DISSENTING OPINION OF JUDGE KOROMA

In the present Order the Court, responding to a Request for an Examination of the Situation filed by New Zealand on 21 August 1995, and a Further Request for the Indication of Provisional Measures to direct France not to carry out further nuclear tests in the South Pacific region, also filed on 21 August 1995, found that:

> "the 'Request for an Examination of the Situation' in accordance with paragraph 63 of the Judgment of the Court of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case, submitted by New Zealand on 21 August 1995, *does not fall within the provisions of the said paragraph 63 and must consequently be dismissed*" (para. 68 (1); emphasis added).

I respectfully disagree with this finding and wish to dissociate myself from it for the reasons set out hereunder.

At the outset, however, I feel bound to observe that this is the second time that New Zealand has brought a case on the issue of nuclear tests in the Pacific region; and that on both occasions the Court has declined to consider the merits of its case.

The Court's function is to decide disputes that are submitted to it (Art. 38, para. 1, of the Statute); accordingly, if the Court has jurisdiction conferred on it and the case is admissible, the Court is duty-bound to hear and determine a case submitted to it.

On neither occasion has the Court found that it was unable to consider the merits of New Zealand's claim on account of a lack of jurisdiction or because the claim was found to be inadmissible.

In 1973, New Zealand presented an Application to the Court asking it to adjudge and declare:

> "That the conduct by the French Government of *nuclear tests* in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests." (*Nuclear Tests (New Zealand* v. *France), I.C.J. Reports 1974*, p. 460, para. 11; emphasis added.)

Its submissions in the Memorial were worded as follows:

> "the Government of New Zealand submits to the Court that it is entitled to a declaration and judgment that —

(a) the Court has jurisdiction to entertain the Application filed by New Zealand and to deal with the merits of the dispute; and
(b) the Application is admissible" (*Nuclear Tests (New Zealand* v. *France), I.C.J. Reports 1974*, p. 460, para. 11).

In its Judgment of 20 December 1974, the Court stated as follows:

> "The type of tests to which the proceedings relate is described in the Application as 'nuclear tests in the South Pacific region that gave rise to radio-active fall-out', the type of testing contemplated not being specified. However, New Zealand's case has been argued mainly in relation to atmospheric tests; and the statements quoted in paragraphs 26, 27 and 28 above, particularly those of successive Prime Ministers of New Zealand, of 11 June and 1 November 1974, show that an assurance 'that nuclear testing of this kind', that is to say, testing in the atmosphere, 'is finished for good' would meet the object of the New Zealand claim. The Court therefore considers that, for purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to atmospheric tests so conducted as to give rise to radio-active fall-out on New Zealand territory" (*ibid.*, p. 466, para. 29),

and:

> "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." (*Ibid.*, p. 477, para. 63.)

On 21 August 1995 New Zealand presented the Court with a Request to examine the situation arising

> "out of a proposed action announced by France which will, if carried out, affect the basis of the Judgment rendered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case" (para. 1).

The Court responded by saying that:

> "the 'Request for an Examination of the Situation' in accordance with paragraph 63 of the Judgment of the Court of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case, submitted

by New Zealand on 21 August 1995, *does not fall within the provisions of the said paragraph 63 and must consequently be dismissed*" (Order, para. 68 (1); emphasis added).

As I have already stated, I cannot support this finding and wish to be dissociated from it.

In substantiating its Request for an examination, New Zealand stated that the basis of its claim was the right conferred on it by paragraph 63 of the 1974 Judgment rendered by the Court in the *Nuclear Tests (New Zealand* v. *France)* case (*I.C.J. Reports 1974*, p. 477, see above).

The French Government, in a letter dated 28 August 1995, expressed the conviction that the Judgment of 20 December 1974 could in no event today serve as a basis for the jurisdiction of the Court; that the present action by New Zealand did not fall within the 1973-1974 case, which related exclusively to atmospheric tests; that the present action by New Zealand could no longer be related to that case as the 1973 claim no longer existed.

The French Government also stated that since France had not given its consent to the action by New Zealand, the Court lacked jurisdiction to entertain the action.

