile le 20 mai 1966 — soit six semaines avant la première expérience — sa déclaration d'acceptation de la juridiction obligatoire de la Cour internationale de Justice,

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[1] Vignes, "Observations sur la nouvelle déclaration française d'acceptation de la juridiction obligatoire de la Cour internationale de Justice", *Revue générale de droit international public*, troisième série—tome XXXI, tome LXIV—1960, p. 52 at p. 68.

[2] Feydy, "La nouvelle déclaration française d'acceptation de la juridiction obligatoire de la Cour internationale de Justice" (1966), 12 *Annuaire français de droit international*, p. 155 at p. 159.

[3] Dreyfus, "Les déclarations souscrites par la France aux termes de l'article 36 du Statut de la Cour internationale de La Haye" (1959), *Annuaire français de droit international*, p. 258 at pp. 264-269; Vignes, *loc. cit.*, at pp. 56-57.

[4] *I.C.J. Reports 1957*, p. 9.

[5] Dreyfus, *loc. cit.*, at pp. 269-270; Vignes, *loc. cit.*, at pp. 57 ff.

[6] Feydy, *loc. cit.*, at p. 159; Vignes, *loc. cit.*, at p. 69.

en excluant pour l'avenir de la compétence de la Cour les 'différends concernant des activités se rapportant à la défense nationale' [1]."

172. There has in recent years been little in the way of official explanation of the French Government's stance in relation to the compulsory jurisdiction of the International Court of Justice. Thus, Feydy writes:

"Les modifications de 1966 pourraient laisser les observateurs plus perplexes. Ni l'effet immédiat qu'en espère le gouvernement français, ni le sens qu'il faut donner à la nouvelle déclaration ne sont absolument évidents à première vue. Et ceci d'autant plus, faut-il le rappeler, que la jurisprudence inaugurée en 1959 n'a pas subi de changement: il s'agit là d'un acte unilatéral du gouvernement français et non pas d'un traité au sens de l'article 53 de la Constitution du 4 octobre 1958. Ni débats, ni travaux parlementaires ne peuvent donc en éclairer la signification, contrairement aux textes antérieurs à 1959 [2]."

It would, however, 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. In his article on Nuclear Tests in the Pacific, Rousseau says, in reference to the national defence reservation:

"La limitation est de taille et, dans les termes imprécis où elle est formulée, elle risque de réduire dans des proportions imprévisibles le maigre domaine encore assigné à la Cour. Mais il n'est pas douteux qu'au premier rang des différends unilatéralement déclarés non justiciables figurent désormais les différends nés des réclamations pour dommages causés par des expériences nucléaires [3]."

Referring more generally to the features of the 1966 declaration, Feydy concludes:

"Sans vouloir donner à tout prix de l'unité à l'ensemble des modifications de 1966, on peut donc voir dans ces réserves supplémentaires, dans l'esquive de plus en plus perfectionnée des problèmes posés par la réciprocité, dans cette affirmation des droits du gouvernement français sur le contenu comme sur la durée de ses engagements, un progrès assez cohérent vers le glacis protecteur que les Etats adhérents à la clause facultative ne cessent de construire entre eux et la juridiction de la Cour internationale de Justice [4]."

173. In summary, an examination of the surrounding circumstances appears to reinforce the evidence of a conflict of intention in the text of the third French reservation, with the danger of encompassing its invalidity. This situation is, of course, the product of the tensions experienced, in great or less

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[1] Rousseau, "Chronique des faits internationaux: expériences nucléaires dans le Pacifique (2 juillet-5 octobre 1966)", *Revue générale de droit international public*, troisième série—tome XXXVII, tome LXX—1966, p. 1032 at p. 1040.

[2] *Feydy, loc. cit. at pp. 155-156.*

[3] Rousseau, *loc. cit.* at p. 1040.

[4] Feydy, *loc. cit.* at p. 160.

degree, by every State which desires to assume, and yet to limit, the reciprocal play of rights and obligations under the optional clause. In the case of France, this tension may well have been extreme, because it involved the balancing of a long record of loyalty to the Court's compulsory jurisdiction with a marked disinclination to accept restrictions upon its national freedom of action. In the official silence which surrounds the making of the French declaration of 1966, there may also be an element of a viewpoint expressed by Vignes in his comments on the national security reservation contained in the declaration of 1959:

> "Ne peut-on déclarer, de plus, comme pour l'ancienne réserve française de compétence nationale, qu'elle est incompatible avec la Statut de la Cour et notamment l'article 36, paragraphe 6? Il ne semble pas possible de conclure à cette incompatibilité. Si en fait la détermination de la sécurité nationale semble appartenir au gouvernement français, si elle permet le cas échéant de retirer compétence à la Cour pour certains différends, il n'en demeure pas moins que celle-ci peut exercer un contrôle et que par là même elle demeure juridiquement maîtresse de sa compétence [1]."

174. The New Zealand Government does not contend that the French reservation of "disputes concerning activities connected with national defence" must be regarded as incompatible with Article 36 of the Statute. It must be construed in accordance with its actual wording and with applicable rules of law. The latter include the presumption that texts emanating from a government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law. It is no doubt possible to interpret the term "national defence" in ways which do no violence to its ordinary meaning, and which enable the Court to assert its right to settle any dispute concerning its own jurisdiction. It may be, for example, that some guidance can be drawn from the extent of the right of self-defence, to which all measures of national defence must ultimately be related.

175. On the other hand, the New Zealand Government does not accept that an activity falls within the rubric of "national defence" simply because it relates to the development of an instrument of mass destruction—or that the concept of "activities connected with national defence" can in its ordinary meaning extend to a programme of nuclear weapons testing in the atmosphere, carried out in a region of the world far removed from metropolitan France, contrary to the wishes of the Governments and peoples of that region and to the will of the world community consistently expressed in the resolutions of United Nations bodies. Finally, even if the phrase were thought capable of such a meaning, it could only procure its own invalidity; for the Court cannot administer a reservation which in effect leaves it to the declarant State to assert its own conception of its vital interests.

176. The New Zealand Government submits that the matters to which these proceedings relate do not fall within the third or any reservation to the French declaration of acceptance, and that the Court has jurisdiction pursuant to Article 36 (2) and (5), of the Statute of the Court.

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[1] Vignes, *loc. cit.* at p. 70.

PART IV

RELATIONSHIP BETWEEN THE TWO SOURCES OF JURISDICTION

177. The French Annex asserts that, "on the hypothesis that the General Act is not wholly without validity", it is inapplicable in situations excluded by France's unilateral declaration of acceptance of the jurisdiction of the Court under Article 36 (2) of the Statute. This assertion itself rests upon the hypothesis, which the New Zealand Government does not admit, that the issues raised in these proceedings fall within the scope of reservations made in the French declaration.

178. Even if the position were otherwise and France had effectively excluded the subject of the present dispute with New Zealand from the ambit of its acceptance of the Court's jurisdiction under Article 36 (2) of the Statute, the proposition advanced by France that its declaration under the optional clause has limited the obligations assumed by it under a prior treaty is untenable. It is contrary to principle, to judicial authority and to the clear purpose and provisions of the General Act.

179. Paragraphs 1 and 2 of Article 36 are properly to be construed as providing two separate means of access to the Court, two independent and cumulative sources of obligation. This is the natural and ordinary construction of the two provisions, neither of which contains any reference to the other. It is also the construction which has gained the stamp of judicial approval. In the case concerning the *Electricity Company of Sofia and Bulgaria* the Applicant, Belgium, based its application on a bilateral treaty of conciliation, arbitration and judicial settlement—a treaty similar in many respects to the General Act—and also on earlier declarations made by it and the Respondent, Bulgaria, under Article 36 (2) of the Statute. The Court held that both the treaty and the two declarations were in force at the time of the filing of the Belgian Application and that the treaty did not restrict the extent of the more extensive jurisdiction conferred by the two declarations. The central passage in the Court's Judgment on this point read as follows:

> ". . . the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain. In concluding the Treaty of conciliation, arbitration and judicial settlement, the object of Belgium and Bulgaria was to institute a very complete system of mutual obligations with a view to the pacific settlement of any disputes which might arise between them. There is, however, no justification for holding that in so doing they intended to weaken the obligations which they had previously entered into with a similar purpose, and especially where such obligations were more extensive than those ensuing from the Treaty.
>
> It follows that if, in a particular case, a dispute could not be referred to the Court under the Treaty, whereas it might be submitted to it under the declarations of Belgium and Bulgaria accepting as compulsory the jurisdiction of the Court . . . the Treaty cannot be adduced to prevent

those declarations from exercising their effects and disputes from being thus submitted to the Court [1]."

180. These observations are directly in point in the present case. The issue now before the Court is, admittedly, a different one in the sense that the sequence of acceptance of obligations to submit to the jurisdiction of the Court, through the two avenues of paragraph 1 and paragraph 2 of Article 36, is reversed. The Court is not here concerned to inquire whether New Zealand and France may have intended, by entering into treaty relations, to cut back the scope of their declarations—or the declaration of one of them—under the optional clause. Rather, the issue now is the relationship between jurisdiction conferred on the Court by an earlier treaty and by a later declaration under the optional clause. But in this situation, the reasons for treating the two sources of jurisdiction as separate and independent of each other are even more compelling than they were in the *Electricity Company* case. The argumentation on this point in the French Annex amounts, in essence, to the assertion that a subsisting treaty relationship between two States—or at any rate the treaty relationship established by the General Act—may be amended by a subsequent and unacknowledged unilateral act of one of the parties to the treaty. To state the contention in this form is to reveal its radical nature. Its endorsement in the present case—or in any comparable case—would be in flat contradiction of the law of treaties. It would, moreover, conflict with the specific provision in the General Act permitting, within certain limits, unilateral reservations to the Act. It would also open the way to the virtual destruction of paragraph 1 of Article 36 as a source of the Court's jurisdiction; for treaties conferring jurisdiction under this head could be amended, rewritten and contradicted by a host of unilateral declarations under the optional clause [2].

181. The French Annex also argues that:

> "the practice of States in regard to declarations on the basis of Article 36 is equally important for determining the validity of the Act. More precisely, it is necessary to take into account the position adopted by States as regards their reservations on the one hand to their optional declarations, and on the other hand to their acceptance of the General Act.
>
> For so long as the General Act was manifestly in force, the reservations to the Court's competence on either basis were always similar."

It is the contention of New Zealand that it is erroneous in law to link or in any way relate the two sources of jurisdiction. But, independently of that proposition, do the facts support the French position? Were the commitments under the two sources of jurisdiction "similar", were they "closely interdependent", was there "a necessary coherence" in the 1930s and did the commitments diverge—did the parallelism cease—from 1940 onwards?

182. The facts, it is believed, do not square with the French position. The limits of the commitments under the two instruments—the General Act and Article 36 (2) of the Statute—can be considered in two groups. The first comprises those conditions which determine the temporal validity of the com-

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[1] *P.C.I.J., Series A/B, No. 77*, p. 76.

[2] The French Annex seeks to avoid this result by drawing a distinction between compromissory clauses and treaties for the pacific settlement of disputes. It is difficult, however, to see the basis of this distinction which, in any event, is in no way reflected in the Court's treatment of the situation before it in the *Electricity Company* case, *loc. cit.*

mitment: the period for which the undertaking is accepted and the power, if any, to terminate it. The second concerns the limits to the area of the commitment while it is in force: the exclusion of prior disputes, of matters within domestic jurisdiction, of matters before the Council of the League, etc.

