DISSENTING OPINION OF JUDGE WEERAMANTRY

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This is a Request by which New Zealand seeks the continuation of the proceedings it filed in 1973. New Zealand is not entitled to commence fresh proceedings against France in view of the steps taken by France, since the institution of the case in 1973, to withdraw the bases of jurisdiction under which that case was filed. New Zealand's Request for an Examination of the Situation can only be entertained by the Court if it constitutes another phase of those earlier proceedings. The burden lies upon New Zealand to demonstrate this.

The fundamental question before the Court in this Request is whether the "basis of this Judgment" of this Court in 1974 has been "affected", for the Court in that Judgment left open to New Zealand the right to approach this Court again in that event. That question can only be decided by a two-fold process — an examination of the meaning of the term "basis of this Judgment" and an examination of such factual material as New Zealand places before the Court to show that that "basis" has been "affected".

I regret that the Court has chosen to determine the entire Request, involving, though it does, matters of profound moment to the entire global community, upon what seems to me to be an unduly limited construction of the phrase "basis of this Judgment", without a determination on the second question essential to its decision, namely, whether New Zealand has made out a prima facie case on the facts that such basis has been affected. It seems to me the two questions are integrally linked. As is so often the case with questions affecting the competence of the Court, a decision in this case can only be arrived at through an interaction of the legal and factual elements involved (see Ibrahim F. I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, 1965, p. 299).

The phrase "basis of this Judgment" necessitates an enquiry into the grievance which brought New Zealand to the Court, the object of the proceedings, the remedies contained in the Judgment, the basis of facts and knowledge underlying the Judgment, the reasoning or *ratio decidendi* of the Judgment and, in short, the overall context in which the operative words are set. My conclusion, having regard to all these matters, is fundamentally different from that of the majority of my colleagues. The difference between the two approaches touches the fundamentals of the judicial process as I understand it, and this opinion contains some necessary observations in this regard.

The ensuing opinion is an attempt to describe what I conceive to be the correct approach to the momentous question which New Zealand's Request brings before the Court. In making these observations, I bear in mind of course that the scope of New Zealand's present Request is circumscribed within the limits of the initial pleadings on which that case commenced and that New Zealand can claim no more now than it claimed then. No grievances, no reliefs, no orders can be pleaded or

sought other than those which are strictly within the limits of that original Application.

INTRODUCTION

Unusual Nature of New Zealand's Request

This Request for an Examination of the Situation is probably without precedent in the annals of the Court. It does not fit within any of the standard applications recognized by the Court's rules for the revision or interpretation of a judgment rendered by the Court. It is an unusual request generated by an unusual provision contained in the Court's Judgment of 1974.

Paragraph 63 of that Judgment reads as follows:

> "Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request." (*Nuclear Tests (New Zealand* v. *France), I.C.J. Reports 1974*, p. 477.)

Paragraph 63 was a precautionary provision which the Court included in its Judgment when it decided to act upon a unilateral declaration by France that it would discontinue atmospheric testing of nuclear weapons — a declaration which it considered to be legally binding. The Court used its undoubted powers of regulating its own procedure to devise a procedure *sui generis*.

This procedure went beyond the provision for interpretation of a judgment contained in Article 60 of the Court's Statute and the provision for revision contained in Article 61. The Court no doubt considered that in the circumstances before it, it needed to go beyond either of those provisions. It was seeking to meet a need different from the need for interpretation or for revision of the Judgment. It was also opening the door to New Zealand in a manner which reached beyond the period of limitation attached to applications for revision.

The rationale of the Court's action was totally different from the rationale underlying revision, for revision involves an alteration or modification of the Judgment, whereas the Court's action was aimed at preserving the Judgment in its full integrity, in the event that some event had occurred which undermined the basis of the Judgment. Moreover, had

revision been its intention, there was no necessity for the Court to make any special provision as the Statute would have operated automatically.

I therefore see no merit in the submission that an application under paragraph 63 is an application for revision under another guise. The two procedures are totally different in conception, nature and operation.

In devising a special provision dealing with a situation that could arise in the future and affect the *basis* of the Judgment, the Court was demonstrating its anxiety to preserve intact the basic assumptions on which the Judgment was constructed. We must conclude that the Court considered the matter too important to be left unprovided for.

The Court, well aware of the provisions in its established procedure relating to interpretation and revision, was not indulging in an exercise in tautology. It was devising an unprecedented procedure to meet an unprecedented situation.

Background to the Court's Judgment in 1974

The Court accepted the French declaration as reducing New Zealand's claim to one which no longer had any object. Indeed, in the Court's view, it had caused the dispute to disappear.

One can be in no doubt that the Court's understanding — and indeed New Zealand's — at the time was that the damage complained of by New Zealand would come to an end in view of the undertaking by France. Atmospheric tests were the only tests then being conducted by France in the Pacific. An unequivocal indication was given that they would be ended. To all appearances the dispute was therefore at an end.

Yet the Court was dealing with a matter of the utmost importance to the fundamental rights of the people of New Zealand. It did not leave open any possibilities for circumstances yet unseen to undermine the basis of its Judgment, nor did it leave New Zealand defenceless in the protection of the very rights whose protection had brought it before the Court in the first instance. Though fully satisfied that the objective of New Zealand had been attained and the threats to its rights overcome, it still took the precaution of introducing into its Judgment this clause of its own devising.

It is under that clause that New Zealand requests the Court to consider the situation in the light of its assertion that the current underground nuclear tests produce the same kind of radioactive contamination of its environment as it complained of in 1973.

Questions of Jurisdiction and Admissibility

In the case instituted in 1973, the Court did not proceed to a finding on questions of jurisdiction and admissibility. The Order of 22 June 1973

indicating certain provisional measures against the Parties was made on the basis that:

> "it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the Government of New Zealand may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application" (*Nuclear Tests (New Zealand* v. *France), Interim Protection, I.C.J. Reports 1973*, p. 140, para. 24).

There was thus no determination on questions of admissibility or jurisdiction prior to that Order, nor was there a finding on these matters at any subsequent stage.

For the reasons set out above, this opinion does not in any way touch upon the merits of New Zealand's claim. It will confine itself initially to examining whether the basis of the 1974 Judgment has been in any way affected. It will be necessary for a determination of this question to refer to some matters of fact set out in New Zealand's Request and Application. But if these are referred to, they are only for an examination of the question whether there is prima facie a situation which reactivates the 1973 case through the key provided by paragraph 63 of the 1974 Judgment. It is impossible to determine whether the basis of that Judgment has been affected without some reference to such questions of fact.

Some Preliminary Questions

Is the 1974 Case Dead?

One of the basic positions of France is that the Judgment of 1974 is *res judicata* and that the case instituted in 1973 is dead. In the picturesque language of its counsel, this was no legal Lazarus and no one could revive it.

France also calls in aid, in support of this view, the fact that no academic writing and no publication of the Court lists New Zealand's case against France as a case that is pending. Rather, it is listed even in official Court publications among cases that have been disposed of.

In addressing this question, certain incontrovertible propositions must first be noted:

— the Court itself has stated in the Judgment that New Zealand may come back to the Court in certain eventualities, however one may define them;
— the Court specially fashioned this procedure to meet the particular needs of this case;
— this right is given without any limitation of time;
— no academic publications, nor indeed any official publications of the Court, can prevail against the express words of the Judgment itself;

— the Court was within its undoubted inherent powers of regulating its own procedure in making this provision in the Judgment;

— the Court was concerned with possible future events which might undermine the basis of the Judgment;
— the Court deliberately chose a procedure other than revision or interpretation.

The argument that the case was dead is consequently one which seems to fly in the face of the Court's own words which kept it alive in certain eventualities. Far from being a revisionary procedure in another form, paragraph 63 is an independent procedure standing in its own right. Devised by the Court and carrying the full stamp of the Court's authority, its express words contradict the contention that the case is dead.

Paragraph 63 enables the case to be reopened by New Zealand if, but only if, the conditions it specifies be met — namely, that the basis of the Judgment has been affected. If that paragraph comes into operation, the case is revived, New Zealand's Request must be entertained by the Court and New Zealand's request for provisional measures must be considered. New Zealand would be approaching the Court under the very authority of the Court itself. New Zealand's right to approach the Court and the validity of New Zealand's Request to this effect cannot in these circumstances be in doubt. The Court would then also have to consider the interventions by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia.

If, on the other hand, New Zealand does not have the key with which to open the door of paragraph 63, its Request must be dismissed and the occasion for taking the other steps specified above does not arise.

Whether New Zealand has that key — i.e., whether New Zealand is able to show that the basis of the Judgment is affected — is the crux of the matter before the Court.

Is Paragraph 63 Self-contradictory?

It was suggested in the course of the argument that the words "in accordance with the provisions of the Statute" restrict New Zealand to the specific forms of approaching the Court which are provided in the Statute. I do not read these words so narrowly, for such a reading would negate the right which the Court was expressly giving to New Zealand by paragraph 63.

I read these words as meaning rather that the Court was ensuring that New Zealand must follow the usual procedural formalities required of any application made by any party to the Court.

I cannot subscribe to the view that the Court was giving New Zealand a right in the earlier part of that sentence which it was immediately taking

away by restricting New Zealand's application to existing Court procedure which did not indeed provide for any such application. The Court did not contradict itself in this manner, and to suggest as much is to do little credit to the remarkable foresight exhibited by the Court in providing New Zealand with the right which it did.

The Court's first task therefore is to examine whether New Zealand has brought before it circumstances which affect the basis of the 1974 Judgment. If it has, the Court must then proceed, in terms of its own Judgment, to examine those circumstances with the greatest of care in order to determine whether a situation has arisen which requires the Court to grant to New Zealand the relief it seeks.

Can New Zealand's Request Be Disposed of Administratively?

It has been contended by France that this matter should be disposed of administratively. It is said in support of this position that New Zealand is bringing a fresh matter to the Court; that New Zealand is approaching the Court on the basis of a case that is dead; that there is no legally valid application before the Court; and that indeed the matter can be dealt with administratively on the basis of a manifest and patent lack of jurisdiction.

France submitted that the Court should take a decision *proprio motu* without any need for a public hearing. In support of its contention that the matter should be disposed of by means of an order without hearings, France relied upon the cases of *Treatment in Hungary of Aircraft and Crew of United States of America* (*I.C.J. Reports 1954*, pp. 101 and 105); *Aerial Incident of 4 September 1954* (*I.C.J. Reports 1958*, pp. 160-161); *Aerial Incident of 7 November 1954* (*I.C.J. Reports 1959*, p. 278)[1].