Because of the unprecedented nature of the Request by New Zealand, and in the interest of justice, the Court had invited the two States to inform it of their views on the following question:

"Do the Requests submitted to the Court by the Government of New Zealand on 21 August 1995 fall within the provisions of paragraph 63 of the Judgment of the Court of 20 December 1974 in the case concerning *Nuclear Tests (New Zealand* v. *France)*?"

Responding to the question, New Zealand had argued that the Requests were a continuation of the proceedings commenced in 1973, when it sought from the Court a determination that the conduct of nuclear tests in the South Pacific region that gave rise to radioactive fallout constituted a violation of New Zealand's rights under international law and that those rights would be violated by any further such tests.

New Zealand drew the attention of the Court to the fact that, at the time the Court heard oral arguments on jurisdiction and admissibility in relation to the case, during and after which several authoritative statements were made by the French authorities relating to atmospheric testing, the Court imputed to the French Government the assurance that those statements were legally binding undertakings and took the view that the claim of New Zealand was to be interpreted as applying to atmospheric tests only. The Court accordingly concluded that, as a consequence of the undertaking by France, the essential concerns of New Zealand had been met.

In further responding to the question put by the Court, New Zealand pointed out that the Court, having reached the above conclusion, reserved

to New Zealand the right as spelt out in paragraph 63 to return to the Court in the event of the basis of the Judgment being affected.

New Zealand stated that underlying the 1974 Judgment was the assumption that the decision by France to cease atmospheric testing and switch to underground testing met New Zealand's immediate concern about contamination of the environment; however, it contended that its wider concerns as stated in its Application remained, and that no thought had at the time been given to whether underground nuclear testing might lead to some of the same environmental consequences that had been the subject of its 1973 Application.

New Zealand also asserted that as only atmospheric testing was taking place in the South Pacific region in 1974, underground testing was not in issue, and that the Court had no evidence that such testing either could or could not lead to radioactive contamination of any part of the environment.

Among several other reasons which New Zealand advanced as having motivated the 1974 Judgment, it stated that the most likely one the Court had in mind in formulating paragraph 63 was the idea that the resumption of nuclear testing by France at some future time could give rise to artificial radioactive contamination of the environment in a manner not foreseen in 1974, and which could affect the basis of the Judgment.

New Zealand says its reading flows from the conclusion that France could not have reserved the right to radioactive contamination of the marine environment by methods other than atmospheric testing — i.e., by underground testing — at the time France made its unilateral commitment.

New Zealand suggested that France had abandoned atmospheric testing in favour of underground testing because at the time atmospheric testing was the only known method of causing the contamination of which New Zealand complained, while underground testing was thought not to present such risks. Therefore, said New Zealand, what was in issue in 1973-1974 was testing that could cause radioactive contamination, not only of the territory of other States, but also of the marine environment in which other States had an interest.

New Zealand suggested that France had decided to resort to underground testing because it was at that time thought to be free of the risk of causing radioactive contamination of the environment.

New Zealand stated that it had decided to "Request for an Examination of the Situation" in pursuance of the right reserved to it by the Court in the 1974 Judgment, because of increasing scientific evidence which had emerged of late and because of its concern about the possible environmental impacts of underground testing.

In attempting to demonstrate that its Request was covered by paragraph 63, New Zealand stated that a noted vulcanologist, Professor Pierre Vincent, writing on the environmental risks of nuclear testing at Mururoa, had stated that:

> "All the factors now known to be conducive to the destabilisation of volcanoes — major weathering and fracturing of materials, and steep sides — are present at Mururoa. In view of that fact, the shock wave produced by one of the planned new explosions, even if it were conducted beneath the lagoon, could be big enough to cause one or more of the large 'pre-perforated' blocks to shear away. This situation, which has no parallel anywhere else, can only be described as high-risk.
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> The immediate consequence of such a destabilisation would be a sudden spill-out of part of the radioactive 'stockpile' into the sea and the formation of a tidal wave — or, more accurately speaking, a tsunami — which would threaten the lives of those living not only in Mururoa but in neighbouring archipelagoes." (Request, Ann. 5.)

Another scientist, Dr. Colin Summerhayes, a Director of Oceanographic Sciences in the United Kingdom, writing in the *Independent* newspaper of London on 9 September 1995 in relation to volcanic islands like Mururoa stated that they are:

> "inherently unstable and may fail, given an appropriate trigger like an earthquake or a very large explosion. Failure is likely to cause a giant submarine landslide which may demolish parts of the island and could create a tidal wave that may itself damage coastal installations on other islands nearby."

