INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

NUCLEAR TESTS CASES

VOLUME I

(AUSTRALIA *v.* FRANCE)

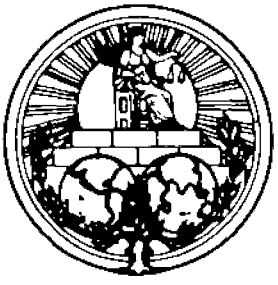
COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DES ESSAIS NUCLÉAIRES

VOLUME I

(AUSTRALIE c. FRANCE)



ORAL ARGUMENTS ON JURISDICTION AND ADMISSIBILITY

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, on 4, 5, 6, 8, 9 and 11 July and 20 December 1974, President Lachs presiding

SIXTH PUBLIC SITTING (4 VII 74, 10 a.m.)

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

Also present:

For the Government of Australia:

Mr. P. Brazil, of the Australian Bar, Officer of the Australian Attorney-General's Department, *as Agent*;

H.E. Mr. F. J. Blakeney, C.B.E., Ambassador of Australia, *as Co-Agent*;

Senator the Honourable Lionel Murphy, Q.C., Attorney-General of Australia,

Mr. M. H. Byers, Q.C., Solicitor-General of Australia,

Mr. E. Lauterpacht, Q.C., of the English Bar, Lecturer in the University of Cambridge,

Professor D. P. O'Connell, of the English, Australian and New Zealand Bars, Chichele Professor of Public International Law in the University of Oxford, *as Counsel*;

Professor H. Messel, Head of School of Physics, University of Sydney,

Mr. D. J. Stevens, Director, Australian Radiation Laboratory,

Mr. H. Burmester, of the Australian Bar, Officer of the Attorney-General's Department,

Mr. F. M. Douglas, of the Australian Bar, Officer of the Attorney-General's Department,

Mr. J. F. Browne, of the Australian Bar, Officer of the Department of Foreign Affairs,

Mr. C. D. Mackenzie, of the Australian Bar, Third Secretary, Australian Embassy, The Hague, *as Advisers*.

OPENING OF THE ORAL PROCEEDINGS

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

The Application[1] of Australia was filed on 9 May 1973, and instituted proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean. The Government of Australia asked the Court to adjudge and declare that the carrying out of further atmospheric nuclear weapons tests in the South Pacific Ocean is not consistent with applicable rules of international law, and to order the French Republic not to carry out any further such tests.

The Applicant seeks to found the jurisdiction of the Court on Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928 together with Articles 36, paragraph 1, and 37 of the Statute of the Court, and the accessions of Australia and France to the General Act; and alternatively, on Article 36, paragraph 2, of the Statute of the Court and the declarations made by Australia and France under that Article. By a letter[2] from the Ambassador of France to the Netherlands received on 16 May 1973, the Court was informed that the French Government considered that the Court was manifestly not competent in this case and that France could not accept its jurisdiction. The annex to the letter set out the reasons for this view. The French Government stated that it did not intend to appoint an agent and requested the Court to remove the case from the list.

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

By an Order[4] made by the President of the Court on 28 August 1973 these time-limits were extended to 23 November 1973 for the Memorial and 19 April 1974 for the Counter-Memorial.

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

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

The Governments of Argentina and New Zealand have asked that the pleadings and annexed documents in this case should be made available to them in

[1] See pp. 3-39, *supra*.
[2] II, p. 347.
[3] *I.C.J. Reports 1973*, p. 99.
[4] *I.C.J. Reports 1973*, p. 338.
[5] See pp. 249-380, *supra*.

accordance with Article 48, paragraph 2, of the 1972 Rules of Court[1]. No objection having been made by the Parties, it was decided to accede to these requests.

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

I now declare the proceedings in this case open on the preliminary questions of the jurisdiction of the Court and the admissibility of the Application.

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[1] II, pp. 409-419.

ARGUMENT OF SENATOR MURPHY

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Senator MURPHY: Mr. President and Members of the Court. May I first express our sympathy for Vice-President Ammoun and our wishes for his speedy recovery.

On behalf of Australia, we will now present our submissions on the two questions of jurisdiction and admissibility as required by the Court.

Before opening the case, may I again express on behalf of our Government and our people Australia's respect for this—the highest judicial tribunal.

Our country took an active part in the successful initiatives pursued at San Francisco in 1945 by no small number of States for the establishment of this Court. Of the Australians, a former Attorney-General, Dr. Evatt and a former Solicitor-General, Sir Kenneth Bailey, were outstanding in their advocacy of judicial settlement of international disputes. Under various governments, Australia has lent its fullest support to the role of the Court in the international legal system.

My first task is to review developments in relation to these proceedings since I last addressed the Court.

It will be recalled that in the operative part of the Order of 22 June 1973 the Court indicated the following provisional measures against France:

> "The Governments of Australia and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory." (*I.C.J. Reports 1973*, p. 106.)

The terms of the Order were clear and unconditional. Yet on 22 July 1973 the French Government detonated the first of a series of five nuclear tests. Australia immediately protested to France. By 10 August last year, the deposit of radio-active fall-out on Australian territory from that test had been detected. On 24 August, Australia protested to the French Government against the explosions of 22 and 29 July and 19 August and called for an assurance from the Government of France that no further breaches of the Order of the Court would take place. The immediate reply of the French Government took the form of two further explosions on 24 and 29 August.

On 19 September the Australian Government, by a letter delivered to the Registrar, formally brought to the notice of the Court the facts regarding the French tests of July and August, as well as the deposit of radio-active fall-out on Australian territory. This letter also stated that "in the opinion of the Government of Australia the conduct of the French Government constitutes a clear and deliberate breach of the Order of the Court of 22 June 1973."

On 26 September the Government of Australia protested again to the French Government, and on 28 September conveyed to the Secretary-General of the United Nations information about the French tests together with an indication that in the view of the Australian Government these tests were a clear and deliberate breach of the Court's Order of 22 June. This letter was circulated as a document of the General Assembly (UN Doc. A/C.1/1031).

On 10 October the French Government initiated a procedure in the General Assembly of the United Nations. The technical form of this initiative was to suggest that UNSCEAR "should be asked to meet as a matter of urgency to take cognizance of the additional documents that have been received and, after considering them, to supplement with the help of the information contained therein the excellent report which it submitted last year" (A/9192, p. 2).

In the special committee—the Special Political Committee—the failure of the French Government to refer to its own tests in the summer of 1973 was the subject of a proposal to amend the draft resolution before the Committee by the addition of a preambular paragraph reading: "Noting with regret that nuclear tests in the atmosphere and elsewhere have been conducted since resolution 2905 (XXVII) and resolution 2934 (XXVII) were adopted"—that is, tests carried out in 1973. This amendment as orally modified was adopted.

The operative part of the resolution to which this amendment had been made requested UNSCEAR to meet as soon as possible to make a study of the most recent documents, and to update, with a view to their re-submission to the General Assembly at its current session, the conclusions contained in its latest report. The Assembly adopted this resolution (3063 (XXVIII)) on 13 November 1973.

Pursuant to this resolution UNSCEAR met on 26 and 27 November. The Committee restricted itself to a purely factual assessment of the position[1].

The United Nations General Assembly considered the UNSCEAR report in late November and early December and on 14 December adopted resolution 3154 (XXVIII) on the effects of atomic radiation; a copy of this resolution has been lodged with the Registrar[2]. The following matters referred to in Part A of the resolution are of special significance in relation to the issues raised in these proceedings:

(a) The third preambular paragraph notes with concern that there has been additional radio-active fall-out resulting in additions to the total doses of ionizing radiation since the Scientific Committee prepared its last report.

(b) The fourth preambular paragraph reaffirmed the General Assembly's deep apprehension concerning the harmful consequences of nuclear weapon tests for the acceleration of the arms race and for the health of present and future generations.

(c) The main operative paragraph "*Deplores* environmental pollution by ionizing radiation from the testing of nuclear weapons".

The debate in the Special Political Committee which followed the Report of UNSCEAR and preceded the adoption of the resolution is of considerable significance because certain statements made by the French representative, Mr. Scalabre, show how the French Government was prepared to debate, albeit in a political forum, the very matters on which it is unwilling to argue before this Court—the principal judicial organ of the United Nations.

At one point, after suggesting that "the profound alarm expressed by the co-sponsors of the draft resolution A/SPC/L.294 was somewhat astonishing" the French delegate continued:

> "However, if their Governments were concerned to that extent by insignificant increases in atomic radiation, which were compensated by the gradual disappearance of the oldest radio-active elements, why did they

[1] See pp. 533-534, *infra*.
[2] See pp. 535-537, *infra*.

> not evacuate their mountains and high plateaus, destroy television sets, prohibit the use of X-rays and aircraft and, finally, demolish any building exceeding 10 storeys in height?" (A/SPC/SR.903, pp. 4-5.)

A few sentences later the French delegate complained that the draft resolution under consideration—

> "... marked the end of objectivity in studying the effects of atomic-radiation and replaced it by *a priori* emotion. It marked the beginning of the use of the study for political ends" *(ibid.)*.

A short while later, in a reply to certain remarks made by the New Zealand delegate, the French delegate said: "It was true that any exposure to radiation entailed risk, but the importance of that risk must be calculated objectively *[évaluer objectivement]*."

My colleagues will draw to your attention the direct relevance of the whole of the French statement to the question of admissibility in the present case. But at this moment there is one important comment that I am bound to make regarding the remarks of Mr. Scalabre. His words adequately justify the anxiety of the Australian Government, its interest in bringing these proceedings and the propriety, nay necessity, of judicial investigation.