183. Annex XI sets out the conditions of the first kind in declarations accepting the compulsory jurisdiction of the Court made by the parties to the General Act. Some of the relevant conclusions which can be drawn from that Annex are as follows. First, in no case at all, either during the 1930s or subsequently, have these conditions in the declarations of any one party coincided with the five-yearly periods of the General Act. Secondly, on only one occasion was the General Act's scheme of automatic renewal for five years unless six months' notice has been given, adopted in a declaration made by a party to the Act during the 1930s, and even that declaration is out of phase by one year with the Act's periods. By contrast, that scheme has been adopted in five declarations since 1947. Thirdly, sixteen of the declarations deposited by parties to the General Act and valid in the 1930s were for a fixed term only; at the end of that time they expired; only six continued in force after that initial period (all were subject to termination on notice). The trend since the 1930s has been to allow the declarations to continue, although not, it should of course be added, subject in all cases to the restrictive system of the General Act. Fourthly, the period of commitment in the 1930s was not in most cases the five years of the General Act: a large majority of the declarations were made for ten years. It is true that some of these declarations were made before the Act was drafted but about half were made in its life-time, including some renewals. Indeed there have been more declarations for five-yearly periods made by parties to the Act since 1940. Finally, in a few cases, in the 1930s, parties to the Act were not bound by a declaration for a period and, in one case, not at all.

184. An examination of the limits of the area of the commitment, while it is in force—that is, of the reservations to the declarations and the accessions—also shows that it cannot be said that the reservations were always similar in the 1930s. Again a few facts can be mentioned. Thus (considering only the position in relation to Chapter II of the Act), eleven parties acceded to the Act without any reservations; of those only six during the 1930s had affixed no reservation to their declarations; and of those six, four in the 1940s still had no reservation to their declarations. One reservation which was quite commonly made by parties to the General Act excluded disputes arising prior to, or relating to situations or facts prior to, accession. Eleven parties have made this reservation. At the end of the 1930s eight had a similar reservation in their declaration (although with different effective dates), and two did not (the remaining party had not made a declaration). On the other hand, four parties which did not attach that reservation to their accessions did subject their declarations to it. Finally, while it is true that in some cases where there was a general correlation between the two sources of jurisdiction, divergencies occurred after 1940, in other cases these did not occur. Thus the declarations and accessions of Australia (until 1954), of Canada (until 1970), of India (until 1956), of New Zealand (until the present), of Switzerland (until the present), remained generally similar, as did the declarations and accessions of those States parties to the General Act which between 1950 and 1971 became party to the Revised General Act.

185. An explanation has already been given [1] of the significance of certain

[1] Paras. 59 to 67, above.

of the reservations to the Act by reference to the similar reservations to the declarations. This is a reflection of the fact that the nature of the commitment to the Court to be given in a general instrument for peaceful settlement would often be determined by those responsible for making that commitment after some consideration of the existing commitments to the Court.

186. But although there might be in some cases this kind of general relationship between the two sources of jurisdiction, the relationship, it is submitted, is completely without legal significance. And, as appears from the preceding discussion, it has never in any event existed in any precise factual form which might be given some legal recognition.

187. The fact that commitments given under the two instruments have always differed in some degree for every party to the Act is consistent with the purpose of those who prepared the General Act, a purpose which is manifest from its provisions. As the New Zealand Agent said in the oral hearing at the interim measures stage:

> "the General Act was the result of an attempt to make more extensive, for the parties to it, the obligations of peaceful settlement of disputes. Conciliation and arbitration were made compulsory in certain situations; the Court's jurisdiction was made compulsory; the power to terminate that obligation was for most States considerably restricted; the power to make reservations was limited; and in other ways the régime of the General Act was made more onerous than that of the Statute. If, then, more extensive obligations were going to be accepted vis-à-vis other States, which were also willing to accept them, might not the parties also be expected to append less restrictive reservations? And, in fact, some did, and continue, as a result, to be subject, in their relations with the other parties, to more extensive obligations than those arising under the optional clause."

PART V

ADMISSIBILITY

A. Nature of the Claim Which Is the Subject of the Dispute and of the Legal Rights for Which New Zealand Seeks Protection

188. The dispute between New Zealand and France is of a legal character. 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. France has denied and continues to deny this claim.

189. New Zealand asserts that opposition to atmospheric nuclear tests—opposition derived from an awareness of the dangers which they present to the life, health and security of peoples and nations everywhere and of their irreversible contribution to the pollution of the human environment—has crystallized to the point of the formation of a rule of customary international law prohibiting nuclear tests that give rise to radioactive fallout. Evidence of the necessary *opinio juris* is to be found, *inter alia*, in the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water of 5 August 1963, in the Treaty for the Prohibition of Nuclear Weapons in Latin America of 14 February 1967, in the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, in the constantly reiterated decisions of the General Assembly and other United Nations bodies, in the standards proclaimed by responsible international scientific agencies, such as the United Nations Scientific Committee on the Effects of Atomic Radiation and the International Commission on Radiological Protection, in resolution 3 (I) on Nuclear Weapons Tests adopted by the Stockholm Conference on the Environment and in the Declaration on the Environment adopted by the same Conference, in protests at the continuance of atmospheric nuclear testing, whether made bilaterally or through regional meetings, and in the views expressed by learned writers [1].

190. In the Application instituting proceedings (para. 28) and again in the Request by New Zealand for Interim Measures of Protection (para. 2) New Zealand characterized the illegality of the nuclear testing undertaken by France by reference, *inter alia*, to its violation of five different categories of legal rights. These were enumerated in both documents as follows:

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

(b) the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radioactive 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;

[1] Much of the relevant material except bilateral protests made by countries other than New Zealand is collected in Annexes I to VI of the Request by New Zealand for Interim Measures of Protection.

(c) the right of New Zealand that no radioactive 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 of New Zealand that no radioactive 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 Government of New Zealand and of the Cook Islands, Niue and the Tokelau Islands;

(e) the right 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.

191. The rights asserted under heads *(a)* and *(b)* fall into a different category from those under heads *(c)*, *(d)* and *(e)*. The rights listed under *(a)* and *(b)* are shared in the sense that their violation in relation to any one nation will necessarily involve a violation of the same rights vested in other members of the international community. The degree of attention which individual countries are prepared to give to the protection of these rights and the degree of anxiety displayed in the event of their violation may, and obviously does, vary. Yet the rights are the same for all. They reflect a community interest in the protection of the security, life and health of all peoples and in the preservation of the global environment. The rights are held in common and the corresponding obligation imposed on France (and on any other nuclear power) is owed in equal measure to New Zealand and to every other member of the international community. It is an obligation *erga omnes*.

192. The rights in *(c)*, *(d)* and *(e)* are not shared in that sense. New Zealand is not, of course, the sole possessor of the right, which derives from its sovereignty, to control the level of radioactivity in its territory, territorial waters and air space or of the right not to have harm caused to it and its people as a result of the entry into those areas of radioactive debris from nuclear testing. Nor, obviously, is New Zealand the only nation whose citizens are entitled to exercise well-established freedoms of the high seas. Yet it cannot be said that the nuclear testing which France has undertaken in the past, and may undertake in the future, will necessarily involve the violation of the same rights possessed by all other countries. So far as the heads *(c)* and *(d)* are concerned, whether French nuclear testing in the atmosphere will involve a violation of the rights of any particular country, is largely a function of its geographical location. If radioactive debris from French testing does not enter the territory, territorial waters or air space of a particular country (or at any rate cannot be detected) its rights under heads *(c)* and *(d)* will not be affected by what has occurred at Mururoa. The geographical situation of New Zealand (and of the Cook Islands, Niue and the Tokelau Islands), like that of a number of other countries and territories in the South Pacific region, is such that the atmospheric explosion of a nuclear device of more than the minimum size is certain to involve a violation of its sovereign rights and the explosion of virtually *any* nuclear device in the atmosphere is very likely indeed to have the same result.

193. So far as concerns the rights set forth under head *(e)*, the actions taken by France to enable it to carry out atmospheric nuclear tests at Mururoa involve threats to the rights of all to exercise the freedoms of the high seas.

Whether or not the French action will involve a violation of the high seas rights of any particular country will depend on whether or not its citizens have occasion to attempt to exercise high seas freedoms in the vicinity of Mururoa. As noted in paragraph 205 below, New Zealand citizens have attempted to exercise these freedoms in that area and their right to do so has been forcibly denied to them by the French authorities.

B. International Law and the Concept of Legal Interest

194. It is generally accepted [1] that it is a requirement of international adjudication that a claimant State must establish not only the existence of a dispute but also that it has a legal interest in that dispute. As the International Court has recognized, however, the notion of legal interest or *locus standi* does not have a fixed content. In the *Northern Cameroons* case, having made the point that at certain times the arguments of the parties had been at cross purposes because of the absence of a common meaning attributed to such terms as "interest" and "admissibility", the Court went on to say:

> "The Court recognizes that these words in differing contexts may have varying connotations but it does not find it necessary in the present case to explore the meaning of these terms. For the purposes of the present case, a factual analysis undertaken in the light of certain guiding principles may suffice to conduce to the resolution of the issues to which the Court directs its attention [2]."

195. If the content of the notion of "legal interest" varies from case to case, it has also been enlarged with the development of substantive rules of international law. International law has never been concerned exclusively with the protection of the material interests, narrowly defined, of individual States. It has long been acknowledged that States may have a legitimate—and legal—interest in matters which cannot readily be related to their financial, economic or other tangible interests [3]. And, in an increasingly interdependent world, there has been an accelerating shift in the emphasis of substantive rules of international law away from the protection of rights of individual States towards the protection of the general welfare, of community interests shared by all.

196. The development of substantive rules of law for the protection of the general welfare has been accompanied by a recognition of the interests of individual States in the judicial enforcement of those rules. Had this parallel development not occurred, there would have been an increasingly large body of international law rules lacking any means of judicial protection. In this respect, the protection of international community interests differs markedly from the protection of the public interest in many municipal law systems. The point has been made forcefully by De Visscher:

> "L'exigence d'un intérêt personnel est assurément la règle dans le droit judiciaire interne de la plupart des pays en dépit d'orientations contraires qui se font de plus en plus nombreuses. L'action en justice y a pour objet d'assurer la sanction de droits dont une personne se prétend titulaire;

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[1] But not universally: see Judge Morelli's observations in the *Northern Cameroons* case, *I.C.J. Reports 1963*, p. 132.

[2] *I.C.J. Reports 1963*, p. 28.

[3] For an early illustration of this in the jurisprudence of the Permanent Court, see *S.S. "Wimbledon", P.C.I.J., Series A, No. 1*, pp. 20 and 33.

en principe, son fondement est subjectif et non objectif. Au sein de l'Etat, c'est aux autorités constituées qu'est réservée en principe l'action dite publique dans l'intérêt du respect de la légalité.

Dans les rapports internationaux où cette fonction est encore largement déficiente on ne peut à priori refuser aux Etats individuellement tout titre quelconque à défendre en justice certains intérêts généraux qui, par définition, dépassent leurs intérêts directs et personnels [1]."

The same point has been made by Abi-Saab:

"Dans certains systèmes juridiques de structures simples, tels le droit romain archaïque et le droit musulman, et en l'absence d'organes centraux pouvant représenter en justice les intérêts de la société, c'est aux membres mêmes de cette société qu'est dévolue cette tache *(actio popularis, da'awa al Hisba)*. Le droit international se trouve à ce même stade d'évolution de son organisation. Et aussi longtemps que les organes collectifs internationaux n'ont pas accès, en matière contentieuse, à la justice internationale, la possibilité de représenter en justice les intérêts de la société internationale, demeure réservée aux Etats agissant individuellement [2]."