Those were cases of manifest and patent lack of jurisdiction where it was not possible for the Court to take any procedural steps, and are distinguishable from the present case, where New Zealand comes to the Court directly within the terms of an express provision of the Court's own Judgment. The Court needs to consider whether New Zealand is correct in its contention that the basis of the 1974 Judgment is affected by the current nuclear tests. If it is not, New Zealand would have no case, but if it is, there is a matter to be seriously considered. The decision

[1] In 1973, likewise, the position of France, as stated in a letter to the Court delivered on 16 May 1973, was that the Court was "manifestly not competent" to deal with the dispute, and that the Court should drop the matter from its docket. The grounds included the argument that the dispute concerned an activity connected with national defence and was thus excluded from the jurisdiction of the Court by the third French reservation to its declaration of acceptance of the compulsory jurisdiction of the Court. The Court rejected the French contention that the absence of jurisdiction was manifest (*Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 138).

whether there is or is not such a matter is obviously one which cannot be taken behind the closed doors of purely administrative orders, without a public hearing.

It would be contrary to the entire scheme of the administration of justice, as conceived in its Statute and practised by the Court, for the Court to dismiss such an application *in camera*, without a public hearing and even without the benefit of an *ad hoc* judge from the country in question — as France invited the Court to do. Such procedures, available in circumstances where there is a patent, complete and manifest lack of jurisdiction, are inapplicable to the present situation.

If, indeed, New Zealand makes out a prima facie case that the basis of the 1974 Judgment has been affected by supervening events, New Zealand has clearly the right to approach the Court, in terms of the Court's own Judgment, for a judicial determination of the situation arising from the resumption of nuclear testing. The Court will of course deny such relief if, upon a fuller examination of the matter, it is not satisfied that New Zealand's case has been substantiated. But it can only do so judicially.

The matter has, happily, been heard by the Court at a public hearing, at which both Parties have presented their submissions, and both Parties have been afforded the opportunity of a reply. In following this procedure, the Court has given due effect to such principles as *audi alteram partem* which are integral constituents of the rule of law and justice.

Moreover, under Article 79 (1) (Article 67 (1) at the time of the 1973 case) and Article 79 (7) (Article 67 (7) in 1973) of the Rules of Court, New Zealand was clearly entitled to a judicial determination of these preliminary objections to its application.

CORRESPONDENCE BETWEEN NEW ZEALAND'S COMPLAINTS IN 1973 AND 1995

New Zealand's Complaints in 1973

To understand the basis of the Judgment, which New Zealand claims has been affected, it is necessary, preliminarily, to look at New Zealand's complaint to the Court in 1973.

New Zealand had come to the Court with a complaint that it was suffering damage of five specified descriptions from the radioactive fallout generated by French nuclear explosions in the Pacific. That damage was specified as follows:

> "The rights to be protected are:
>
> (i) the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fall-out be conducted;

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

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

(iv) the right of New Zealand that no radio-active material, having entered the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their airspace 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;

(v) 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 sea-bed, without interference or detriment resulting from nuclear testing.

The fact that further nuclear tests at the French Pacific Test Centre will aggravate and extend the dispute between New Zealand and France is one of the grounds on which New Zealand seeks protection of the foregoing rights. In addition and independently, New Zealand has the right to the performance by France of its undertaking contained in Article 33 (3) of the General Act for the Pacific Settlement of International Disputes to abstain from any action whatsoever that may aggravate or extend the present dispute." (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, Request for the Indication of Interim Measures of Protection, p. 49, para. 2.)

It will be noticed that in the entirety of this paragraph, there is no limitation to atmospheric tests, but that the reference throughout is in general terms to nuclear tests and nuclear testing.

Of particular significance, in the light of the present Request, were the identification of the dispute in paragraph 17 of the 1973 Application as including the effects of fallout on the *"natural resources of the sea"* (*ibid.*, p. 6), and the reference in paragraph 22 to the freedom to exploit the resources of the sea and the seabed, and the continued pollution of the maritime environment of New Zealand *"beyond the limits of national jurisdiction"* (*ibid.*, p. 7; emphasis added).

The prayer of New Zealand was no less clear in its statement of the objectives of the proceedings, for it said that New Zealand asks the Court to adjudge and declare:

> "That the conduct by the French Government of *nuclear tests in the South Pacific region* that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests." (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, Application, p. 9; emphasis added.)

So, also, paragraph 10 of New Zealand's Application:

> "The New Zealand Government will seek a *declaration* that the conduct by the French Government of *nuclear tests in the South Pacific region* that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests." (*Ibid.*, p. 4; emphasis added.)

The Applicant's Memorial in paragraph 5 describes this request for a declaration as "the principal issue before the Court" (*ibid.*, p. 146).

What was the gravamen of New Zealand's complaints? Was it the infringement of the various rights thus specified as resulting from nuclear tests, or was it atmospheric tests and atmospheric tests alone?

It seems reasonable to conclude that New Zealand's complaint to the Court was in relation to the alleged infringement of its rights under international law, which resulted from unjustified artificial radioactive contamination of its terrestrial, maritime and aerial environment. The means used at that stage to bring about this result was atmospheric tests and New Zealand naturally complained against these. The means was subsidiary to the central fact of injury. It was in the injury that the complaint was grounded. The injury was the larger context within which the specific act causing damage was set.

Nowhere in the pleadings, submissions or Judgment is there the slightest suggestion of any acceptance by New Zealand of the principle that the same damage would be tolerated without complaint, if caused by nuclear explosions in another medium. It seems unreasonable to suggest that New Zealand would have been quite content to endure damage by radioactive contamination so long as it did not occur from atmospheric tests.

Nor could the Court have endorsed the view that the dispute had disappeared, or that the claim by New Zealand no longer had any object if there was the suggestion of a possibility of radioactive contamination resulting from the underground tests. Nor could it have viewed France's undertaking as a reservation, even by remotest implication, of the right

to cause nuclear contamination of the environment provided it was not caused by atmospheric testing.

The State of Knowledge in 1974

The state of knowledge at the time is relevant. The belief of the 1960s that underground testing was safe is reflected in the terms of the Partial Test Ban Treaty of 1963 (to which the United States of America, the United Kingdom and the Union of Soviet Socialist Republics were parties), which banned nuclear weapons tests in the atmosphere, in outer space and underwater. Tests in these media were thought to raise the environmental concerns uppermost in the minds of the contracting States, but underground testing was thought to have "the potential for essentially total confinement of the radioactive products formed" (A. C. McEwan, "Environmental Effects of Underground Nuclear Explosions", in Goldblat and Cox (eds.), *Nuclear Weapon Tests: Prohibition or Limitation?*, 1988, p. 83).

Even two years after the 1974 Judgment, a major treaty was entered into which displayed an international expectation that underground nuclear explosions were safe. The Peaceful Nuclear Explosions Treaty, signed on 28 May 1976 between the United States and the Soviet Union, provided for underground nuclear explosions for peaceful purposes, as this seemed to meet the need for "safe" nuclear energy for major construction works. Goldblat and Cox, in the study already referred to, observe:

> "For many years, peaceful nuclear explosions (PNEs) had been seen as potentially valuable activities for a variety of purposes. In the United States, the so-called Plowshare Programme set out to explore possible uses of PNEs for digging canals or for other industrial ends, such as gas stimulation or oil recovery from otherwise uneconomic deposits. However, progress was slow, given the necessity of systematic tests using both conventional and nuclear explosives, because the need to minimize the risks required careful experimentation. By the mid-1970s, industrial interest in the use of underground nuclear explosions for non-military purposes had waned in the USA, *while public concern over possible environmental hazards had increased.* These hazards include — in addition to the release of radioactive material — shock wave effects which may occur close to the points of detonation. The programme was terminated in 1977, shortly after the signing of the PNET." (Jozef Goldblat and David Cox, "Summary and Conclusions", *ibid.*, p. 13; emphasis added.)

The expectations of the early 1970s that underground tests provided a safe alternative were obviously belied by later experience. As McEwan observes:

> "Venting to the atmosphere has, however, occurred for a number of underground tests, other than those associated with Plowshare-type projects, and more minor sub-surface ventings may occur more commonly." (*Op. cit.*, p. 83.)

Here perhaps lies the key to understanding the readiness of the Court and the Parties in 1974 to welcome underground tests as a means of cessation of radioactive harm to New Zealand, and as eliminating its grievances.

Knowledge and experience not available in 1974 are available now, placing upon the Court the duty, in the interests not only of New Zealand but of the world community generally, to use the power it reserved to itself in 1974 to re-examine the situation if the basis of its Judgment has been affected. If what seemed safe in 1974 now reveals its hazards in a manner not known or expected then, there is a responsibility lying upon the Court to take note of this change in the fundamental assumptions underlying its Judgment of 1974.

If the Court had then the knowledge we have now of the possibility of leakage due to fissures, porosity, water seepage, subsidences and sheering off of parts of the atoll, it would be strange indeed if the Court committed New Zealand to this danger, and considered that, despite so exposing New Zealand, it was fully removing New Zealand's grievance of radioactive damage. That would be a total *non sequitur*. It would also lead to the apparent absurdity of the Court endorsing radioactive contamination so long as it was committed by means other than atmospheric testing.

Another strange result would be that, as New Zealand submitted, the Court would have been building into its Judgment a massive escape clause for France — a clause to the effect that France reserved the right to conduct unsafe testing. It was quite clear in all the circumstances that the assurance of underground testing which France was offering was understood as an assurance of a safe for an unsafe method of testing. Just as the atmospheric testing was known to be unsafe, the underground testing was thought to be safe. When France gave the assurance that it would stop the atmospheric testing and that it was ready to move to underground testing, it was a statement which in all the circumstances of the case was understood to be a shift to a procedure which obviated the dangers of which New Zealand complained.

New Zealand's Present Grievances

New Zealand now tells the Court that the self-same type of damage it complained of in 1973, namely, radioactive contamination resulting from nuclear explosions by France in the Pacific, does now occur from underground testing. It says that these proposed underground tests will infringe the rights of New Zealand in the same way as the atmospheric tests did in 1973.