When Mr. Scalabre asked why States did not evacuate their mountains and high places, did not destroy television sets, prohibit the use of X-rays and aircraft and, finally, demolish any building exceeding 10 storeys in height, he identified the legal issue which is involved in this case. Given that radio-activity is a condition with which man must live but which is nonetheless known to be a source of danger, what in legal terms is the proper order of priorities in exposing man to further contacts with ionising radiation? It is clear that society —both national and international—has accepted that there is no unrestricted freedom wilfully to increase levels of radio-activity. Man, regardless of nationality, possesses a right to his domicile, at no matter how high an altitude, to the use of his television, to the benefit of X-rays and aircraft and high-rise buildings. These are part of the established needs of society. The risks of radio-activity inherent in them are accepted by society. But this does not give other persons the right unilaterally to increase radio-activity and to meet the complainant by the suggestion that if the complainant does not like what is being done he is free to reduce his own exposure to radio-activity in other ways. To suggest otherwise is to maintain that we live in an unregulated society in which the resolution of such conflicting claim is outside the sphere of the law. The Government of Australia does not share this view. The Government of France appears to think otherwise. The difference between them is a legal question and as such requires objective determination. This is precisely what Australia seeks and France rejects: an objective determination of legal issues dependent upon complex considerations of fact. What more objective body could be found for this purpose than the present Court?

I return to the narrative of developments in relation to this case during the period since the Order of 22 June 1973. On 10 January of this year the French Government stated by a note[1] addressed to the Secretary-General of the United Nations that it denounced the 1928 General Act for the Pacific Settlement of International Disputes in accordance with the terms of Article 45 thereof. This treaty, the Court will recall, was the treaty which, so the French Government asserted in May and June 1973, was manifestly devoid of force. The denun-

[1] See p. 555, *infra*.

ciation was said to be without prejudice to the French position as asserted in May 1973. But no form of words can reverse the inference which must inevitably arise as a matter, at the least, of common sense to the effect that the French Government was in January 1974 not certain that the General Act had ceased to be effective. My colleagues and I will have more to say of this when we come to develop in detail our submissions regarding the continuing force and effect of the General Act.

At this moment, when the Court has assembled for the purpose of hearing oral argument in this further stage of the legal proceedings, France is engaged in conducting a further series of nuclear tests in the atmosphere in the South Pacific. In order to ensure the conduct of those tests, areas of the high seas and its superjacent airspace have been appropriated by the French authorities by proclamations of dangerous zones and of prohibited zones along the lines described in paragraph 45 of the Australian Application and in paragraph 428 of the Australian Memorial.

There is another development to which I refer. You will recall that Australia has consistently stated it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted. Indeed as the Court will remember such an assurance was sought of the French Government by the Australian Government by note dated 3 January 1973, but no such assurance was given.

I should remind the Court that in paragraph 427 of its Memorial the Australian Government made a statement, then completely accurate, to the effect that the French Government had given no indication of any intention of departing from the programme of testing planned for 1974 and 1975. That statement will need now to be read in light of the matters to which I now turn and which deal with the official communications by the French Government of its present plans.

The development to which I refer is the official statement issued on 8 June by the Office of the Presidency of the French Republic. A copy of the original French text has been lodged with the Registry[1]. That statement, omitting the first and purely formal opening paragraph, is as follows:

> "The Presidency of the Republic states on this occasion that at the point which has been reached in the execution of its nuclear defence programme, France will be in a position to move to the stage of underground firings as soon as the tests series scheduled for this summer has been completed.
>
> Limited to the minimum imposed by the programme for perfecting our dissuasive force, the atmospheric tests that will be carried out this year will of course be conducted, as in the past, in conditions of complete security.
>
> Their harmlessness has been confirmed by the reports of the United Nations Scientific Committee whose conclusions are regularly published."

I should observe that the allegation in the last sentence of the statement suggesting that UNSCEAR has confirmed the harmlessness of French atmospheric nuclear tests is not correct; UNSCEAR has never—and I repeat never—confirmed the harmlessness of any atmospheric nuclear test, as a reading of the reports of UNSCEAR will readily show.

The statement by the French President requires close scrutiny. I must emphasize the basic distinction between an assertion that tests will go underground and an assurance that no further atmospheric tests will take place. Even though France said it "will be in a position to move to the stage of underground

[1] See p. 550, *infra*.

firings", this in no way precludes it from a continuation or resumption of atmospheric tests possibly even in conjunction with underground tests. We have received clear scientific guidance that the possibility of further atmospheric testing taking place after the commencement of underground tests cannot be excluded. Moreover, nothing has been said to the Australian Government in its discussions with the French Government suggesting that the latter dissents from this understanding of the position. The French Government has never given the assurances which the Australian Government has sought regarding atmospheric testing.

The Prime Minister of Australia said recently in a public statement on 17 June[1] that he had sent a message to the new French President expressing the sincere desire to develop relations between our two Governments and peoples. Mr. Whitlam also said that he had hoped that the French Government would be prepared to co-operate in having this continuing dispute resolved in a responsible manner by the International Court in accordance with international law. We continue to believe that the dispute that undoubtedly exists between our two countries as to the legality of atmospheric testing in the South Pacific can best be settled by this Court, which is the principal judicial organ of the United Nations.

The concern of the Australian Government is to exclude completely atmospheric testing. It has repeatedly sought assurances that atmospheric tests will end. It has not received these assurances. The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests.

It follows that the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests. The risk that this policy will lead to further atmospheric tests in 1975, and in subsequent years, continues to be a real one. In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests, should the French Government decide to hold them. These judicial proceedings are as relevant and as important as when the Australian Application was filed.

Mr. President, the Australian Government is pleased to place before the Court its oral argument on the two questions referred to in the Court's Order. The first is the question of the jurisdiction of the Court to entertain the dispute. The second is referred to as the question of the admissibility of the Australian Application.

That Application asks the Court to adjudge and declare that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law; and to order that the French Republic shall not carry out any further such tests.

Our basic propositions at this stage of the proceedings are that the Court has undoubted competence to hear the merits of the case and that we are entitled as a matter of law to such a hearing. The Court, we respectfully submit, should so rule at this stage of the proceedings.

Mr. President, the Australian argument will be presented in two parts, one relating to the question of jurisdiction and the other to the question of admissibility; and they will be approached in that order. One reason for doing so is the basic logical consideration that unless the Court finds that it has jurisdiction it has no basis on which to proceed to a consideration of admissibility.

The approach just indicated is reflected in and confirmed by the manner in

[1] See p. 551, *infra*.

which Article 53 has been applied by the Court. The terms of Article 53 read as follows:

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
>
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

In the most recent case, *Fisheries Jurisdiction*, the Court has indicated that matters of jurisdiction must be dealt with before the merits. It said at page 54 of *I.C.J. Reports 1973*:

> "According to this provision [that is, Article 53], whenever one of the parties does not appear before the Court, or fails to defend its case, the Court, before finding upon the merits, must satisfy itself that it has jurisdiction."

The Court went on to say: "... Article 53 ... both entitles the Court and, in the present proceedings, requires it to pronounce upon the question of its jurisdiction" (*I.C.J. Reports 1973*, p. 66).

I also refer the Court to the views expressed by Judge Jiménez de Aréchaga in his article on the 1972 Amendments to the Rules of Procedure appearing in the *American Journal of International Law*. The judge observed, on page 12, that "The new rules of procedure provide that the Court must make a positive finding as to its jurisdiction at the preliminary stage of the proceedings before embarking on the merits of the case". He referred in the following paragraph to Article 53 as supporting this approach. While the merits cannot be equated with admissibility the attribution of logical priority to jurisdiction in that case also involves that that question should enjoy priority in a case involving admissibility.

Another relevant factor is that the French annex of 16 May 1973, irregular though it is as a procedural document, makes it quite clear that the objections which France is raising to the consideration of this case by the Court relate to jurisdiction, not to admissibility. The attitude taken by the Parties therefore strongly suggests that as the principal issue dividing them at this stage of the case is that of jurisdiction, it is this specific question which must be resolved in priority to any other. This would be in full conformity with the acknowledged function of the Court to remove uncertainty from the legal relations between the Parties.

If the Court finds that it has jurisdiction, it must then decide whether the Application is admissible. The question of admissibility is one that is essentially preliminary. We trust that the Court will not in considering the question of the admissibility of the claim finally decide any question of law or fact in the case. This is emphasized by the fact that in its Order of 22 June the Court has indicated that the issue of admissibility is limited to Australia's legal interests in its claims. As the Court said at the comparable stage in the *Fisheries Jurisdiction* cases:

> "In the present phase it [that is, the case] concerns the competence of the Court to hear and pronounce upon this dispute. The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits." (*I.C.J. Reports 1973*, p. 54.)

When the Court has decided issues of jurisdiction and admissibility, Article 53 calls upon it to determine whether the claims are well founded in fact and law. This is a question for the merits.

"Well founded" in Article 53 obviously means more than a prima facie case because it suggests some degree of finality. Its equivalent in the French text of the Statute is "fondé". "Well founded" is not the same as "admissible", for "admissibility" means admitting a case for the consideration of the Court. Admitting a case cannot be the same as deciding that case in favour of the applicant. It follows that the Court will not ask an applicant, under the heading of admissibility, to prove what he would have to prove in order to get final judgment; and hence Article 53, we submit, does not call upon the Court, at this stage of the case, to make a final decision on issues that "really pertain to the merits", to use the words used by Judge Jiménez de Aréchaga in his declaration of 22 June (*I.C.J. Reports 1973*, p. 144). Any other approach would mean that a party to proceedings in this Court would be in a worse position procedurally where the other party does not appear than it would be if the other party did appear. That would be an extraordinary result.