Dr. Summerhayes further stated that the creation of such a tidal wave was "a genuine threat to coasts as far away as New Zealand and Australia". New Zealand also pointed out that the French Atomic Agency Commission itself, in data it had itself presented, had shown that the largest tests of the 1970s and 1980s at Mururoa had had unanticipated effects.

New Zealand further asserted that France itself had acknowledged that there had been accidents and accidental releases of radioactivity during post-test sampling operations.

It further stated that it had a reasonably founded concern that what France had already done to the two atolls might cumulatively have so weakened their structures that further tests would develop the weaknesses and fracture the structures in such a way as to cause a substantial escape of radioactive material and risks to the marine environment, and

that there was now good reason to fear that those risks were substantially greater than had previously been believed.

The foregoing matters provide new evidence regarding the cumulative effect of underground testing which has occasioned the serious concerns felt by the South Pacific nations.

According to New Zealand, the Noumea Convention of 1986, to which France is a party, requires France to cease testing at least until an Environmental Impact Assessment has been completed. It also suggested that new developments in international law, particularly the precautionary principle, place the onus of proof on France to offer satisfactory evidence that underground testing is safe.

As to the standard of proof to be applied by the Court in determining whether it has competence or jurisdiction to entertain its Requests, New Zealand submitted that the prima facie rather than definitive standard should apply as in the case of requests for provisional measures of protection.

New Zealand submitted that, applying the prima facie standard to the situation faced by New Zealand in 1995, the Court would find that paragraph 63 would "appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (Request, para. 12).

In further considering the scope and operation of paragraph 63, New Zealand reminded the Court of what is stated in that paragraph, namely, "the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation . . ." (*ibid.*, para. 61).

New Zealand pointed out that with the announcement of 13 June 1995 by the French Government, a situation had arisen that the Court had in mind in the Judgment of 1974; that the Request of 21 August 1995 sought the continuation of the proceedings New Zealand had commenced in 1973; that even though those proceedings had been the subject of a Judgment delivered on 20 December 1974, that Judgment did not bring the case to an end; that the current Request was another phase in those proceedings and that the right to bring the Request derived from the 1974 Judgment.

New Zealand further stated that the paragraph not only granted it the right to bring the Request, but also preserved the jurisdictional basis of the case when it stated that the denunciation by France on 2 January 1974 of the General Act for the Pacific Settlement of International Disputes of 1928 did not divest the Court of the jurisdiction it already possessed; that in adopting that form of words, the Court exercised its inherent power to preserve its jurisdiction in the case to be used in appropriate circumstances when the occasion demanded, and in the interest of justice.

As to the meaning of the words "to request an examination of the situation in accordance with the provisions of the Statute", New Zealand

postulated that the Court meant that the presentation of a "Request for an Examination" was to be part of the same case, and not a new one; but acknowledged that even when the Court had used its inherent power, as it had done in this case, in order that a particular method of procedure might be followed, it must recognize that jurisdiction must be conceived of in terms of what had founded the original case. It suggested that the provisions of the Statute referred to in paragraph 63 were those of Article 36 (1) and (2). On the other hand, New Zealand argued that the obligation to proceed in accordance with the Statute might extend beyond any particular statutory provision; and that it might be intended that examination would continue in accordance with the general statutory and regulatory requirements for the procedure of any case.

New Zealand drew attention to the Court's inherent power to accommodate the particular requirements of a case.

It pointed out that its Request should not be regarded as an Application for Revision under Article 61 of the Statute; that its case does not deal with the discovery of an essential fact discovered after the Judgment that would require its correction and rectification, but rather that paragraph 63 of the 1974 Judgment was intended to allow for further consideration of the subject-matter of the case only in defined circumstances; that there was no reason why the Court should have wished to limit the French undertaking to ten years, as Article 61 expressly provides. In New Zealand's view, the Court was not referring to revision under paragraph 63, but to the possibility of a separate derivative proceeding which in the 1974 Judgment it had expressly authorized.

New Zealand also advanced the argument that, as a result of the evolution of the law, there is now no basis for assuming that the law permits underground testing; that, on the contrary, international law in general and the Noumea Convention in particular impose on France an obligation not to contaminate the environment with radioactive material.