197. Other writers [3] have referred to an important public policy element in the recognition by international law of an individual right of protection of rules protecting community interests. A narrow construction of the notion of legal interest in these cases will tend to run counter to the objective of the United Nations Charter of securing the settlement of disputes by pacific means; a generous interpretation of the requirement of legal interest will help to permit the settlement of disputes before they deteriorate and seriously disturb friendly relations among States.

198. The landmarks in the development of the recognition of the right of States to bring issues before international tribunals in the general interest and without the need to establish direct injury to interests vested in them alone, have been located with authority in the separate and dissenting opinions of Judge Jessup in the *South West Africa* cases [4]. These two opinions reveal that there is an imposing body of precedent which establishes a legal interest in the general welfare in fields as diverse as slavery, minorities, dependent peoples, labour, genocide, racial discrimination and human rights in general [5].

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[1] C. De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice* (1966), pp. 70 and 71.

[2] G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (1967), pp. 142 and 143.

[3] For example C. W. Jenks, *The Prospects of International Adjudication* (1964), p. 524.

[4] *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, pp. 425-433 and *South West Africa, Second Phase, I.C.J. Reports 1966*, pp. 373-388.

[5] A more recent illustration of treaty law recognizing that individual States not directly affected have an interest in the enforcement of rules for the protection of the international community as a whole—and indeed a duty to assist in their enforcement—is to be found in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. See also in the same sense the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons prepared by the International Law Commission and contained in Chapter III of the Commission's Report on the work of its twenty-fourth session: United Nations, *General Assembly Official Records, 27th Session*, Supplement No. 10 (A/8710/Rev. 1).

Following his survey of these precedents in the second of these two opinions Judge Jessup stated his general conclusion in the following terms:

> "I agree that there is no generally established *actio popularis* in international law. But international law has accepted and established situations in which States are given a right of action without any showing of individual prejudice or individual substantive interest as distinguished from the general interest [1]."

199. Guidance as to what these situations are is to be found in the most recent pronouncement by the Court on the subject of legal interest in its judgment in the case concerning the *Barcelona Traction, Light and Power Company, Limited* [2]. In that case the Court was required to consider the right of Belgium to exercise diplomatic protection of shareholders of Belgian nationality in a company incorporated in Canada. In the course of its consideration of this question, the Court characterized the different kinds of international law obligation which may be incumbent on States as follows:

> ". . . 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 [3]."

200. A number of features of this passage invite attention. First, it clearly does not purport to state exhaustively all those areas of international law which give rise to obligations owed to the international community as a whole and in respect of which all States have a legal interest in the protection of the rights involved. The areas of law mentioned—aggression, genocide, fundamental human rights, including freedom from slavery and racial discrimination, are illustrative only. Secondly, it is acknowledged, with specific reference to genocide [4] that customary law as well as treaty law may give rise

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[1] *I.C.J. Reports 1966*, pp. 387 and 388.

[2] *I.C.J. Reports 1970*, p. 3.

[3] *Ibid.*, p. 32.

[4] The reference to the Court's Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* is presumably to the following passage on the page cited: "*In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d'être of the convention.*

to obligations *erga omnes* and to the corresponding rights of protection. Thirdly, it may be significant that the examples given of fields of law involving obligations owed to the whole of the international community have a certain fundamental character. The elaboration of these obligations has been given substantial attention by the organized international community; their violation can fairly be said to be an affront to the conscience of mankind.

201. In the course of its Judgment, in which it decided that the Belgian Government lacked standing to exercise a right of protection on behalf of its nationals who were shareholders in Barcelona Traction, the Court drew attention to the fact that the Company had another avenue of protection open to it:

> "In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so [1]."

202. Judge Lachs, in a declaration agreeing with the reasoning and conclusions of the Court's Judgment, added the following statement on the same point:

> "The Court has found, in the light of the relevant elements of law and of fact, that the Applicant, the Belgian Government, has no capacity in the present case. At the same time it has stated that the Canadian Government's right of protection in respect of the Barcelona Traction company has remained unaffected by the proceedings now closed.
>
> I consider that the existence of this right is an essential premise of the Court's reasoning, and that its importance is emphasized by the seriousness of the claim and the particular nature of the unlawful acts with which it charges certain authorities of the respondent State [2]."

C. New Zealand's Legal Interest

203. Paragraphs 188 to 193 above drew attention to the two different categories of rights for which New Zealand seeks protection. With regard to the second category of rights under heads *(c)*, *(d)* and *(e)*, New Zealand's

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Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."

See also the following passage in the joint dissent of Judges Guerrero, McNair, Read and Hsu Mo: "It is an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States. So, when a common effort is made to promote a great humanitarian object, as in the case of the Genocide Convention, every interested State naturally expects every other interested State not to seek any individual advantage or convenience, but to carry out the measures resolved upon by common accord." (*I.C.J. Reports 1951*, p. 46.)

[1] *I.C.J. Reports 1970*, p. 50.

[2] *Ibid.*, pp. 52-53.

legal interest is of a direct, immediate and uncomplicated kind. Each series of nuclear tests by France involves the entry into the territory, territorial waters and air space of New Zealand, the Cook Islands, Niue and the Tokelau Islands, of radioactive debris. This was true of the tests held in 1966, 1967, 1968, 1970, 1971 and 1972. It was also true of the series of tests conducted by France this year—despite the Court's Order of 22 June 1973—between 22 July and 29 August. In each year in which a tests series has been conducted the citizens of New Zealand, the Cook Islands, Niue and the Tokelau Islands, have been subjected to the uncertain genetic and somatic effects of increases in levels of radioactivity; and on each occasion anxiety, apprehension and concern have resulted. It hardly needs to be said that New Zealand has a close and intimate concern with the health, both physical and mental, of its people. This interest is of a more direct and tangible kind than its interest would be, for example, in the violation of its air space by the unauthorized entry of a foreign military aircraft—an interest which would undoubtedly be sufficient to give it standing before any international tribunal.

204. In the case of the high seas freedoms referred to under head *(e)* there has, this year, been a significant new development which gives further substance to New Zealand's legal interest in the preservation of those freedoms in the vicinity of Mururoa. As in previous years a dangerous zone for shipping and aircraft was activated before the beginning of the 1973 tests series by notifications to mariners (AVURNAV) and airmen (NOTAM) issued on 9 July 1973 with effect from 11 July 1973. In addition, however, the French Government this year considerably enlarged its encroachment on high seas freedoms. By a decree dated 4 July 1973 and published in the Official Journal of the French Republic on 8 July 1973 the French Government purported to declare a "security zone" around Mururoa to a distance of 60 nautical miles contiguous to the territorial sea, and to reserve to France the right temporarily to suspend maritime navigation in that area. By a further decree of the same date (also published in the Official Journal on 8 July 1973), the French Government purported to suspend maritime navigation in the "security zone" from 11 July until further notice. This latter decree also charged the admiral commanding the Pacific Testing Centre with taking with regard to vessels contravening the decree "all necessary steps to ensure their security and that of those on board". The second of these two decrees remained in force until it was declared ineffective as from 15 September by a third decree of 11 September 1973 published in the Official Journal of 14 September 1973. All three decrees are set out in Annex XII to this Memorial.

205. On 18 July 1973 and again on 15 August 1973, New Zealand citizens on vessels which were not of French nationality and which were on the high seas in the vicinity of Mururoa, were apprehended by the French authorities and subsequently taken against their will to French territory and detained there for a period of days before being permitted to return to New Zealand. The Government of New Zealand protested to the French Government about these two incidents. The texts of the protests are set out in Annex XIII to this Memorial.

206. The question of New Zealand's legal interest in the judicial protection of the rights claimed under heads *(a)* and *(b)* raises issues of the kind canvassed in Section B of this Part of the Memorial. The passage quoted in paragraph 199 from the Court's judgment in the *Barcelona Traction* case is especially pertinent.

207. In the submission of the Government of New Zealand, the principle stated in that passage concerning obligations owed to the whole of the inter-

national community is directly applicable to the protection of the right to inherit a world in which nuclear testing in the atmosphere does not take place and of the right to the preservation of the environment from unjustified artificial radioactive contamination. As already noted, these rights for which New Zealand seeks protection reflect community interests and they are shared. The obligation not to undertake nuclear testing which gives rise to radioactive fallout—like the obligations stemming from the outlawing of aggression and genocide and from the law relating to the protection of human rights—is owed to the international community as a whole. In the words used by the Court, "all States have a legal interest in its observance".

208. The point has already been made that the examples of obligations *erga omnes* given by the Court in this passage all have a certain fundamental character. To the extent that it may be thought that it is a condition of the existence of a legal interest in the protection of rights corresponding to an obligation *erga omnes*, that condition is amply fulfilled in the present case.

209. Because the first goal of the United Nations Charter is the preservation of international peace and security, disarmament and arms control have been debated at length at every working session of the General Assembly since the inception of the United Nations Organization. Over the last 15 years a major portion of that annual debate has been devoted to the question of nuclear weapons testing with special emphasis placed on the testing in the atmosphere that gives rise to radioactive fallout. The terms of the resolutions on this topic adopted by the General Assembly each year leave no room for doubt about the vital importance attached to it by the membership of the United Nations [1]. These resolutions are also eloquent testimony as to the reasons underlying the deepening concern about atmospheric nuclear testing. Over the years the appeals and demands for an end to this activity have become more urgent, but the attitudes revealed have been remarkably consistent: testing in the atmosphere is a hazard to the health of present and future generations; testing in any environment is a danger to mankind—a threat to peace and security everywhere and, ultimately, to man's survival.

210. The concern of the organized international community with the preservation of the global environment has more recent origins. Yet here too it is plain enough that the problems which are being tackled by a variety of means, including the proclamation of norms and standards, are both of concern to the whole of the international community and of fundamental importance. The Declaration on the Environment adopted by the Stockholm Conference [2] states this explicitly. Paragraph 6 of the Declaration states at the end:

> "To defend and improve the human environment for present and future generations has become an imperative goal for mankind—a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of world-wide economic and social development."

Paragraph 7 of the Declaration, which immediately precedes the principles set forth in Part II, concludes with the following words:

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[1] The resolutions are collected in Annex II to the Request by New Zealand for Interim Measures of Protection.

[2] The full text of the Declaration on the Environment is contained in Annex VI to the Request by New Zealand for Interim Measures of Protection.

"A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organizations in the common interest. The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity."

211. On the basis of the doctrine stated by the Court in the *Barcelona Traction* case every member of the international community must have a legal interest in the community rights which New Zealand has invoked and which the present proceedings seek to protect. That alone would be sufficient to give New Zealand standing to take legal action to protect those rights. Additionally, however, New Zealand is specially affected by the violation of those rights and its legal interest in their protection is correspondingly strengthened.

