DISSENTING OPINION OF JUDGE SIR GEOFFREY PALMER

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INTRODUCTION

1. The application before the Court appears to be unique. No precedent has been referred to that resembles it in fact or law. It is not easy to grapple with a case which is both so novel in legal terms and of such moment in substantive terms. In the end the result depends upon the approach to be adopted to the legal interpretation of the Judgment rendered by the Court in the same case in 1974. Absent the usual legal navigation lights which guide this Court in its judicial work, we are thrown back to the basic elements of legal reasoning that should be applied to the task. I differ from the approach to legal analysis adopted by the majority of the Court, so I respectfully dissent from the Judgment of the Court.

THE NATURE OF THE PROCEEDINGS

2. On 21 August 1995 the Government of New Zealand filed in the Registry of this Court two documents:

(a) Request for an Examination of the Situation in accordance with paragraph 63 of the Court's 1974 Judgment in the *Nuclear Tests (New Zealand* v. *France)* case;
(b) Further Request for the Indication of Provisional Measures.

3. The full text of paragraph 63 of the 1974 Judgment is 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." (*I.C.J. Reports 1974*, p. 477.)

4. On 9 May 1973 the New Zealand Government instituted proceedings against France with the purpose of obtaining a determination that the conduct by the French Government 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 (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, p. 3).

5. In 1973 the Court's jurisdiction was invoked under two heads:

(a) Articles 36 (1) and 37 of the Statute of the International Court of Justice and Article 17 of the General Act for the Pacific Settlement of International Disputes to which New Zealand and France both had acceded; and

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

France ceased atmospheric testing in the South Pacific while this case was before the Court in 1974 in circumstances that will be analysed later in this opinion.

6. In 1995 this Court scheduled a public sitting in order to enable New Zealand and France to inform it of their views on an issue framed by the Court:

> "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)*?"

It is a procedural issue far removed from the merits of the case. Is there a sufficient link between the case as it was pleaded and decided in 1974 and the effects of the French nuclear tests that are continuing underground in the South Pacific to allow further consideration to be given to the New Zealand Request? It was described in the oral argument by France as a prior question to a later preliminary one. New Zealand said it was to determine whether New Zealand could in the circumstances exercise the right reserved to it in 1974 to return and pursue its 1973 case. Cases in this Court, because of the peculiar nature of its jurisdiction, may go through three phases with distinct proceedings in each — preliminary objections to jurisdiction, preliminary objections to admissibility and the merits of the case. But this 1995 proceeding was not any of those. It was of a procedural species not seen before and its novelty may have given rise to misunderstandings. It led among other things to the Court sidestepping New Zealand's Further Request for the Indication of Provisional Measures and dealing with the Request itself in a somewhat summary manner. Both the procedural posture of the case and the substantive issues are novel; but novelty is no reason to dismiss the case or not consider it fully.

7. It should be noted that France filed no pleadings in the case in 1974, was not represented at the oral proceedings and at all times maintained the attitude as expressed in a letter of 16 May 1973 from the Ambassador of France to the Netherlands which was placed before the Court. That letter expressed France's view that the Court was manifestly not competent in the case; that it could not accept the Court's jurisdiction and that

accordingly the French Government did not intend to appoint an agent and requested the Court to remove the case from the list (*I.C.J. Reports 1974*, p. 458).

8. A slightly different approach to the present application has been taken by the Government of France in 1995. The same position taken in 1973 was expressed by France in the letter dated 28 August 1995 to the Registrar at the Court by the Ambassador of the French Republic to the Netherlands in which it is argued that "no basis exists which might found, even if only prima facie, the jurisdiction of the Court to entertain the New Zealand Requests". In 1995, however, the French Government was represented by its Director of Legal Affairs at the Ministry of Foreign Affairs at the meeting scheduled by the President of the Court on 30 August 1995. As a result of that meeting France filed with the Court an *aide-mémoire* containing 14 pages of closely reasoned legal argument as to why New Zealand's application could not be entertained by the Court. In 1995 France was represented by counsel before the Court. It fully participated in oral hearings on 11 and 12 September 1995.

9. In dealing with the present application it is necessary to ascertain exactly what was decided and what was not decided by the Court in 1974. The President of France issued a communiqué on 8 June 1974 and other official statements were made to the effect that atmospheric tests would cease, giving way to underground testing. The Court in its 1974 decision decided that the case before the Court had been rendered moot since New Zealand had secured what it sought. The Court went on to state that the statements by France that atmospheric tests would cease were statements upon which other nations were bound to rely. The Court held the statements "constitute an undertaking possessing legal effect" (*I.C.J. Reports 1974*, p. 474, para. 53). Thus the Court reasoned that the "dispute having disappeared, the claim advanced by New Zealand no longer has any object" (*I.C.J. Reports 1974*, p. 476, para. 59).

10. In its Request of 14 May 1973 New Zealand did not restrict itself to concern with atmospheric nuclear testing. In its submission the rights to be protected by the Court were:

> "(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." (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, Request for the Indication of Interim Measures of Protection, p. 49, compare with Application, *ibid.*, p. 8.)

11. The elements of the request relevant to the present application are:

— the maritime environment,
— the terrestrial environment,
— unjustified artificial radioactive contamination,
— the effects on the environment of the region,
— freedom to explore and exploit the resources of the sea-bed without detriment from nuclear testing,
— the dangers to territorial waters.

12. It is against that background that paragraph 63 of the Court's Judgment falls to be considered. In the written proceedings and oral hearings before this Court the paragraph has been subjected to a remarkable range of interpretations and it is a passage with some delphic qualities. It hangs in a tantalizing fashion over the whole case.

13. The paragraph appears alone in the Judgment plainly separated from the passages which both precede it and follow it. What was its purpose? What is its proper interpretation? These are the questions upon which the result of the case depends. But before discussing those issues some context needs to be set out to allow a more ample appreciation of them.

Some Background Issues

A History of Consistent Opposition

14. This case concerning French nuclear testing in the South Pacific has a long history. It began in this Court in 1973. Diplomatic correspondence between New Zealand and France revealed serious concern about

the subject for a decade earlier (*I.C.J. Reports 1974*, p. 464, para. 26). Before that France had tested nuclear devices in Algeria. Two factors which favoured a change of venue for testing were the fact that Algeria secured its independence from France in 1963 and there was concern that the Saharan winds carried radioactive debris into Europe. (See generally "Note, French Testing and International Law", 24 *Rutgers Law Review* 144 (1969).) While the Pacific may have been more expansive in spatial terms, the reception to the tests there, first atmospheric and later underground, reinforced the old adage of environmental law: not-in-my-backyard.

15. But it would be wrong to attribute New Zealand's opposition to nuclear testing to the French movement of testing to the Pacific. France conducted 19 tests in Algeria between February 1960 and February 1966. At the time the official order to proceed with testing was given in 1958 there was a General Assembly resolution expressly condemning French testing, not only for the threat that it posed to the then moratorium but also for "causing anxiety among all peoples, and more particularly those of Africa". New Zealand voted for that resolution in the General Assembly (resolution 1379 (XIV), 20 November 1959).

16. This history of New Zealand opposition to nuclear testing is meticulously examined in a scholarly article by J. Stephen Kós ("Interim Relief in the International Court of Justice: New Zealand and the Nuclear Test Cases", 14 *Victoria University of Wellington Law Review* 357 (1984)). He finds that New Zealand, unlike Australia, had "had a consistent and outspoken record to all atmospheric testing since 1958" (p. 370). One of the counsel in the 1973 New Zealand case, who was again counsel before the Court on this occasion, Sir Kenneth Keith, Q.C., wrote in a learned article,

> "The diplomatic record, assembled in the documentation submitted to the Court, shows a consistent and developing New Zealand position dating from 1958 when it supported a resolution about testing in the Sahara." (K. J. Keith, "The Nuclear Tests Cases after Ten Years", 14 *Victoria University of Wellington Law Review* 350 (1984).)

17. In truth, the New Zealand opposition to nuclear tests has three strands — concern for disarmament and an opposition to the spread of nuclear weapons and their testing; the effects of nuclear testing on the environment; and a regional concern. There is in fact a strong element of consistency about New Zealand's attitude to nuclear testing in all catego-

ries and in this history is to be found the explanation for why New Zealand's pleadings in the 1974 case are substantially wider than Australia's in the companion case. The New Zealand pleadings as set out earlier in this opinion manifestly do not restrict themselves to issues of atmospheric nuclear testing. The environmental issues are prominent.

18. It is also significant that the New Zealand official reaction to France's assurances, made while the case was before the Court, that atmospheric testing would cease and give way to underground testing was not accepted by New Zealand. France had issued a communiqué on 8 June 1974 indicating it would cease atmospheric tests. New Zealand in a diplomatic note that was also before the 1974 Court said it had "fundamental opposition to all nuclear testing" (*I.C.J. Reports 1974*, p. 470, para. 37).

19. Then there was the official New Zealand Government response to the Judgment of the Court. The official statement of the New Zealand Prime Minister, the Rt. Hon. W. E. Rowling, was made on 21 December 1974 and put before this Court on 11 September 1995. It concluded as follows:

> "Mr. Rowling concluded by recalling that New Zealand's concern about nuclear testing had never been confined to the particular case of the tests conducted by France — or indeed, to the question of testing in the atmosphere. It would continue to be the New Zealand Government's aim to bring about the ending of all forms of nuclear weapons testing, by any country."