The Noumea Convention of 25 November 1986 (to which New Zealand and France together with other States are parties), New Zealand pointed out, is concerned with the protection of the natural resources and environment of the South Pacific region, and that Article 12 of that treaty provides that:

> "The Parties shall take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices."

New Zealand takes the position that France is under an obligation to carry out an Environmental Impact Assessment, in accordance with Article 16 of the Treaty, before embarking on nuclear testing, to determine whether such tests are environmentally acceptable to the location and that no radioactive material will be introduced into the environment as a

result of those tests. New Zealand maintains that France has not carried out such an assessment, or that there is no available evidence to show that it has done so.

New Zealand contends that apart from France's obligation under the Noumea Convention to carry out an Environmental Impact Assessment of the proposed underground nuclear tests, it is also obliged under customary international law to carry out such an assessment in relation to any activity which is likely to cause significant damage to the environment, particularly where such effects are likely to be transboundary in nature. In its view, nuclear tests, because of their significant deposits of radioactive material which could be released into the immediate marine environment, must be preceded by such an assessment. That obligation, according to New Zealand, is founded on concordant State practice, the 1987 UNEP Goals and Principles of Environmental Impact Assessment, Articles 205 and 206 of the 1982 United Nations Law of the Sea Convention, the 1985 ASEAN Agreement, the European Community Environment Assessment Directive, the 1989 World Bank Operational Directive, the 1991 Espoo Convention, the 1991 Protocol on Environmental Protection to the Antarctic Treaty and the 1992 Convention on Biological Diversity, as well as the Euratom Treaty, all of which serve as a legal basis and as an illustration of the international standards accepted by France as applicable in this sphere of activity. New Zealand submits that France's refusal to carry out such a procedure for this class of activity is illegal.

As further evidence of the general obligation on France to conduct an Environmental Impact Assessment, New Zealand refers to Principle 21 of the Stockholm Declaration on the Human Environment and Principle 2 of the Rio Declaration on Environment and Development of 1992, which takes the form of a binding treaty for the South Pacific region in Article 4 (6) of the Noumea Convention, which provides that:

> "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."

It is also part of New Zealand's case that the introduction of radioactive material into the oceans is a matter of special concern to the international community, and calls for the most extensive, if not absolute, prohibition. This principle, says New Zealand, is recognized by France both in terms of Agenda 21, paragraph 22.5 *(c)*, of the 1992 United Nations Conference on Environment and Development and in Article 10

of the Noumea Convention whereby: "The Parties agree to prohibit the dumping of radioactive wastes or other radioactive matter in the Convention area."

In sum, New Zealand maintains that France has accepted stringent requirements — which have now become law — which prohibit it from introducing radioactive material into the marine environment, and even prohibit the storage of radioactive wastes (including the produce of nuclear tests) unless there is compelling evidence to the effect that such storage will not lead to the introduction of radioactive material into the marine environment.

Another of the legal bases cited for its claim that France will be in breach of international law with the resumption of testing derives from the binding Treaty Banning Nuclear Weapon Testing in the Atmosphere, in Outer Space and Under Water, of 5 August 1963, which proclaims in its preamble the objective of States "to achieve the discontinuation of all test explosions of nuclear weapons for all time" and the desire "to put an end to the contamination of man's environment by radioactive substances".

New Zealand is of the conviction that contemporary international law does not countenance the continuance of nuclear testing which causes radioactive contamination of the environment outside the territory of the testing State.

In summing up its response to the question posed by the Court, New Zealand maintained that since 1974 the situation had changed so radically as to have materially affected the basis of the Judgment; that such changes had struck at the rationale on which the case was barred from proceeding in 1974 so as to warrant its resumption in 1995; that the Court's assumption that the cessation of atmospheric testing would protect New Zealand's right had been affected by further evidence in 1995 when France resumed underground testing in the South Pacific region of Mururoa and Fangataufa and that this would have had potentially adverse and detrimental effects on those atolls.

New Zealand submitted that the conditions for resuming the case have accordingly been met; that there is now real evidence that New Zealand's original concerns that there should be no contamination of the marine environment have been reactivated by the underground testing carried out by France, and that the evidence of risk is compelling.