It follows from what I have said that if the Court were to find that the question of admissibility does not possess, in the circumstances of the case, an exclusively preliminary character, it should proceed to the merits stage provided of course it is satisfied as to jurisdiction. This, as we understand it, was the point that Judge Sir Humphrey Waldock was making in referring to Article 67, paragraph 7, in his declaration of 22 June. He said that the principles set forth in that paragraph should guide the Court in giving its decision on this phase of the proceedings. Under paragraph 7, the Court may either uphold or reject an objection of inadmissibility. The equivalent in the present case would be for the Court to rule that the Australian Application is or is not admissible. We submit that it clearly is. But under the paragraph the Court may also declare that an objection does not possess, in the circumstances of the case, an exclusively preliminary character. In that event the paragraph requires the Court to fix time-limits for further proceedings. If in the present case the Court were to take that view of the admissibility issue—we do not think it should, but possibly it might—then obviously the guidance offered by paragraph 7 is that it should move on to the next stage of the proceedings—that is to say, the merits stage.

Mr. President, I turn now to the question of the jurisdiction of the Court to entertain the dispute. The contention of the Government of Australia is that it is entitled to a declaration and judgment that the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973.

It is not proposed that our oral statements go over the whole ground covered by the written pleadings in relation to jurisdiction, or that they merely repeat the facts and arguments these contain. Rather, we will direct our statements to the essential issues that divide the Parties on this matter as paragraph 1 of Article 56 of the Rules requires.

The first main matter that divides the Parties, namely the question of the competence of the Court to decide its own jurisdiction is capable of only one answer.

The other Party has not only expressed the view, but it has also acted on the view that it can decide for itself the question of jurisdiction. I refer to the French Note of 16 May 1973, which after asserting that the French Government considers that the Court is manifestly not competent in this case, states bluntly that it—that is, the French Government—cannot accept the Court's jurisdiction.

There is no principle of international law more fundamental and more universally accepted than the one which attributes to an international tribunal the competence to determine its own jurisdiction. Authoritatively stated in the *Alabama* Arbitration, the principle has received explicit recognition in Article 36 (6) of the Statute of this Court. It also received recognition in Article 41 of the 1928 General Act for the Pacific Settlement of International Disputes.

Another citation, which I add because it is so recent and therefore no doubt fresh in the minds of the Court, is the reference contained in the Judgments of the Court on the jurisdictional phase of the *Fisheries Jurisdiction* cases.

> "Furthermore, any question as to the jurisdiction of the Court, deriving from an alleged lapse through changed circumstances, is resolvable through the accepted judicial principle enshrined in Article 36, paragraph 6, of the Court's Statute, which provides that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'. In this case such a dispute obviously exists, as can be seen from Iceland's communications to the Court, and to the other Party, even if Iceland has chosen not to appoint an Agent, file a Counter-Memorial or submit preliminary objections to the Court's jurisdiction." (*I.C.J. Reports 1973*, p. 66.)

Mr. President, need I say more on the first central issue that appears to divide the Parties.

I now proceed to deal with the jurisdictional basis provided by the 1928 General Act when read—as it must be—with Articles 37 and 36 (1) of the Statute of this Court.

The facts that both Australia and France have acceded to all parts of the 1928 General Act and that neither had denounced the General Act at the date of the Application need no elaboration by me at this stage of the proceedings.

There is however the subsequent development to which I now wish to refer, and I did shortly a little earlier. On 10 January 1974 the Secretary-General of the United Nations received a letter from the Minister of Foreign Affairs of France stating the following, and I give the translation in English.

> "In a case dealt with by the International Court of Justice, the Government of the French Republic noted that it was contended that the 1928 General Act for the Pacific Settlement of International Disputes could, in the present circumstances, justify the exercise of jurisdiction by the Court.
>
> On that occasion the French Government specified the reasons why it considered that view to be unfounded.
>
> While reaffirming that position, and, accordingly, without prejudice to it, the French Government requests you, with a view to avoiding any new controversy, to take cognizance of the fact that, with respect to any State or any institution that might contend that the General Act is still in force, the present letter constitutes denunciation of that Act in conformity with Article 45 thereof."

Under Article 45, the denunciation would take effect on 15 August next, when the current period of the General Act expires.

At the same time, the Secretary-General of the United Nations received a letter terminating France's acceptance of the compulsory jurisdiction of the Court under Article 36 (2).

I note in passing that the letter concerning the General Act demonstrates a certain lack of confidence in the position of the French Government stated in the French Note that the Court is manifestly without jurisdiction in this case

because the General Act has lapsed. But, in any case, the notice, in the sense that it purports to be a valid denunciation under Article 45 of the General Act, cannot, in accordance with the established principle recognized by the Court, be regarded as having any direct effect on the present proceedings. The same comment applies to the action taken in relation to Article 36 (2) of the Court's Statute.

The link between Article 17 and the present Court is furnished by Articles 36 (1) and 37 of the Statute of this Court. Australia and France are parties to the Statute of the Court and they are therefore bound by the substitution of the International Court for the Permanent Court effected by Article 37. The operation of Article 37 as effecting substitution of the present Court for the Permanent Court, in those places where references to the latter are found in treaties in force between parties to the Statute, has been repeatedly acknowledged by the Court. I need do no more on this point than refer to the *South West Africa* cases (*Preliminary Objections, I.C.J. Reports 1962*, pp. 334-335) and to the full consideration of this matter in the *Barcelona Traction* case (*Preliminary Objections, I.C.J. Reports 1964*, pp. 31-36).

It is very important to appreciate the nature of the obligations that were solemnly undertaken by France and Australia when they acceded to the General Act, particularly as they relate to Chapter II of the General Act relating to judicial settlement. Without wishing to anticipate later stages of our argument, I recall to the Court's mind the historical fact that at the end of the First World War a great effort was made to build up methods for the peaceful settlement of international disputes. The Covenant of the League of Nations was such an instance as also was the Statute of the Permanent Court of International Justice. But what are specially relevant for present purposes are the numerous special treaties for the pacific settlement of international disputes that were concluded in the postwar period. The Hispano-Belgian Treaty of 1927 considered in the *Barcelona Traction* case was such a treaty.

The 1928 General Act constitutes another instance; its special character was that it was multilateral in form whereas most of the other treaties were bilateral, but the multilateral form of the General Act should not be allowed to disguise the fact that it created a series of bilateral bonds. Under Article 44 the General Act came into force on accession by two parties only, and theoretically it might have had only two. This understanding of the basic nature of the obligations under the General Act is confirmed by Mr. Politis, the person who more than any other individual was responsible for the drafting of the Act, when he said that "two adhesions would be sufficient even though they related to the simplest part of the Act... in order to bring the General Act into force". (*League of Nations Official Journal, Special Supplement No. 65*, Records of the 9th Ordinary Session of the Assembly, Minutes of the First Committee, 9th Meeting, 20 September 1928, p. 64.)

In this respect, the network of bilateral obligations created by the General Act is exactly comparable with the bilateral obligation considered by this Court in the *Barcelona Traction* case in relation to the Hispano-Belgian Treaty of 1927.

What in essence was the nature of the obligations undertaken by parties that acceded to all parts of the General Act? The painstaking drafting that went into its preparation resulted in an instrument containing 47 articles. For the purposes of my remarks, I wish to confine myself to major undertakings of substance. My learned friend, Professor O'Connell, will be making a more detailed examination of the General Act for the purposes of his argument. For my purposes in this address the substantive obligations undertaken may be summed up as follows:

1. Firstly, all legal disputes—defined as "all disputes as to which the Parties are in conflict as to their respective rights"—shall be submitted for decision to the Permanent Court of International Justice, now to be read for the purposes of these proceedings as a reference to this Court. The fundamental nature of the obligation thus undertaken by the parties is evident not only from the positive language of the first paragraph of Article 17 but also from the proviso to that paragraph and from the saving clause in the first paragraph of Article 20. Under the proviso, legal disputes are to be remitted to an arbitral tribunal *only* if the parties so agree. Under the saving clause it is provided that such disputes are to be subject to the procedure of conciliation only if the parties so agree.
2. So much for the fundamental obligation undertaken with respect to legal disputes. Secondly, as to other disputes, parties agree to submit them first to the procedure of conciliation, in accordance with the provisions of Chapter I of the General Act, and, if not settled by that procedure, to an arbitral tribunal for decision in accordance with Chapter III.

Concerning the nature of the obligations undertaken in the General Act, we have moreover the clear guidance afforded by the Court's judgment in the *Barcelona Traction* case. Speaking of the provisions of the Hispano-Belgian Treaty that are comparable to Article 17 of the 1928 General Act, the Court said:

> "In the light of these provisions, it would be difficult either to deny the seriousness of the intention to create an obligation to have recourse to compulsory adjudication—all other means of settlement failing—or to assert that this obligation was exclusively dependent on the existence of a particular forum, in such a way that it would become totally abrogated and extinguished by the disappearance of that forum. The error of such an assertion would lie in a confusion of ends with means—the end being obligatory judicial settlement, the means an indicated forum, but not necessarily the only possible one." (*I.C.J. Reports 1964*, p. 38.)

Mr. President, the words that I would wish to emphasize for present purposes are those referring to "the seriousness of the intention to create an obligation to have recourse to compulsory adjudication—all other means of settlement failing". In the case of France the seriousness of this intention in relation to the General Act was made manifest, first of all in the fact that France's accession was authorized by a special law of the French Parliament, and secondly by the very terms used by the then French Minister for Foreign Affairs, Mr. Briand, in his letter of 10 April 1931 to the Secretary-General of the League of Nations to which the Court was referred in the oral proceedings on interim measures. That distinguished international statesman deposited the French accession in person to emphasize the importance French opinion attached to the General Act. The text of the letter is set forth in Annex 3 of the Memorial.

It is clear therefore, Mr. President, that we are not dealing here with obligations of a fragile or temporary character liable to lapse, for example, when the chosen forum ceases to exist. The decision of this Court in the *Barcelona Traction* case shows that the modification of the chosen forum is not fatal to the existence of the obligation. That case further shows that obligations of the kind now in question are to be interpreted in the light of their substantive object of securing the judicial settlement of international disputes. They are intrinsically enduring in their character and can only be terminated by action clearly authorized by the rules of the law of treaties.