According to the material placed before the Court by New Zealand, underground tests produce all the five species of damage specified in paragraph 2 of its Request for the Indication of Interim Measures of Protection, dated 14 May 1973: namely, (i) violation of the right to be free of radioactive fallout[1]; (ii) violation of the right to the preservation from unjustified, artificial radioactive contamination of the terrestrial, maritime and aerial environment; (iii) violation of the right that New Zealand air space and territorial waters be free of the entry of radioactive material; (iv) the apprehension, anxiety and concern resulting from such entry; (v) violation of the right to exploitation of the resources of the sea without interference or detriment resulting from nuclear testing.

The gist of New Zealand's complaint in 1973 was that damage or harm from radioactivity in the five ways it specified was being caused by France. The only way in which it was then being caused was by atmospheric testing of nuclear weapons.

The gist of New Zealand's complaint today is that the same type of damage or harm from radioactivity is being caused by France. It is caused, as alleged before, by the detonation of nuclear weapons in the Pacific, but today the venue is underground, where formerly it was atmospheric. New Zealand's position, however, is that the damage is the same; the infringement of New Zealand's rights is the same; the agency of physical causation is the same, namely, the explosion of nuclear weapons. The only difference is that that agency of causation is detonated not above ground but underground. Hence the Request to the Court for protection against the same damage from which it sought protection in 1973.

Hence, also, appears the wisdom of the Court's precautionary provision in 1974 enabling New Zealand to come before the Court again.

[1] "Fallout" is not limited to atmospheric debris. The *Oxford English Dictionary* defines "fallout" as "Radioactive refuse of a nuclear bomb explosion" (2nd ed., Vol. V, 1989, p. 696).

INTERPRETATION OF PARAGRAPH 63

The Terms of Paragraph 63

How does one ascertain the "basis of a judgment"? The phrase seems to go to the heart of the judgment, the reasoning on which it proceeds, the foundation on which it rests. To search for the basis of a judgment, does one look only at what the judgment expressly decrees, or does one have regard also to such matters as the context in which the judgment was delivered, the harm or mischief complained of, the request of parties to which that judgment was an answer, and the object of the proceedings? It seems quite clear that a proper and legally sustainable approach to this question requires a consideration of the Court's order or decree, not in isolation but in context.

It is necessary now to look at the carefully drawn language used by the Court to confer this right on New Zealand.

How would the expression "basis of the judgment" be understood according to the ordinary significance of language? And what does it mean in the special context of this case?

While the nature of a judgment's commands or prohibitions are important, so also is the basic object which it sought to achieve. It would strain both language and juridical principle to hold that the basis of a judgment can be found in its commands or prohibitions alone, considered apart from its reasons, or in its reasons alone, considered apart from its commands and prohibitions. As in all legal interpretation, it must be an interpretation in context.

Some insights may also be gained from discussions of the meaning of the expression *ratio decidendi*, which one examines in order to ascertain the basis of a judgment. The volumes written on what constitutes the *ratio decidendi* of a judgment (see, for example, Cross and Harris, *Precedent in English Law*, 4th ed., 1991) contain various formulations of its meaning, but all different versions go back to the central question of law or principle from which the eventual orders made in the case proceed. The orders, or in this case the means prohibited, are part of the judgment, but clearly not the *basis* of the judgment.

What is this central question of principle in the 1974 Judgment? It must surely be that New Zealand is entitled to protection against harm caused by radioactivity from the explosion of nuclear weapons. It surely cannot be that New Zealand is entitled to protection against harm caused by radioactivity so long as such radioactivity proceeds from atmospheric detonations, and that New Zealand is not entitled to such protection if the harm proceeds from underground explosions.

To make this point clearer still, suppose France had moved not to underground explosions but to underwater explosions alongside of Mururoa. Could anyone have claimed that this was a permissible activity within the terms of the 1974 Judgment? It would strain language and

credibility to argue that such was the intention of the Court. The conclusion appears patently clear that the basis of the Judgment was that harm must not be caused by nuclear tests and that New Zealand was entitled not to be exposed to radioactive contamination from French nuclear tests in the Pacific.

Another way of analysing the phrase is to observe that an order or directive statement contained in a judgment constitutes only a part of a judgment. The term "judgment" goes beyond the merely operative portion of a judgment. The *basis* of a judgment goes deeper still into the area of the underlying principles on which it rests, rather than the external orders used to implement it.

As I read paragraph 63, it seems clear, in the Court's own language, that it was not contemplating a breach by France of its undertaking, or of the Court's Judgment, but that it still had some concerns that the "substratum" of the Judgment might be affected in some way not then foreseeable. It is a tribute to the wisdom of the Court and to its foresight that it expressly provided for this possibility. The contrary contention, which necessarily implies that the Court was prepared to sanction similar damage so long as it did not occur from atmospheric testing, is clearly untenable and does little credit to the judgment and foresight of the Court of 1974.

The Court's Formulation of the Bases of the 1974 Judgment

These conclusions, based on ordinary rules of interpretation, are reinforced when one has regard to the Court's own observations in the Judgment itself.

The Court's recognition of this principle of contextual interpretation appears quite clearly from paragraph 59 of the Judgment, wherein the Court states: "Thus the Court concludes that, the dispute having disappeared, the claim advanced by New Zealand no longer has any object." These considerations, set out in one of the paragraphs immediately preceding the operative paragraph 63, show the context which the Court considered relevant. In fact, that paragraph posed two very definite and specifically formulated questions:

(a) has the dispute disappeared?
(b) has the claim of New Zealand no longer any object?

One is straight away led into the questions, "What was the dispute?" and "What was its claim?" The dispute comprised the grievances and the claim comprised the reliefs. The grievances appear, *inter alia*, from New Zealand's Application (para. 28) of 9 May 1973, New Zealand's Memorial (para. 190) of 29 October 1973, and in the Request for the Indication of Interim Measures of Protection (para. 2) of 14 May 1973, which spelt

out quite clearly the rights in respect of which it sought protection. The reliefs, read in the context of the grievances, can only mean the cessation of those grievances. The Court was satisfied according to its knowledge then that with France's undertaking the grievances came to an end and no further reliefs were necessary.

To be more specific, the Court's view therefore was that all the five heads of injury mentioned by New Zealand, which formed the subject of its dispute with France, had disappeared. If such injury had disappeared in all its five aspects, New Zealand's claim would surely no longer have any object. Such was the reasoning or the *ratio decidendi* which led the Court to its conclusions. Yet it considered the protection of New Zealand's rights to be so fundamental that it reinforced New Zealand's protections by inserting the precautionary provision that if the basis of the Judgment should be affected, New Zealand may approach the Court again.

The Concentration in 1974 upon Atmospheric Tests

Much has been made in the proceedings before us of the concentration of New Zealand's presentation and the Court's Judgment upon atmospheric tests. From this the inference is sought to be drawn that this was New Zealand's only concern.

In the first place, as already pointed out, there is a liberal reference in the pleadings and the oral presentations to radioactive damage caused by France in explosions in the Pacific without limitation to atmospheric explosions.

In the second place, it must be remembered that atmospheric explosions were the only French explosions then taking place in the Pacific. It was not the province of New Zealand to speculate upon the unknown impact upon New Zealand of hypothetical underground explosions yet to take place in the future.

Court presentations take place upon the basis of practicalities and not upon guesses or speculations as to the likely effect of modalities of harm which are as yet hypothetical. The presentation of the matter in Court naturally concentrated on the practical and immediate aspect, and it would have been strange if it had not. The Court's attention likewise focused on this matter and it would have been strange if it had not.

Furthermore, if such speculation were inappropriate for the Parties, it was even more inappropriate for the Court to engage judicially in speculation upon this unknown field. It was not for New Zealand nor for the Court to engage in speculation as to the possible effects of underground testing which had never yet been used in a manner causing danger or damage to New Zealand, on which no material had been placed before the Court, and which was not the cause of the immediate damage of which New Zealand complained. Indeed, had counsel indulged in such a

speculative exercise, they may well have been asked to address the Court on practicalities rather than hypotheses.

Nor did New Zealand argue its case *solely* on the basis of atmospheric tests. As the Court itself observes in paragraph 29 of its Judgment, New Zealand's case was argued *mainly* in relation to atmospheric tests — nor could the case have been argued in the light of the information then available, except on the basis of atmospheric tests.

Dr. Finlay, the Attorney-General for New Zealand, in opening New Zealand's case at the oral proceedings for the Request for Interim Measures of Protection on 24 May 1973, stated at the very outset of his submissions:

> "The request relates to proceedings recently instituted by New Zealand against France asking the Court to adjudge and declare that the conduct by the French Government *in the South Pacific region of tests that give rise to radio-active fall-out* constitutes a violation of New Zealand's rights under international law, and that those rights will be violated by any further such tests." (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, p. 100; emphasis added.)

The concentration on tests in the atmosphere, for the obvious reason that only such tests were then being conducted, did not mean a shift away from the central core of the case to the peripheries, or from the subject of the grievance to the particular means by which it was caused.

It is also of interest to note that both immediately before and after the hearings in Court in July 1974, the New Zealand Government officially indicated that its position was wider than the cessation of atmospheric testing.

The first statement, as recounted in paragraph 37 of the Judgment of 1974, was a Note of 17 June 1974 from the New Zealand Embassy in Paris categorically asserting that New Zealand's position was one of fundamental opposition to *all* nuclear testing:

> "The announcement that France will proceed to underground tests in 1975, while presenting a new development, *does not affect New Zealand's fundamental opposition to all nuclear testing*, nor does it in any way reduce New Zealand's opposition to the atmospheric tests set down for this year: the more so since the French Government is unable to give firm assurances that no atmospheric testing will be undertaken after 1974." (*I.C.J. Reports 1974*, p. 470; emphasis added.)

The second statement was made on the day following the Judgment of the Court, on 21 December 1974, when the Prime Minister of New Zea-

land made the observation that, "The Court's finding achieves *in large measure* the immediate object for which these proceedings were brought" (emphasis added). The cessation of atmospheric tests was thus not the end-all of New Zealand's request.

The Substance of the Grievance and the Means by Which It Is Caused

In an examination of a matter such as this, there could well be a tendency for undue concentration on the means by which a wrong is committed, to the exclusion of the wrong itself. The means is often ancillary, for it is the wrong or injury sustained by a party that is the core of the complaint.