Responding to the question posed by the Court as to whether the Request by New Zealand fell within the provisions of paragraph 63 of the 1974 Judgment, France argued that there was no case in the legal sense in terms of the Statute and Rules of Court. France stated that there was a fundamental difference between the *Nuclear Tests (New Zealand* v. *France)* case of 1973 and the Request of 1995. The 1974 Judgment,

according to France, related to nuclear tests producing effects in New Zealand, Niue, the Cook Islands and Tokelau and not to the South Pacific region as a whole, whereas the 1995 Request concerns the marine environment of the South Pacific region.

France further argued that the Request by New Zealand did not meet the provisions of the Statute — especially Article 40 — nor did the Request fall under Articles 60 or 61 of the Statute relating respectively to an application for interpretation or a request for a revision of the Judgment. France also contended that the 1974 Judgment could not have contemplated underground testing, since that type of testing was not in issue at the time.

It further argued that since the law invoked by New Zealand was new law, that law would require a new case, but that as New Zealand had submitted that the Request was not a new case, there was no procedural foundation for the Request to stand on; that the Court therefore had no statutory basis on which to pronounce on New Zealand's Request; that New Zealand's Request, therefore, did not fall within the provisions of paragraph 63 of the 1974 Judgment.

France also contended that the Judgment excluded New Zealand's broader concerns as the Court had the right and duty to identify the object of the claim. France suggested that what the Court contemplated in paragraph 63 was a hypothetical future examination of the case, and New Zealand's interpretation of that text as enabling it to reopen the case was a misreading of the paragraph.

France also contested the scientific evidence presented by New Zealand, saying that the level of radioactivity found in the atolls was the same as was to be found in far-away countries and regions, and that New Zealand had not been affected by radioactivity emanating from the nuclear tests; nor had the continuation of the tests had any effects on the environment.

It asserted that fracturing as a result of the tests on the atolls was normal, and that there was no risk of geological disaster; that, after twenty years of testing, radioactivity in the environment of Mururoa was slight.

As far as the relevant Conventions requiring certain actions to be taken, France stated that it had contributed greatly to the development of the law; that hazardous wastes and underground tests are not one and the same thing; that France has complied with the precautionary principle and was complying fully with the international law of the environment.

France rejected the *res ipsa loquitur* principle which New Zealand had advanced regarding the burden of proof and maintained that such burden rested upon New Zealand.

France submitted that the Request of New Zealand neither fell within the terms of paragraph 63 nor met the conditions set therein.

The issue was thus joined as France, through its letter, *aide-mémoire,* and its presentation during the oral hearings, attempted to show in every material particular that the Requests of New Zealand had no legal basis, and also denied that the Court was competent to entertain the Request.

In my view, the Court took the right decision when it invited the two States to inform it of their views as to whether the Requests submitted by New Zealand fell within the provisions of paragraph 63 of the Court's 1974 Judgment in the *Nuclear Tests (New Zealand* v. *France)* case. The burden of establishing the legal basis of the Request rested upon New Zealand, for it was New Zealand that had submitted the Request, and it was for New Zealand to establish that the Request fell within the provisions of paragraph 63.

In my considered opinion, the standard of proof the Court should have applied as to whether New Zealand had established the legal basis of its Request should have been on a prima facie basis.

It seems to me that when it put the question for both States to address, the Court was attempting to determine whether it was competent to consider the main Request and the Further Request submitted by New Zealand in which the Court was asked to indicate interim provisional measures under Article 41 of the Statute to restrain France from resuming underground nuclear testing in the South Pacific region.

New Zealand had advanced the argument that the Court's jurisdiction to entertain both Requests was derived from paragraph 63 of the Judgment. France contested this.

In the *Nuclear Tests (New Zealand* v. *France)* case in 1973-1974, New Zealand had founded the jurisdiction of the Court on:

> "*(a)* Article 17 of the General Act of Geneva for the Pacific Settlement of International Disputes of 1928, in combination with Articles 36 (1) and 37 of the Statute of the Court, and
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> *(b)* the declarations respectively of New Zealand and France under Article 36 (2) — the optional clause — of the Statute, in combination with paragraph 5 of the same Article." (*Judgment, I.C.J. Reports 1974*, p. 509, para. 59, joint dissenting opinion.)