212. The atmospheric testing of nuclear weapons inevitably arouses the keenest sense of alarm and antagonism among the peoples and governments of the region in which the tests are carried out. It is the countries of the region which are subjected to uninvited increases in levels of radioactivity which are not to their benefit; and they are the most direct witnesses of the fact that preparations for nuclear war are being undertaken. A specifically regional concern was manifested in the late 1950s and early 1960s when France was planning and then conducting atmospheric nuclear tests in the Sahara. Exactly the same kind of regional disquiet has been occasioned by French testing in the South Pacific. The Governments of the countries and territories of the South Pacific, in bilateral protests and at regional meetings, have repeatedly reminded France of the dangers to which they are exposed by the nuclear testing at Mururoa and of the anxieties which this activity generates in their peoples [1]. In both cases, the Sahara and the South Pacific, the United Nations has recognized that a portion of its membership has special reasons to be concerned about atmospheric nuclear testing and a special interest in having it halted [2].

213. The countries and territories of the South Pacific region have been at one in opposing the nuclear testing undertaken at Mururoa. Within the region New Zealand has been one of the main spokesmen on this issue. Its prominent role has resulted in part from New Zealand's geographical location. In part, too, it has stemmed from the responsibilities which New Zealand has in relation to the non-self-governing territories of Niue and the Tokelau Islands, to the associated State of the Cook Islands—French Polynesia's nearest neighbour—and, by treaty, to the independent State of Western Samoa. From the inception of its diplomatic correspondence with France on the French programme of testing in the South Pacific, the Government of New Zealand has stressed that its concern is not confined to considerations

[1] The development of the regional concern with French testing in the South Pacific is traced in paragraphs 15-27 of the Request by New Zealand for Interim Measures of Protection and in the Attorney-General's statement on 24 May 1973 in the course of the oral proceedings on that Request. See also the texts of regional statements collected in Annex IV to the Request.

[2] See General Assembly resolutions 1379 (XIV) of 20 November 1959 and 2934A (XXVII) of 29 November 1972. Both resolutions are contained in Annex II to the Request by New Zealand for Interim Measures of Protection.

directly affecting the inhabitants of New Zealand itself. That correspondence [1] constitutes an unbroken record of protest—made on behalf of New Zealand itself and on behalf of the other countries and territories for which it has responsibilities—which dates back more than a decade to the time when French intentions first became known. No country has more consistently and clearly expressed opposition to French nuclear testing in the South Pacific. No country has a stronger claim to a legal interest in the protection of the right to inhabit a world free from nuclear testing in the atmosphere and the right to the preservation of the environment from unjustified artificial radioactive contamination. A decision that the Government of New Zealand lacked a sufficient legal interest to make its Application admissible would amount to a finding that the law relating to atmospheric nuclear testing is devoid of any means of judicial protection.

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[1] The correspondence is set out in Annex II to the Application Instituting Proceedings.

PART VI

SUBMISSIONS OF THE GOVERNMENT OF NEW ZEALAND

A. Summary of Contentions Put Forward in this Memorial

214. The Government of New Zealand contends that the considerations of fact and law set out in the foregoing sections of this Memorial establish that—

(a) the General Act for the Pacific Settlement of International Disputes of 26 September 1928 is a treaty or convention in force between New Zealand and France, for the purposes of Articles 36 (1) and 37 of the Statute of the Court, and the dispute referred to the Court in the Application filed by New Zealand falls within the scope of Article 17 of the Act;
(b) the dispute referred to the Court falls within the scope of Article 36 (2) and (5) of the Statute of the Court;
(c) these two sources of jurisdiction are independent of each other; and
(d) New Zealand has a legal interest in respect of the dispute entitling the Court to admit the Application, and in all other respects the Application is admissible.

B. Submissions of the Government of New Zealand

215. Accordingly, the Government of New Zealand submits to the Court that it is entitled to a declaration and judgment that—

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

29 October 1973.

(Signed) R. Q. QUENTIN-BAXTER,
Agent of the Government of New Zealand.

ANNEXES TO THE MEMORIAL

Annex I

General Act for the Pacific Settlement of International Disputes (Geneva, September 26 1928)

CHAPTER I

CONCILIATION

Article 1

Disputes of every kind between two or more Parties to the present General Act which it has not been possible to settle by diplomacy shall, subject to such reservations as may be made under Article 39, be submitted, under the conditions laid down in the present Chapter, to the procedure of conciliation.

Article 2

The disputes referred to in the preceding article shall be submitted to a permanent or special Conciliation Commission constituted by the parties to the dispute.

Article 3

On a request to that effect being made by one of the Contracting Parties to another Party, a permanent Conciliation Commission shall be constituted within a period of six months.

Article 4

Unless the parties concerned agree otherwise, the Conciliation Commission shall be constituted as follows:

(1) The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective nationals. The three other commissioners shall be appointed by agreement from among the nationals of third Powers. These three commissioners must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. The parties shall appoint the President of the Commission from among them.

(2) The commissioners shall be appointed for three years. They shall be re-eligible. The commissioners appointed jointly may be replaced during the course of their mandate by agreement between the parties. Either party may, however, at any time replace a commissioner whom it has appointed. Even if replaced, the commissioners shall continue to exercise their functions until the termination of the work in hand.

(3) Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

Article 5

If, when a dispute arises, no permanent Conciliation Commission appointed by the parties is in existence, a special commission shall be constituted for the examination of the dispute within a period of three months from the date at which a request to that effect is made by one of the parties to the other party. The necessary appointments shall be made in the manner laid down in the preceding article, unless the parties decide otherwise.

Article 6

1. If the appointment of the commissioners to be designated jointly is not made within the periods provided for in Articles 3 and 5, the making of the necessary appointments shall be entrusted to a third Power, chosen by agreement between the parties, or on request of the parties, to the Acting President of the Council of the League of Nations.

2. If no agreement is reached on either of these procedures, each party shall designate a different Power, and the appointment shall be made in concert by the Powers thus chosen.

3. If, within a period of three months, the two Powers have been unable to reach an agreement, each of them shall submit a number of candidates equal to the number of members to be appointed. It shall then be decided by lot which of the candidates thus designated shall be appointed.

Article 7

1. Disputes shall be brought before the Conciliation Commission by means of an application addressed to the President by the two parties acting in agreement, or in default thereof by one or other of the parties.

2. The application, after giving a summary account of the subject of the dispute, shall contain the invitation to the Commission to take all necessary measures with a view to arriving at an amicable solution.

3. If the application emanates from only one of the parties, the other party shall, without delay, be notified by it.

Article 8

1. Within fifteen days from the date on which a dispute has been brought by one of the parties before a permanent Conciliation Commission, either party may replace its own commissioner, for the examination of the particular dispute, by a person possessing special competence in the matter.

2. The party making use of this right shall immediately notify the other party; the latter shall, in such case, be entitled to take similar action within fifteen days from the date on which it received the notification.

Article 9

1. In the absence of agreement to the contrary between the parties, the Conciliation Commission shall meet at the seat of the League of Nations, or at some other place selected by its President.

2. The Commission may in all circumstances request the Secretary-General of the League of Nations to afford it his assistance.

Article 10

The work of the Conciliation Commission shall not be conducted in public unless a decision to that effect is taken by the Commission with the consent of the parties.

Article 11

1. In the absence of agreement to the contrary between the parties, the Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to enquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Part III of the Hague Convention of October 18, 1907, for the Pacific Settlement of International Disputes.

2. The parties shall be represented before the Conciliation Commission by agents, whose duty shall be to act as intermediaries between them and the Commission; they may, moreover, be assisted by counsel and experts appointed by them for that purpose and may request that all persons whose evidence appears to them desirable shall be heard.

3. The Commission, for its part, shall be entitled to request oral explanations from the agents, counsel and experts of both parties, as well as from all persons it may think desirable to summon with the consent of their Governments.

Article 12

In the absence of agreement to the contrary between the parties, the decisions of the Conciliation Commission shall be taken by a majority vote, and the Commission may only take decisions on the substance of the dispute if all its members are present.

Article 13

The parties undertake to facilitate the work of the Conciliation Commission, and particularly to supply it to the greatest possible extent with all relevant documents and information, as well as to use the means at their disposal to allow it to proceed in their territory, and in accordance with their law, to the summoning and hearing of witnesses or experts and to visit the localities in question.

Article 14

1. During the proceedings of the Commission, each of the commissioners shall receive emoluments the amount of which shall be fixed by agreement between the parties, each of which shall contribute an equal share.

2. The general expenses arising out of the working of the Commission shall be divided in the same manner.

Article 15

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

2. At the close of proceedings the Commission shall draw up a procès-verbal stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it has been impossible to effect a settlement. No mention shall be made in the procès-verbal of whether the Commission's decisions were taken unanimously or by a majority vote.

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognisance of the dispute.

Article 16

The Commission's procès-verbal shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

CHAPTER II

JUDICIAL SETTLEMENT

Article 17

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

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice.

Article 18

If the parties agree to submit the disputes mentioned in the preceding article to an arbitral tribunal, they shall draw up a special agreement in which they shall specify the subject of the dispute, the arbitrators selected, and the procedure to be followed. In the absence of sufficient particulars in the special agreement, the provisions of the Hague Convention of October 18th, 1907, for the Pacific Settlement of International Disputes shall apply so far as is necessary. If nothing is laid down in the special agreement as to the rules regarding the substance of the dispute to be followed by the arbitrators, the tribunal shall apply the substantive rules enumerated in Article 38 of the Statute of the Permanent Court of International Justice.

Article 19

If the parties fail to agree concerning the special agreement referred to in the preceding article, or fail to appoint arbitrators, either party shall be at liberty, after giving three months' notice, to bring the dispute by an application direct before the Permanent Court of International Justice.

Article 20

1. Notwithstanding the provisions of Article 1, disputes of the kind referred to in Article 17 arising between parties who have acceded to the obligations contained in the present chapter shall only be subject to the procedure of conciliation if the parties so agree.

2. The obligation to resort to the procedure of conciliation remains applicable to disputes which are excluded from judicial settlement only by the operation of reservations under the provisions of Article 39.

3. In the event of recourse to and failure of conciliation, neither party may bring the dispute before the Permanent Court of International Justice or call for the constitution of the arbitral tribunal referred to in Article 18 before the expiration of one month from the termination of the proceedings of the Conciliation Commission.

CHAPTER III

ARBITRATION

Article 21

Any dispute not of the kind referred to in Article 17 which does not, within the month following the termination of the work of the Conciliation Commission provided for in Chapter I, form the object of an agreement between the parties, shall, subject to such reservations as may be made under Article 39, be brought before an arbitral tribunal which, unless the parties otherwise agree, shall be constituted in the manner set out below.

Article 22

The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third Powers. They must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties.

Article 23

1. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments.

2. If no agreement is reached on this point, each party shall designate a different Power, and the appointments shall be made in concert by the Powers thus chosen.

3. If, within a period of three months, the two Powers so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the Permanent Court of International Justice. If the latter is prevented from acting or is a subject of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a subject of one of the parties, the appointments shall be made by the oldest member of the Court who is not a subject of either party.

Article 24

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

Article 25

The parties shall draw up a special agreement determining the subject of the disputes and the details of procedure.

Article 26

In the absence of sufficient particulars in the special agreement regarding the matters referred to in the preceding article, the provisions of the Hague Convention of October 18th, 1907, for the Pacific Settlement of International Disputes shall apply so far as is necessary.

Article 27

Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by one or other party.

Article 28

If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.

CHAPTER IV

GENERAL PROVISIONS

Article 29

1. Disputes for the settlement of which a special procedure is laid down in other conventions in force between the parties to the dispute shall be settled in conformity with the provisions of those conventions.