If harm to the person is threatened with a particular kind of weapon such as a sword, it is no justification to the offender if, upon the prohibition of the use of that weapon, he proceeds to cause the same harm by the use of another weapon, such as a club. A homely illustration could be used to test this proposition. If X should complain to the village elder that Y is threatening him with a sword in a manner causing reasonable apprehension of an intention to cause grievous harm, and the village elder orders Y to drop his sword, is that order to be construed as an order to refrain from causing bodily harm with a sword, or as an order to refrain from causing bodily harm, whatever the weapon used? If Y thereafter proceeds to harm X with a club, Y would surely not be able to contend that the order issued on him related to the use of a sword and that he did not violate it in any way by using a club. Clearly, a larger reason lies behind the order than the mere prohibition against inflicting harm with a sword. The unexpressed rationale lying behind the order, namely, the desire to protect X from bodily harm, lies at the very heart of the order, if it is to be construed in the light of common sense.

Another example of a slightly higher degree of sophistication is as follows. Suppose a person should complain to a court that his neighbour is seeking to burn his property by the act of throwing fire bombs at it. He asks the court for an injunction restraining such conduct. The court orders the respondent to desist from the act of throwing fire bombs and this undertaking is accepted by the complainant. Would there not be an undermining of the basis of this order if the neighbour, having desisted from throwing fire bombs, commences throwing firebrands instead? Would an objective observer, looking for the *basis* of the Court's order, confine it to fire bombs rather than look at the object of the order, the substance of the complaint, and the interest sought to be protected? In such a context, it would indeed be strange if an argument were set up that the complaint regarding firebrands must be the subject of a new case rather than a continuation of the existing one.

In general terms, it would not harmonize with ordinary notions of justice that an order to protect the complainant by prohibiting the use of a given means of inflicting harm should be viewed as not comprising the causing of similar harm by the use of another means — least of all when that weapon is used to inflict the identical injury. In all matters of interpretation, the central object of any provision must be constantly borne in mind.

Some Principles of Interpretation

A fundamental rule of interpretation of any legal document is that it must not be so construed as to lead to results which are unreasonable or absurd. The interpretation that the Court was banning radioactive contamination by atmospheric tests but giving its tacit endorsement to radioactive contamination by underground tests seems to fall into this category. For reasons already discussed, the Court's order clearly did not contemplate that the shift to underground testing, in the state of knowledge at that time, would lead to these deleterious results. The Court could not, even by remotest implication, have reserved the right to France to cause similar kinds of nuclear contamination provided it was done by non-atmospheric testing.

Another way of looking at this matter is that it was a clear implication of the French declaration that the new procedures it was resorting to were to be free of the harm manifestly resulting from the old procedures.

To draw an analogy from another department of law, it is a well-known doctrine, universally recognized in the law, that there can be certain conditions not expressly specified in a document, which nevertheless are so clearly implied by its terms that a reasonable onlooker would say, "Of course, that is understood." The entire body of learning on the doctrine of the implied term in contract rests upon this rationale.

In regard to the underground tests which were announced by the French Government as replacing the atmospheric tests, it would surely be the view of an objective onlooker that the clear understanding, in regard to those tests, was that they would not affect such rights of New Zealand as it had sought to conserve by asking the Court for relief. The basis of the Judgment issued by the Court in answer to New Zealand's claim to protection was the implication that such protection ensued in consequence of France's declaration.

New Zealand's complaint related to the radioactive contamination of its terrestrial, maritime and aerial environment. That threat was now apparently at an end, for how else could the Court pronounce that New Zealand's claim had no longer any object?

Applying all the three tests formulated by the Court, the basis of the 1974 Judgment has been affected, the dispute has not disappeared, and

New Zealand's claim still has an object if the identical type of harm — namely, radioactive contamination — results from the new situation that has arisen. On all these three counts, all specifically part of the 1974 Judgment, New Zealand has the right to ask the Court to examine the situation in the light of paragraph 63.

Significance of Opening Sentence of Paragraph 63

There is an important aspect of paragraph 63 which is deeply relevant to an understanding of the words "if the basis of this Judgment were to be affected". This aspect is reflected in the opening sentence of that paragraph, setting the context for the operative words that follow.

In the opening sentence, the Court makes it clear beyond any doubt that what it was contemplating was not any default by France in complying with its commitment. In the Court's own words, that was an aspect which "it is not the Court's function to contemplate".

This is in line with an entrenched body of principle contained both in its governing instruments and its settled practice, that once the Court has delivered judgment, it is *functus officio*. It has discharged the duty for which the parties approached it and resolved the dispute so far as a judgment according to law can resolve it. Enforcement is not and never has been the concern of the Court, either in terms of its Statute or in terms of its settled jurisprudence.

In formulating paragraph 63, the Court was making it clear beyond doubt that what it was contemplating was not a non-observance by France of its obligations. That was assumed. In short, the cessation of atmospheric tests was assumed.

But on the basis of compliance by France, there could still be considerations affecting the basis of the Judgment which parties could not contemplate at that time, but which might nevertheless entitle a party in all justice to ask the Court for an examination of the situation. The Court was providing for just such an eventuality as this — that while France complied with its undertaking, the basis of the Judgment could still in some way be affected.

Significance of the Last Sentence of Paragraph 63

The Court provided in the same paragraph that the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which was relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of a subsequent request by New Zealand. This sentence is a further indication by the Court that New Zealand was to have its

rights preserved on the basis of the existing Judgment, and that the existing case was not dead. The sentence is a clear anticipation of a possible return by New Zealand to the Court upon the basis of a Judgment which was still alive for this purpose.

It also demonstrates the considered and deliberate projection of the Court's mind into the problems of the future, without being content to close the book, so to speak, in 1974. Future jurisdiction had disappeared and New Zealand's right to implead France afresh had been destroyed, but this did not deter the Court from expressly empowering New Zealand to return to the Court on the basis of the original case if New Zealand was able to show the Court that the basis of the Judgment was affected.

The Special Need for a Precautionary Clause

In dealing with radioactive contamination, the Court was dealing for the first time with a force whose potential for causing damage to the human condition was as yet imperfectly understood. It was known to be capable of causing multiple deleterious effects to human health and environment. It was a force whose magnitude of destructive power had been awesomely demonstrated. The Court needed to be ultra-cautious.

The clause enabling New Zealand to approach the Court was a procedural innovation, reinforcing in a very special way the integrity of the Judgment which the Court was rendering. It was a provision ensuring that the Judgment would not be undermined by future acts or events which could not then be specified. It exhibited a concern for the realities rather than the forms of justice.

Against this background, it is significant that even in the case of *Nuclear Tests (Australia* v. *France)*, where the pleadings were more closely geared to atmospheric tests than in the case of *Nuclear Tests (New Zealand* v. *France)*, the Court still considered it necessary to give Australia the right to come back to the Court if circumstances should occur which affected the basis of the Judgment (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60). Even in the context of atmospheric tests, there could possibly be some unknown lingering after-effects which might affect the basis of the Judgment and need correction.

A fortiori, in the case of New Zealand, where there was a shortfall between the Judgment of the Court and the prayer of New Zealand, there was a greater need for the interests of New Zealand to be protected.

The Court's deep concern with the effects of French testing was indeed demonstrated not merely at this stage of the case, but from the stage of preliminary measures in 1973, when the Court manifested that concern by ordering interim measures of protection before any determination of jurisdiction and admissibility.

INTERIM MEASURES

The Grant of Interim Measures

New Zealand has also requested interim measures now, as it did in 1973. In view of the Court's Order, this case does not proceed to the stage where such measures can be ordered. It is my view, however, that New Zealand has made out a prima facie case that it is suffering, or likely to suffer, damage of the nature which it complained of in 1973, and has thereby brought itself within the terms of paragraph 63. As a consequence, New Zealand would have reached the stage where it was entitled to a consideration by the Court of its request for interim measures.

New Zealand's Request on this occasion does not go so far as a request for an absolute declaration that nuclear tests violate the various enumerated rights of New Zealand, inasmuch as New Zealand is content, in the alternative, with a declaration that it is unlawful for France to conduct such tests *before* it has undertaken an Environmental Impact Assessment (EIA) according to accepted international standards. Such a procedure is within the power of France and if, as France has declared, the tests are environmentally safe, an EIA confirming this position would negate New Zealand's claim, and result in its dismissal.

The Approach of the Court to Preliminary Measures in 1973

It is pertinent to this discussion to refer also to the approach of the Court in 1973 to the question of preliminary measures — an approach which reflected deep concern that damage of the sort complained of by New Zealand could cause irreparable prejudice to the rights which were the subject of dispute. The Court's approach displayed a willingness to act even before jurisdiction and admissibility were proved.

The Court of course made it clear that its decision in no way prejudiced the question of the jurisdiction of the Court to deal with the merits of the case (*I.C.J. Reports 1973*, p. 142, para. 34).

It seems to me that the approach of the Court in the present case, when radioactive contamination by nuclear explosions is again complained of, might well have been on similar lines.

SOME RELEVANT LEGAL PRINCIPLES

The Inter-Temporal Principle

It is a truism that scientific knowledge increases exponentially. The knowledge of 1995 is not the knowledge of 1974. Nor was the knowledge

of 1974 the knowledge of the 1950s. There is perhaps as much of a differential between the knowledge relating to such matters between the 1970s and the 1950s as there is between the knowledge of the 1990s and the 1970s. The nature and effects of nuclear activity and radioactive contamination are matters of popular knowledge, having regard to such episodes as Chernobyl, which have demonstrated even to the layman how much more widespread the damaging effects of radioactive contamination are than was once believed. Elsewhere in this opinion reference has been made to the better understanding of the effects of underground nuclear explosions since 1974, when they were considered safe.

The Court is seised of the present Request at this point of time and must bring to bear upon it the scientific knowledge now available. A court, faced with a science-oriented problem of present and future damage in 1995, cannot resolve it by ignoring the knowledge acquired between 1974 and 1995, and by applying to the problem in hand the knowledge of 1974. That would be an exercise in unreality.

A similar question arose when New Zealand was asked at the time of the 1974 case why it did not protest against the larger and more dangerous nuclear explosions of the 1950s, just as today it is asked why it did not object to France's underground testing in the 1970s. The answer of Dr. Finlay, the New Zealand Attorney-General, offers an interesting perspective on the inter-temporal principle. He observed:

> "The plain answer is that an inter-temporal rule applies to fact as well as to law. In the world of the 1950s shoe shops in my country and in many others had X-ray machines through which the customer could see the bones of his feet in the shoes he was trying on. In the world of the 1970s we are appalled by, and forbid, these unnecessary exposures to the damaging effects of radiation." (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, p. 255.)