20. Indeed it is a matter of public record that New Zealand had a serious diplomatic dispute with the United States of America over the ability of ships from that country to bring nuclear weapons into New Zealand harbours, a dispute which resulted in a rupturing of the Anzus Alliance established between the United States, Australia and New Zealand pursuant to the 1951 Anzus Treaty (131 United Nations, *Treaty Series (UNTS)* 83). The dispute caused the United States to suspend its treaty obligation towards New Zealand because New Zealand would not admit to its ports nuclear armed or powered ships. New Zealand passed a statute that remains the law enshrining that policy: New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987.

21. From 1983 onwards there was a consistent pattern of official public statements expressed by New Zealand to France's underground nuclear testing in the Pacific. The 1995 New Zealand Request shows that New Zealand publicly objected on no fewer than 50 occasions.

22. Further, New Zealand continuously sought information, or evidence, from France in bilateral, regional and multilateral contexts. Those requests include the following:

3 December 1979: request by New Zealand Minister of Foreign Affairs during meeting in Paris with French Foreign Minister;

22 April 1980: request to France to allow visit to Mururoa test site by New Zealand scientists;
9 December 1981: further request for information;
24 March 1982: New Zealand request for independent verification of French safety measures;

23 August 1982: New Zealand repeated request for access to site by New Zealand scientists (Atkinson visit allowed October-November 1983);

25 November 1986: Noumea Convention signed following negotiations over some years involving New Zealand and France and other South Pacific States.

There were no tests between July 1991 and September 1995. (Reply to question by Judge Schwebel.)

23. In responding to the 1995 Request before it the Court needed to examine here the context of this particular dispute closely. In 1973 the burden of the complaint by New Zealand was that it was entitled to be free from the hazards of increased nuclear radiation due to French nuclear testing in the South Pacific. As indicated elsewhere in this opinion the Court found it unnecessary in 1974 to address the central issue attributing "legal effect" to France's public undertaking to halt atmospheric testing. Unhappily, this disposition of the case manifestly did not have the effect of solving the dispute between the Parties. The state of international law on the central issues was not decided. The reality is that in one form or another French nuclear testing in the South Pacific has been at the root of a series of international law issues which have arisen between the two nations since 1974 (United Nations Secretary-General: Ruling on the *Rainbow Warrior* affair between France and New Zealand, reprinted in 26 *International Legal Materials (ILM)* 1346 (1987), 74 *International Law Reports (ILR)* 241; *Rainbow Warrior (New Zealand* v. *France)*, International Arbitration Award, 30 April 1990 (Eduardo Jiménez de Aréchaga, Professor Bredin and Sir Kenneth Keith), 82 *ILR* 499).)

Intervenors

24. That there is widespread concern about the environmental issues raised by the French tests is obvious enough, not only from the high

media profile the issues enjoyed at the very time of the oral hearings but also from the fact that a number of countries sought to intervene in these proceedings under Article 62 of the Statute and have filed the necessary documents to do so. Those countries are:

Australia,
Samoa,
Solomon Islands,
Marshall Islands,
Federated States of Micronesia.

The Court has taken no action on the Applications made by these countries; an omission considered by this Judge to be unfortunate. It is a big step for the smaller of these democratic countries to attempt to come before this Court combining as they do the interests of Polynesian, Melanesian and Micronesian peoples and they are entitled to a response. They were not permitted to be heard in the oral argument and they well may have been able to add valuable assistance to the Court's consideration. The issue before the Court was one that deserved to be considered in its regional context as well as its factual and legal context. As Paul East, Q.C., the Attorney-General of New Zealand told the Court the 15 countries of the South Pacific Forum regard French nuclear testing "of grave concern to the countries and peoples of the region" (CR 95/19, p. 20, para. 13). This regional concern is exemplified by the provisions of the South Pacific Nuclear Free Zone Treaty concluded at Rarotonga 6 August 1985, entered into force 11 December 1986 (24 *ILM* 1442 (1985)).

THE CENTRAL LEGAL ISSUES

Paragraph 63

25. The central legal issue in the case is how to interpret paragraph 63 of the Court's 1974 Judgment, which for ease of reference is repeated again:

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

The New Zealand Argument

26. The New Zealand interpretation of the paragraph is based on its 1973 Application which was not limited to atmospheric testing and was at its base a dispute about nuclear contamination. The prime concern was contamination, its source was incidental or secondary (1995 New Zealand Request, para. 64). New Zealand says its interpretation draws strength from its prayer that the Court adjudge and declare the conduct of nuclear tests in the South Pacific constituted a violation of New Zealand rights under international law. New Zealand further draws comfort from the fact that the operative part of the Court's Order of 22 June 1973 talks of the need to avoid "nuclear tests" and is not restricted to atmospheric tests (1995 New Zealand Request, para. 65). New Zealand further points to the scope of the 1973 Application in its concern with the living resources of the sea.

27. New Zealand then puts its argument in this way:

> "It is true that the French declarations had said that, in giving up atmospheric testing, France would be in a position to pass to the stage of underground testing. Thus even though the prospect of underground testing was in the mind of the Court, it did not specifically rule that underground testing would end the dispute absolutely. The crucial point to recall is that no one had any idea at that time that the underground testing subsequently to be carried out at Mururoa or at Fangataufa could, or would in due course, lead to some of the results that it was thought the termination of atmospheric testing would avoid, namely, pollution of the marine environment by radioactive material. If it had been so contemplated, the Court could hardly have taken the view that the French renunciation of atmospheric testing could by itself have brought the 'dispute' to an end — for evidently it would not have." (*Ibid.*, para. 67.)

28. Thus, New Zealand argues that the scope of the Court's 1974 Judgment must be measured not by reference to atmospheric testing as such, but rather by reference to the stated objective of the Application, which was to secure a prohibition of testing likely to produce contamination in the Pacific marine environment by any artificial radioactive material. It was triggered by the announcement of 13 June 1995 by the President of the French Republic announcing a series of tests after France had previously ceased testing in July 1991. On the basis of scien-

tific evidence, the case New Zealand now presents is that underground nuclear testing at Mururoa and Fangataufa has already led to some contamination of the marine environment and there appears a real risk of its leading to further potentially significant contamination. Thus, concludes the argument on this point by New Zealand, the matching made by the Court in 1974 between atmospheric testing and the width of the dispute between New Zealand and France is based on a presumption that is no longer valid. By the time of the oral hearing there had occurred a total of 135 underground nuclear explosions in the South Pacific making up the relevant background against which the provisions in paragraph 63 of the Judgment must be examined. So, New Zealand now seeks a resumption of the 1973 proceedings before this Court because the basis of the 1974 Judgment has been affected by new developments and by the cumulation of concentrations of hazardous radioactive materials which will be a danger if they escape.

29. On the critical element upon which the view of the majority turns the New Zealand Solicitor-General, J. J. McGrath, Q.C., made the following oral submission:

> "Had it been the Court's intention to confine resumption of the case to a situation where France had reverted to atmospheric testing, the Court would have said so. It did not. Instead it framed the test in broad words which raised the question of whether the rationale underlying the Judgment of 1974 continued to apply. It is argued by France that only future atmospheric testing is covered by the right to go back to the Court. But that, Members of the Court, is contradicted by the very generality and wide scope of the words 'if the basis of the Judgment is affected'. Indeed, if you look at the whole of paragraph 63, it is impossible to treat the French unilateral undertaking to cease atmospheric testing as the only event that would change the basis of the Judgment. The first sentence of the paragraph says that the Court is not prepared to contemplate a breach of its undertaking by France. How, then, can it be argued that the second sentence contemplated solely that possibility?" (CR 95/19, p. 50, para. 38.)

30. There were in the New Zealand view two assumptions forming the basis of the Judgment in 1974. The first was that France would comply with its commitment to cease atmospheric testing and confine itself to underground testing. The second assumption was that the cessation of atmospheric testing met and matched New Zealand's allegations and concerns regarding nuclear contamination as they stood in 1974. Then New Zealand went on to develop an extensive argument as to why the second assumption was no longer valid. Thus, if the wider concerns that

it expressed in its pleading came again into issue in the future it was at liberty to reopen the case under paragraph 63. The words "basis of the Judgment" were deliberately left undefined, New Zealand contends. New Zealand went on to develop lengthy arguments as to what had changed. In short what had changed were both the facts and the law.

31. Professor Elihu Lauterpacht put the argument for New Zealand in this way. He suggested to the Court that if New Zealand had been asked in 1974 the question: What is your concern — to stop atmospheric testing or prevention of nuclear contamination, it would have provided the following answer:

> "It is ridiculous to think that we would be content with the abandonment of atmospheric testing if nuclear pollution were to be allowed to continue by other means. For us it is not the means or the medium of testing that matters. It is the consequences. The fact that the testing is carried out in the atmosphere is only incidental to the consequences of the testing." (CR 95/19, p. 64, para. 5.)