The Court ruled that the provisions invoked by New Zealand appeared, prima facie, to afford a basis on which its jurisdiction might be founded (*Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 138).

Thus, when making its Order indicating provisional measures, the Court applied the prima facie test in order to determine a basis on which its jurisdiction might be founded.

In that Order the Court recalled that, by the terms of Article 41 of the Statute, the Court might indicate interim measures of protection only

when it considered that circumstances so required in order to preserve the rights of either Party; that New Zealand had alleged that the series of French nuclear tests had added to radioactive fallout on New Zealand territory, and that it had further contended that there was an immediate possibility of a further atmospheric nuclear test being carried out by France which would cause New Zealand harm. Taking these factors into consideration, the Court ordered both Parties not to take any action which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party (*I.C.J. Reports 1973*, p. 142).

In recent years a settled case-law has emerged in the Court which allows issues relating to incidental jurisdiction to be decided if title to jurisdiction can be adduced and is not manifestly invalid, and if the circumstances so require (case concerning *Anglo-Iranian Oil Co., Interim Protection, I.C.J. Reports 1951*, p. 89, cases concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection* and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, I.C.J. Reports 1972*, pp. 12 and 30). The Court has taken the position that the mere fact that a State has challenged the basis of its jurisdiction does not suffice to prevent it from indicating interim measures of protection; nor need it come to the conclusion that where it has jurisdiction to deal with the merits of a case it must decide whether to grant interim provisional measures of protection.

Given the seriousness of the matter New Zealand has raised in its Request, and the weight of the evidence presented both in terms of facts and the law, it is my considered opinion that it has clearly shown both that its Request has a legal basis and that it falls within the provisions of paragraph 63. Had the Court applied the appropriate standard of proof, it would have come to the conclusion that New Zealand had established a prima facie case for the Court not only to have granted its request for the indication of provisional measures of protection, but to have assumed jurisdiction to consider the merits of the Request.

With regard to France's contention that the Court lacked jurisdiction to entertain the Request, New Zealand argued that the Court's jurisdiction was derived from the 1974 Judgment itself, when the Court in that Judgment stated that:

> "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" (*I.C.J. Reports 1974*, p. 477, para. 63).

New Zealand agreed that its Request is not based on any of the provisions of the Statute as such. However, its view of the Court's position

was that, having regard to the manifest connection between the Request and the terms of the 1974 Judgment, the Court would receive and process that Request made to it in the same manner as it would any other request or application made to it by a State party to the Statute.

It anticipated that the Court would then deal with the Request in a procedurally predictable way, and that if France were to consider that the Court lacked competence or jurisdiction to deal with the matter, it would appear and so argue, with the Court either sustaining the objections, in which event the proceedings would come to an end, or rejecting them, whereupon the case would proceed in the normal way. New Zealand argued that it was this kind of predictable procedure, based on the Statute which the Court had contemplated and its subordinate Rules, to which the Court in 1974 was referring by the use of the words "in accordance with the provisions of the Statute" in paragraph 63.

This explanation of the Court's intent in 1974 appears cogent, reasonable and persuasive. The Court had apparently envisaged a situation in which New Zealand or any other State party might want to request an "examination of a situation" affecting the Judgment, although New Zealand or those other States might not be in a position to do so as France had disconnected its jurisdictional link with the Court.

To guard against such a contingency, the Court decided, using its inherent powers, and in the interest of the administration of justice, that the jurisdictional link which it had found to exist when New Zealand filed its Application in 1973 must be preserved and serve as the jurisdictional link for a possible request for an examination of the situation, were the basis of the Judgment to be affected.

As I have stated, this argument seems to me very plausible, for even if, as France contends, the basis of the Court's Judgment related to France's unilateral declarations with reference to atmospheric and underground testing, if New Zealand or any other State had misconstrued the basis and submitted a request, founding the Court's jurisdiction on paragraph 63, France would have been obliged to present a formal objection to the Court, or the Court itself would have had to determine whether a jurisdictional link existed.

Only after such a determination would the Court have been able to decide whether or not any such link existed. The test to be applied by the Court at this stage, in my view, should be the prima facie one, and if met should have entitled the Court to assume jurisdictional title.