So it is with the knowledge of the effects of underground explosions in the 1970s, as compared with the knowledge of the 1990s. That which was assumed then has been contradicted by later knowledge. The basic suppositions of fact on which public conduct was ordered have been undermined. If the basic assumption of the protection of a party's rights in 1974 is undermined by knowledge available in 1995, and if the terms of the protecting judgment make its reconsideration available to a party complaining that its basis has been undermined, this Court, when approached on the footing that the basis of the Judgment has been undermined, must apply to that question the knowledge it has today and not the knowledge of 1974. The question whether the basis of the Judgment has been affected is a question of practical reality and not of legal

abstractions viewed apart from their practical impact upon human life and the environment in the applicant State.

The Concept of Intergenerational Rights

The case before the Court raises, as no case ever before the Court has done, the principle of intergenerational equity — an important and rapidly developing principle of contemporary environmental law.

Professor Lauterpacht, on behalf of New Zealand, adverted to this aspect when he submitted to the Court that if damage of the kind alleged had been inflicted on the environment by the people of the Stone Age, it would be with us today. Having regard to the information before us that the half-life of a radioactive by-product of nuclear tests can extend to over 20,000 years, this is an important aspect that an international tribunal cannot fail to notice. In a matter of which it is duly seised, this Court must regard itself as a trustee of those rights in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself. If this Court is charged with administering international law, and if this principle is building itself into the corpus of international law, or has already done so, this principle is one which must inevitably be a concern of this Court. The consideration involved is too serious to be dismissed as lacking in importance merely because there is no precedent on which it rests.

New Zealand's complaint that its rights are affected does not relate only to the rights of people presently in existence. The rights of the people of New Zealand include the rights of unborn posterity. Those are rights which a nation is entitled, and indeed obliged, to protect. In considering whether New Zealand has made out a prima facie case of damage to its interests sufficient to bring the processes of this Court into operation in terms of paragraph 63, this is therefore an important aspect not to be ignored.

In the words of an important recent work on this question:

> "The starting proposition is that each generation is both a custodian and a user of our common natural and cultural patrimony. As custodians of this planet, we have certain moral obligations to future generations which we can transform into legally enforceable norms." (See E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, 1989, p. 21.)

The Stockholm Declaration on the Human Environment adopted by the United Nations Conference on the Environment at Stockholm,

16 June 1972, formulated nearly a quarter century ago the principle of "a solemn responsibility to protect and improve the environment for present and future generations" (Principle 1). This guideline sufficiently spells out the approach to this new principle which is relevant to the problem the Court faces of assessing the likely damage to the people of New Zealand. This Court has not thus far had occasion to make any pronouncement on this developing field. The present case presents it with a pre-eminent opportunity to do so, as it raises in pointed form the possibility of damage to generations yet unborn.

The Precautionary Principle

Where a party complains to the Court of possible environmental damage of an irreversible nature which another party is committing or threatening to commit, the proof or disproof of the matter alleged may present difficulty to the claimant as the necessary information may largely be in the hands of the party causing or threatening the damage.

The law cannot function in protection of the environment unless a legal principle is evolved to meet this evidentiary difficulty, and environmental law has responded with what has come to be described as the precautionary principle — a principle which is gaining increasing support as part of the international law of the environment (see Philippe Sands, *Principles of International Environmental Law*, Vol. I, pp. 208-210).

In 1990, the Ministers from 34 countries in the Economic Commission for Europe and the Commissioner for the Environment of the European Community, meeting at Bergen, Norway, issued the Bergen ECE Ministerial Declaration on Sustainable Development. Article 7 of this Declaration formulated the precautionary principle in these terms:

> "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation." (Bergen ECE Ministerial Declaration on Sustainable Development, 15 May 1990, in Harald Hohmann (ed.), *Basic Documents of International Environmental Law*, Vol. 1, 1992, pp. 558-559.)

In paragraph 16 *(f)*, the Declaration stressed the importance of optimizing democratic decision-making related to environment and develop-

ment issues, and it identified the following need as part of what it called the Bergen process:

> "To undertake the prior assessment and public reporting of the environmental impact of projects which are likely to have a significant effect on the human health and the environment and, so far as practicable, of the policies, programmes and plans which underlie such projects and to ensure that East European and developing countries are assisted through bilateral and multilateral channels in evaluating the environmental impact and sustainability of their own development projects. To develop or expand procedures to assess the risks and potential environmental impacts of products." (*Op. cit.*, p. 565.)

The precautionary principle of course went further back in time than 1990. It is a principle of relevance to New Zealand in its application to this Court and one which inevitably calls for consideration in the context of this case.

New Zealand has placed materials before the Court to the best of its ability, but France is in possession of the actual information. The principle then springs into operation to give the Court the basic rationale for considering New Zealand's request and not postponing the application of such means as are available to the Court to prevent, on a provisional basis, the threatened environmental degradation, until such time as the full scientific evidence becomes available in refutation of the New Zealand contention.

Several environmental treaties have already accepted the precautionary principle (see Sands, *op. cit.*, pp. 210 *et seq.*). Among these are the 1992 Baltic Sea Convention and the 1992 Maastricht Treaty (Treaty on European Union, Title XVI, Art. 130*r* (2)), which states that Community policy on the environment "*shall* be based on the precautionary principle" (emphasis added). It is noteworthy that under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the parties (France and the United Kingdom), wishing to retain the option of dumping low and intermediate level radioactive wastes at sea, would be required to report to the OSPAR Commission on:

> "the results of scientific studies which show that any potential dumping operations would not result in hazards to human health, harm to living resources or marine ecosystems, damage to amenities or interference with other legitimate uses of the sea" (Ann. II, Art. 3 (3) *(c)*, cited from Sands, *op. cit.*, p. 212).

This last application of the precautionary principle, to which France is a party, has particular relevance to the matter presently before the Court.

The provision in the Maastricht Treaty, incorporating the precautionary principle as the basis of European Community policy on the environment (Art. 130*r* (2)), would lead one to expect that the principle thus applicable to Europe would apply also to European activity in other global theatres.

Reference should be made finally to Principle 15 of the Rio Declaration on Environment and Development, 1992, which reads:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." (*Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, Vol. I, Ann. I, p. 6.)

Environmental Impact Assessment (EIA)

This principle is ancillary to the broader principle just discussed. As with the previous principle, this principle is gathering strength and international acceptance, and has reached the level of general recognition at which this Court should take notice of it.

The United Nations Environment Programme (UNEP) Guidelines of 1987 on "Goals and Principles of Environmental Impact Assessment" states in Principle 1 that:

> "States (including their competent authorities) should not undertake or authorize activities without prior consideration, at an early stage, of their environmental effects. Where the extent, nature or location of a proposed activity is such that it is likely to significantly affect the environment, a comprehensive environmental impact assessment should be undertaken in accordance with the following principles." (Hohmann, *op. cit.*, p. 187.)

A proper Environmental Impact Assessment should, according to Principle 4, include:

"*(a)* A description of the proposed activity;
(b) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effects of the proposed activity;
(c) A description of practical alternatives, as appropriate;
(d) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short-term and long-term effects;

(e) An identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures;

(f) An indication of gaps in knowledge and uncertainties which may be encountered in compiling the required information;

(g) An indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives;

(h) A brief, non-technical summary of the information provided under the above headings." (Hohmann, *op. cit.*, p. 188.)

It is clear that on an issue of the magnitude of that which brings New Zealand before this Court the principle of Environmental Impact Assessment would prima facie be applicable in terms of the current state of international environmental law.

This Court, situated as it is at the apex of international tribunals, necessarily enjoys a position of special trust and responsibility in relation to the principles of environmental law, especially those relating to what is described in environmental law as the Global Commons. When a matter is brought before it which raises serious environmental issues of global importance, and a prima facie case is made out of the possibility of environmental damage, the Court is entitled to take into account the Environmental Impact Assessment principle in determining its preliminary approach.

Of course the situation may well be proved to be otherwise and fears currently expressed may prove to be groundless. But that stage is reached only after the Environmental Impact Assessment and not before.

The Illegality of Introducing Radioactive Waste into the Marine Environment

This principle is too well established to need discussion. The marine environment belongs to all, and any introduction of radioactive waste into one's territorial waters must necessarily raise the danger of its spread into the wider ocean spaces that belong to all.

If such danger can be shown prima facie to exist or be within the bounds of reasonable possibility, the burden shifts on those who claim such action is safe to establish that this is indeed so. As observed already, the 1992 OSPAR Convention between France and the United Kingdom requires a report that any proposed dumping of low and intermediate level radioactive wastes would not result in hazards to human health and marine resources. Such is the standard observed internationally. Until

such time, a judicial tribunal is entitled to act upon the prima facie case that New Zealand has made out.

The Report of the Rio Conference of 1992 deals in Chapter 22 of Agenda 21 with "Safe and Environmentally Sound Management of Radioactive Wastes". Paragraph 22.5 *(c)* deals specifically with this problem in terms that States should:

> "Not promote or allow the storage or disposal of high-level, intermediate-level and low-level radioactive wastes near the marine environment unless they determine that scientific evidence, consistent with the applicable internationally agreed principles and guidelines, shows that such storage or disposal poses no unacceptable risk to people and the marine environment or does not interfere with other legitimate uses of the sea, making, in the process of consideration, appropriate use of the concept of the precautionary approach." (*Report of the United Nations Conference on Environment and Development* (A/CONF.151/26/Rev.1), Vol. I, Ann. II, pp. 371-372.)

France supported Agenda 21. Indeed, President Mitterrand gave it such strong support as to suggest that the Secretary-General of the United Nations should be entrusted with the task of taking stock of the implementation of Agenda 21 every year (*ibid.*, Vol. III, p. 195).

The President also observed:

> "Secondly, it would be useful to determine more clearly the role, or the responsibility, of the countries of the North. I think that they have to preserve and restore their own domain (water, air, towns, countryside), a task which their Governments are tackling unevenly. *That they have to refrain from any action harmful to the environment of the countries of the South.* Such is the purpose of France's very strict laws on the export of wastes." (*Ibid.*, p. 194; emphasis added.)

It scarcely needs citation of authority to establish so self-evident a principle.