2. The present General Act shall not affect any agreements in force by which conciliation procedure is established between the Parties or they are bound by obligations to resort to arbitration or judicial settlement which ensure the settlement of the dispute. If, however, these agreements provide only for a procedure of conciliation, after such procedure has been followed without result, the provisions of the present General Act concerning judicial settlement or arbitration shall be applied in so far as the parties have acceded thereto.

Article 30

If a party brings before a Conciliation Commission a dispute which the other party, relying on conventions in force between the parties, has submitted to the Permanent Court of International Justice or an Arbitral Tribunal, the Commission shall defer consideration of the dispute until the Court or the Arbitral Tribunal has prounounced upon the conflict of competence. The same rule shall apply if the Court or the Tribunal is seized of the case by one of the parties during the conciliation proceedings.

Article 31

1. In the case of a dispute the occasion of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, the party in question may object to the matter in dispute being submitted for settlement by the different methods laid down in the present General Act until a decision with final effect has been pronounced, within a reasonable time, by the competent authority.

2. In such a case, the party which desires to resort to the procedures laid down in the present General Act must notify the other party of its intention within a period of one year from the date of the aforementioned decision.

Article 32

If, in a judicial sentence or arbitral award, it is declared that a judgment, or a measure enjoined by a court of law or other authority of one of the parties to the dispute, is wholly or in part contrary to international law, and if the constitutional law of that party does not permit or only partially permits the consequences of the judgment or measure in question to be annulled, the parties agree that the judicial sentence or arbitral award shall grant the injured party equitable satisfaction.

Article 33

1. In all cases where a dispute forms the object of arbitration or judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute, or the Arbitral Tribunal, shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures.

2. If the dispute is brought before a Conciliation Commission, the latter may recommend to the parties the adoption of such provisional measures as it considers suitable.

3. The parties undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute.

Article 34

Should a dispute arise between more than two Parties to the present General Act, the following rules shall be observed for the application of the forms of procedure described in the foregoing provisions:

(a) In the case of conciliation procedure, a special commission shall invariably be constituted. The composition of such commission shall differ according as the parties all have separate interests or as two or more of their number act together.

In the former case, the parties shall each appoint one commissioner and shall jointly appoint commissioners nationals of third Powers not parties to the dispute, whose number shall always exceed by one the number of commissioners appointed separately by the parties.

In the second case, the parties who act together shall appoint their commissioner jointly by agreement between themselves and shall combine with the other party or parties in appointing third commissioners.

In either event, the parties, unless they agree otherwise, shall apply Article 5 and the following articles of the present Act, so far as they are compatible with the provisions of the present article.

(b) In the case of judicial procedure, the Statute of the Permanent Court of International Justice shall apply.

(c) In the case of arbitral procedure, if agreement is not secured as to the composition of the tribunal, in the case of the disputes mentioned in

Article 17, each party shall have the right, by means of an application, to submit the dispute to the Permanent Court of International Justice; in the case of the disputes mentioned in Article 21, the above Article 22 and following articles shall apply, but each party having separate interests shall appoint one arbitrator and the number of arbitrators separately appointed by the parties to the dispute shall always be one less than that of the other arbitrators.

Article 35

1. The present General Act shall be applicable as between the Parties thereto, even though a third Power, whether a party to the Act or not, has an interest in the dispute.

2. In conciliation procedure, the parties may agree to invite such third Power to intervene.

Article 36

1. In judicial or arbitral procedure, if a third Power should consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit to the Permanent Court of International Justice or to the arbitral tribunal a request to intervene as a third Party.

2. It will be for the Court or the tribunal to decide upon this request.

Article 37

1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar of the Permanent Court of International Justice or the arbitral tribunal shall notify all such States forthwith.

2. Every State so notified has the right to intervene in the proceedings; but, if it uses this right, the construction given by the decision will be binding upon it.

Article 38

Accessions to the present General Act may extend:

A. Either to all the provisions of the Act (Chapters I, II, III and IV);

B. Or to those provisions only which relate to conciliation and judicial settlement (Chapters I and II), together with the general provisions dealing with these procedures (Chapter IV);

C. Or to those provisions only which relate to conciliation (Chapter I), together with the general provisions concerning that procedure (Chapter IV).

The Contracting Parties may benefit by the accessions of other Parties only in so far as they have themselves assumed the same obligations.

Article 39

1. In addition to the power given in the preceding article, a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.

2. These reservations may be such as to exclude from the procedure described in the present Act:

(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;

(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;

(c) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories.

3. If one of the parties to a dispute has made a reservation, the other parties may enforce the same reservation in regard to that party.

4. In the case of Parties, who have acceded to the provisions of the present General Act relating to judicial settlement or to arbitration, such reservations as they may have made shall, unless otherwise expressly stated, be deemed not to apply to the procedure of conciliation.

Article 40

A Party whose accession has been only partial, or was made subject to reservations, may at any moment, by means of a simple declaration, either extend the scope of his accession or abandon all or part of his reservations.

Article 41

Disputes relating to the interpretation or application of the present General Act, including those concerning the classification of disputes and the scope of reservations, shall be submitted to the Permanent Court of International Justice.

Article 42

The present General Act, of which the French and English texts shall both be authentic, shall bear the date of the 26th of September, 1928.

Article 43

1. The present General Act shall be open to accession by all the Heads of States or other competent authorities of the Members of the League of Nations and the non-Member States to which the Council of the League of Nations has communicated a copy for this purpose.

2. The instruments of accession and the additional declarations provided for by Article 40 shall be transmitted to the Secretary-General of the League of Nations, who shall notify their receipt to all the Members of the League and to the non-Member States referred to in the preceding paragraph.

3. The Secretary-General of the League of Nations shall draw up three lists, denominated respectively by the letters A, B and C, corresponding to the three forms of accession to the present Act provided for in Article 38, in which shall be shown the accessions and additional declarations of the Contracting Parties. These lists, which shall be continually kept up to date, shall be published in the annual report presented to the Assembly of the League of Nations by the Secretary-General.

Article 44

1. The present General Act shall come into force on the ninetieth day following the receipt by the Secretary-General of the League of Nations of the accession of not less than two Contracting Parties.

2. Accessions received after the entry into force of the Act, in accordance with the previous paragraph, shall become effective as from the ninetieth day

following the date of receipt by the Secretary-General of the League of Nations. The same rule shall apply to the additional declaration provided for by Article 40.

Article 45

1. The present General Act shall be concluded for a period of five years, dating from its entry into force.

2. It shall remain in force for further successive periods of five years in the case of Contracting Parties which do not denounce it at least six months before the expiration of the current period.

3. Denunciation shall be effected by a written notification addressed to the Secretary-General of the League of Nations, who shall inform all the Members of the League and the non-Member States referred to in Article 43.

4. A denunciation may be partial only, or may consist in notification of reservations not previously made.

5. Notwithstanding denunciation by one of the Contracting Parties concerned in a dispute, all proceedings pending at the expiration of the current period of the General Act shall be duly completed.

Article 46

A copy of the present General Act, signed by the President of the Assembly and by the Secretary-General of the League of Nations, shall be deposited in the archives of the Secretariat; a certified true copy shall be delivered by the Secretary-General to all the Members of the League of Nations and to the non-Member States indicated by the Council of the League of Nations.

Article 47

The present General Act shall be registered by the Secretary-General of the League of Nations on the date of its entry into force.

Annex II

Resolution of 26 September 1928 of the Assembly of the League of Nations on "the Submission and Recommendation of a General Act and of Three Model Bilateral Conventions in Regard to Conciliation, Arbitration and Judicial Settlement"

The Assembly,

Having considered the work of the Committee on Arbitration and Security:

(1) Firmly convinced that effective machinery for ensuring the peaceful settlement of international disputes is an essential element in the cause of security and disarmament;

(2) Considering that the faithful observance, under the auspices of the League of Nations, of methods of pacific settlement renders possible the settlement of all disputes;

(3) Noting that respect for rights established by treaty or resulting from international law is obligatory upon international tribunals;

(4) Recognising that the rights of the several States cannot be modified except with their consent;

(5) Taking note of the fact that a great number of particular international conventions provide for obligatory conciliation, arbitration or judicial settlement;

(6) Being desirous of facilitating to the greatest possible degree the development of undertakings in regard to the said methods of procedure;

(7) Declaring that such undertakings are not to be interpreted as restricting the duty of the League of Nations to take at any time whatever action may be deemed wise and effectual to safeguard the peace of the world; or as impeding its intervention in virtue of Articles 15 and 17 of the Covenant, where a dispute cannot be submitted to arbitral or judicial procedure or cannot be settled by such procedure, or where the conciliation proceedings have failed;

(8) Invites all States whether Members of the League or not, and in so far as their existing agreements do not already achieve this end, to accept obligations in pursuance of the above purpose either by becoming parties to the annexed General Act (Annex 1) or by concluding particular conventions with individual States in accordance with the model bilateral conventions annexed hereto (Annex 2) or in such terms as may be deemed appropriate[1]:

(9) Resolves to communicate the annexed General Act and the annexed model bilateral conventions to all Members of the League of Nations and to such States not Members of the League as may be indicated by the Council;

(10) Requests the Council to give the Secretariat of the League of Nations instructions to keep a list of the engagements contracted in accordance with the terms of the present resolution either by acceptance of the provisions of the General Act or by the conclusion of particular conventions with the same object, so as to enable Members of the League and States non-Members of the League to obtain information as soon as possible.

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[1] Annex 1 (i.e., the text of the General Act) is set out in Annex I to this Memorial; Annex 2 (i.e., the texts of the model bilateral conventions) is not reproduced.

Annex III

Resolutions Adopted by the League Assembly at Its Final Session on 18 April 1946

The Assembly of the League of Nations,

Having considered the resolution on the assumption by the United Nations of functions and powers hitherto exercised by the League of Nations under international agreements, which was adopted by the General Assembly of the United Nations on February 16th, 1946:

Adopts the following resolutions:

(1) Custody of the Original Texts of International Agreements.

The Assembly directs that the Secretary-General of the League of Nations shall, on a date to be fixed in agreement with the Secretary-General of the United Nations, transfer to the Secretariat of the United Nations, for safe custody and performance of the functions hitherto performed by the Secretariat of the League, all the original signed texts of treaties and international conventions, agreements and other instruments, which are deposited with the Secretariat of the League of Nations, with the exception of the Conventions of the International Labour Organisation, the originals of which and other related documents shall be placed at the disposal of that Organisation.

(2) Functions and Powers arising out of International Agreements of a Technical and Non-political Character.

The Assembly recommends the Governments of the Members of the League to facilitate in every way the assumption without interruption by the United Nations, or by specialised agencies brought into relationship with that Organization, of functions and powers which have been entrusted to the League of Nations, under international agreements of a technical and non-political character, and which the United Nations is willing to maintain.

Annex IV

General Assembly Resolution 24 (I) of 12 February 1946 on the "Transfer of Certain Functions, Activities and Assets of the League of Nations"

I

FUNCTIONS AND POWERS BELONGING TO THE LEAGUE OF NATIONS UNDER INTERNATIONAL AGREEMENTS

Under various treaties and international conventions, agreements and other instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.

Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations, have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.

Therefore:

1. *The General Assembly* reserves the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialised agency brought into relationship with the United Nations should exercise each particular function or power assumed.

2. *The General Assembly* records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary.

3. *The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below.