The next matter to which I refer is the question of the existence in the present

case of a dispute within the meaning of Article 17 of the General Act. I think that the Court would wish me to examine this aspect even though it does not appear to be one of the central issues that divide the Parties. The long French Annex denying jurisdiction does not at any stage deny that a legal dispute exists between the parties within the meaning of Article 17.

Mr. President, there is clearly a dispute with regard to which the Parties are in conflict as to their respective rights within the meaning of that Article. The Government of Australia's position is that it is a case exclusively in terms of legal rights. Thus, in its note to the French Government of 3 January 1973 set forth in Annex 9 of the Application the clearest statement of the nature of the Australian Government's claim appears:

> "In the opinion of the Australian Government, the conducting of such tests would not only be undesirable but would be unlawful—particularly in so far as it involves modification of the physical conditions of and over Australian territory; pollution of the atmosphere and of the resources of seas; interference with freedom of navigation both on the high seas and in the airspace above; and infraction of legal norms concerning atmospheric testing of nuclear weapons."

In its Note of 13 February 1973 to the French Government set forth in Annex 11 of the Application the Australian Government stated the following:

> "It is recalled that, in its Note dated 3 January 1973, the Australian Government stated its opinion that the conducting of atmospheric nuclear tests in the Pacific by the French Government would not only be undesirable but would be unlawful. In your Ambassador's Note dated 7 February 1973 it is stated that the French Government, having studied most carefully the problems raised in the Australian Note, is convinced that its nuclear tests have violated no rule of international law. The Australian Government regrets that it cannot agree with the point of view of the French Government, being on the contrary convinced that the conducting of the tests violates rules of international law. It is clear that in this regard there exists between our two Governments a substantial legal dispute."

The French Ambassador's Note of 7 February 1973 referred to is set forth in Annex 10 of the Application. The particular passage in question is translated in the Application as follows.

> "Furthermore, the French Government, which has studied with the closest attention the problems raised in the Australian Note, has the conviction that its nuclear experiments have not violated any rule of international law. It hopes to make this plain in connection with the 'infractions' of this law alleged by the Australian Government in the Note cited above [that is the Note of 3 January]."

Paragraph 18 of the Application describes the subsequent negotiations that took place in Paris between the Australian Government and the French Government. France was not prepared to join with Australia in a joint approach to the International Court of Justice. The refusal of the French Government was not based on any withdrawal by France from its position that nuclear tests conducted in the atmosphere were lawful.

The fact that a particular question may have a political aspect does not of course prevent it from also being a legal question and the dispute about it from being a legal dispute. In view of some suggestions in dissenting opinions to the Court's Order of 22 June, I should comment on the matter.

The first comment is that the practice of this Court and of its predecessor indicates that the existence of a political element does not remove a dispute from the jurisdiction of the Court. From the time of the Permanent Court, one may cite the Advisory Opinion on the *Customs Union* case between Germany and Austria, which was able to be dealt with as a legal question notwithstanding its undoubted political content. Certainly that was the view taken by the protagonists in those proceedings, including the French Government, and it was the view accepted by the Court including some judges who entered strong separate opinions, particularly Judge Anzilotti. From the jurisprudence of this Court one may refer to the Advisory Opinion on *Certain Expenses of the United Nations* (*I.C.J. Reports 1962*, p. 155) when it observed:

> "It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision."

This point may also be illustrated by reference to an observation by an eminent judge who was widely regarded as one of the greatest judges in the common law system. I refer to the late Sir Owen Dixon, former Chief Justice of the High Court of Australia, who made the following observation about a comment that certain constitutional legal doctrines were said to be based on political rather than legal considerations. Sir Owen said:

> "The Constitution is a political instrument. It deals with government and governmental powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political for nearly every consideration arising from the Constitution can be so described, but whether they are compelling." (*Commonwealth Law Reports*, Vol. 74, at p. 82.)

The analogy with international law is, I suggest, complete. International law is political, since by its very nature it deals with relations between sovereign States and their powers. The statement that the claim of one State that another State should refrain from certain conduct is political in character, is easy to make. It has a specious plausibility but it really is in the legal context meaningless. It is not a question whether the claim has political aspects as almost everything arising under international law has political aspects, but whether the legal considerations founding the claim are compelling.

May I add one more citation from an address by the late Professor Hans Kelsen. His comment on the attempt to postulate a dichotomy between political and legal disputes was frank and to the point. He said:

> "Therefore the distinction between political conflicts and legal disputes is bound to fail in the aim for which it was originally conceived, namely, to sabotage the obligatory jurisdiction of an international court." (*Proceedings of the American Society of International Law*, 1941, p. 84.)

Mr. President, I can sum up this aspect of the case very simply. The Government of Australia asserts that the conducting by the French Government of nuclear tests at its South Pacific Tests Centre is contrary to international law. It seeks, as is its right, to invoke the compromissory clause contained in Article 17 of the 1928 General Act. The attitude of the other Party is that its testing

programme is completely legal. It has resisted, however, the steps that have been taken to have this matter litigated and ruled upon by the Court. Many comments might be made on this position of the French Government. The only point I wish to make at this stage, Mr. President, is that the obvious reluctance to have its legal propositions on substance tested in this Court does not in any way affect the proposition that the Parties are in conflict as to their respective rights.

The obligation of judicial settlement contained in Article 17 of the General Act does not apply where the Parties agree to have resort to an arbitral tribunal. There has been no agreement in the present case to resort to an arbitral tribunal.

Another precondition for the exercise of jurisdiction under Article 17 of the General Act is the inapplicability of reservations to the Court's jurisdiction made under Article 39 of the General Act. I would like to draw the attention of the Court to the fact that Article 17 specifically provides that the jurisdiction of the Court is subject only to those reservations made under Article 39. It would thus appear that the intention of parties to the General Act was that the jurisdiction of the Court under the General Act should not be subject to reservations made by a party under other instruments such as under Article 36 (2) of the Statute of the Court.

The Court adjourned from 11.20 to 11.45 a.m.

The reservations made to the General Act by Australia and France are set forth in Annexes 1 and 2 to the Memorial. I do not propose to refer to the French reservations since no point is made in this regard by the French Annex, nor is any point made in this connection by the Court or its Members in the Order and opinions published on 22 June. I need to say something, however, about the comments to be found at pages 8 and 9[1] of the Registry's revised translation of the French Annex, concerning the Australian reservations.

Thus, the French Annex refers to the reservation relating to disputes submitted to the Council of the League of Nations. Presumably the intended reference is to paragraph 2 of the Australian accession to the effect that Australia reserved the right, in relation to disputes mentioned in Article 17, to require that the procedure described in Chapter II shall be suspended in respect of any dispute which has been submitted to, and is under consideration by, the Council of the League of Nations.

We have studied carefully the comments made in the French Annex that if the General Act were in force there would be uncertainty as to the scope of this reservation by Australia, an uncertainty said to be entirely to the advantage of Australia and thus unacceptable. In order to demonstrate the alleged uncertainty, however, the French Annex is forced to take the position of asserting that the present effect of the reservations depends in some way or other upon the attitude of Australia.

Mr. President, it should be a sufficient answer to this contention to say that neither the French Government nor the Australian Government has invoked the reservation, and to point out moreover that the reservation is clearly inapplicable in the present proceedings. But there are two further observations that can be made which appear to us to be also conclusive on the matter. The allegation that uncertainty in the reservation is entirely to the advantage of Australia overlooks the fact that, as explicitly stated in Article 39 (3) of the General Act, if one of the parties to a dispute has made a reservation, the other party may enforce the same reservation in regard to that party. The French

[1] II, pp. 354-356.

contention is logically and legally defective for another reason also. There will be no uncertainty because if the reservation were to be invoked in proceedings under Chapter II it would be the function and duty of the Court to determine its meaning.

The French Annex also refers to the Australian reservation excluding disputes with any party to the General Act which was not a Member of the League of Nations. The same so-called defect of uncertainty was said to apply to this reservation after the disappearance of the League of Nations.

The points I have already made about the reservation relating to the Council of the League of Nations apply here also. And, in addition, the jurisprudence of this Court relating to the meaning to be attributed, since the termination of the League of Nations, to references in compromissory clauses to States parties to the League of Nations provides yet another answer to this particular contention. Thus, a comparable reference to membership of the League of Nations was examined by Judge Sir Arnold McNair in his separate opinion on the *International Status of South West Africa* in relation to Article 7 (2) of the Mandate for South West Africa. Article 7 (2) provided that "if any dispute . . . should arise between the Mandatory and another Member of the League of Nations relating to the... Mandate, [it should] be submitted to the Permanent Court of International Justice". Judge Sir Arnold McNair, speaking in 1950, succinctly observed: "The expression 'Member of the League of Nations' is descriptive, in my opinion, not conditional, and does not mean 'so long as the League exists and they are Members of it'." (*I.C.J. Reports 1950*, pp. 158-159.)

This was precisely the approach applied by the Court itself in 1962 in the preliminary objections phase of the *South West Africa* cases brought by Ethiopia and Liberia and the Court in 1966 found no reason to vary that approach. In this regard, the situation was thus one in which Liberia and Ethiopia, having been Members of the League before its dissolution, were, for the purposes of the jurisdictional clause, still to be regarded as "Members of the League of Nations", 16 years after its dissolution.

France and Australia were Members of the League of Nations at all relevant times before 1946, when the League of Nations was dissolved. Their position is exactly comparable to the position of the other two countries considered by this Court in the *South West Africa* cases, and we submit the same decision should be given.

This analysis of the Australian reservations indicates, Mr. President, first, that the Australian reservations have not been invoked in the proceedings and, secondly, that each has a perfectly clear meaning excluding their application to the present proceedings. The only legal conclusion open, it is suggested, is that they do not affect the Court's jurisdiction in this case.