The Principle that Damage Must Not Be Caused to Other Nations

The conclusions just reached are reinforced by a fundamental principle of modern environmental law which must here be noted. It is well entrenched in international law and goes as far back as the *Trail Smelter* case (*Reports of International Arbitral Awards*, 1938, Vol. III, p. 1905) and perhaps beyond (see also *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4).

This basic principle, that no nation is entitled by its own activities to cause damage to the environment of any other nation, appears as Principle 2 of the Rio Declaration on the Environment, 1992:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (*Report of the United Nations Conference on Environment and Development* (A/CONF.151/26/Rev.1), Vol. I, Ann. I, p. 3.)

Other international instruments that embody this principle are the Stockholm Declaration on the Human Environment (1972, Principle 21) and the 1986 Noumea Convention, Article 4 (6) of which states:

> "Nothing in this Convention shall affect the sovereign right of States to exploit, develop and manage their own natural resources pursuant to their own policies, taking into account their duty to protect and preserve the environment. Each Party shall ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of its national jurisdiction." (Hohmann, *Basic Documents of International Environmental Law*, 1992, Vol. 2, p. 1063.)

It is in the context of such a deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law that the Court must reach a determination as to whether a prima facie case of danger to its rights has been made out by New Zealand.

HAS NEW ZEALAND MADE OUT A PRIMA FACIE CASE?

The Approach to the Question of Proof

As stressed in this opinion, it is essential, in order to activate the procedures of the Court, that New Zealand should make out at least a prima facie case that the dangers which brought it to Court in 1973 are now present again in consequence of the underground nuclear tests that France has commenced in the Pacific. There must therefore be an examination of the facts in order to decide whether the jurisdictional basis exists for New Zealand's present Request.

The ensuing examination is therefore undertaken as an integral part of the preliminary jurisdictional question and is not a part of any examination of the merits.

There are two ways of approaching this question. The first is to place the burden of proof fairly and squarely upon New Zealand, and to ask whether a prima facie case has been made out of the presence of such dangers as New Zealand complains of.

The second approach is to apply the principle of environmental law under which, where environmental damage of any sort is threatened, the burden of proving that it will not produce the damaging consequences complained of is placed upon the author of that damage. In this view of the matter, the Court would hold that the environmental damage New Zealand complains of is prima facie established in the absence of proof by France that the proposed nuclear tests are environmentally safe.

It will be noted in this connection that all the information bearing upon this matter is in the possession of the Respondent. The Applicant has only indirect or secondary information, but has endeavoured to place before the Court such information as it has been able, to the best of its ability, to marshal for the purposes of this application.

The second approach is sufficiently well established in international law for the Court to act upon it. Yet, it is sufficient for present purposes to act upon the first approach, throwing the burden of proof upon New Zealand.

What is the nature of the prima facie case that New Zealand has made out?

The Scientific Fact-finding Missions

New Zealand has placed before the Court such scientific material as is available to it, and has referred, in particular, to three scientific reports in support of its submissions regarding the unreliability of Mururoa and Fangataufa atolls as repositories of nuclear wastes. It states that the French Government has not permitted a full scientific investigation of Mururoa atoll, but that three limited investigations are all that have been allowed on Mururoa, and none at all at Fangataufa where the larger explosions have occurred.

These are the investigations of Mr. M. H. Tazieff, a noted French vulcanologist, in 1982; that of a team of scientists led by Mr. Hugh Atkinson, a former Director of New Zealand's National Radiation Laboratory, in 1983; and that of a scientific and film team, led by Commander Cousteau, in 1987.

Mr. Tazieff commented that a systematic study over a number of years was required of the most mobile radionuclides in ground water and in the sea, for an assessment of the effectiveness of the containment of radioactivity (Tazieff Report, p. 7, cited in New Zealand's Request, para. 38); while Commander Cousteau concluded that leakage could occur on a time scale of 100-300 years, a significantly shorter period than previous estimates (*ibid.*, para. 40, in reliance upon the Cousteau Mission Report). The conclusions of the Atkinson Report are dealt with later.

France replies to New Zealand's contentions by asserting that the New Zealand descriptions envisaged "disasters of Hollywoodian proportions", while the tests are, in fact, environmentally safe (CR 95/20, p. 62). Professor de Brichambaut, for France, stated, *inter alia*, that traces of radioactivity on Mururoa are infinitesimal; that the level of radioactivity is the same as on all the atolls in the South Pacific; that it is considerably lower than the levels found in Paris, Darwin, Chile or Colombia. He submitted that the level of radioactive elements (measured in micrograys per year) is 262 in Mururoa, 463 in Tahiti, 815 in Australia and 900 in New Zealand. He added that in Holland it is 280, just above the level in Mururoa. He also gave the Court various statistics in relation to doses of radioactivity measured in the Polynesian population (*ibid.*, p. 55).

However, the main question on which the Court would need to reach a prima facie conclusion is the question of the safety of Mururoa as a repository of radioactive waste, both over the long term, in consequence of natural impairment of the atoll, and in the short term in consequence of nuclear explosions.

These matters are dealt with in the ensuing paragraphs.

The danger of radioactive contamination resulting from France's underground tests could perhaps be considered under the following heads:

(a) the nature of the nuclear tests proposed;
(b) the structure of Mururoa and Fangataufa atolls;
(c) the impact upon the atolls of the previous explosions;
(d) the impact upon Mururoa of the proposed new series of explosions;
(e) the internationally accepted safety standards for the storage of radioactive wastes;
(f) the danger to marine life of the release of radioactive substances into the ocean; and
(g) the possibility of accident.

If, upon a review of these matters, it can reasonably be stated that a prima facie case has been made out of possible danger from radioactive contamination resulting from France's nuclear tests in the Pacific, New Zealand would be entitled to submit that it has discharged the burden lying upon it of showing that it comes within the terms of paragraph 63.

The possible dangers will now be outlined under the heads enumerated, bearing in mind that, in a case of this magnitude, even a prima facie finding of possible dangers is not to be lightly reached. The relevant material must be therefore examined with the greatest care. The ensuing discussion aims at ascertaining whether, upon an objective analysis, New Zealand has made out a prima facie case that the dangers it complained of in 1973 now exist in 1995, thereby activating paragraph 63 of the 1974 Judgment.

The nature of underground nuclear tests

The information placed before the Court is to the effect that holes of a depth of around 1,000 metres are drilled into the ground surface of the atoll. New Zealand states that the details of location of the test shafts have not been released by France. The structure of the atoll consists of a coral crown over a volcanic base. Many tests have also been conducted in the lagoon area adjacent to the coral rim.

A cylinder containing the explosive device and a large amount of instrumentation is then dropped into the hole. The shaft is packed tight with material, including a special kind of concrete, to stop the escape through the shaft into the atmosphere of radioactive material from the explosion.

Upon detonation, everything at the bottom of the shaft is vaporized and a ball-shaped chamber forms in the structure of the surrounding rock. For the small 10-kiloton blasts, the chamber would be approximately 50 metres in diameter and for explosions of around 100 kilotons the chamber might be around 120 metres in diameter.

The immense heat of the explosion vitrifies the rock around it and much of the radioactive material released by the explosion is contained within this vitrified rock and within the explosion chamber.

New Zealand submits that another effect of the explosion is an earthquake shock which may measure between 4 and 6 on the Richter scale. This may fracture some of the upper limestone layers of the atoll and may generate landslides towards the outer flanks of the atoll.

I refer again to McEwan's technical study on "Environmental effects of underground nuclear explosions":

> "The greatest environmental impacts of underground tests result from seismic and local shock wave effects. The latter include ground movements, subsidence, collapse crater formation, cliff falls and submarine slides which may occur within a few kilometres of the detonation points." (*Op. cit.*, p. 89.)

The important question also arises of the possibility of venting, i.e., the escape of vapours, liquid and other by-products of the explosion from the confined space in which the explosions occur. The *Report of a New Zealand, Australian and Papua New Guinea Scientific Mission to Mururoa Atoll*, which was headed by Mr. H. R. Atkinson, Retired Director of the National Radiation Laboratory, Christchurch (one of the three reports deposited along with the New Zealand Request), observes:

"Venting of gaseous and volatile fission products from the underground test sites does occur at the time of detonation. The radionuclides vented include ones other than the noble gases (which are admitted by the French) and there is evidence that their magnitude is greater than would be expected simply through the back-packing of the placement bore being 'less than perfect'." (*Report of a New Zealand, Australian and Papua New Guinea Scientific Mission to Mururoa Atoll*, p. 132.)

The structure of Mururoa and Fangataufa atolls

The structure of the atoll is said to consist of a coral crown upon a volcanic base. Water percolates through the entire rock structure. Whether through prior explosions or otherwise, there is a network of fissures in the structure of the atoll.

The Atkinson Report contained the following descriptions of the atoll structure of Mururoa:

"Mururoa in common with other atolls is made up of two sequences; the upper limestones of 180-500 m thickness, overlying volcanics of several thousand metres thickness." (*Ibid.*, p. 7.)

"The limestones, comprised of superimposed successions of reefs, are for the most part porous and permeable with many horizons of particularly high porosity and permeability. The flanks of the atoll however are protected by aprons of low permeability." (*Ibid.*, pp. 7-8.)

"The French claim that any leakage from the volcanics to the limestones will be stopped by the impermeable transition zone is not borne out by the data inspected.

The transition zone which occurs between the volcanics and limestones is highly variable in thickness and rock type and this casts doubt on its ability to act as an impermeable barrier to potential radioactive leakage. The potential exists for leakage of water from detonation cavities to the biosphere in less than 1000 years." (*Ibid.*, p. 8.)

"The claim that the transition zone acts as a barrier to long-term leakage can, on the basis of geological evidence, be discounted. The volcanics in their virgin state offer a poor to moderate geo-chemical barrier and a moderate to good hydrological barrier. The testing programme is reducing the effectiveness of both." (*Ibid.*, p. 9.)

The McEwan study, already referred to, observes that:

"Leakage of radioactive material from an underground testing site may occur if there is ground water present at the emplacement depth

at the time of explosion, or if fracturing of rock subsequently allows ground water access to the cavity." (*Op. cit.*, p. 85.)

Having regard to the saturation of the rock structure with water, this seems to be, prima facie, a factor to be taken into account.

The impact upon the atolls of previous explosions

The Atkinson Report concludes:

"The integrity of the carbonate part of the atoll has been impaired.

— Fissures have formed in the limestones as a result of testing.