The Argument of France

32. The arguments adduced by France stoutly resist all of the New Zealand claims. One of the counsel for France, Sir Arthur Watts, described the New Zealand Request as "curious and unprecedented" (CR 95/21, p. 47). This submission was based on the notion that the case no longer existed. In fact that there was no provision for such a Request in either the Statute governing the Court or its Rules. Thus in essence the French argument was that the *Nuclear Tests (New Zealand* v. *France)* case no longer exists. It came to "an end in 1974, and is dead" (*ibid.*, p. 52). Since it was dead it could not rise again.

33. In the *aide-mémoire* submitted to the Court on 6 September 1995 France submits that the Request of New Zealand does not relate to any case and consequently no procedural steps can be taken. France submits the case was closed by the Judgment of this Court on 20 December 1974. France reasons that since the Court found that the claim then by New Zealand no longer had any object, as a result of the statements made by France, the Court was not called upon to give a decision. This, says France, was the decision, it is *res judicata* and the matter is at an end. The whole case was about atmospheric tests and only atmospheric tests. The structure of the Court's Judgment demonstrates it. Furthermore, the Court and New Zealand knew that tests were going to continue underground. The statements made by France and relied upon by the Court said so. France points to passages in the Judgment saying that the New Zealand Application should be interpreted as applying only to atmospheric tests. And, France argues, none of the six dissenting Judges dis-

puted the fundamental conclusion that the object of the New Zealand Application related to atmospheric tests. France goes on to quote statements in the New Zealand pleadings that the "core of the legal dispute" is whether atmospheric testing involves the violation of international law. (*Aide-mémoire* submitted on behalf of France, para. 16.) Thus, in the view of France paragraph 63 is to be read against a background that the whole case was and is restricted to atmospheric tests. France concludes on the basis of this reasoning that the New Zealand 1995 Request is of a "wholly artificial and unacceptable nature" (*ibid.*, para. 19).

34. Taken as a whole the Judgment of the Court established the following three propositions in the view of France. First it expressly considered New Zealand's application to relate solely to atmospheric tests and not other types of tests. Second, the Court found France committed by various unilateral declarations not to conduct further atmospheric tests. Third, it held that New Zealand's claim no longer had any object.

35. The French argument went on to contend that the public announcement of France in 1974 to undertake no further atmospheric tests could not be dissociated from its similarly announced intention to carry out underground tests. Furthermore, says France, New Zealand understood the decision the same way France did. It refrained from complaining about underground tests in the South Pacific for some years and when it did denounce the underground tests New Zealand never advanced the decision of the International Court of Justice as a basis for doing so.

36. France went on to argue that a further objection to the New Zealand Request is the point that there is no provision within the Statute of the International Court of Justice within which the Request falls. Paragraph 63 of the Judgment, France emphasizes, said that any application New Zealand might make pursuant to the paragraph had to be "in accordance with the provisions of the Statute". The present Request could not be brought within the terms of the Statute — it was neither an application for interpretation under Article 60 nor a request for a revision of judgment under Article 61. The conditions under which those articles apply were absent in this case. Thus, the Request was nothing and nothing could be done with it.

Weighing the Arguments

37. Weighing these arguments it appears to me that they demonstrate widely divergent legal approaches. The French approach is a strict, technical legal approach. It was described by more than one of the French

counsel as "rigorous". I should have thought "unrealistic" may have been a better characterization of it. Such a strict construction approach avoids the need for the Court to address the substance of the issues. The approach allows the Court to avoid encountering the highly controversial issues of nuclear testing in the South Pacific by France by reading down the language of the Court in paragraph 63 of its 1974 Judgment and restricting its application to the matters that France no longer argues in favour of, namely atmospheric nuclear testing. The second approach requires the Court to grapple with the real issues that exist between France and New Zealand about the obligations under international law in respect to testing of the character that is currently continuing in the South Pacific as this case proceeds.

38. The difference between the two approaches will result in important practical consequences. The first approach produces a decision that there is no case before the Court, nothing further to be gone into and the whole matter will be at an end. If the second approach is adopted it causes the Court to embark upon a consideration of further jurisdictional matters and perhaps eventually an examination of the obligations at international law that exist in the circumstances. It must be stressed, however, that even if the second approach to the issue as framed by the Court prevails there is no necessary implication to be drawn from it that France has acted in contravention of international law. It is simply that the issue will fall to be argued and decided before this Court. To decide the present issue against France will simply allow further stages of the case to continue before this Court, in particular New Zealand's Further Request for the Indication of Provisional Measures will then come to be dealt with.

39. In the event, a majority of the Court has decided in 1995 that while the French argument that there is nothing here fails, there is nevertheless nothing here that the Court is prepared to take up. Since I differ from the judgment of the Court, I set out my own reasoning in some detail in the following paragraphs.

40. Confining the analysis for the moment to what the 1974 Court actually said in paragraph 63, it must be accepted on any interpretation that the Court meant that there were circumstances in which New Zealand could request an examination of the situation. That is what the Court said and it must be understood to have meant it. In order to underline the jurisdictional significance of this utterance the Court pointed out that the denunciation by France of the General Act for the Pacific Settlement of International Disputes which was relied on as a basis for jurisdiction cannot constitute an obstacle to such a request. Why did it say that? Presumably because having decided there were circumstances in which New Zealand could request an examination of the situation by the Court at a later date it did not want that Request then to be met by jurisdictional arguments that the provisions by which the Court was allegedly seised of the dispute in the first place were now spent. For the Court to

go to such pains to ensure that the power for New Zealand to return to the Court should be kept open must indicate that the Court felt that right was an important safeguard.

41. The reasons for the 1974 Court developing its view are perhaps not far to seek. The Court must have known New Zealand may fail to accept the view that there was nothing left to decide after the statements made by the French Government about a cessation of atmospheric testing. Indeed, official statements concerning the New Zealand position on France's assurances were before the Court in 1974 and these were that it rejected all forms of testing, not merely atmospheric. These are clearly set out in the Judgment (*I.C.J. Reports 1974*, p. 470, para. 37). The Court could not foresee what may happen in the future. Out of caution, therefore, it left the opportunity open for an examination of the situation in the future. That was both a comfort for New Zealand and a protection for the Court in ensuring that its authority in the matter was recognized and continued.

42. The basis for paragraph 63 may indeed stem from the strong dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock. Those Judges said:

> "In accordance with the above-mentioned basic principles, the true nature of New Zealand's claim, and of the objectives sought by the Applicant, ought to have been determined on the basis of the clear and natural meaning of the text of its formal submission. The interpretation of that submission made by the Court constitutes in our view not an interpretation but a complete revision of the text, which ends in eliminating what constitutes the essence of that submission, namely the request for a declaration of illegality of nuclear tests in the South Pacific Ocean giving rise to radio-active fall-out. A radical alteration of an applicant's submission under the guise of interpretation has serious consequences because it constitutes a frustration of a party's legitimate expectations that the case which it has put before the Court will be examined and decided. In this instance the serious consequences have an irrevocable character because the Applicant is now prevented from resubmitting its Application and seising the Court again by reason of France's denunciation of the instruments on which it is sought to base the Court's jurisdiction in the present dispute." (*Ibid.*, p. 499, para. 12.)

43. The internal textual evidence to be derived from that passage matches up closely with what was said by the Court in paragraph 63. The Court in that paragraph included a reference to a denounced instrument, specifically saving the request for examination from the fate predicted by

the dissenters. In my opinion a possible explanation of paragraph 63 is that it was adopted by the Court, after having seen the dissent circulated in draft, in order to blunt power of the central point made by the dissenters and to ensure it did not come to pass. In that way the majority may have attempted to secure more support within the Court for the Judgment and may in fact have done so.

44. If the above reasoning is correct, it would suggest the Court had in mind in framing paragraph 63 that New Zealand was entitled to make a Request in terms of its original pleading. And as has been adverted to earlier those pleadings were framed rather widely. The majority of the Court was tacitly admitting future difficulties could arise because of the line it was taking; assurances from France may not be enough to satisfy all the applicant's objectives. The Court did not therefore decide the substantive issue before the Court but left open to itself the opportunity to do so later. New Zealand, as the dissenting Judges observed in 1974, never filed any discontinuance of its proceedings in light of French assurances. While the case was found to be moot in 1974 its status could change if the facts that rendered it moot changed.

45. What were the circumstances in which such a Request as contemplated by the 1974 Court could be made? The first sentence of paragraph 63 indicates that it is not the Court's function to contemplate that a State would not comply with a commitment once the Court has found the State has made the commitment. The Court should be taken at its word; if it is taken at its word the Court's concerns were not restricted to non-compliance by France of its undertakings. The concerns were wider than that. The next sentence is critical: "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 operative words are "if the basis of this Judgment were to be affected". A large number of things could affect the basis of the Judgment. Not the least of these were future developments which the Court could not foresee in 1974 but which it knew may produce circumstances which could require its Judgment to be examined again. If the basic factors underlying the Judgment changed because of France's future conduct then the issues could be revisited by the Court.

46. There is nothing in the language of paragraph 63 to restrict such an examination to France's compliance with its undertaking not to resume atmospheric nuclear testing. France relies upon paragraph 29 of the Judgment particularly the passage where the Court says that it considers

> "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" (*I.C.J. Reports 1974*, p. 466).