Mr. President, summing up at this point, our position is that each of the preconditions for the application of Article 17 of the General Act is satisfied. I have indicated the nature of the engagement or commitment that was made by States that accepted that Article. I have referred to the words of the Court concerning the comparable provisions in the Hispano-Belgian Treaty of 1927. I spoke of the "seriousness of the intention to create an obligation to have recourse to compulsory adjudication". I have dealt with the reservations to the General Act. In doing this I have sought to cover those arguments on which the French Government has put particular emphasis.

Certain assertions made in the French Note and Annex, that nevertheless the General Act has lost its effectiveness and become invalid after the collapse of the League of Nations, will be dealt with in a following address. It will refer to the compelling evidence that proves that the General Act has *not* ceased to be in

force because of the lapse of the League or because of its revision in 1949 or because of other factors like obsolescence, desuetude or fundamental change of circumstances. What I will do now in the remaining part of my address is to complement and complete that argumentation by showing *positively* how the jurisprudence of the Court and the practice of States confirm the continuing validity and effectiveness of the General Act.

I may say, Mr. President, that French official practice has made the greatest single contribution towards demonstrating the continuing vitality of the General Act. Indeed French practice on the point is so extensive and so substantial as to indicate that the fundamental principle of good faith and consistency in treaty relations enshrined in Article 45 of the Vienna Convention on the Law of Treaties may well be applicable. Article 45 is set forth in paragraph 187 of the Australian Memorial. It embodies the fundamental principle that a State may not invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty if, after becoming aware of the facts, it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or its maintenance in force. France has again and again since 1946 asserted and relied upon the continuing validity of the General Act.

The Court could thus dispose of the French contention by reference to the principle in Article 45, and I invite it to do so. Additionally, the Court, we submit, should hold that the materials to which I am about to refer positively show that the General Act continues to have force and vitality. Having shown the General Act to have been a treaty in force between Australia and France it should not be necessary for us, as a matter of burden of proof, to show that it continues in force—that is to be presumed. Rather it is for France to show the contrary. But in any case the positive evidence exists to establish its continuing vitality.

That this is so is brought out, for example, by the proceedings in 1955 to 1957 by France against Norway in the *Certain Norwegian Loans* case. The significance of these proceedings has already been dealt with at length in the oral proceedings relating to interim measures (pp. 213-219, *supra*). The central point that divides the Parties to the present proceedings is the interpretation of the views of the Court on the submission so clearly and so frequently made by the French Government in that case that the General Act was fully in force. I shall focus on that aspect after recalling briefly to the minds of the Court the argument of the Parties in that case.

The Application of the French Government was submitted on 6 July 1955. The claimant Government referred therein, in so far as jurisdiction was concerned, only to the declarations of acceptance of the compulsory jurisdiction of the Court, expressed, on the basis of Article 36, paragraph 2, of the Statute, by Norway and France on 15 November 1945 and 1 March 1949 respectively (*I.C.J. Pleadings, Certain Norwegian Loans*, Vol. I, p. 9).

However, in the observations submitted on 31 August 1956 the French Government, in referring to the previous rejection by Norway of any form of arbitration on the issue, requested the Court to find that there had been a violation by Norway of the General Act of 26 September 1928 (*ibid.*, Vol. I, p. 180). This position was confirmed in a Note addressed on 17 September 1956 by the French Minister of Foreign Affairs to the Norwegian Embassy in Paris (*ibid.*, p. 301). In the oral pleading by the Agent of the French Government at the hearing of 15 May 1957 there again appears a reference to Article 17 of the General Act of 26 September 1928 (*ibid.*, Vol. II, p. 60).

It should be noted that, on the other hand, the Norwegian Government in its Counter-Memorial of 20 December 1956, even though rejecting in point of

fact the charge made against it by referring to the efforts it had made in favour of the development of international jurisdiction, in no way denied that the General Act of 1928 was in force between the Parties. The same can be said with regard to the oral pleading on behalf of the Norwegian Government delivered on 21 May 1957 by Professor Bourquin (*ibid.*, p. 123). In two instances that distinguished lawyer referred to the General Act of 1928 with a view to pointing out that the French Government had seemed to renounce its theory of a violation on the part of the Norwegian Government of the obligations resulting from that Act. But at no time did Professor Bourquin raise any doubts whatever in connection with its being in force. The issue was very carefully gone into in detail by Judge Basdevant, in his dissenting opinion. The terms used by that distinguished jurist could not be more precise and are worth being recalled *in extenso*. He said:

> "In the matter of compulsory jurisdiction, France and Norway are not bound only by the Declarations to which they subscribed on the basis of Article 36, paragraph 2, of the Statute of the Court. They are bound also by the General Act of September 26th, 1928, to which they have both acceded. This Act is, so far as they are concerned, one of those 'treaties and conventions in force' which establish the jurisdiction of the Court and which are referred to in Article 36, paragraph 1, of the Statute. For the purposes of the application of this Act, Article 37 of the Statute has substituted the International Court of Justice for the Permanent Court of International Justice. This Act was mentioned in the Observations of the French Government and was subsequently invoked explicitly at the hearing of May 14th by the Agent of that Government. It was mentioned, at the hearing of May 21st, by Counsel for the Norwegian Government. At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway.
>
> There is no reason to think that this General Act should not receive the attention of the Court. At no time did it appear that the French Government had abandoned its right to rely on it. Even if it had maintained silence with regard to it, the Court 'whose function it is to decide in accordance with international law such disputes as are submitted to it' could not ignore it. When it is a matter of determining its jurisdiction and, above all, of determining the effect of an objection to its compulsory jurisdiction, the principle of which has been admitted as between the Parties, the Court must, of itself, seek with all the means at its disposal to ascertain what is the law." (*I.C.J. Reports 1957*, p. 74.)

Mr. President, the dissenting opinion of this distinguished French judge thus contains the most effective assertion one could wish of the present validity of the General Act of 26 September 1928 and of the continuing force of the obligation resulting therefrom on the parties to accept the compulsory jurisdiction of the International Court of Justice in the legal disputes between them.

Need I remind the Court that Judge Basdevant was one of the most prominent authorities on matters of international law, who not only sat as judge on the issue of the *Norwegian Loans*, but was over a period of many years Chief Legal Adviser to the Ministry of Foreign Affairs of France, and then President of the International Court of Justice itself, from 1949 to 1952.

Now the French Annex states, at page 4[1] of the translation that:

[1] II, p. 351.

"An examination of the positions adopted by international tribunals and the conduct of States gives further reasons for concluding that the 1928 Act lacks present validity. So far as the International Court of Justice is concerned, it had to settle this point [that is, the continuance in force of the General Act] in the case concerning *Certain Norwegian Loans*."

This statement in the French Annex is not correct. The Court did not have to settle the point whether the 1928 Act "lacks present validity". It expressly avoided reaching any such conclusion. It is necessary to recall the words of the Judgment where the General Act is mentioned *(I.C.J. Reports 1957)*, and I refer to the passage at page 23:

"... the Court notes in the first place that the present case has been brought before it on the basis of Article 36, paragraph 2, of the Statute and of the corresponding Declarations... made by the Parties in accordance with Article 36, paragraph 2, of the Statute on condition of reciprocity".

At page 11 in the opening part of the Judgment the Court recounted:

"The Application thus filed in the Registry on July 6th, 1955, expressly refers to Article 36, paragraph 2, of the Statute of the Court and to the acceptance of the compulsory jurisdiction of the International Court of Justice by the Kingdom of Norway on November 16th, 1946, and by the French Republic on March 1st, 1949."

It then refers to two substantive grounds for the claim against Norway. At page 24 it goes on:

"The French Government also referred to the Franco-Norwegian Arbitration Convention of 1904 and to the General Act of Geneva of September 26th, 1928, to which both France and Norway are parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate.

These engagements were referred to in the Observations and Submissions of the French Government on the Preliminary Objections and subsequently and more explicitly in the oral presentations of the French Agent. Neither of these references, however, can be regarded as sufficient to justify the view that the Application of the French Government was, so far as the question of jurisdiction is concerned, based upon the Convention or the General Act. If the French Government had intended to proceed upon that basis it would expressly have so stated.

As already shown, the Application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, paragraph 2, of the Statute. In these circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court."

At page 26 the Court quotes counsel for Norway:

"... the Court has jurisdiction only in so far as undertakings prior to the origin of disputes have conferred upon it the power of adjudicating on such disputes as might arise between France and Norway.

What are these undertakings?

They are the undertakings resulting from the Declarations made by the

two Governments on the basis of Article 36, paragraph 2, of the Statute of the Court.

. . . . . .

That is the only basis on which the other Party can rely to show that its Application falls within the limits of the jurisdictional competence of the Court."

Mr. President, in the light of these passages in the Court's Judgment, the assertion that the Court "had to settle" the question whether the General Act "lacks present validity" falls to the ground. The Court made it plain that it did not have to settle the point.

Judge Badawi in his separate opinion does not discuss the General Act or Judge Basdevant's opinion. Judge Guerrero, in his dissenting opinion says:

"... I share the view of the Court when it recognizes that, in the present case, the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute" (*ibid.*, p. 67).

He does not mention the General Act. Judge Read, in his comprehensive dissenting opinion, dealt both with the merits and with jurisdiction, but did not find it necessary to mention the General Act.

Judge Basdevant explains, at page 77, "the source of my dissent" namely that "the Judgment interprets the Norwegian Government's intention in a different way from that in which I have felt it proper to interpret it". He adds that it was thus not necessary for the Court to consider points with which he deals in his dissenting opinion. He concludes:

"Having regard to the sense I attach to the Norwegian Government's intention in invoking the French reservation, and having regard to the nature of the questions actually submitted to the Court, I do not think that Norway is justified, in this case, in declining the jurisdiction of the Court on the ground of the reservation concerning its national jurisdiction." (*Ibid.*, p. 78.)