— Surface subsidence to the order of 1 m has affected over 1 km^2 of the north-eastern region and 1.5 km^2 of the south-west margin. Such subsidence is the direct result of cumulative compaction in the limestones, and propagated by testing.
— Submarine slides, particularly along the southern margin, have resulted from a number of tests at Mururoa. The effect of these slides is to strip the outer rim of the atoll of its protective impermeable limestone.

Fissuring and removal of the apron limestone through sliding will both serve to increase lateral and vertical water transport in the carbonate body of the atoll." (*Op. cit.*, pp. 105-106.)

All three of these heads seem to be of great importance to the issue before the Court. Fissures can conceivably widen and afford an outlet to the sea. The subsidence to an extent of one metre of a square kilometre of the atoll's surface reflects a structural movement serious enough to cause concern. The stripping of the outer rim of the atoll must also be thought, in the absence of contrary evidence, to weaken the protective structure of the atoll.

The impact upon Mururoa of the proposed new series of explosions

It is of course impossible to state, on the available scientific material, how many more explosions the structure of the atoll can withstand without some major structural damage such as may release the pent-up radioactive debris of over 100 explosions contained within the atoll's structure. It may be that the structure could withstand one thousand more explosions, or it may be that the structure is nearing the end of its endurance of continuing explosions.

There is, according to New Zealand, an ever-present danger that the already fissured structure of the atoll cannot be guaranteed to remain intact and that even one more explosion could well be the force that can

trigger off a major structural collapse. The structure has already been buffeted by explosions equivalent to some 150 times the power of the Hiroshima bomb. There are over 126 shafts drilled into a segment of an atoll which is less than 28 km long. We do not have the benefit of an impact assessment survey of the ability of the atoll's structure to withstand these shocks.

In the words of New Zealand's counsel, Professor Lauterpacht, New Zealand could ask whether the world can be confident that the present series of tests may not place upon the camel of Mururoa the straw that breaks its back.

The internationally accepted safety standards for the storage of radioactive wastes

At the conclusion of the hearings, I addressed a question to both Parties as to whether there are internationally accepted criteria for the selection of geological repositories for radioactive wastes, requesting a brief list of such criteria, if there were any.

The French reply was:

> "Il n'existe actuellement aucune norme officielle internationale concernant les critères géologiques de stockage des déchets radioactifs. Les études scientifiques menées quant à la nature des roches les plus appropriées aboutissent à un consensus sur la nécessité d'avoir un environnement géologique stable, une faible perméabilité des roches et un contexte propice à une rétention des radioéléments par les roches."[1]

New Zealand, however, referred to the International Atomic Energy Agency's Safety Standard, "Safety Principles and Technical Criteria for the Underground Disposal of High Level Radioactive Wastes" (Safety Series No. 99, 1989)[2], a document which New Zealand states has been superseded by more detailed studies. The criteria set out in this document include the following:

> "*Criterion No. 7: Site geology*
>
> The repository shall be located at sufficient depth to protect adequately the emplaced waste from external events and processes in

[1] Letter from France dated 15 September 1995, replies to the questions put by Judge Weeramantry, No. 2:

> "There is currently no official international norm relating to the geological criteria for the storage of radioactive waste. The scientific investigations of the nature of the most appropriate rocks lead to a consensus on the need to have a geologically stable environment, rocks of a low permeability and a context favourable to a retention of radioelements by the rocks." *[Translation by the Registry.]*

[2] Letter from New Zealand dated 15 September 1995, replies to the questions put by Judge Weeramantry, No. 2.

a host rock having properties that adequately restrict the deterioration of physical barriers and the transport of radionuclides from the repository to the environment.

Criterion No. 8: Consideration of natural resources

The repository site shall be selected, to the extent practicable, to avoid proximity to valuable natural resources or materials which are not readily available from other sources."

These criteria, when applied to Mururoa, raise prima facie concerns as to its safety for purposes of storage of radioactive waste.

The International Atomic Energy Agency Safety Guide, "Safety of Geological Disposal Facilities" (Safety Series No. 111-G-4.1, 1994) also gives some useful indications of factors having a bearing on this question. Guidelines 412 and 413 are particularly significant:

"412. The hydrogeological characteristics and setting of the geological environment should tend to restrict groundwater flow within the repository and should support safe waste isolation for the required times.

413. An evaluation of the mechanisms of groundwater movement, as well as an analysis of the direction and rate of flow will be an important input to the safety assessment of any site because the most likely mode of radionuclide release is by groundwater flow. Irrespective of the nature of the waste or the disposal option, a geological environment capable of restricting flow to, through and from the repository will contribute to preventing unacceptable radionuclide releases. Natural features such as aquifers or fracture zones are potential release pathways for radionuclides. Such paths should be limited in the repository host rock so that the protective functions of the geological and engineered barrier system remain compatible. The dilution capacity of the hydrogeological system may also be important and should be evaluated. Siting should be optimised in such a way as to favour long and slow moving groundwater pathways from the repository to the environment."

These are of course matters on which the Court in due course would have received fuller information had the matter proceeded to a hearing on the substantive question of New Zealand's request.

Alongside of these criteria and guidelines, it would be useful to look at some of the conclusions of the Atkinson Report. Conclusion 3 of the Atkinson Report states, in regard to underground testing at Mururoa, that:

> "The radioactive residues of underground testing can with some justification be equated to high-level radioactive waste. It is not expected that Mururoa would meet the generally accepted criteria on site selection for a geologic repository for high-level radioactive wastes." (Atkinson Report, p. 133.)

An index to altered world perceptions of the environmentally deleterious effects of radioactive waste, whether resulting from peaceful or military purposes, is the concern shown at the Rio Conference on Environment and Development in 1992. Chapter 22 of the Report of the Conference is devoted to "Safe and Environmentally Sound Management of Radioactive Wastes". Though the wastes there referred to are those generated from peaceful activities, the concerns expressed are relevant in the present context.

Paragraph 22.1 of the Report observed that:

> "the activity concentration, especially in sealed radiation sources, might be high, thus justifying very stringent radiological protection measures" (*Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1), Vol. I, Agenda 21, Ann. II, p. 370),

and paragraph 22.8 observed that:

> "States, in cooperation with international organizations, where appropriate, should:
>
> *(a)* Promote research and development of methods for the safe and environmentally sound treatment, processing and disposal, including deep geological disposal, of high-level radioactive waste;
>
> *(b)* Conduct research and assessment programmes concerned with evaluating the health and environmental impact of radioactive waste disposal." (*Ibid.*, p. 372.)

It seems clear therefore that whatever the source of radioactive materials, the care with which they are stored underground is a matter of international concern. The porous nature of Mururoa is one which gives rise to special concern in the absence of an EIA relating to not merely the retentive properties of the soil of Mururoa, but also in regard to its ability to withstand repeated atomic blasts.

The danger to marine life of the release of radioactive substances into the ocean

In the light of these circumstances, it can scarcely be said that New Zealand has not made out at least a prima facie case that there is a danger of a rupture of the atoll's structure, with the possibility of release

into the ocean of a vast quantity of pent-up radioactive materials. Such a case can of course be rebutted by appropriate scientific evidence, but till such time affords a sufficient basis for New Zealand to maintain its claim that radioactive contamination from nuclear explosions affects its rights now, as it did in 1973.

A world that has known the effects upon the food chain several hundreds of miles away from Chernobyl may well wonder what the effects may be upon the marine food chain of such a release of radioactivity. Such questions may be raised even more pointedly in the absence of an EIA by France prior to the present series of tests.

Should a radioactive leak affect the food chain in the Pacific, the rights affected would be not only those of New Zealanders, but of all the Pacific peoples, many of whom are dependent on fishing for their livelihood. The danger of radioactive contamination affecting plankton and moving up the food chain to all forms of marine life is a factor to be reckoned with, even if it were in small quantities. Migratory species such as tuna could carry this contamination of the food chain much further afield. Should there be a release of pent-up radioactive waste of over a hundred explosions through a major crack or fissuring of the structure of the atoll, the consequences could well be catastrophic.

The half-life of radioactive by-products varies from 14,000 to 24,000 years. Plutonium 239 has a half-life of 24,000 years, and plutonium 240 a half-life of 6,570 years, according to the responses of both Parties to a question I asked at the oral hearings.

The question may well arise whether the French Government can indeed offer any sort of assurance that the by-products released from over 100 nuclear explosions would be safely contained within the fragile structure of Mururoa for several multiples of tens of thousands of years. The possibility of such contamination must therefore be viewed with concern. The atoll has already sustained fissure cracks in consequence of prior explosions totalling the fire power of over 150 Hiroshima-type explosions[1]. A Pacific islander could indeed have serious fears as to whether this brittle and porous island structure could withstand internally the force of even one Hiroshima-type explosion. By and large, the Pacific islanders live in total dependence upon the sea, and it is not to be wondered at that some of them are waiting at the door of this Court in

[1] See the list of French nuclear tests at Mururoa and Fangataufa in Annex 4 of the New Zealand Request for an Examination of the Situation, reproduced from J. Bouchez and R. Lecomte, *Les atolls de Mururoa et de Fangataufa*, 1995, Vol. II.

the hope that they will be heard, by way of intervention, in a matter of fundamental importance to their health, their way of life and their livelihood.

Having regard to the developments of international law embracing the principle of intergenerational rights and responsibilities, this is an environmental risk of which, in the absence of rebutting material from France, New Zealand and the islands covered by its Request are entitled, prima facie, to complain. It may be that France has material with which it can satisfy the Court on that issue, but no such material has been offered. Having regard to the course of geological events, a guarantee of stability of such an island formation for hundreds of thousands of years does not seem within the bounds of likelihood or possibility.

As for New Zealand, New Zealand has from the very commencement of this case couched its claim in terms, "including apprehension, anxiety and concern, to the people and Government of New Zealand and of the Cook Islands, Niue and Tokelau Islands", and on the basis of the violation of its rights to the exploitation of the seas. Those were New Zealand's concerns in 1974 and those particular concerns are redoubled now by the current nuclear tests.

The possibility of accident

The best intentioned and regulated of human activities must always face the possibility of an accident resulting from some unforeseen circumstance. The history of underground testing at Mururoa has not been free of accident.

According to New Zealand, an official publication of the French Atomic Energy Commission acknowledged that a device which had become stuck in the detonation shaft was exploded at a depth of approximately 987 metres, 110 metres less than planned. The test generated a submarine landslide of about one million cubic metres of material off the mass of the atoll which set off a tsunami which washed over part of the atoll, seriously injuring two persons.