It is true that this was the basis upon which the Court framed its Judgment. But it was not a position agreed to by New Zealand and the plain language of New Zealand's Application was broader. Understood in that way there is nothing inconsistent between paragraphs 29 and 63. Paragraph 63 was a recognition by the Court of the realities of the situation produced by its Judgment. So, if the "basis of this Judgment were to be affected" the Applicant could request an examination of the situation.

Resolution of the Issue

47. The resolution of the first issue to be determined arising out of paragraph 63 turns upon how the 1974 Judgment is characterized — what are its essential elements.

The competing *rationes decidendi* of the case from each country's point of view might be stated as follows:

France: When New Zealand brought proceedings in the International Court of Justice in 1973 in respect of nuclear tests France was then conducting in the Pacific the Court decided

(1) that the New Zealand Application related solely to atmospheric testing notwithstanding wider claims made in the New Zealand pleadings;
(2) when France committed itself by unilateral declaration not to conduct any further atmospheric nuclear tests the Court held that undertaking was legally binding upon France thereby rendering the claim without object and the Court was not called to give a decision upon it;
(3) the Court reserved leave to New Zealand to request the Court in the future to examine the situation if the basis of its Judgment were to be affected, but this right is limited to a breach by France of the undertaking in Proposition 2 because the Court decided Proposition 1.

New Zealand: When New Zealand brought proceedings in the International Court of Justice in 1973 in respect of nuclear tests France was then conducting in the Pacific the Court decided

(1) that the New Zealand Application related solely to atmospheric testing notwithstanding wider claims made in the New Zealand pleadings;
(2) when France committed itself by unilateral declaration not to con-

duct any further atmospheric nuclear tests the Court held that undertaking was legally binding upon France thereby rendering the claim by New Zealand without object and the Court is not called upon to give a decision on it;

(3) the Court reserved leave to New Zealand to request the Court to examine the situation if the basis of its Judgment were to be affected, and this proposition is not limited by the other two.

48. Stated in that way it is apparent that the third proposition is the pivot. It can be accepted that some version of the proposition is an essential part of the Judgment in both accounts. But is Proposition 3 a dependent or independent variable? There is nothing in the proposition developed by the Court itself to suggest that it is a factor which is limited by Proposition 1. There is nothing to indicate that Proposition 3 was to be considered a subordinate and subsidiary part of the Judgment. It seems to me that it was of equal standing with the other two elements of the Judgment. In fact potentially it was more potent than they. It had the power within it to eviscerate Proposition 1. Should subsequent events undermine that portion of the Judgment dealt with in Proposition 1 that proposition could no longer stand. Indeed Proposition 3 could be seen as an important element of the *ratio decidendi.* It is an important qualification to paragraph 65 (the *dispositif*) where the Court found by nine votes to six that "the claim of New Zealand no longer has any object and that the Court is therefore not called upon to give a decision thereon" (*I.C.J. Reports 1974*, p. 478).

49. The reason for the pertinence of Proposition 3 is that the Court did not decide the case that was put in front of it in 1973-1974. It avoided the issue, using the French announcements as the basis for doing so. In order to allow itself the freedom to decide the case should subsequent developments make that appropriate, it formulated Proposition 3. It was thereby deliberately introducing an element which made the Judgment less than final. This was an unusual Judgment of which it might be said proceedings were not definitely ended. If "the basis of the Judgment were to be affected" it could be reopened if the true subject, object and purpose of New Zealand's Application was brought into issue.

In Accordance with the Provisions of the Statute

50. I turn now to the phrase used by the Court in paragraph 63 that the Applicant could request an examination of the situation "in accordance with the provisions of the Statute". France argues strongly that there are no express provisions within the Statute within which the Request falls. It is neither an application for revision nor a request for interpretation of the 1974 Judgment in terms of the provisions of Ar-

ticles 60 and 61 of the Court's Statute. France argued this point in paragraphs 24 to 26 of its *aide-mémoire* of 6 September 1995 and its oral submission. With respect I find those arguments well made but they do not in my opinion dispose of the issue.

51. In my opinion the jurisdictional foundation for the New Zealand Request rests upon the Judgment itself, particularly paragraph 63. The Judgment was rendered in accordance with the Statute. Indeed, France now admits the validity of the Judgment, even though it chose to make no appearance before this Court in 1973-1974 and did not comply with provisional measures ordered by the Court. The Court solemnly and clearly left it open in paragraph 63 for New Zealand to request an examination of the situation. The Court in reaching its Judgment knew what the Statute provided. In these circumstances the reference to the Statute must be understood as meaning in accordance with the Statute, the Rules of the Court and the Judgment of the Court. It was not to be understood as a reference to a particular procedure provided for by the Statute. What the Court meant in my opinion was that if paragraph 63 was activated the Court would use the procedures it usually uses to deal with it. It was a commitment to procedural due process in relation to any application for an examination of the situation. To give the phrase the meaning contended for by France is to render the paragraph devoid of practical effect. It could not have been intended by the Court to prevent a New Zealand return to the Court if, for example, France had resumed atmospheric testing 12 years after the Judgment.

52. In making provision in paragraph 63 in the way that it did, the Court was acting in exercise of the inherent power it enjoys as the result of its existence, including the Statute of the International Court of Justice itself and the reference in Article 1 to the Court as "the principal judicial organ of the United Nations" and the power in Article 48 to make orders for the conduct of the case. The Court in my opinion has the power to regulate its own procedure and to devise a procedure *sui generis*. It is, after all, a court.

53. The French argument also relies upon the long period of time that has elapsed since the Judgment of the Court coupled with the fact that New Zealand refrained from protesting against the underground tests which France carried out on occasions. But against that it should be said that it is common in domestic jurisdictions for matters to be left open for the parties to litigation to return to the Court consequent upon later developments. Such a feature in international law can hardly be regarded as unacceptable in terms of the sources of international law articulated in Article 38 (1) of the Statute of the International Court of Justice. In such circumstances the formal fact of the status of the case on the Court's formal list is irrelevant.

54. In my opinion the Court had the power to keep open the possibility of an examination of the situation in this case and it exercised that power. The reason the case is not dead is because the 1974 Judgment kept it alive. Given the subsequent development of matters in the South Pacific it might be regarded as providential that the Court had the foresight to act in the way that it did.

THE FACTUAL ENVIRONMENTAL ARGUMENT

55. Having concluded that the Court is not precluded by the terms of its 1974 Judgment from entering into an examination of it, I now come to a discussion of the arguments of whether it should in the circumstances exercise in 1995 the possibility left open in 1974. Such an analysis necessarily requires some reference to the facts.

The Prima Facie Standard

56. New Zealand submitted that the appropriate standard was for the Court to apply a prima facie standard as it does in provisional measures cases and not set an absolute standard. New Zealand contended that it could meet the more demanding standard on the facts but that it was not the appropriate test. That was because of the jurisdictional character of the issue and the fact that New Zealand had requested provisional measures in relation to the case.

57. The contention of France, by way of contrast, was that New Zealand had the burden of proof and the standard was the normal standard of proof that applies to any State that has the burden of making good its arguments. France denied there were jurisdictional issues in the sense argued by New Zealand on the grounds that the issue was whether or not the case still existed.

58. I have dealt with the issue of the whether the case still existed in the previous segment of this opinion. Having decided that it does remain open to make application under paragraph 63 of the Judgment of 1974 I conclude that the test proposed by New Zealand is the appropriate one, and to be fair to France it does not appear to me that the contrary view was strongly argued. It appears to me that what New Zealand has to show is that there is a prima facie case to examine the Judgment. It sought to do that by two arguments:

(a) the pertinent facts have changed increasing the risk of nuclear contamination;
(b) the state of international law had rapidly developed and progressed from the point it was at in 1974 so clarifying the standards to be applied to the dispute.

Either change, it was submitted, would be sufficient to trigger the process of examination by the Court under paragraph 63. To these factual and legal issues this opinion will now turn.

New Zealand's Argument on the Facts

59. Coming to the environmental issues raised in the Request by New Zealand, New Zealand asks the Court in paragraph 113

> "to adjudge and declare:
>
> (i) that the conduct of the proposed nuclear tests will constitute a violation of the rights under international law of New Zealand, as well as of other States;
>
> further or in the alternative;
>
> (ii) that it is unlawful for France to conduct such nuclear tests before it has undertaken an Environmental Impact Assessment according to accepted international standards. Unless such an assessment establishes that the tests will not give rise, directly or indirectly, to radioactive contamination of the marine environment the rights under international law of New Zealand, as well as the rights of other States, will be violated."

60. As New Zealand puts the argument the situation developed gradually, but has now reached the stage where it affects the basis of the 1974 Judgment. That is to say evidence has accumulated concerning the number of underground tests now numbering 135 since the Court's Judgment of 1974. Among the issues are the nature of the geomorphology of the atolls where the tests are conducted, concern that there will be leakages of radiation in the long run, the facts that there are now some 126 nuclear waste "stockpiles" located within the structure of Mururoa atoll at depths of between 500 and 1,000 metres, and eight large stockpiles at Fangataufa. These piles consist of the longer lived isotopes of strontium, caesium and plutonium. The half-life of some types of caesium can be as high as 3 million years. Plutonium produced by a plutonium weapon can have a half-life of 24,000 years.