It is fair to conclude that, had the Court interpreted the intention of the Norwegian Government as Judge Basdevant interpreted it, it would have examined the applicability and efficacy of the General Act, and, given the great and deserved prestige of Judge Basdevant, would have given the greatest weight to the conclusion he had reached.

It is therefore incorrect for the French Annex to continue by saying, at **II**, page 351, that:

"... the applications of Australia and New Zealand against France present a similar problem: that of the relationship between the broad acceptance of the P.C.I.J. by the 1928 Act and the subsequent more limited acceptance of the jurisdiction of the International Court of Justice on the basis of Article 36, paragraph 2—the only differences deriving from the fact that the General Act is formally invoked by the Applicants, but also from the nigh-on twenty additional years that now aggravate the desuetude of the 1928 Act".

Of "the only differences", the crucial one is the intention to rely on one basis for the Court's jurisdiction: interpretation of the intention of the Parties, which as Mr. Lauterpacht has shown in his analysis of Judge Anzilotti's opinion in *Electricity Company of Sofia and Bulgaria*, in the oral proceedings on

interim measures, is a key note, just as it was the key note in Judge Basdevant's mind.

The French Annex, at II, page 351, suggests that Judge Basdevant must have put his arguments before his colleagues but that his thesis "does not appear even to have merited being discussed in any of his colleagues' separate or dissenting opinions". The implied disparagement of so distinguished a jurist is remarkable. In the practice of the Court, it has not been usual for judges to comment on the views in a separate or dissenting opinion, although this was sometimes done. In the *Certain Norwegian Loans* case, I do not find that Judge Badawi, or Judge Sir Hersch Lauterpacht, or Judge Guerrero, or Judge Read, in their separate or dissenting opinions, referred to any of their colleagues' separate views. Indeed Sir Hersch does refer to the General Act but not in any way to express a view about the position of Judge Basdevant. The Resolution concerning the Internal Judicial Practice of the Court, which was in force in 1957 when the *Certain Norwegian Loans* was decided, had no provision about the exchange of separate or dissenting opinions. This omission was met in the revision of 5 July 1968, in Article 7 of the Resolution, which requires separate and dissenting opinions to be made available to the Court. In the *Barcelona Traction* case (1970) it will be seen that some of the individual opinions do refer to the opinions of other judges in the same case.

Summing up, Judge Basdevant's judgment must therefore be regarded as a distinct and undisturbed judicial authority on the subject.

I turn now to the evidence that exists of the continuing vitality of the General Act, to be found in the practice of States. Almost all this practice belongs to the period after the demise of the League of Nations in 1946. It is interesting to reflect on that fact. It means that the incontrovertible evidence provided by this practice negates, in the clearest way, the attitude taken in the French Annex that, in some way or another, the General Act lapsed with the League of Nations.

The main instances of State practice may be itemized as follows:

Firstly, I refer to the Settlement Agreement of 17 November 1946 between France and Thailand. The League of Nations was wound up on 18 April 1946. Article 3 of the Agreement is set forth as page 293, *supra*, of the Memorial. Not only does the Article speak of the General Act as if it was then in force, but it seems highly unlikely that the parties would have incorporated such a reference to a treaty which either of them considered to be no longer in force.

Secondly, I refer the Court to the Special Conciliation Committee constituted by France and Thailand, pursuant to Article 3, which actually sat in Washington in May and June 1947. The meeting is referred to in paragraph 230 of the Memorial, which sets forth the statement made by the Commission that "in accordance with Article 10 of the General Act of Geneva, it was decided that the Commission would not be public". I would stress that it was a French-Thai Commission and that the French Government was represented by senior French diplomats. It is not really credible that these experienced diplomats would have invoked the General Act in 1947 in those terms if their Government considered that the Act was a dead-letter because of the lapse of the League of Nations or desuetude.

Thirdly, I mention the several references that were made to the 1928 General Act during the drafting of the European Convention for the Pacific Settlement of International Disputes. They are summarized in paragraphs 221 to 225 of the Memorial. Thus, a representative of Denmark, Mr. Lannung, specifically referred in the course of debates to the General Act as being in force for 20 States. His statement, made in 1955, in the context of expert juridical discussion

of instruments relating to peaceful settlement, constitutes clear evidence of the continuing vitality of the General Act.

Fourthly, I cite the repeated submissions by the French Government invoking the General Act as a treaty in force in the course of the proceedings in the *Certain Norwegian Loans* case. The proceedings occupied the years 1955 to 1957. I have already referred to those submissions, and I shall not discuss them at this point, except to say that in their context they provide most powerful and uncontradicted testimony that the General Act continued in force.

Fifthly, I cite the attitude of the States involved in the *Temple of Preah Vihear* case (paras. 227-232 of the Memorial). These indicate that Cambodia and Thailand, in 1959 to 1961, considered the General Act as in force. When the application of the General Act was opposed by Thailand it was only on the assumption that neither Cambodia nor Thailand was a party to it. There was not even the slightest suggestion that the General Act may have fallen into desuetude. Counsel for Cambodia was Professor Reuter, at present a distinguished member of the International Law Commission. Professor Reuter has appeared as counsel and even Deputy-Agent for the Government of France on a number of occasions. He is on record (Memorial, p. 299, *supra*, para. 242) as stating categorically that the General Act is "in force".

Sixthly, I cite the reliance that was placed on the General Act being in force in 1964 when the attitude of the French Government was being explained in the French National Assembly as to why it did not envisage becoming a party to the European Convention on Pacific Settlement. The Foreign Minister referred to certain obligations by which France was already bound—"liée". The references included a reference to the 1928 General Act revised in 1949. The reference to the revision can only have been descriptive since France is not a party to the revising instrument. The thrust of the statement is clear: France is already bound by the 1928 General Act. To suggest any other meaning is tantamount to suggesting that the Foreign Minister was deliberately misleading the French Parliament. The details are set forth in paragraph 233 of the Memorial.

Seventhly, I cite the evidence provided by the treaty compilations and treaty lists relating to the countries that became parties to the General Act and referred to in paragraphs 235 and 236 of the Australian Memorial. Two propositions emerge. One is that a number of official, semi-official and unofficial treaty lists show the General Act as still being in force. To illustrate these, it may be sufficient to mention only Dr. Rollet's 1971 list of French multilateral treaties, which lists Australia and France as parties, and the Treaty List published by the Swedish Ministry of Foreign Affairs in 1969. The second proposition is that no treaty list which has been examined states or implies that the General Act has been terminated. The omission of the General Act from a few of the treaty lists is perfectly consistent with the non-exhaustive character of those lists.

Eighthly, I would like to cite two instances of State practice, one relating to a time shortly before the revision of the General Act in 1949 and the other to a time shortly before the institution of the present proceedings. The 1951 volume of the *Official Bulletin of the United States Department of State* contains notes on the compulsory jurisdiction of this Court and refers at some length to the Revised General Act. What is significant for present purposes is the following note which appears at page 668: "The General Act of September 26, 1928, remains in force, the current 5-year period beginning August 16, 1949." So much for the United States view on the matter. The Netherlands has, as recently as 1971, made an unequivocal statement that the 1928 General Act continues in force, in the very context of consideration by it of the Revised General Act. In a memorandum dated 3 March 1971 from the Netherlands Foreign Minister

to the Second Chamber of the States General describing the Revised General Act and explaining the reasons of the Government of the Netherlands for seeking the Parliament's consent to ratify it, the General Act is spoken of as "still in force for 22 States including the Kingdom". It might be an appropriate point, Mr. President, to refer also to the annual articles called "Notes of Legal Questions Concerning the United Nations" contributed by Professor Yuen-Liang to the *American Journal of International Law* at the time when he was Director, Division for the Development and Codification of International Law, at the United Nations Secretariat. He was later Secretary to the International Law Commission and he is a member of the Institut de droit international. In his contribution to Volume 42 of the *American Journal of International Law* he describes the initial moves for the revision of the General Act. In note 40 on page 897 he says: "this General Act is now binding upon twenty-two States". In the 1949 volume, No. 43, at page 706 and the following pages, he refers to the rights of the parties under the General Act as being left intact.

Ninthly, I cite the highly qualified publicists confirming the continuing existence of the General Act referred to in paragraphs 240-258 of the Memorial.

Summing up on this part of our argument, Mr. President, the jurisprudence of this Court, the practice of States and the opinions of authors confirm in the most convincing manner the continuing validity and effectiveness of the General Act. It is perhaps the very strength of that case that explains the rather strained character of the arguments set forth in the French Note and French Annex to support the contention that the General Act has lapsed and also the extreme vagueness of some of those contentions if they are to be considered as legal arguments. It is to some of these contentions that I would like now to turn.

Thus the French Annex places great emphasis on the parallelism which it alleges existed between reservations which countries inserted in their accessions to the General Act and their respective declarations under Article 36 of the Statute of the Permanent Court of International Justice. It also alleges that, in relation to countries which acceded to the Revised General Act, this parallelism between their accessions to that Act and their declarations under the Statute of the present Court stands unbelied.

It is really very difficult to know what to make of such an argument. There is no legal duty upon States to maintain parallelism in this area and it could in fact be inconvenient for States to do so. An instance that may be cited concerns the Australian accession to the optional protocol of signature concerning the compulsory settlement of disputes arising under the 1958 Conventions on the Law of the Sea. There are no reservations to the Australian accession, which was lodged in 1963. However, the Australian declaration under Article 36 (2) of the Statute of this Court lodged in 1954 and still in force contained a number of reservations, including one specifically relating to law of the sea matters.