A. Functions pertaining to a Secretariat

Under certain of the instruments referred to at the beginning of this resolution, the League of Nations has, for the general convenience of the parties, undertaken to act as custodian of the original signed texts of the instruments, and to perform certain functions, pertaining to a secretariat, which do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties. These functions include: The receipt of additional signatures and of instruments of ratification, accession and denunciation; receipt of notice of extension of the instruments to colonies or posses-

sions of a party or to protectorates or territories for which it holds a mandate; notification of such acts to other parties and other interested States; the issue of certified copies; and the circulation of information or documents which the parties have undertaken to communicate to each other. Any interruption in the performance of these functions would be contrary to the interests of all the parties. It would be convenient for the United Nations to have the custody of those instruments which are connected with activities of the League of Nations and which the United Nations is likely to continue.

Therefore:

The General Assembly declares that the United Nations is willing to accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations.

B. Functions and Powers of a Technical and Non-Political Character

Among the instruments referred to at the beginning of this resolution are some of a technical and non-political character which contain provisions, relating to the substance of the instruments, whose due execution is dependent on the exercise, by the League of Nations or particular organs of the League, of functions or powers conferred by the instruments. Certain of these instruments are intimately connected with activities which the United Nations will or may continue.

It is necessary, however, to examine carefully which of the organs of the United Nations or which of the specialised agencies brought into relationship with the United Nations should, in the future, exercise the functions and powers in question, in so far as they are maintained.

Therefore:

The General Assembly is willing, subject to these reservations, to take the necessary measures to ensure the continued exercise of these functions and powers, and refers the matter to the Economic and Social Council.

C. Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments Having a Political Character

The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character.

Annex V

Actions relating to Treaties Adopted under the Auspices of the League of Nations

This Annex lists occasions on which a State which had been a Member of the League of Nations but which was no longer such a Member either because it had withdrawn or because the League was no longer in existence, took action in relation to a treaty, participation in which was limited. The limited participation provisions take three forms:

(a) treaties open to Members of the League of Nations, and to non-Members (i) which were invited to, or (ii) which were represented at, the Conference which prepared the treaties, or which were invited by the Council of the League;

(b) treaties open to States (i) which were invited to, or (ii) which were represented at, the Conference, to Members, and to non-Members invited by the Council; and

(c) treaties open to Members, and to non-Members invited by the Council.

The list does not include actions taken in response to the accession invitations issued by the Secretary-General of the United Nations, under General Assembly resolutions 1903 (XVIII) and 2021 (XX), in respect of the eleven treaties mentioned in the latter resolution. The accepted interpretation of those resolutions seems to be that the participation clauses of the relevant treaties have been widened by the action of the parties and of the General Assembly. This list is limited to situations where the original treaty has not been amended or has not been amended so far as the State taking the action in question is concerned. That is, the treaty provides—so far as is relevant to the situations mentioned—that only "Members of the League of Nations" may become parties.

The list is based on *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions, List of Signatures, Ratifications, Accessions, etc., as at 31 December 1971* (ST/LEG/SER.D/5) and *Signatures and Ratifications and Accessions in respect of Agreements and Conventions concluded under the Auspices of the League of Nations. Twenty-First List* (C.25.M.25. 1943. V. Annex; *League of Nations Official Journal*, Special Supp. 193). (The *Supplement to the Twenty-First List* (C.87.M.87. 1946. V.; *League of Nations Official Journal*, Special Supp. 195) contains no relevant information.)

(The two lists are referred to below as LN List, UN List.)

Opium Convention, Geneva, 19 February 1925 (Category *(b)* (ii): neither State mentioned was represented at the conference).

Costa Rica acceded 1935 (withdrew from League as from 1927); it also acceded to the Protocol to the Convention at the same time.

Paraguay acceded 1941 (withdrew from League as from 1937) (LN List, pp. 122, 123; UN List, pp. 123, 124, 125).

Convention for Limiting the Manufacture and regulating the Distribution of Narcotic Drugs, Geneva, 13 July 1931 (Category *(a)* (ii)).

Japan ratified 3 June 1935 (withdrew from League as from March 1935; signed before 31 December 1931; see the decision relating to Japan's position on the governing body, *League of Nations Official Journal*, 1935, pp. 599, 615); Japan also ratified the Protocol of Signature at the same time.

Paraguay ratified 1941 (withdrew from League as from 1937; signed before 31 December 1931) (LN List, pp. 126, 128; UN List, pp. 129, 131).

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs and *Protocol of Signature*, Geneva, 26 June 1936 (Category *(a)* (i)).

Guatemala acceded August 1938 (withdrew from League as from May 1938) (LN List, p. 130; UN List, pp. 137, 138).

Convention for the Suppression of Traffic in Women and Children, Geneva, 30 September 1921 (Category *(c)*).

Brazil ratified 1933 (withdrew from League as from 1928; signed by 31 March 1922)

USSR acceded 18 December 1947 (a Member of the League from September 1934 to December 1939; no record of an invitation has been discovered).

(On the same day it also, as a party to the Convention, definitively signed and became party to the Protocol amending the Convention and thereby became party to the Convention as amended) (LN List, p. 132; UN List, pp. 158, 159, 156, 157).

Convention for the Suppression of the Traffic in Women of Full Age, Geneva, 11 October 1933 (Category *(a)* (ii)).

France ratified 8 January 1947 (a Member of the League, it signed before 1 April 1934)

(It did not become party to the Protocol of 12 November 1947 amending the Convention)

USSR acceded 18 December 1947 (a Member of the League from September 1934 to December 1939) (see note under the 1921 convention) (UN List, pp. 161, 156, 160).

International Convention relating to Economic Statistics and *Protocol*, Geneva, 14 December 1928 (Category *(a)* (ii)).

Belgium ratified 1950 (a Member of the League, it signed before 30 September 1929)

(Belgium subsequently ratified the Convention as amended by the Protocol of 1948)

Japan ratified 1952 (a Member of the League, it signed before 30 September 1929)

(Japan subsequently accepted the Protocol amending the Convention and thereby became party to the Convention as amended) (UN List, pp. 314, 315, 311, 312).

Convention concerning the Use of Broadcasting in the Cause of Peace, Geneva, 23 September 1936 (Category *(a)* (ii)).

Guatemala acceded November 1938 (withdrew from the League as from May 1938) (LN List p. 52; UN List, p. 407).

Protocol relating to a Certain Case of Statelessness, The Hague, 12 April 1930 (Category *(a)* (i)).

Yugoslavia acceded 1959 (Member of League) (UN List, p. 410).

Protocol relating to Military Obligations in Certain Cases of Double Nationality, The Hague, 12 April 1930 (Category *(a)* (i)).

Austria ratified in 1958 (a Member of the League, it signed the Protocol by 31 December 1930) (UN List, p. 413).

Convention for the Suppression of Counterfeiting Currency and *Protocol*, Geneva, 20 April 1929 (Category *(a)* (ii))

France ratified 1958 (a Member of the League, it signed by 31 December 1929)

Switzerland ratified 1958 (a Member of the League, it signed by 31 December 1929)

Thailand acceded 1963 (a Member of the League)

United Kingdom ratified 1959 (a Member of the League, it signed by 31 December 1929)

(UN List, pp. 432, 433).

Convention relating to the Simplification of Customs Formalities and *Protocol*, Geneva, 3 November 1923 (Category *(b)* (ii)).

Japan ratified 1952 (a Member of the League, it signed by 31 October 1924) (UN List, p. 446).

Convention for the Campaign Against Contagious Diseases of Animals.

Convention concerning the Transit of Animals, Meat and Other Products of Animal Origin with Annex.

Convention concerning the Export and Import of Animal Products (Other than Meat, Meat Preparations, Fresh Animal Products, Milk and Milk Products), with Annex, Geneva, 20 February 1935 (Category *(c)*).

Yugoslavia acceded in 1967 to all three conventions (Member of the League) (UN List, pp. 447, 448, 449).

Consistently with the above practice, the League list included among the States which were entitled to accede to treaties with restricted participation clauses, States which had been Members of the League. Thus, in respect of the General Act, which it will be recalled was open to accession by Members and those invited by the Council (Category *(c)*) the 1944 list includes all the former Members of the League (except Haiti, the withdrawal of which had only just taken effect) among those States, other than Members, which were entitled to accede: p. 48. (See for similar listings: pp. 52, 61, 62, 63, 64, 81, 83, 84, 89, 98, 103, 106, 110, 115, 116, 117, etc., and earlier lists in the same series.)

Annex VI

GENERAL ASSEMBLY RESOLUTION 268A (III) OF 28 APRIL 1949 ON THE "RESTORATION TO THE GENERAL ACT OF 26 SEPTEMBER 1928 OF ITS ORIGINAL EFFICACY"

The General Assembly,

Mindful of its responsibilities, under Articles 13 (1*a*) and 11 (1) of the Charter, to promote international co-operation in the political field and to make recommendations with regard to the general principles of the maintenance of international peace and security, and

Whereas the efficacy of the General Act of 26 September 1928 for the pacific settlement of international disputes is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared,

Whereas the amendments hereafter mentioned are of a nature to restore to the General Act its original efficacy,

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

Instructs the Secretary-General to prepare a revised text of the General Act, including the amendments mentioned hereafter, and to hold it open to accession by States, under the title "Revised General Act for the Pacific Settlement of International Disputes":

Amendments to Be Made to the General Act of 26 September 1928

(a) In article 6, the words "to the Acting President of the Council of the League of Nations" shall be replaced by "to the President of the General Assembly of the United Nations, or, if the latter is not in session, to the last President".

(b) In articles 9, 43 (paragraph 2), 44, 45 and 47, the words "of the League of Nations", or the words "of the League", shall be replaced by "of the United Nations".

(c) In articles 17, 18, 19, 20, 23, 28, 30, 33, 34, 36, 37 and 41, the words "Permanent Court of International Justice" shall be replaced by "International Court of Justice".

(d) The text of article 42 shall be replaced by the following provision:

> "The present General Act shall bear the date . . . (date of the resolution of the General Assembly)."

(e) The text of paragraph 1 of article 43 shall be replaced by the following provision:

> "1. The present General Act shall be open to accession by the Members of the United Nations, by the non-member States which shall have become parties to the Statute of the International Court of Justice or to

which the General Assembly of the United Nations shall have communicated a copy for this purpose."

(f) In article 43 (paragraph 3), the words "The Secretary-General of the League of Nations" shall be replaced by "The Secretary-General of the United Nations", and the words "The Assembly of the League of Nations" shall be replaced by "the General Assembly of the United Nations".

(g) The text of article 46 shall be replaced by the following provision:

"A copy of the present General Act, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat. A certified true copy shall be delivered by the Secretary-General to each of the Members of the United Nations, to the non-member States which shall have become parties to the Statute of the International Court of Justice and to those designated by the General Assembly of the United Nations."

Annex VII

EXTRACT FROM THE REPORT OF THE INTERIM COMMITTEE TO THE THIRD SESSION OF THE GENERAL ASSEMBLY

(3) Belgian proposal to restore the original efficacy of the General Act of 26 September 1928 (A/AC.18/18 and Add. 1)

46. The Belgian proposal to confer upon organs of the United Nations certain functions formerly entrusted to organs of the League of Nations and to the Permanent Court of International Justice under the General Act of 1928, was considered at length. The original proposal was elaborated by a commentary including a draft resolution to be proposed to the General Assembly providing for the amendment of the Act and opening the amended Act to ratification.