61. If this nuclear waste or substantial parts of it was released into the marine environment the New Zealand contention is the effect upon marine natural living resources, especially fish and plankton, could be significant. Radionuclides released into the water are concentrated as they pass through the food chain to higher organisms. The effects would be distributed through the marine ecosystem, affecting highly migratory species including tuna. Similar concerns were stated by New Zealand in the 1973 Application.

62. The 1995 New Zealand Request points to increasing and recent scientific concern about the possible environmental impacts of underground nuclear testing. The article by Professor Pierre Vincent, the French vulcanologist that appeared in *Le Monde* on 12 July 1995 raises serious environmental concerns about the future of the atolls concerned. He says increased fracturing may open up the system to gradual migration of radioactive elements into the sea. He states this to be "a very real risk" (New Zealand Request, Ann. 5). The French scientist goes on to suggest that the factors that are conducive to the destabilization of volcanoes combined with a nuclear explosion could be big enough for large parts of the atoll to sheer away. This is described as high risk. In such circumstances there could be a spill-out of dangerous radioactive materials. New Zealand further referred orally to the views of Dr. Colin Summerhayes, Director of the Institute of Oceanographic Sciences in the United Kingdom, to the effect that volcanic islands like Mururoa were inherently unstable and may fail given an appropriate trigger like an earthquake or very large explosion.

63. New Zealand concludes its Request on this point in the following way:

> "There is, therefore, now reason to fear that the risks of a significant release of radioactive material from either or both of the atolls as a result of or consequent upon renewed testing activity are substantially higher than was previously believed to have been the case. These risks include the possibility of a serious collapse or fissuring of the atolls such as to release significant quantities of the radioactive material stored therein with potentially serious consequences for the marine environment." (Para. 25.)

64. The Request then proceeds to evaluate what information is available about the safety of testing on the atolls and examines the three limited investigations that have been conducted of Mururoa atoll. No independent scientific mission has so far visited Fangataufa, the place where the biggest explosions have occurred. The studies that have been made of Mururoa show that radioactive material has been released into the aerial and marine environments during even routine activities associated with testing programmes. Long-term leakage of radioactive material into the marine environment appears to be a significant risk in the long term. Spectacular effects on the atoll structure from the tests have been documented in the Cousteau study:

> "Underwater filming down to 230 metres by the Cousteau team revealed spectacular fissures and collapses of rock in the atoll that

> could only have been caused by the underground explosions." (1995 New Zealand Request, para. 43.)

These test sites, it is argued by New Zealand, are quite unsuitable for the purpose for which they have been used and are quite unlike continental land masses or other oceanic islands that have been used for underground testing. In an atoll the boundary between land and sea is indistinct. "Water passes from the ocean into the atoll, including its central core, and from the atoll into the ocean." (*Ibid.*, para. 51.)

65. There is also analysis in the Request of what New Zealand considers to be inadequate assurances of safety by the French and details of documented accidents are given. France, it is said, has repeatedly claimed that the tests are safe but has limited or denied access to test sites. In my opinion the nature of the argument put forward by New Zealand suggests that if the legal issues permitted the case to proceed there would be significant evidence available to support the view that real environmental dangers flow from the testing done and planned by France in the South Pacific. In arriving at that conclusion I am not making any judgment about what the scientific evidence may ultimately show were it to be put before this Court and adjudicated upon.

66. France who is in the best position to know of the risks has provided some evidence to the Court. France says it has followed a policy of openness in making information available. There was little said by France about the potential risks long term being built up by cumulations of nuclear waste in the two atolls where testing is carried out. These wastes, France said, were trapped in vitrified rock. Furthermore the problems of shearing off of parts of the atoll and the development of fissures were attractive "Hollywood scenarios" but nothing more. The French presentation at the oral hearings went to some pains to make assurances about the safety of the tests. Large graphic presentations of the geomorphological structure of Mururoa were made. There was reference to a number of scientific studies that were before the Court. Counsel for France, Mr. de Brichambaut, said there was ample monitoring of the situation on a continuing basis. Precautions had been taken. France had observed its international legal obligations, he said.

The Calculus of Environmental Risk

67. The Court is not in a position to make definitive conclusions on the scientific evidence on the basis of the material put before it. Listening to the submissions at the oral hearings did, however, convince me that there were real issues at large here. The true question related to the assessment of the level of risk. The two nations appeared to have very different approaches to that subject. It is, however, an issue which could be determined were the Court to give it a full hearing.

68. There are a number of factors to be weighed in deciding whether New Zealand satisfied the prima facie standard outlined above which would warrant a decision that the basis of the 1974 Judgment had altered and should be examined. These factors are:

— the ultrahazardous nature of nuclear explosions and the dangerous nature of the waste they produce;
— the length of time that some of the nuclear materials remain hazardous which is measured in tens of thousands of years or longer;

— the fragile nature of the atoll structure and the cumulative effect of a large number of nuclear explosions upon the structure;
— the fact that atolls cannot be distinguished from the marine environment and must be thought of as an inherent part of the ocean ecosystem;
— the high number of tests which have been concentrated within a small area;
— the proximity of the testing to the marine environment;
— the high quantities of dangerous nuclear wastes now accumulated on the test sites;
— the risks of radiation entering the food chain through plankton, tuna and other fish;

— the risks of further fissures and shearing off of part of the atoll structure occurring as the result of further testing.

69. It cannot be doubted that France has engaged in activities that have substantially altered the natural environment of the test sites in the Pacific. These actions have been intentional and they have been under scientific scrutiny, especially by French scientists. But the unintended repercussions of intentional human action are often the most important. The nature of the risks inherent in the activity itself would suggest caution to be appropriate. Some means of calculating those risks is necessary to arrive at a determination of whether New Zealand has satisfied the test. This calculus I suggest should contain a number of elements:

— the magnitude of the recognizable risk of harm by nuclear contamination in the circumstances;
— the probability of the risk coming to pass;
— the utility and benefits of the conduct being assessed — viz. nuclear testing by France;
— the cost of the measures needed to avert the risk.

70. In my opinion what is required under the test the Court should apply is a risk-benefit analysis. There must be a balancing of the risks of the activity, the probability of harm, the utility of the activity and the measures needed to eliminate the risk. This is similar to a calculus of the

risk analysis in the law of torts in some common law jurisdictions (see *Prosser and Keeton on the Law of Torts*, 5th ed., 1984, pp. 169-173; Richard A. Epstein, *Cases and Materials on Torts*, 5th ed., 1990, pp. 150-168; *Blyth* v. *Birmingham Water Works*, 11 Exchequer 781, 156 English Reports 1047 (1856); *United States* v. *Carroll Towing Co.*, 159 Federal Reports 2d 169 (2d Cir. 1947)). But it is submitted that it is an appropriate analytical construct with some modifications for measuring the issue here.

71. The gravity of the radiation harm if it occurs is likely to be serious for the marine environment. The magnitude of the risk that the harm will occur must be regarded as significant given the destructive force of nuclear explosions and the possibility of other disturbances or abnormal situations occurring in the course of the long life of the dangerous substances. The costs of averting the risk in this instance are low — they consist of France providing a fully scientifically verifiable environment impact assessment in accordance with modern environmental practice which demonstrates that the proposed tests will not result in nuclear contamination. No doubt France and New Zealand would differ greatly on the utility of nuclear testing but it can reasonably be said that the extra tests proposed cannot have great value given the number that have preceded them. They are of diminishing marginal value, if they have any value at all. If the calculus of the risk analysis were applied in this way, then on these facts a prima facie case is made out by New Zealand in my opinion.

72. The test put forward here derives from support from the recent work of the International Law Commission where it laid down that for the purposes of draft Articles under its consideration "risk of causing significant transboundary harm" an expression which refers "to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact" (Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), p. 400).

73. The conclusion of this segment of the opinion is as follows: judged on the prima facie standard a case on the environmental facts has been made out to examine the Judgment.

The Legal Environmental Issues

74. The second argument advanced by New Zealand as to why the Court should examine the 1974 Judgment revolved around the changes in the state of international law relating to the environment in general and nuclear testing in particular in the period between 1974 and the 1995

hearings. In order to evaluate that submission it is necessary to briefly traverse those developments in the broad before becoming specific.

The Development of International Environmental Law

75. When this case began in 1973 it was shortly after the international meeting at Stockholm which produced the Stockholm Declaration of the United Nations Conference on the Human Environment (adopted by the United Nations Conference on the Human Environment at Stockholm, 16 June 1972, 11 *ILM* 1416 (1972) (Stockholm Declaration). It was that Conference that started the march of the new field of international environmental law toward international legal maturity. At that time only 25 countries possessed national environmental ministries. The Declaration advanced the development of the principles of international environmental law. It can confidently be stated that some of those principles stated in the Declaration have received such widespread support in State practice coupled with a sense on the part of States that they are legally binding that they have by now entered into the framework of customary international law. The impact of human activities on the environment in a comprehensive way was brought to the attention of the international community, in effect for the first time by Stockholm. Preambular paragraph 6 of the Stockholm Declaration said: "A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences." It is important to recall that explicit reference was made by New Zealand in its 1973 Request (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, pp. 55-56, paras. 33, 34 and 35 with explicit reliance being placed on Principles 6, 7, 21 and 26).