What is the argument that is being put here? Analysed in legal terms, it seems to be that the continuance of the treaty obligations solemnly undertaken by Australia and France in 1931 in relation to the General Act depend upon the vague and uncertain test of whether or not, generally speaking, parties to the General Act maintain parallelism with their declarations under Article 36 (2) of the Statute even though it is not their legal duty to do so. We submit that such a proposition is manifestly erroneous. Moreover, the argument made elsewhere by the Government of France that the reservations under Article 36 (2) override reservations made to similar instruments would, if it is correct, make it unnecessary to maintain such parallelism between separate declarations. This contradictory approach is not acceptable, especially when it is a matter of assessing the significance of the conduct of States in the light of whether the

proposition that parallelism must exist, or the contrary proposition that parallelism need not exist, correctly states the legal position.

The truth of the matter is, Mr. President, that it is difficult to avoid the conclusion that the argument contained in the French Annex on this point is simply another way of putting the French position on desuetude or obsolescence of the General Act. This was dealt with in the Memorial. This argument must, we submit, be rejected for the reasons stated in the Memorial, which Professor O'Connell will elaborate in his address.

It may nevertheless be of some interest to the Court to consider the extent to which the alleged parallelism referred to in the French Annex in fact existed. This is done in paragraphs 263 to 277 of the Australian Memorial. The analysis clearly indicates the inaccuracy of the French Government's assertion that when the General Act was manifestly in force States took care to maintain an identity between their accessions to the General Act and their declarations under Article 36 and that a similar position has applied in relation to the Revised General Act where countries party to it have also filed declarations under the optional clause. The lack of parallelism is even more pronounced when one takes into account the differing dates of termination or possible termination of the respective declarations under Article 36 and accessions to the General Act and where relevant the Revised General Act.

Another matter dealt with in the French Annex to which I wish to refer at this stage is the argument that—and I quote from the Registry's translation—"Australia's most recent action with reference to that Act amounted to a patent violation of it". The conclusion sought to be drawn is that the General Act is therefore inapplicable in relations between France and Australia even if it has not lost all validity.

The Government of Australia is unable to accept either the accuracy or the validity of either of these points.

The reference made by the French Annex is of course to the Australian Prime Minister's telegram of 7 September 1939 to the Secretary-General of the League of Nations, set forth in Annex 1 of the Memorial. In that telegram, the Prime Minister made what was obviously a reference to the Second World War and notified the Secretary-General that Australia would not regard its accession to the General Act as covering or relating to any dispute arising out of the events occurring during "the present crisis". It is clear from this that Australia was making a statement as to its intention with regard to disputes arising out of that war. France and a number of other countries had already lodged similar communications which also indicated the disputes which were to be reserved from their accessions to the Act.

Two comments may fairly be made on the Australian instrument. One was that it was not lodged within six months before the expiry of the then current period of the General Act that terminated on 15 August 1939. It therefore could not take effect on that date. The second comment is that the language of the communication was perhaps imprecise. What was obviously mainly in mind was disputes arising out of the events connected with the Second World War.

The French Annex refers to certain so-called protests lodged against the Australian communication of 1939. The actual documents in question are conveniently referred to at pages 191 and 219 of the *United States Department of State Bulletin*, 1940. The Secretary-General of the League of Nations stated in a circular letter dated 17 January 1940 that the Minister for Foreign Affairs of Sweden had informed him that, while taking note of the Australian Government's communication, the Swedish Government felt obliged to make reservations as to the legal effect of the telegram, more particularly as regards disputes

not connected with the war. The Norwegian notification is referred to on page 219. It is similar in effect. It will be noted that the notifications are not protests, as the French Annex suggests, but rather the countries concerned were reserving their position on the legal effect. Secondly and most importantly, it is clear that the point they had in mind was certainly not that Australia had broken its links under the General Act, but rather the opposite. Their point appeared to be that the links continued possibly without any diminution by reason of the 1939 declarations, or at least diminished only in relation to disputes actually connected with the war. The reservations expressed by Sweden and Norway were not referred to, I should add, in the 1944 League of Nations list of treaties contained in the *Official Journal, Special Supplement No. 193.*

Mr. President, in these circumstances, even if the Australian action could be regarded as a departure from the procedural requirements of the General Act, what conceivable relevance can that have today? The so-called breach was manifestly not intended to terminate Australia's relationship under the General Act and it did not do so. Did it adversely affect the rights of France under the General Act? There is no suggestion that it did, and if France now belatedly chooses to say that her rights in relation to the Australian actions during the Second World War were injured by what happened in 1939, it is now completely out of time.

Our submission is that there is no substance in the French argument, and nothing that can justify the Court deciding otherwise than that the General Act is of continuing force and validity and that France and Australia were parties to it at the date of the institution of these proceedings.

Mr. President, after I have concluded my address, Professor O'Connell will develop the argument that the General Act has not ceased to be in force by reason of its relationship with the League of Nations system or by reason of the revision of the General Act in 1949. He will also submit that there is no basis at all for saying that the General Act has been terminated by desuetude or obsolescence or because of any fundamental change of circumstances.

Mr. Lauterpacht will follow Professor O'Connell and will address the Court on the link of compulsory jurisdiction between Australia and France under Article 36 (2) of the Statute of the Court. Mr. Lauterpacht will also deal with the two separate and distinct sources of access to the Court: under the General Act via Article 36 (1) of the Statute on the one hand and under Article 36 (2) on the other. He will show that the reservation under Article 36 (2) relied upon by the French Government has no bearing at all on the jurisdiction pursuant to Article 36 (1).

Solicitor-General Byers will be dealing with the question of admissibility and he will be referring in that connection to the position and task of the Government of Australia on this matter. For the convenience of the Court and especially in view of the fact that reasons of State may make it impossible for me to be present when that issue is being dealt with, I would, at this stage, briefly summarise those submissions.

It is the submission of the Government of Australia that the issue of admissibility is limited to the question of Australia's legal interest in its claims, and that such an interest exists in each branch of its claims. In my submission to the Court on 21 May last year I presented a summary of the position in relation to fall-out over Australia from nuclear explosions conducted by France in the atmosphere at Mururoa Atoll. I recall for the Court the basic issues which were identified.

It was pointed out that natural conditions result in the transfer of radio-active debris from those explosions to the Australian air space and in their deposition

on Australian territory. Attention was drawn to the incontrovertible fact that the presence of that radio-active debris constitutes an uncontrolled source of ionising radiation and results in members of the Australian population incurring an additional exposure to such radiation and that this extends to every member of the Australian population, every man, every woman and every child.

The Australian Government asserted that exposure to ionising radiation, however small, is harmful. The submissions drew attention to an established principle that there should be no exposure to ionising radiation from artificial sources without a compensating benefit. We asserted that it is for each country itself to decide the levels of artificial ionising radiation to which its people are to be subjected and to balance the risks involved against any compensating benefits.

I do not suggest that the Court is presently concerned in detail with each of these aspects. Nevertheless it is relevant to bring to the attention of the Court that there is no new compelling scientific evidence which points to a need for the Australian Government to qualify its previous presentation save to say that documents we have submitted to the Court in relation to the 1973 French tests show that radio-active fall-out from those tests further contaminated the Australian air space and was deposited on Australian territory.

The Court adjourned from 1 p.m. to 3 p.m.

Mr. President and Members of the Court, in his address the Solicitor-General will elaborate on the matters to which I have made reference. His elaboration will not be made in full scientific details but will be confined at this stage of the case to demonstrating that the argument proceeds from the fact that radio-active debris from French nuclear tests in the atmosphere invades Australian air space, is deposited on Australian territory and is harmful to the Australian population and to the Australian environment. The argument will be advanced that intrusion of radio-active debris from French nuclear tests is an infringement of Australian sovereignty in at least two aspects.

One aspect is the territorial aspect. The other is the decisional aspect of sovereignty, that is to say, that characteristic which the possession of sovereignty necessarily confers upon the sovereign—the right to say for itself what decisions will be made by it and, in particular, the extent to which, if at all, its population will be exposed to the risk of damage.

The argument will proceed, first of all, by suggesting that these territorial and decisional aspects of sovereignty are rights which international law recognizes and which it protects as legal rights by way of imposing upon each other sovereign an obligation to respect the sovereign rights of all others.

The matter will then be looked at independently and upon the basis that one possible view is that Australia's international legal rights may flow from the incorporation into international law of the maxim that each sovereign must so use its own territory as not to inflict damage to the rights of others. It will be submitted that on that basis and assuming that by damage is meant a positive harm, that in this case that requirement would also be met by a consideration of the nature of the deposit and the physical consequences that it may inflict on the Australian population and environment as well as the undoubted fact that the deposit and its probable repetition have subjected the Australian population to considerable mental distress.

There is, of course, the further fact that the carrying on of the tests has required that Australia should set up and maintain a substantial and effective

monitoring system by which the amount of that deposit may be ascertained so that the population may be protected.

Lastly on this aspect, it will be submitted that if either of the preceding views is incorrect the conduct of the tests by France so as to lead to deposit on Australian soil, air space and environment generally, amounts to an abuse by France of its rights and therefore imposes upon it international responsibility.

It will be next submitted that Australia possesses a legal interest in propounding the assertion that the conduct by France of atmospheric tests conflicts with a prohibition of contemporary customary international law outlawing atmospheric tests by any country.

Australia's legal interest in maintaining that claim will be supported by arguments that the prohibition, the existence of which for present purposes must be assumed, is one *erga omnes*, that is to say one owed to each State in the world. For that reason Australia possesses the necessary requisite interest even if she had not sustained any damage.

It will further be contended and alternatively that the fact that Australia has sustained damage in the manner outlined, that is to say, to its population, to its environment, both territorial and marine, confers upon it a special interest which enables it to contend against France that its breach of the prohibition is one for which it is at Australia's suit legally responsible.

The third claim is that the conduct by France of nuclear tests in the South Pacific coupled with the closures of the seas necessarily involved is a breach by it of the freedom of the high seas.