As was made clear in the discussion, adoption of the proposal would not imply any approval or disapproval by the Interim Committee or the General Assembly of the substantive provisions of the General Act. By agreeing that United Nations organs (including the International Court of Justice) would assume the functions of the League of Nations and the Permanent Court of International Justice under the Act and by providing for this in a protocol open to accession, the General Assembly would merely make it possible for States, of their own volition, to restore the efficacy of the Act.

The Belgian representative made certain changes in the draft resolution to make clearer its limited scope as described above. The representative of the United Kingdom stated that, while his Government was a party to the General Act, it had acceded with reservations and now had doubts concerning the value of some of its provisions. He did not object to the draft resolution because it had been made clear that no Assembly approval of the Act as public policy of the Organization was implied.

It was noted that, by a resolution of 12 February 1946, the General Assembly had decided to assume certain non-political functions and activities of the League of Nations and that in this resolution it had determined that it would itself examine, or submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments of a political character.

The question arose whether, in the light of this, the General Assembly should be advised to adopt the proposed resolution only at the request of a specific number of the parties. In the view of the Belgian representative, the consent of the parties was unnecessary, since, in its final form, his proposal did not suppress or modify the General Act, as established in 1928, but left it intact as also, therefore, whatever rights the parties to that act might still derive from it. The Belgian proposal would achieve its object through a revised General Act, binding only on States willing to accede thereto. There would thereby be created an entirely new and independent contractual relationship for the implementation of certain of the ends contemplated in Articles 11, paragraph 1, and 13, paragraph 1 *a*, of the Charter. Thanks to a few alterations, the new General Act would, for the benefit of those States

acceding thereto, restore the original effectiveness of the machinery provided in the Act of 1928, an act which, though still theoretically in existence, has become largely inapplicable.

It was noted, for example, that the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of parties which are not Members of the United Nations or parties to the Statute of the International Court of Justice.

It was also noted that, since the function of the Acting President of the Council of the League of Nations under the General Act would, by the draft resolution, be vested in the President of the General Assembly or, if the Assembly were not in session, in the President of the most recent session, approval by the Security Council might not be necessary. It was felt that the choice of the last President of the General Assembly to perform this function might be reconsidered at a later stage if the Interim Committee should be continued.

The Interim Committee approved the proposal as elaborated.

Annex VIII

EXTRACT FROM OFFICIAL JOURNAL OF THE FRENCH REPUBLIC, NATIONAL ASSEMBLY, 11 DECEMBER 1964, PAGE 6064: QUESTION TO THE FRENCH MINISTER OF FOREIGN AFFAIRS: ANSWER BY THE MINISTER

11176. M. Dassié demande à M. le ministre des affaires étrangères s'il entre dans les intentions du Gouvernement d'engager la procédure de ratification de la convention européenne pour le règlement pacifique des différends qu'il a signée le 29 avril 1957. *(Question du 14 octobre 1964.)*

Réponse. La France, comme la plupart des Etats européens, est liée par de nombreuses obligations de règlement pacifique des différends depuis les conventions de La Haye de 1899 et 1907, le statut de la Cour permanente de justice internationale et de la Cour internationale de justice, l'acte général d'arbitrage du 28 septembre 1928 revisé en 1949, auxquels viennent s'ajouter plusieurs conventions bilatérales de conciliation et d'arbitrage. La convention européenne sur le règlement pacifique des différends internationaux risque de faire double emploi avec plusieurs des textes susvisés. Sa ratification rendrait donc nécessaire une revision complète des engagements internationaux de la France en la matière. Dans ces conditions, le Gouvernement n'envisage pas d'entamer pour l'instant la procédure de ratification de ladite convention.

Annex IX

Evidence in Treaty Lists of the Continued Force of the General Act

The following publications, both official and unofficial, have been found which list treaties in force for countries which adhered to the General Act.

(a) *France*

A book compiled by H. Rollet, *Liste des engagements multilatéraux au 30 juin 1969* (1971) states its nature in its preface in the following terms:

> "Pour compléter la liste des accords bilatéraux en vigueur au 30 juin 1969 auxquels la France est partie, une liste aussi complète que possible des accords multilatéraux auxquels la France était partie à la même date a été dressée."

The General Act is listed in this publication [1].

(b) *India*

A book by C. M. Samuel, a former research scholar of the University of Delhi, *India Treaty Manual* (1966) is described on the title page as "giving citations to the text of over 1,000 treaties binding India in 1966". In the introduction it is stated that it is "an attempt to list India's treaties"; and it is noted that it is compiled from non-official sources. The 1928 General Act is listed and under this listing there is the annotation: "Later: April 1949 Revised General Act . . ." Under the separate listing of the 1949 Revised General Act there is no note, as there is in several other cases, to the effect that the later instrument has superseded the earlier.

(c) *Netherlands*

The publication by A. M. Stuyt, *Repertorium van door Nederland tussen 1813 en 1950 gesloten Verdragen* (1953), published by the government printer, contains, in Part II, information concerning each treaty in force as at 1 July 1952. The author, in an introduction, thanks the Ministry of Foreign Affairs "out of whose archives much of the data was extracted". The 1928 General Act is included.

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[1] Rollet's work also includes a list of the States parties, as at 30 June 1969, to the treaties included in it. The States parties to the General Act are listed as follows: Australia, Belgium, Canada, Denmark, Ethiopia, Finland, France, Great Britain, Greece, Italy, Luxembourg, Netherlands, Norway, Peru, Turkey and Sweden. It will be seen that a number of countries are excluded from this list. The omission of Spain is explicable by reference to the fact that it lodged an instrument of denuciation of the General Act on 8 April 1939. Is is not known why other countries which adhered to the General Act, including India, Ireland, New Zealand and Switzerland, are not listed.

(d) *New Zealand*

The New Zealand Treaty List 1948, published in 1948 by the Department of External Affairs and included in the *New Zealand Treaty Series*, 1948, No. 11 states in a prefatory note (p. 3) that it is "a result of an examination of New Zealand's formal obligations and commitments" and, further on (p. 17), it is said: "The international agreements shown in this publication are those which seem to affect New Zealand as at 31 March 1948." The 1928 General Act is included in the section recording multilateral agreements. This publication is the only treaty list (other than a 1961 publication which only covered the period 1948-1960) which has been produced by New Zealand.

(e) *Norway*

The Treaties of Norway 1661-1968 (1970), a publication by the Norwegian Ministry of Foreign Affairs, does not include the General Act in the relevant chronological volume, but it is noted in the preface to the publication that some treaties have been omitted, including some "considered to be of small practical value". The reader is referred to the Index volume (4) for relevant information in respect of such treaties. The Index volume lists both the 1928 General Act and the 1949 Revised General Act. According to a list of signs and abbreviations at the front of the volume, listings of treaties which are no longer in force are placed in square brackets. There are no such brackets around the listing of the 1928 General Act [1]. A supplementary index published in 1973 as a stop-gap until the publication of a complete new edition of the Index volume (4), includes a section containing a list of treaties no longer in force. The General Act is not included in this section.

(f) *Sweden*

Kungl, Utrikesdepartementets kalender 1969, published by the Swedish Ministry of Foreign Affairs, contains a section headed: "Treaties in force with foreign powers as at 1 February 1969." The 1928 General Act is listed in this section and a footnote to this listing reads (in translation): "Still in force for some States.—See also the Revised General Act of 28 April 1949."

A further Swedish publication by S. Lewenhaupt (who appears to have held an official position) "*Traktatöversikt Frammande makters ställning till för Sverige bindande internationella avtal*" (1948) states in its preface that it is a listing of treaties which are in force for Sweden. The information collected is said to be supported by material from the archives of the Foreign Ministry and most of the manuscript is stated to have been checked by the authorities holding the original documents. It is stated that the list contains those agreements which, on the basis of information received by the Swedish Foreign Ministry at that date, were in effect on 1 July 1947. The 1928 General Act is included.

[1] Attention should, however, be drawn to the fact that the preface of the Index volume (4) contains the following paragraph:

> "In many cases it may be difficult to establish whether or not a certain treaty should be considered as still being in force between Norway and the other party in question. The fact that a treaty is or is not included in the present work does not signify that the Ministry of Foreign Affairs has adopted any final attitude in regard to whether or not that particular treaty is still binding for Norway. The compilation is primarily intended to assist those who need it in their work."

(g) *Switzerland*

Volumes XI-XIV of *Recueil Systématique des Lois et Ordonnances, 1848-1947* (1949-1953), published by the Federal Government, contains all the international agreements published between 12 September 1848 and 13 December 1947 which remained in force on 1 January 1948. Volume XI includes the 1928 General Act. Over the last two years, Switzerland has published a complete revision of the laws in a new format. The 1972 Index volume to this revision, *Recueil Officiel et Recueil Systématique du Droit Fédéral, Table des Matières, Année 1972*, contains a section headed "Table Systématique des Textes Legislatifs en vigueur publiés de 1848 à 1972". The General Act is listed in this section with a reference to the volume and page where it is to be found in the earlier collection.

2. Mention should also be made to the fact that a book by A. L. Paddock, *International Treaties Binding Ethiopia* (1952), does not include the General Act among the treaties it lists. It is, however, clear from the foreword to the book that it does not purport to list all the treaties binding on Ethiopia. The foreword states:

> "Many of the old agreements have not been reproduced here. What was intended was to show, by reproduction of the texts of agreements that contributed to the development of Ethiopian international engagements, the thread of development over the years."

3. It should be stated for the sake of completeness, that treaty lists and indices to publications containing the texts of treaties have been located in respect of each of the following countries, but in no case does the work purport to list treaties in force as at the date of its publication: Australia, Belgium, Canada, Denmark, Great Britain, Ireland, Italy, Peru and Turkey.

Annex X

NOTE OF 15 OCTOBER 1973 FROM THE NEW ZEALAND PERMANENT MISSON TO THE UNITED NATIONS TO THE PERMANENT MISSION OF NORWAY TO THE UNITED NATIONS: NOTE OF 26 OCTOBER 1973 FROM THE PERMANENT MISSION IN REPLY

New Zealand Note

The Permanent Mission of New Zealand to the United Nations presents its compliments to the Permanent Mission of Norway to the United Nations and has the honour to refer to the General Act concerning the Pacific Settlement of International Disputes done at Geneva on 26 September 1928. The New Zealand Mission would be most grateful for information bearing on Norway's attitude towards the 1928 General Act as illustrated, for example, in treaty lists or material submitted to the Norwegian Parliament.

The New Zealand Mission takes this opportunity to convey to the Permanent Mission of Norway the assurances of its highest consideration.

Norwegian Note

The Permanent Mission of Norway to the United Nations presents its compliments to the Permanent Mission of New Zealand to the United Nations and has the honour with reference to the latter's Note of 15 October 1973 regarding the General Act concerning the Pacific Settlement of International Disputes done at Geneva on 26 September 1928, to give the following information with regard to Norway's attitude towards the said General Act:

(1) The General Act of 1928 entered into force for Norway on 9 September 1930.

In Parliamentary Bill No. 59 (1951) from the Ministry of Foreign Affairs regarding the Revised General Act of 1949 it is stated amongst other things that (in translation from Norwegian):

"The revised General Act for the Pacific Settlement of International Disputes which entered into force on 20 May 1950 applies only to those States which explicitly accede to the Act. The Act in no way affects the rights of those States which have acceded to the original General Act. These States may continue to invoke this Act to the extent it might apply. The Ministry of Foreign Affairs therefore believes that the question of denouncing the original General Act should be postponed until further notice."