76. Principle 1 of the Stockholm Declaration established that the people bear "a solemn responsibility to protect and improve the environment for present and future generations". Principle 2 talks of the need to safeguard natural resources including air, land and water. Principle 6 laid down that the discharge of toxic substances must be halted where they were in such quantities or concentrations "to exceed the capacity of the environment to render them harmless . . .". Principle 7 requires States to take all possible steps to prevent pollution to the seas by substances liable to create hazards for human health and marine life. Principle 18 asked for "the identification, avoidance and control of environmental risks . . .". Principle 21 required States 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".

Principle 26 dealt with the need to spare the environment and people "the effects of nuclear weapons and all other means of mass destruction".

77. In recent years the proliferation of international conventions and treaties on the global environment has been considerable. There are more than a hundred multilateral environmental instruments in force many of which have been negotiated since the 1972 Stockholm Declaration. The United Nations Environment Programme register listed 152 in 1991 before the significant outburst of activity at the Rio de Janeiro United Nations Conference on Environment and Development in 1992. For present purposes the important point about the development of international environmental law is that its most important flowering and expansion spans the period of this case — it started in earnest about the time this case began and reached a crescendo at Rio in 1992.

78. Indeed the consensus flowing from Rio is itself significant in the context of the arguments being advanced in the present case. The Rio Declaration refined, advanced, sharpened and developed some of the principles adopted at Stockholm (Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development at Rio de Janeiro, 13 June 1992, 31 *ILM* 874 (1992) (Rio Declaration)). Many of the principles were repeated but some new ones make an appearance:

Principle 15:

> "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."

Principle 17:

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

79. Maurice Strong who was Secretary-General of both the Stockholm and the Rio Conferences has summed up his view of the need to develop the mechanisms of international environmental law still further. He said:

> "To manage our common future on this planet, we will need a new global legal regime based essentially on the extension into international life of the rule of law, together with reliable mechanisms for accountability and enforcement that provide the basis for the effec-

tive functioning of national societies." (Foreword by Maurice F. Strong to L. D. Guruswamy *et al., International Environmental Law and World Order*, 1994, p. vii.)

80. This Court in this very case in 1974 made a contribution to the growing field of international environmental law. The *Nuclear Tests* cases have come to be cited as one of a quartet of cases that offer some protection for the environment through the medium of customary international law. Others include the *Corfu Channel (United Kingdom* v. *Albania)* (*I.C.J. Reports 1949*, p. 4) establishing the principle of every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. The *Trail Smelter (United States* v. *Canada)* (III *Reports of International Arbitral Awards (RIAA)* 1905 (1938 and 1941)) established that no State has the right to use or permit the use of its territory in such a way as to cause injury by fumes in the territory of another State. The *Lake Lanoux Arbitration* (XII *RIAA* 281 (1957)) turned on the interpretation of a particular treaty but it may establish the principle that a State has the duty to give notice when its actions may impair the environmental enjoyment of another State. To these should now be added the contribution of this Court if only because of the environmental degradation with which the case dealt (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240). Significantly, by the Court deciding to hear the case, a result was produced by way of settlement. The principles established by these cases have been included in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.

81. But authoritative decisions in the area of international environment law are scarce enough. They certainly lag behind the plethora of conventional law that has sprung into existence in the more than 20 years spanning the life of this case. The nature of some of the issues is helpfully discussed in the Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, on "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law" (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), pp. 367 ff.), a subject with which the Commission has been grappling since 1978 without definitive result. The Commission is giving priority in its work to prevention of activities having a risk of causing transboundary harm.

82. Indeed, following Rio and perhaps because of it, this Court on 6 August 1993 exercising its powers under Article 26 of the Statute of the

International Court of Justice set up a Chamber of seven Judges to deal with environmental matters. The Court in an I.C.J. communiqué (93/20, 19 July 1993) announced:

> "In view of the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction, the Court has now deemed it appropriate to establish a seven-member Chamber for Environmental Matters . . ."

83. The forces that led the Court to establish a Chamber for consideration of environmental cases is reflected in the quantity of work being done by highly qualified publicists of the various nations upon the subject of international environmental law. Such works include A. Kiss and D. Shelton, *International Environmental Law*, 1991; P. Birnie and A. Boyle, *International Law and the Environment*, 1992; P. Sands *et al.*, *Principles of International Environmental Law — Documents in International Environmental Law*, 2 volumes, 1995; L. Guruswamy *et al.*, *International Environmental Law and World Order*, 1994; J. Carroll (ed.), *International Environmental Diplomacy*, 1988; E. B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, 1989; E. B. Weiss (ed.), *Environmental Change and International Law*, 1992; C. Stone, *The Gnat is Older than Man: Global Environment and Human Agenda*, 1993; P. Sand, *Lessons Learned in Global Environmental Governance*, 1990; G. Handl (ed.), *Yearbook of International Environmental Law*, 1990, and annually. The periodical literature is so vast on the subject that it cannot be cited.

84. The obvious and overwhelming trend of these developments from Stockholm to Rio has been to establish a comprehensive set of norms to protect the global environment. There is a widespread recognition now that there are risks that threaten our common survival. We cannot permit the onward march of technology and development without giving attention to the environmental limits that must govern these issues. Otherwise the paradigm of sustainable development embraced by the world at the Rio Conference cannot be achieved (World Commission on Environment and Development, *Our Common Future*, 1987, p. 5; see also D. H. Meadows, D. L. Meadows and J. Randers, *Beyond the Limits*, 1992).

International Law on Radioactive Hazards

85. It was against the background outlined above that Sir Kenneth Keith, Q.C., for New Zealand sought to establish four legal propositions:

(i) States must 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 their jurisdiction.

(ii) Any addition of radioactive material to the environment or exposure of individuals to radiation must be justified. Such addition or exposure must be for good reason.

(iii) Any disposal or introduction of artificially created radioactive material into the marine environment is heavily circumscribed. It is in general forbidden.

(iv) Any introduction of radioactive material into the marine environment as a result of nuclear tests is forbidden. The world community no longer accepts that the testing of nuclear weapons can be used to justify marine contamination.

The law now sets higher standards in an "increasingly interdependent world", Sir Kenneth told the Court (CR 95/20, p. 10).

86. New Zealand in support of its propositions relied upon the Stockholm and Rio Declarations and in particular on the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region concluded at Noumea, 25 November 1986, entered into force 22 August 1990 (26 *ILM* 38 (1987)). New Zealand and France both are parties to the Convention. These legal materials and others cited to the Court established in the view of New Zealand an increasingly strict attitude to the addition of radioactive material to the general environment and the exposure of individuals to radiation. In relation to the marine environment it was even more exacting. Among the materials cited in support of these propositions were: Article 14 of the Draft Articles considered in the 1994 Annual Report of the International Law Commission mentioned above; the International Atomic Energy Agency, Safety Series No. 77, *Principles for Limiting Releases of Radioactive Effluents into the Environment*, 1986; Agenda 21, Chapter 22, of the Rio Declaration, "Safe and Environmentally Sound Management of Radioactive Wastes", paragraph 5 (para. 100 of the New Zealand Request); Convention on the High Seas concluded at Geneva 29 April 1958, entered into force 30 September 1962 (450 *UNTS* 82, Art. 25); United Nations Convention on the Law of the Sea concluded at Montego Bay, 10 December 1982, entered into force 16 November 1994 (21 *ILM* 1261 (1982), Part XII, Art. 194); Convention on Biological Diversity, concluded at Rio de Janeiro 5 June 1992, entered into force 29 December 1993 (31 *ILM* 818 (1992), Arts. 3 and 14); Statute of the International Atomic Energy Agency, 26 October 1956 (276 *UNTS* 3, Art. 34); Convention for the Protection of the Marine Environment of the North-East Atlantic, concluded at Paris, September 1992 (32 *ILM* 1069 (1993), Ann. II, Art. 3 (3) *(a)* and *(b)*); Convention

on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, concluded at London, 19 December 1972 (11 *ILM* 1291 (1972)), Annex I; Resolution of Consultative Meeting LDC 21 (9) on Dumping Radioactive Wastes at Sea, 1985.

Environmental Impact Assessment

87. At this point, Mr. D. J. MacKay for New Zealand went on to develop this segment of the argument by pointing to the application of the emerging international law on environmental impact assessment (EIA) and the precautionary principle in their application to the facts of this case. In both respects the law had changed dramatically, thus supporting the view that the basis of the Court's Judgment was affected. It was submitted that other parties likely to be affected by the risks have a right to know what the investigations for the EIA are, have a right to propose additional investigations and a right to verify for themselves the result of such investigations. As the law now stands it is a matter of legal duty to first establish before undertaking an activity that the activity does not involve any unacceptable risk to the environment. An EIA is simply a means of establishing a process to comply with that international legal duty. New Zealand pointed to a number of international instruments, including Article 205 of the United Nations Law of the Sea Convention that make explicit reference to EIA.