Other accidents cited by New Zealand are:

"*(a)* In June 1987 officials on Mururoa admitted to Cousteau the accidental release of approximately 1.5 teraBecquerels of radioactive iodine plus other volatile material.

(b) In 1992 scientists of the Combined Radiological Safety Service on Mururoa acknowledged that 0.2 teraBecquerels of radioactive iodine had been accidentally released in 1990 in similar

circumstances." (New Zealand's Request for an Examination of the Situation, para. 54.)

Having regard to the information furnished to the Court by New Zealand as summarized above, and in the absence of specific scientific material or impact assessment studies by France, the possibility of accident is another ground which goes to make out the prima facie case that New Zealand would be obliged to present.

Among the important rights of New Zealand that are threatened are its maritime rights. The 1973 Application of New Zealand covered radioactive damage caused to New Zealand's rights by French nuclear explosions in the Pacific. The fear of such radioactive pollution which brought New Zealand to the Court in 1973 is now appearing again.

The reasonableness of that fear has been proved at least prima facie, thereby enabling New Zealand to claim that the basis of the 1974 Judgment which protected New Zealand against such radioactive contamination has been affected.

New Zealand's application should therefore, in my view, be proceeded with by the Court to the next stage, which is the stage of enquiring whether a case has been made out for the issue of interim measures of protection.

All this would be done as another phase of the 1973 application filed by New Zealand.

The Position of the Intervenors

It follows from the views expressed earlier that the Court could have proceeded to consider whether the intervenors, Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia, should be permitted to intervene in those proceedings. Their contention is that they have an interest of a legal nature in the present proceedings and that they are not seeking to introduce a new dispute before the Court, but are seeking permission to assert their legal interests in an existing dispute in accordance with Article 62 of the Statute. They have very real concerns in regard to their undoubted right to the preservation of their own environment from the danger of radioactive contamination resulting from the conduct of another State. They have quite clearly gone to great lengths to seek legal advice, prepare substantial materials and file carefully prepared pleadings in support of their application for intervention.

It would, in this area as well, have served the substantial interests of justice if, upon a different view of the preliminary question, the matter had proceeded to further enquiry. The intervenors would then have been heard on their right to intervene. If they were found, after a hearing, to have had no right to intervene, they would then have left this Court

satisfied that the Court had heard them on their right to intervention and that procedural rules relating to intervention did not permit the Court to grant them redress. As it is they leave the Court without even the benefit of a hearing.

CONCLUDING REMARKS

The altogether unusual nature of this case prompts a few reflections on the nature of the judicial process. These observations have equal relevance to domestic and international judiciaries, for the judge, whether domestic or international, is equally the servant of the concept of justice.

I wish to cite preliminarily a statement by Justice Cardozo, one of the foremost thinkers on the judicial process. Substitute for the word "cases" the words "international conventions, international custom, general principles of law, judicial decisions and teachings of publicists", and the thought expressed by Cardozo holds good also for the international judge.

Cardozo observed that the judge's duty was not simply to match the colours of the case at hand with the colours of the many samples spread out upon the judicial desk:

> "If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." (Benjamin N. Cardozo, *The Nature of the Judicial Process*, 1921, pp. 20-21.)

This is a case for which there is no matching sample — whether in international conventions, international custom, general principles of law, judicial decisions or teachings of publicists. It presents a challenge to the Court.

This is also a case in which the processes of logical reasoning can well lead to one conclusion or the other. The processes of reasoning set out in this dissenting opinion lead to the conclusion that the Court's 1974 Judgment left open the possibility that, in the event of similar damage occurring by a means other than atmospheric testing, New Zealand should be able to bring this before the Court. The Judgment of the Court upon this Application proceeds, also by a logical chain of reasoning, to arrive at the opposite conclusion, namely, that atmospheric testing and atmospheric testing alone was the subject of the Judgment. The late Professor Julius Stone, who, in addition to his considerable standing in the world of international law, was also one of the deepest researchers into judicial reasoning in our time, referred to such situations as "leeways of judicial

choice" (*Legal System and Lawyers' Reasonings*, 1964; see, especially, Chapter 8 on "Reasons and Reasoning in Judicial and Juristic Argument").

We here enter an area well traversed in legal philosophy for nearly a century. In 1897 the great Justice Holmes gave classic expression to this problem. He observed that the fallacy of:

> "the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form." ("The Path of the Law", *Harvard Law Review*, 1897, Vol. X, p. 466.)

Since then a deluge of writing has illuminated this subject. In this Court — perhaps even more so than in any domestic jurisdiction — these reflections regarding the judicial process are more than ever relevant, for the discipline of international law has deeper philosophical roots than most other legal disciplines. Names such as Llewellyn, Cardozo, Perelman, Julius Stone, not to mention numerous others, illuminate the pathway towards an understanding that the forms of logical reasoning do not inevitably lead to a one and only conclusion.

Black-letter law and legal logic do not assist us when we reach a fork in the road. The realist and sociological schools of jurisprudence shed much light on this problem, which is as pertinent to the judicial function before this Court as it is in the domestic courts.

The relevance of this approach to seminal cases like the *Nuclear Tests* cases has not passed unnoticed. Amidst the vast scholarly literature generated by the decisions of 1973 and 1974[1] are discussions examining the decisions in the light of the philosophical approaches of the Legal

[1] See, for example, John Dugard, "The Nuclear Tests Cases and the South West Africa Cases: Some Realism about the International Judicial Decision", *Virginia Journal of International Law*, 1975-1976, Vol. 15, pp. 463-504; Jerome B. Elkind, "Footnote to the Nuclear Test Cases: Abuse of Right — A Blind Alley for Environmentalists", *Vanderbilt Journal of Transnational Law*, 1976, Vol. 9, pp. 57-97; Thomas M. Franck, "Word Made Law: The Decision of the ICJ in the Nuclear Test Cases", *American Journal of International Law*, 1975, Vol. 69, pp. 612-620; Dinesh Khosla, "Nuclear Test Cases: Judicial Valour *v.* Judicial Discretion", *Indian Journal of International Law*, 1978, Vol. 18, pp. 322-344; Pierre Lellouche, "The Nuclear Tests Cases: Judicial Silence *v.* Atomic Blasts", *Harvard International Law Journal*, 1975, Vol. 16, pp. 614-637.

Realist and Sociological Schools of Jurisprudence[1], for they have a vital bearing upon the international judicial process. The limits of logic and black-letter legal analysis will no doubt be similarly examined in the light of the Court's determination of this case.

The issues brought before the Court are momentous. They can, according to New Zealand, affect the integrity of marine life in the Pacific for many multiples of 24,000 years, the half-life of one of the by-products of nuclear explosions, should they reach to the sea. A prima facie case has been made out of the possibility of release into the ocean of the pent-up radioactive debris of around 127 nuclear explosions on Mururoa alone. That pent-up debris is currently confined in a medium whose stability gives rise to serious doubts. This is a major matter to be examined and it raises the fears of radioactive contamination that were entertained in 1973. Prima facie a case has been made out for a fuller examination of these matters.

The Court has refused to take this step on the basis that paragraph 63 of the 1974 Judgment relates only to atmospheric tests, although the claim was brought before the Court in general terms relating to nuclear explosions in the Pacific. This is a strict construction which is clearly not the only reasonable construction justifiable in logic. On the basis of this strict and inflexible construction, matters of critical importance to the global environment are passed by without the benefit of a preliminary examination. A less rigid construction, which is also possible, has been rejected. The latter course which, in my view, was not unavailable to the Court, should have been chosen in view of the momentous issues involved.

The views of two eminent judges on this Court may be of assistance in this regard. It was the view of Judge Lauterpacht, a view cited with evident approval by Judge Fitzmaurice, that:

> "a tribunal such as the International Court has a duty, both to the parties and in the general interests of the law, that may go considerably beyond a bare decision, and may go beyond the issues the consideration of which will technically suffice to motivate the decision" (Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. II, p. 653).

Judge Fitzmaurice's own view, expressed in terms of comparing a minor tribunal with one standing at the apex of judicial organization, was as follows:

[1] See Edward McWhinney, *The World Court and the Contemporary International Law-Making Process*, 1979, p. 34; see, also, Edward McWhinney, "International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case", *Syracuse Journal of International Law and Commerce*, 1975, Vol. 3, No. 1, p. 9.

> "The sort of bare order or finding that may suit many of the purposes of the magistrate or county court judge will by no means do for the Court of Appeal, the House of Lords or the Judicial Committee of the Privy Council, and their equivalents in other countries. International tribunals at any rate have usually regarded it as an important part of their function, not only to decide, but, in deciding, to expound generally the law having a bearing on the matters decided." (*Op. cit.*, p. 648.)

New Zealand has placed a strong prima facie case before the Court. The Court is still far from the stage of reaching an affirmative finding of fact. All it needs to know at this stage is whether a prima facie case exists for giving the Court the ability to enquire into the grave matter brought before it.

If two views are possible on this matter, the Court should in my view lean towards that which does not shut out enquiry, but leaves the matter open for definitive determination after both Parties have marshalled their arguments and the Court is in a better position to decide. When, at this initial stage, the Court determines that even a prima facie case has not been made out, enabling it to view the matter in greater depth, it is in effect giving a definitive determination prematurely on a matter of the utmost importance, not merely to the Applicant who comes before it but to the entire international community.

I regret that the Court has not availed itself of the opportunity to enquire more fully into this matter and of making a contribution to some of the seminal principles of the evolving corpus of international environmental law[1]. The Court has too long been silent on these issues and, in the words of ancient wisdom, one may well ask "If not now, when?"

(Signed) Christopher Gregory WEERAMANTRY.

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[1] Apart from *Certain Phosphate Lands in Nauru (Nauru* v. *Australia) (I.C.J. Reports 1992), Corfu Channel (I.C.J. Reports 1949)* and the *Nuclear Tests* cases, there is no assistance the Court has given in this most vital area of contemporary international law. The first was only peripherally related to environmental law as it was settled after the Court's judgment on preliminary objections. The *Corfu Channel* case laid down the environmentally important principle that, if a nation knows that harmful effects may occur to other nations from facts within its knowledge and fails to disclose them, it will be liable to the nation that suffers damage. In the *Nuclear Tests* cases of 1973, the Court did not decide the principal environmental issue brought before it.