New Zealand contended that its Request should not be considered as application for revision in accordance with Article 61 of the Statute. This position seems accurate to me, for it appears unlikely that the Court would have contemplated a revision as the route whereby New Zealand could come to the Court, given the conditions laid down in the Article which provides that such an application must be based on some new fact of a decisive nature which was unknown to the Court and to the

party claiming revision, and since the Article precludes any application for revision after ten years. I agree that there was no reason why the Court would have wished to so restrict New Zealand or any other State for that matter if the basis of the Judgment had been affected. Furthermore, paragraph 63 did not anticipate the discovery of new facts but rather provided for an examination of the subject-matter of the Judgment. It is thus clear that New Zealand's Request cannot be debarred under Article 61 of the Statute.

I, therefore, concur with the Court's finding that a special procedure was envisaged in the event that the circumstances defined in paragraph 63 had arisen, in other words, circumstances which "affected" the "basis" of the Judgment.

The Court, according to its Order, has decided that the basis of the Judgment delivered on 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case has not been affected, and hence the "Request for an Examination of the Situation" submitted by New Zealand does not therefore fall within the provisions of paragraph 63 of that Judgment, and cannot therefore give effect to it.

In reaching this conclusion, the Court has found that the basis of the 1974 Judgment in the *Nuclear Tests (New Zealand* v. *France)* case was France's undertaking not to conduct further nuclear tests in the atmosphere, and that it was in the event of a resumption of atmospheric nuclear testing that the basis of the Judgment would have been affected, which hypothesis has not materialized.

This reading of the Judgment, which is preferred by the majority of the Members of the Court, while respectable, is not unassailable or free from doubt. Any such doubts in the reading of the Judgment, given the nature and gravity of the Request, should have been resolved in favour of the State alleging that the basis of the Judgment had been affected.

In my view, the issue whether the basis of the 1974 Judgment has been affected is, to a very large extent, a question of fact. New Zealand has stated that though the 1974 Judgment was based on the French Government's undertaking not to conduct any atmospheric nuclear tests, it maintained that, in both its 1973 Application instituting proceedings and in its written submission, it relied upon concerns going beyond just atmospheric testing. Its Application of 9 May 1973 stated as follows:

> "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 radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests." (*I.C.J. Reports 1974*, p. 460, para. 11; emphasis added.)

In its Application also filed on 9 May 1973,

> "*The Government of Australia asks the Court to adjudge and declare* that . . . the carrying out of further *atmospheric nuclear weapon* tests in the South Pacific Ocean is not consistent with applicable rules of international law.
>
> *And to Order*
>
> that the French Republic shall not carry out any further such tests." (*I.C.J. Reports 1974*, p. 256, para. 11; second emphasis added.)

It can be seen that despite the similarity of the two Applications, New Zealand's concerns were not limited to nuclear atmospheric testing; they were wider. Evidently, even though the two Applications were similar, the Court decided to deal separately with the two actions, presumably because they were not identical. But as the Court's Order now states:

> "having considered the Application of Australia, the Court employed in paragraph 60 of that Judgment a form of words identical to the one used in paragraph 63 of the Judgment in the *Nuclear Tests (New Zealand* v. *France)* case and adopted, in both Judgments, operative parts with the same content" (para. 58).

The Court stated that its decision was reached after it had ascertained the true subject of the dispute, and the object and purpose of the claim, taking account not only of the submission, but of the Application as a whole, the arguments of the Applicant before the Court, and other documents referred to.

Responding to this position taken by the Court in reaching its decision, New Zealand had stated that the 1974 Judgment conclusively decided only two things, namely, that the French statements of intention in relation to atmospheric testing were obligations binding in international law and that, since the Court had concluded from official New Zealand statements that those commitments met and matched New Zealand's primary concern, the case no longer had any object.

In my view, New Zealand's contention is correct, namely, that there was no *res judicata* in respect of the issues raised in its 1973 Application, and that the words "if the basis of this Judgment were to be affected" gave it the right to return to the Court; a right that would be activated if a factor underlying the Court's Judgment of 1974 ceased to be applicable on account of future conduct by France. New Zealand further contends that the basis of the Judgment should not be taken to refer solely to France's undertaking to cease further atmospheric testing.

My own reading of paragraph 63 is that, the Court in its 1974 Judgment having taken into consideration the circumstances then prevailing, namely, atmospheric tests in the Pacific, Australia's concerns about atmospheric tests, as well as the New Zealand Application, France's commitment to cease atmospheric testing led the Court to believe that

cessation of atmospheric testing would end contamination of the environment by radioactive material.