88. Under Article 12 that has been adopted by the International Law Commission in the course of its deliberations, the Commission has decided that before a State carries out activities which involve a risk of causing significant transboundary harm through their physical consequences

> "a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States."

The Noumea Convention referred to earlier also contains an explicit obligation in Article 16 to conduct environmental impact assessments before embarking upon any major project which might affect the marine environment. A more explicit measure appears in Article 12 of that Convention producing a duty to prevent, reduce and control pollution in the Convention area which might result from the testing of nuclear devices.

Precautionary Principle

89. So far as the precautionary principle is concerned New Zealand submitted that in the circumstances it required two things. First, that the assessment must be carried out before and not after the activities are undertaken. Second, that it is for the State contemplating these activities to carry out the assessment and to demonstrate that there is no real risk. It is not for potentially affected States to demonstrate that there will be a risk.

90. I have set out these arguments in some detail because they exhibit the issues that would have been traversed had the case gone to the next stage. France did not address arguments on these points since it at all times regarded the issues before the Court as threshold issues that did not require it to meet the arguments put above. It would be wrong in these circumstances to reach substantive conclusions on the application of the arguments to the facts of the case. It is, however, appropriate to reach a conclusion on what the principles of law discussed establish from the point of view of meeting the test required to examine again the 1974 case.

Conclusion

91. What those principles of international law establish in my view are the following propositions:

(a) international environmental law has developed rapidly and is tending to develop in a way that provides comprehensive protection for the natural environment;

(b) international law has taken an increasingly restrictive approach to the regulation of nuclear radiation;

(c) customary international law may have developed a norm of requiring environmental impact assessment where activities may have a significant effect on the environment;

(d) the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law relating to the environment;

(e) there are obligations based on Conventions that may be applicable here requiring environmental impact assessment and the precautionary principle to be observed.

Taken together, in application to the present dispute, the legal developments are sufficient to meet a prima facie test that the legal circumstances have altered sufficiently to favour an examination of the 1974 case. Let me emphasize again, however, this is not to say what principles of law may apply here in the particular circumstances or indeed what their content might be. That is for the next stage.

92. It is necessary to say something about the application of principles of law at the stage they have reached in 1995 to a case that was pleaded

and first dealt with in the mid 1970s. The harm complained of — nuclear contamination — is a continuing one. It seems apparent to me that the applicable law must be determined, in a circumstance like the present one, at the date the Court is called on to apply it. The converse proposition cannot stand in my opinion.

93. In my view it would exert a salutary and needed influence on international environmental law for this Court to enter upon full hearings and a serious consideration of the issues of this case, whatever ultimate result was eventually reached. There is a pressing need to develop the law in the area. Given the possibility left open expressly in 1974 that in appropriate circumstances the Court could return to these issues, it would be possible to examine the 1974 decision in light of massive changes in the legal principles that have been developed in the period between the Court's two considerations of the issues. In the event, however, because a majority of the Court has taken another view New Zealand's effort to hold France accountable under the principles of international environmental law will fail.

THE NATURE OF THE JUDICIAL CHOICE

The Order of the Court

94. The formalistic approach adopted by the majority of the Court in framing its Order makes it necessary to isolate the steps in its reasoning. It is reasoning I cannot accept. The reasoning the Court advances for making the Order that it can take no action on New Zealand's request for an examination has a number of elements:

(a) the broader designs beyond atmospheric testing that New Zealand might have had when filing its 1973 Application cannot be the subject of the Court's investigations now;

(b) the Court in 1974 was entitled to isolate the real issue and limit it to atmospheric testing and did so;

(c) the language used by the Court in the companion case brought by Australia means that the Court treated the New Zealand case as identical with the Australian one;

(d) thus the 1974 Court was entitled to treat the matter at an end relying on France's unilateral declaration;

(e) it was in the event of a resumption of nuclear tests in the atmosphere that the basis of the Judgment would have been affected;

(f) in consequence of its view in 1995 of the Judgment of 1974 it was not open for the Court to enter into a consideration of underground testing or the arguments on either side relating to those events and take them into account;

(g) for the same reasons as in *(f)* the Court cannot take into account the developments in international environmental law that have taken place since the 1974 Judgment.

95. The conclusion reached by the majority taking into account all of the above is that the 1974 Judgment has not been affected.

96. The essence of the approach taken represents a triumph of formalism over substance. The law appears as some disembodied construct that is far removed from the concerns of the real world. The law is frozen in time, nothing beyond 1974 has any relevance or importance in interpreting paragraph 63, except a resumption of atmospheric testing. It is an approach that depends upon reading down the plain language of paragraph 63, and sapping it of vitality. I find such an approach to legal reasoning arid and intellectually unsatisfying. When dealing with substantive issues of such overwhelming importance, decisions *not* to address those issues need to be convincing and carry *legal conviction.* In this instance, however, the reasoning is laconic.

97. The whole approach by the Court depends upon drawing a distinction between atmospheric nuclear testing and underground nuclear testing and refusing to accept that they are linked by the underlying common factor of nuclear contamination. The distinction is fundamentally unsound in common-sense terms and that ought to be reflected in legal terms. It is legal reasoning of a highly mechanical quality. The significance of the basic distinction drawn by the Court is not easy to defend except by an approach well described as the austerity of tabulated legalism (*Minister of Home Affairs* v. *Fisher* [1980] Appeal Case, p. 328). I cannot defend the distinction relied upon by the Court and therefore respectfully dissent from it.

98. The Court also relies in its Order on the fact that the Court in the companion case brought by Australia in 1973 employed in the Judgment in that case a form of words identical to the one used in paragraph 63 of the New Zealand case. The 1995 Court concludes for that reason the 1974 Court regarded the two cases as identical. With respect, the conclusion does not follow. Worse, it does injustice to New Zealand.

99. One learned author has found no fewer than seven important distinctions between the Australian and New Zealand cases (J. Stephen Kós, "Interim Relief in the International Court: New Zealand and the Nuclear Test Cases", 14 *Victoria University of Wellington Law Review* 357 (1984)). The first observation to be made in this respect is that the cases were not joined in 1973 and the reasons for not joining them are plain enough. As the New Zealand Attorney-General, Dr. A. M. Finlay, Q.C., told the Court:

"The Governments of Australia and New Zealand do not have a

joint approach to the presentation of their respective cases against the Government of France; nor did they bring these cases for the purpose of supporting each other. Actions taken in their region that may violate obligations *erga omnes*, or cause an identical threat to the well-being of the citizens of both their countries, are naturally of concern to both; but history and geography condition and differentiate their individual perceptions of a common threat." (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, p. 254.)

100. The New Zealand case had a broader objective than Australia; there were substantial differences in the submissions and in the remedies sought. New Zealand's case had a stronger ground in law and in fact than Australia's. Mr. Kós, in the article cited above, summarizes the reason for that conclusion:

(a) The equities favoured New Zealand in terms of its past diplomatic and political record. New Zealand's association with United Kingdom nuclear testing was very limited. New Zealand had a consistent and outspoken record of opposition to testing since 1958. The territory of New Zealand and that for which New Zealand was responsible was closer to the test site than Australia's. Its case at the merits stage would have been stronger. New Zealand had legally a stronger position on the legal issues of the application of Article 17 of the General Act for the Pacific Settlement of International Disputes, which Australia had allegedly violated. New Zealand, unlike Australia, had not declared that its considered General Assembly resolutions were not legally binding. New Zealand had a record in the General Assembly of support for the Partial Test Ban Treaty.

(b) New Zealand asserted different rights that it claimed were owed *erga omnes* in equal measure to all States — indicating freedom from "unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment". New Zealand pleaded wide considerations of freedom from harm.

(c) New Zealand asked for different remedies from Australia. New Zealand sought only a declaration that French conduct constituted a violation of New Zealand's rights in international law — it included conduct past and future.

(d) New Zealand alleged different injury from that argued by Australia.

(e) New Zealand took a different approach to the conduct of its legal argument.

(f) Each country took different approaches to the French reservation to compulsory jurisdiction of 20 May 1966.

(g) Australian concessions on the reliance on the General Act were not shared by New Zealand.

101. The Order of the Court also relies upon the argument that France conducted 134 underground nuclear tests without New Zealand ever having claimed that the basis of the Judgment had been affected. New Zealand's record of consistent opposition to French testing in that regard is set out at paragraphs 14-23 of this opinion. Further, it is submitted that the argument made by New Zealand that the situation developed gradually is persuasive in this respect. It is the cumulative effect of events that is determinative. Paragraph 63 itself is not limited as to time. It comes into effect only when matters which affect the basis of the Judgment have crystallized.

102. For the above reasons it is suggested that the decision to treat the New Zealand and Australian cases as identical in legal terms is unsound. It was unsound in 1974 and it does not follow that the Court intended then to limit paragraph 63 of its Judgment to circumstances that would be identical to Australia's despite the use of similar language. The context is important.