In a recommendation No. 158 (1951) from the Foreign Relations Committee to the Parliament it is stated (in translation):

"The Committee agrees with the Ministry that the question of denouncing the original General Act which has been acceded to by a total of twenty-two States, wholly or in part, should be postponed until further notice because those States having acceded to the original General Act still may invoke this Act to the extent it might apply."

It follows from the official records of the Parliament (1951) at page

1655 that the Parliament unanimously without debate gave its consent to Norway's accession to the revised General Act of 28 April 1949.

(2) Norway's attitude to the General Act of 1928 remained the same in 1970. The Act is thus included in the Index volume of the *Treaties of Norway 1661-1968*. For convenience the Act was not printed in the *Treaties of Norway*. It is, however, printed in the publication *Agreements with Foreign States* (1929-1930).

(3) Norway's attitude to the General Act of 1928 today is still as outlined above. Norway considers the General Act of 1928 binding vis-à-vis those States having acceded to the Act, but not explicitly acceded to the Revised General Act of 1949 provided that the State concerned has not denounced the original General Act.

(4) Norway has not yet denounced the original General Act of 1928.

The Permanent Mission of Norway takes this opportunity to convey to the Permanent Mission of New Zealand the assurances of its highest consideration.

Annex XI

CONDITIONS RELATING TO THE PERIOD OF VALIDITY AND TO TERMINATION IN THE DECLARATIONS RECOGNIZING THE COURT'S COMPULSORY JURISDICTION, MADE BY THE STATES PARTIES TO THE GENERAL ACT

This Annex sets out certain information relating to the declarations made under Article 36 (2) of the Statutes of the two Courts by the States which also acceded to the General Act. It notes the periods for which the declarations were to run, the conditions relating to termination and the terminations. The dates of the commencement of the commitment are those provided for in the instruments in question rather than the date of deposit. The date which appears in parentheses beside the name of each State is the date on which the General Act came into effect for it.

2. The successive five-yearly periods under the General Act are 16 August 1929-15 August 1934, 16 August 1934-15 August 1939, . . . 16 August 1964-15 August 1969, 16 August 1969-15 August 1974.

Australia (29.8.31)

(i) 18.8.30 for 10 years; thereafter terminable on notice; terminated 2.9.40
(ii) 2.9.40 for 5 years; thereafter terminable on notice; terminated 6.2.54
(iii) 6.2.54; terminable on notice.

Belgium (16.8.29)

(i) 10.3.26 for 15 years
(ii) 13.7.48 for 5 years
(iii) 17.6.58 for 5 years; thereafter terminable on notice.

Canada (30.8.31)

(i) 28.7.30 for 10 years; thereafter terminable on notice; terminated 7.4.70
(ii) 7.4.70; terminable on notice.

Denmark (13.7.30)

(i) 13.6.21 for 5 years
(ii) 13.6.26 for 10 years
(iii) 13.6.36 for 10 years
(iv) 10.12.46 for 10 years
(v) 10.12.56 for 5 years and successive 5-year periods unless at least 6 months' notice is given.

Estonia (2.12.31)

(i) 2.5.23 for 5 years
(ii) 2.5.28 for 10 years
(iii) 2.5.38 for 10 years.

Ethiopia (13.6.35)

(i) 12.7.26 for 5 years
(ii) 16.7.31 for 2 years
(iii) 18.9.34 for 2 years.

Finland (5.12.30)

(i) 6.4.22 for 5 years
(ii) 6.4.27 for 10 years

(iii) 6.4.37 for 10 years
(iv) 25.6.58 for 5 years and successive 5-year periods unless at least 6 months' notice is given.

France (29.8.31)

(i) 25.4.31 for 5 years
(ii) 25.4.36 for 5 years
(iii) 1.3.49 for 5 years; thereafter terminable on notice; terminated 10.7.59
(iv) 10.7.59 for 3 years; thereafter terminable on notice; terminated 20.5.66
(v) 20.5.66; terminable on notice.

Greece (14.9.31)

(i) 12.9.29 for 5 years
(ii) 12.9.34 for 5 years
(iii) 12.9.39 for 5 years.

India (29.8.31)

(i) 5.2.30 for 10 years; thereafter terminable on notice; terminated 7.3.40
(ii) 28.2.40 for 5 years; thereafter terminable on notice; terminated 9.1.56
(iii) 7.1.56; terminable on notice; terminated 8.2.57
(iv) 14.9.59; terminable on notice.

Ireland (25.12.31)

(i) 11.7.30 for 20 years.

Italy (6.12.31)

(i) 7.9.31 for 5 years.

Latvia (16.12.35)

(i) 26.2.30 for 5 years
(ii) 26.2.35 for 5 years; thereafter terminable on notice.

Luxemburg (14.12.30)

(i) 15.9.30 for 5 years and successive 5-year periods unless at least 6 months' notice is given.

Netherlands (6.11.30)

(i) 6.8.21 for 5 years
(ii) 6.8.26 for 10 years
(iii) 6.8.36 for 10 years
(iv) 6.8.46 for 10 years; thereafter terminable on notice; terminated 6.8.56
(v) 6.8.56 for 5 years and successive 5-year periods unless at least 6 months' notice is given.

New Zealand (29.8.31)

(i) 29.3.30 for 10 years; thereafter terminable on notice; terminated 5.4.40
(ii) 1.4.40 for 5 years; thereafter terminable on notice
(The French Annex is in error in referring to a later New Zealand declaration).

Norway (9.9.29)

(i) 3.10.21 for 5 years
(ii) 3.10.26 for 10 years
(iii) 3.10.36 for 10 years
(iv) 3.10.46 for 10 years
(v) 3.10.56 for 5 years and successive 5-year periods unless at least 6 months' notice is given.

Peru (19.2.32)

(i) 29.3.32 for 10 years.

Spain (15.12.30)

(i) 21.9.28 for 10 years.

Sweden (16.8.29)

(i) 16.8.21 for 5 years
(ii) 16.8.26 for 10 years
(iii) 16.8.36 for 10 years
(iv) 5.4.47 for 10 years
(v) 6.4.57 for 5 years and for successive 5-year periods unless at least 6 months' notice is given.

Switzerland (7.3.35)

(i) 25.7.21 for 5 years
(ii) 24.7.26 for 10 years
(iii) 17.4.37 for 10 years
(iv) 28.7.48; terminable on 1 year's notice.

Turkey (24.8.34)

[(i) 12.3.36 for 5 years; not ratified]
(ii) 22.5.47 for 5 years
(iii) 23.5.52 for 5 years
(iv) 23.5.57 for 5 years
(v) 23.5.62 for 5 years
(vi) 23.5.67 for 5 years.

United Kingdom (29.8.31)

(i) 5.2.30 for 10 years; thereafter terminable on notice; terminated 7.3.40
(ii) 28.2.40 for 5 years; thereafter terminable on notice; terminated 2.6.55
(iii) 2.6.55; terminable on notice; terminated 31.10.55
(iv) 31.10.55; terminable on notice; terminated 12.4.57
(v) 18.4.57; terminable on notice; terminated 26.11.58
(vi) 26.11.58; terminable on notice; terminated 27.11.63
(vii) 27.11.63; terminable on notice; terminated 1.1.69
(viii) 1.1.69; terminable on notice.

Annex XII

FRENCH DECREES RELATING TO "SECURITY ZONE" ROUND MURUROA

1. Décret n° 73-618 du 4 juillet 1973 créant une zone de sécurité en Polynésie française

[See Annex 7 to the Australian Memorial, I, p. 363]

2. Suspension de la navigation maritime dans une zone de sécurité en Polynésie française

[See Annex 8 to the Australian Memorial, I, p. 364]

3. Navigation maritime dans la zone de sécurité en Polynésie française

Le ministre des armées,

Vu le décret n° 73-618 du 4 juillet 1973 créant une zone de sécurité en Polynésie française;

Vu l'arrêté du 4 juillet 1973 portant suspension de la navigation maritime dans une zone de sécurité en Polynésie française,

Arrête:

Art. 1er. L'arrêté du 4 juillet 1973 portant suspension de la navigation maritime dans la zone de sécurité en Polynésie française cesse d'avoir effet le 15 septembre 1973, à 0 heure T.U.

Art. 2. Le présent arrêté sera publié au *Journal officiel* de la République française.

Fait à Paris, le 11 septembre 1973.

Robert GALLEY.

Annex XIII

NOTES OF 22 JULY 1973 AND 1 OCTOBER 1973 FROM NEW ZEALAND EMBASSY TO FRENCH MINISTRY OF FOREIGN AFFAIRS

Note of 22 July 1973

The New Zealand Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour, on the instructions of its Government, to transmit the following communication.

Reports that a nuclear weapons test has been conducted at Mururoa have been received with profound dismay in New Zealand. The New Zealand Government must once again affirm its strong opposition to all such tests and deplore this latest act by the French Government in defiance of the renewed and most earnest representations of the peoples of the South Pacific and of many other governments around the world.

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 New Zealand Government must further protest at the French Government's violation of the rights of New Zealand citizens on board the yacht "Fri" on 18 July. These citizens were in international waters when the French navy unlawfully boarded the vessel and took it under tow. This act was a violation of the freedom of the high seas and is regarded by the New Zealand Government as illegal.

The New Zealand Government urges 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.

The New Zealand Government reaffirms that it regards the tests as a violation of international law and formally reserves the right to hold the French Government responsible for any damage or losses incurred by New Zealand or the Pacific Islands for which New Zealand has a responsibility as a result of any nuclear weapons tests conducted by France.

The New Zealand Embassy avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.

Note of 1 October 1973

The New Zealand Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour to refer to the incident of 15 August which involved the vessel the "Greenpeace III" and which has already been the subject of some discussion between the New Zealand and French Governments.

As explained to the Ambassador of France in Wellington, the two members

of the crew who were New Zealand citizens, Misses Horn and Lornie, have been interrogated at length concerning the incident. They have indicated, in sworn statements that, after having been warned on 13 August to leave the "security zone" round Mururoa, the "Greenpeace III" was boarded on 15 August by a party of men from the French ship "La Dunquerquoise." At the time the "Greenpeace III" was outside the territorial sea of Mururoa. The members of the boarding party were armed with coshes and knives. They made no attempt at discussion of any kind but immediately beat the two men on board the "Greenpeace III" with their coshes, severely injuring one of them and knocking out the other. The two girls were treated roughly but not brutally. The two New Zealand girls (and the other members of the crew of the "Greenpeace III") were then taken against their will to French territory and subsequently detained for some time before being permitted to return to New Zealand.

On 24 September the Ambassador of France handed to the New Zealand Ministry of Foreign Affairs in Wellington, a report on this incident prepared by the French authorities. It is apparent from a study of it that there is some conflict of evidence as to what happened at the time of the boarding of the "Greenpeace III". There would appear, however, to be no dispute that the incident occurred on the high seas outside territorial limits, that force was employed by the boarding party, and that the crew of the "Greenpeace III", including the two New Zealand girls, were taken against their will to French territory.

The New Zealand Government cannot accept that the French Government has any right to suspend international navigation through large areas of the high seas for the purpose of testing nuclear weapons. It regards the implementation of the French decrees of 4 July 1973, which purported to create a security zone round Mururoa, as a violation of international law, and it is disturbed that force should have been used for this purpose in the incident involving the "Greenpeace III". The New Zealand Government protests at the interference with lawful activities of New Zealand citizens on the high seas and at their subsequent detention by the French authorities.

The New Zealand Embassy avails itself of this occasion to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.