The Court thus believed itself to meet New Zealand's primary concerns as far as it related to atmospheric testing, but its wider concerns relating to radioactive fallout from *nuclear testing* remained. New Zealand's reading of an implied understanding that underground testing would not result in radioactive contamination is not therefore without considerable merit.

It thus seems to me that New Zealand was not contesting that atmospheric testing constituted the object of the 1974 Judgment; what it *now* contends is that the object has been affected by radioactive fallout resulting from underground testing. The Court, in my view, should have given more careful consideration to this construction of the Judgment, while taking into account New Zealand's original Application and the evidence presented with the Request.

New Zealand had informed the Court that there is now a growing body of scientific evidence pointing to the potentially adverse and detrimental effects of underground testing in the South Pacific region of the Mururoa and Fangataufa atolls, and showing that contamination of the marine environment is a real risk. It seems to me that this would serve as evidence relating to the basis of the 1974 Judgment. What New Zealand complained about in 1973 was the radioactive effects of *testing*, and if the assumption then made that underground testing produces no radioactive effects no longer holds true, then, in my opinion, the basis of the 1974 Judgment must have been affected. There is merit in the contention that the 1974 Judgment met the concerns — including New Zealand's — in relation to atmospheric testings. However, as radioactive contamination is now said to be caused by underground testing, this, if proved, would seem to affect the basis of the Judgment, and would entitle a party to make use of the channel provided by paragraph 63 as New Zealand has done.

With reference to the law, New Zealand alleged that France is in breach of international law, both conventional and customary, by failing to comply with its obligation not to introduce radioactive material into the environment.

Under contemporary international law, there is probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances. This trend is reflected in treaties such as the Moscow Treaty of 1963 Banning Nuclear Weapon Testing in the Atmosphere, in Outer Space and Under Water (about 130 States are now parties to this Treaty, according to which they undertake to prohibit, prevent and not to carry out any nuclear weapon test explosions at any place under their jurisdiction or control in the atmosphere, including outer space, or under water, includ-

ing territorial waters or the high seas), the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, which have as their object the prevention of radioactive contamination of the environmental areas to which they are related. It is reflected in the United Nations Convention on the Law of the Sea, Part XII of which is on the protection and preservation of the marine environment.

Given this trend, it can be argued that nuclear testing as such is not only prohibited, but would be considered illegal if it would cause radioactive fallout.

It is New Zealand's case that resumed French testing could produce contamination of the Pacific marine environment by artificial radioactive material.

In my view the evidence, though not conclusive, is sufficient to show that a risk of radioactive contamination of the marine environment may be brought about as a result of the resumed tests. The Court should have taken cognizance of the legal trend prohibiting nuclear testing with radioactive effect, and it should have proceeded to an examination of the situation within the framework of the 1973 *Nuclear Tests* case. The Court should also have indicated the interim measures of protection as requested.

In the light of the above considerations, the Court should have decided that New Zealand's Request for an Examination of the Situation falls within the provisions of the 1974 Judgment and should have taken action on it.

In pursuance of the New Zealand Request, the Australian Government and the Governments of Samoa, Solomon Islands, the Marshall Islands and the Federated State of Micronesia filed Applications for permission to intervene.

The Australian Government applied under Article 62 of the Statute, while Solomon Islands and Samoa each filed a document entitled "Application for Permission to Intervene under Article 62/Declaration of Intervention under Article 63", and the Governments of the Marshall Islands and the Federated States of Micronesia submitted similar documents.

In the Order, the majority of the Members of the Court stated that since the "Request for an Examination of the Situation" submitted by New Zealand did not fall within the provisions of paragraph 63 of the Judgment of 1974, the applications for permission to intervene also had no object and could not be the subject of any action.

Since the States concerned, as well as New Zealand, face the risk of radioactive fallout in the South Pacific region, and in view of the fact that

they are parties to the relevant multilateral and regional conventions, it is regrettable that they were not granted the opportunity to present their views on the Request to the Court.

In view of the foregoing considerations, I am unable to associate myself either with the Order of the Court or with most of its findings.

(Signed) Abdul G. KOROMA.