Wider Issues

103. The nature of the judicial choice between the opposing legal positions in this case is stark partly because of the way the case was argued and partly because of the unprecedented nature of the proceeding. The answer reached depends as much upon implicit judgments concerning the proper scope of the judicial role as upon the detailed reasoning by which the result is reached. Law is a human contrivance designed to advance human purposes. Public international law has traditionally been concerned with the relations between States and States were often regarded in the past as its only subjects. But things change and there are signs that the doctrine of State sovereignty upon which so much of the edifice of public international law rests is eroding. The opportunity offered in a case like the present one is to take a wider perspective. It should be remembered that as long ago as 1958 Dr. C. W. Jenks wrote in *The Common Law of Mankind*:

> "International law can no longer be adequately or reasonably defined or described as the law governing the mutual relations of States, even if such a basic definition is accompanied by qualifications or exceptions designed to allow for modern developments; it represents the common law of mankind in an early stage of development, of which the law governing the relations between States is one, but only one, major division." (P. 58.)

104. One of the signal weaknesses of international law is the fact that the jurisdiction of this Court rests at bottom on the consent of the States. Only about one-third of nations accept the compulsory jurisdiction of this Court under Article 36 (2) of the Statute of the International Court of Justice. In general, the most powerful nations are not among the strongest adherents of compulsory jurisdiction for the Court. The Court is reminded of this fact in the letter dated 28 August 1995 addressed to the Registrar of the Court by the Ambassador of the French Republic to the Netherlands in which the following paragraph appears:

> "The jurisdiction of the International Court of Justice rests on the consent of States. In the absence of the prior consent of France, the requests of New Zealand both as regards the principal request and as regards the indication of provisional measures are thus manifestly inadmissible."

Yet as Professor E. Lauterpacht remarks "some cracks in the edifice are developing" (*Aspects of the Administration of International Justice*, 1991, p. 23).

105. Arguments about consent and the logic of the situation in which the Court finds itself have in my opinion caused the Court to be cautious in the past, sometimes unnecessarily. The decision of the majority in this case in 1995 follows the cautious approach. Against that approach it needs to be borne in mind that notwithstanding the fundamental differences between international law and municipal law international law is widely obeyed on the whole. So concern that the basis of the system may be consensual is not a reason for failing to decide principles of international law when they are presented and properly fall to be decided. As Professor Louis Henkin wrote in *How Nations Behave — Law and Foreign Policy* (2nd ed., 1979, p. 47): "It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*"

106. But it must be accepted at once that the Court cannot go off on frolics of its own. It must maintain its credibility in the eyes of States who do not on the whole relish the prospect of third party adjudication which they cannot control. The Court has an obligation in my opinion to maintain itself in the tension between principle and practicality. In this it occupies a role not unfamiliar to domestic tribunals imbued with wide constitutional powers, such as the Supreme Court of the United States. (See generally Alexander M. Bickel, *The Least Dangerous Branch*, 1962.) Yet courts like that one choose their cases, this Court cannot. States set the Court's agenda, not the Court. And this Court does not have available to it the filtering devices available to the Supreme Court of the United States.

107. The Court has a responsibility to declare, develop and uphold international law. But it must be mindful of the limits of law. In disputes

that involve large political elements it will need to be particularly vigilant to avoid over-reaching itself, while at the same time facing up to the fact that disputes between States almost always involve a high political element. It needs to be borne in mind, however, that the fact that the testing of nuclear weapons gives rise to big political disputes does not mean that aspects of the dispute cannot be dealt with by the international legal process.

108. In such circumstances as the present resort to techniques for not deciding cases by other means may be found; to scrutinize jurisdictional arguments and technical arguments with a favourable eye in order to avoid making pronouncements in an area where it is suspected nations may not observe the terms of judgments of the Court or acceptance of the Court's position will be imperilled. These are hard judgments to make. But the consequences of never taking them on such matters as the present one will be to retard progress in the development of international law.

109. For this Judge, the range of judicial choice for this Court is well summed up by Sir Gerald Fitzmaurice in *The Law and Procedure of the International Court of Justice*:

> "There are broadly two main possible approaches to the task of a judge, whether in the international field or elsewhere. There is the approach which conceives it to be the primary, if not the sole duty of the judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law.
>
> If it be asked which of these two attitudes is the better, the answer may well be 'both', or at any rate that each is defensible; but clearly much depends on the circumstances. 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." (Pp. 647-648.)

110. My own approach falls clearly in the category that it is necessary for the International Court of Justice to develop the law and expound it. The Court should deal with all the legal issues and given the nature of international law and the absence of a legislature, clarification and advancement of the law is peculiarly within this Court's responsibility.

CONCLUDING OBSERVATIONS

111. The nature of the dispute between France and New Zealand has been apparent for the whole period spanned by this case in this Court, except between 1991 and 1995 when France observed a moratorium on testing. The dispute is palpably about nuclear testing in the Pacific in all its forms. The official citation for this case was and remains *Nuclear Tests (New Zealand* v. *France)* case. Despite that fact, the Court in its 1995 judgment has chosen to draw a fundamental distinction between atmospheric testing and underground testing.

112. It might have been thought by some that the present application was an appropriate occasion upon which to push out the boat from the shore a little towards the incoming tide of international environmental jurisprudence. The Court failed to decide the issue in 1974 and it has failed again in 1995.

113. The 1974 Judgment created widespread controversy in the international legal literature, some learned commentators regarding it as imaginative and innovative, others called it a landmark of political caution, weak in law and logic. A third group thought the decision a lost opportunity for dealing with international environmental law. (D. P. Verma, "The Nuclear Tests Cases: An Inquiry into the Judicial Response of the International Court of Justice", 8 *South African Yearbook of International Law* 20 (1982); Edward McWhinney, *The World Court and the Contemporary International Law-Making Process*, 1979; R. St. J. Macdonald and Barbara Hough, "The Nuclear Tests Case Revisited", 20 *German Yearbook of International Law* 337 (1977); Jerome B. Elkind, "Footnote to the Nuclear Tests Cases: Abuse of Right — A Blind Alley for Environmentalists", 9 *Vanderbilt Journal of Transnational Law* 57 (1976); Thomas M. Franck, "Word Made Law: The Decision of the I.C.J. in the Nuclear Test Cases", 69 *American Journal of International Law* 612 (1975).) A similar range of reaction to the Court's treatment of the present phase of the case is predictable.

114. In its essence this case has to be understood as an environmental case. New technology has given humankind massive ability to alter the natural environment. The consequences of these activities need to be carefully analysed and examined unless we are to imperil those who come after us. It is a concern well known to international law (see generally E. B. Weiss, *In Fairness to Future Generations*, 1989). As Professor Edith Brown Weiss points out:

> "We, as a species, hold the natural and cultural environment of our planet in common, both with other members of the present generation and with other generations, past and future. At any given

> time, each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits. This imposes obligations upon us to care for the planet and gives us certain rights to use it." (P. 17.)

Further, the special problems created for the law by nuclear energy and tests flow from the ultrahazardous nature of nuclear energy and nuclear explosions (A. Boyle, "Nuclear Energy and International Law: An Environmental Perspective", 60 *British Year Book of International Law* 257 (1989); G. Handl, "Transboundary Nuclear Accidents: The Post-Chernobyl Multilateral Legislative Agenda", 15 *Ecology Law Quarterly* 203 (1988).)

115. The issues generated for the environment by nuclear testing and nuclear accidents demonstrate that States have been unwilling to act as good stewards for or guardians of the environment. The experience suggests that environmental rights ought to be established at the international level and be enforceable there.

116. If in 1995 this Court had been prepared to enter into the next phase of the case, the dispute may at last have been put to rest. For far too long this issue has given rise to substantial, even painful difficulties in the relations between France and New Zealand. The two functions of this Court as I understand it are to act as an institution to settle disputes and to clarify and develop the law. Regrettably the dispute has not been put to rest and the law has not been developed.

117. In this case the Court had an opportunity to make a contribution to one of the most critical environmental issues of our time. It has rejected the opportunity for technical legal reasons which could in my opinion have been decided the other way, fully consonant with proper legal reasoning. It is true that much of the jurisdiction of this Court rests upon the consent of States. It is true that France has withdrawn the consent that allowed the 1974 case to be heard. That is not an adequate reason to refrain from re-opening the case, a possibility that the Judgment in 1974 expressly contemplated. The case is one the Court had the power to decide then; it has the power to decide it now. But the Court refuses to decide it.

118. The position of an *ad hoc* judge on this Court is an unusual one and the nature of the obligations imposed on such a judge have been a source of consideration for me. The Statute provides, in Article 31 (6), that such judges "shall take part in the decision on terms of complete equality with their colleagues". In this case I feel the institution served a useful purpose of bringing to the Court a perspective of one who lives in the region of the world with which the application deals. But I have not felt that my position on the Court is a representative one. Its utility was in providing another perspective and some more detailed familiarity with the background. With respect, I adopt the formulation of an *ad hoc* judge's office put forward by Judge *ad hoc* Lauterpacht in *Application*

of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993:

> "He has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected — though not necessarily accepted — in any separate or dissenting opinion that he may write." (*I.C.J. Reports 1993*, p. 409, para. 6.)

119. Finally, let me add that I have had the opportunity of reading the elegant and persuasive dissenting opinion of my colleague Judge Weeramantry. I agree with it.

(Signed) Sir Geoffrey PALMER.