It will further be submitted that the contamination of the high seas from radio-active fall-out with its consequent contamination of marine life amounts to an interference with that right of fishing which Australia possesses whether exercised or not.

I will not deal in any greater detail with the questions of admissibility. The Solicitor-General's address will deal with this aspect of the case at some length.

Coming as I now do towards the close of my speech, the Court will not be surprised if I emphasize the great importance which the Government of Australia attaches to the present case. I do not need to stress the fact that any episode which introduces strain into the amicable relations of long standing which exist between Australia and France is a matter for regret. Our common interests are great and it is to be hoped that their advancement will not for any significant period be adversely affected by the present dispute or these proceedings. At the same time it must be recognized that these are proceedings to which there was no alternative once the French Government had declined, as it did in the early months of 1973, to terminate atmospheric nuclear testing.

Over the last 20 years there has been a fundamental change in world attitudes to nuclear testing. There has been a growing realization of the dangers of unrestrained development and possession of nuclear weapons and there has been too a marked advance in the understanding of the hazards associated with activities involving ionizing radiation. Attitudes of acquiescence and tolerance which may have been acceptable two decades ago cannot today form part of the approach of any politically mature and aware State. And all this had led very directly to the display of concern shown by the Australian Government and its people for the protection of their well-being or, to put it in legal terms, for the protection of Australia's exclusive sovereign rights over her territory and her shared rights in the use and resources of the oceans as well as the fulfilment of her obligations as a member of the international community. If any explanations of the motivation of the Australian Government in bringing these proceedings

could be called for, these words I have just spoken will I hope suffice to indicate some of the principal considerations in our minds.

I may also recall the resolution adopted by the Institut de droit international in 1959 that recourse to the International Court of Justice can never be regarded as an unfriendly act towards the respondent State. But now that this action has been commenced—and that for reasons, as I must reiterate, of cogent concern and impelling conviction—there are placed before this Court legal issues of great moment. When the Australian Government supports its invocation of the General Act as a basis for the Court's jurisdiction in this case, the Court is confronted by a fundamental problem of the security and continuity of treaty obligations. If I may respectfully say so, it is difficult to see how the Court will be able to subscribe to the doctrines suggested in the French Note and Annex without acknowledging the role in international law of erosive forces of the most perilous portent. The same comment can equally be made regarding the suggestion in the French Annex that a reservation to a declaration made under Article 36 (2) of the Statute can override the obligations assumed under Article 36 (1) in the form of the General Act.

And when it comes to questions of admissibility, any denial of the legal interest of a State in the protection of its territorial sovereignty and the safeguarding of the welfare of its nationals would run counter to fundamental concepts of international law often reaffirmed in recent years in resolutions of the General Assembly and other international organs.

In saying this, it is true that I rely on well-established and traditional law. This does not weaken the force of the contentions—if anything, it makes them stronger. Yet, at the same time, it would be wrong to disregard the fact that alongside all this there exists the opportunity for the Court to proclaim in emphatic terms the directions in which major aspects of the law shall evolve. While my colleagues will develop the case for Australia in terms which, I suggest, reflect the certainties of existing law, it may be asked whether it is right that this case should be conceived of largely in terms of analogues with municipal law. Is the assertion of what, after all, are the general rights of humanity, of which Australia is a part, always to be thought of in terms such as receiving pecuniary compensation for immediately identifiable damage? Is there not room for recognition of the fact that the community to which we all belong has both an immediate and a long-term interest in the identification and prohibition of conduct which cumulatively, over a period of years, is harmful, not only to our generation but harmful to our children and our children's children, if any?

Mr. President, to suggest, as I have already said, that this case involves questions of a moral order far transcending the entitlement to fisheries, the transit rights of aircraft, access to continental shelves—to mention only some of the problems recently before the Court—is in no way to lessen the importance in terms of existing law of the arguments which will be put to you.

It is my earnest hope that my colleagues and I will succeed in our endeavours to assist you in reaching what my Government believes to be a fully justified legal conclusion that I now anticipate, in general terms, the submission which, in due course, will be more formally put to you: that this Court has jurisdiction in the present case and that the claim made by Australia is fully admissible.

I thank the Court for its patient and courteous hearing.

ARGUMENT OF PROFESSOR O'CONNELL

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Professor O'CONNELL: Mr. President and Members of the Court. As my learned leader the Attorney-General has indicated, it is my task, and a task which I am honoured to be asked to undertake, to assist the Court in its deliberations upon the General Act for Pacific Settlement of International Disputes of 26 September 1928, as a basis for the Court's jurisdiction in this case.

The Attorney-General has shown that the General Act is a treaty which came into force between Australia and France and had not, as at the date of the commencement of these proceedings, ceased to be in force between them as a result of either party utilizing the termination procedure laid down in that instrument. These facts being established, nothing more really needs to be said by the Applicant in this case. The normal procedure would be for the respondent State, if it wished to show that the General Act has ceased to be in force between these two Parties, to adduce sufficient reasons for so concluding; reasons of law coupled with facts relevant to the operation of the law.

The burden of proof would obviously rest upon the party making such an allegation, since the Applicant, having shown that the General Act came into force between the Parties, and has not been terminated *inter se* by virtue of the utilization of its machinery, would be entitled to rely upon the presumption that the treaty remains in force between the Parties—a presumption enshrined in the most primordial of all the rubrics of treaty law, *pacta sunt servanda*.

Although it is true, as envisaged in Article 53 of the Court's Statute, that this is a case in which one of the Parties does not appear before the Court, France has not failed to defend its case, however weakly or irregularly. It has sought the best of all possible worlds by relying on the Court's duty under Article 53 to satisfy itself that Australia's case is well founded while, at the same time, dropping in the post, as it were, a list of the points which it might have made had it set out to meet the burden of proof in the hope that these will be taken up by the Court as reasons for finding that the case is ill founded.

So, Mr. President, we are confronted with the situation where the Party upon whom the burden of proof obviously rests fails to appear but nonetheless advances the contention, irregularly and fleetingly made, that the Court lacks even the competence to go into the question because the General Act is a chimera, haunting only the debris of the history of international law—an extraordinary contention indeed, to make to a court invested with the jurisdiction to determine its own jurisdiction, and an extraordinary way of going about it.

What attitude is the applicant State going to take towards this oblique defence put up by the Respondent? In strict law I submit that the proper attitude would be to insist upon the presumption I have above referred to and upon the duty of the Respondent, if it is to disturb that presumption, of coming along to the Court and proving what it sets out to establish.

But such an attitude, authentic though it be, would perhaps not do much to assist the Court, and it is because of my duty as counsel before the Court that I propose to show how insubstantial is the Respondent's case, reminding the Court at every point of the argument that what I am saying is not by way of rebuttal of arguments of the Party upon whom the burden of proof rests, and is

undischarged. That Party's arguments have not been treated in any relevant way.

So, I turn to the fundamental question: how can it be said that the General Act, which for so long undoubtedly possessed the vitality of a treaty, has now become evanescent; a spectre enjoying only literary immortality? The French case is put in generalities and it requires some clarification. If one isolated the apparent elements of it, it would seem to be reducible to four propositions:

1. the General Act was intended by its promoters to last only so long as the League of Nations lasted;
2. the General Act, if not so intended, nonetheless could have lasted only so long as the League of Nations lasted because its machinery altogether broke down with the demise of the League;
3. the General Act, even if its machinery remained workable after the demise of the League, has, in the course of time,—to pursue a mechanical metaphor—seized-up, because the parties have intended to forget about it and never again to use it—the word "desuetude" is used;
4. the General Act is a total anachronism, relegated to an ideological rubbish dump along with other bric-a-brac of the 1920s and hence unworthy to establish the jurisdiction of the Court.

What the Government of France is really asking this Court to do is to find that contemporary international law has rules whereby treaties can wane to the point of extinction without any formal indications of termination. It would be anomalous, indeed, if one were to examine this contention without reference to the Vienna Convention on the Law of Treaties. As this Court said in the *Namibia* case:

> "The rules laid down by the Vienna Convention... concerning the termination of a treaty relationship on account of breach... may in many respects be considered as a codification of existing customary law on the subject." (*I.C.J. Reports 1971*, p. 47.)

The Vienna Convention, to which Australia is a party and France is not, may not be in itself a treaty commitment between the Parties, and even if it were it would not, of itself, technically resolve the case of the General Act. But it is evident from the *travaux préparatoires* that the intention behind the draftsmanship of Part V of the Vienna Convention was to tighten up the rules for termination of treaties so that escape from any treaty would only be possible by orderly and clearly defined means. The presumption of the validity and continuance in force of treaties underlies this whole Part and is, indeed, expressed in Article 42.

If one thing is abundantly clear about this draftsmanship it is that an intention to determine or withdraw from a treaty must be expressed in objective and appropriate measures, and cannot be effective if only cossetted in the secret labyrinths of any particular foreign ministry. Evident too is the intention to insist upon good faith and proper observance.

So that, even if the Vienna Convention is not, in the strictly technical sense, the governing text in this case, nonetheless it enshrines, I submit, the current *opinio juris* on treaty termination, and it is inconceivable that the rules for treaty termination could now become elastic when the clear intention of the community of nations is that they should be taut. This Court has, in fact, endorsed this in the *Fisheries Jurisdiction* case when it refused to go outside the Vienna rules on change of circumstances as a ground of termination. I refer to *I.C.J. Reports 1973* at pages 16 ff. Nothing in the Vienna Convention allows for the notion that any treaty can just be shunted away on to a siding and left derelict,

and that it should become inoperative simply because people have forgotten that it is there.

Against this essential background of fairly rigid and well-established law, Mr. President, I turn now to examine in turn these four French reasons for supposing that the General Act has lost its validity.

My first major submission in answer to the first of these four reasons I state as follows. Firstly, the intentions of the parties to the General Act and the drafting history show the mutual independence of the General Act and the Covenant of the League of Nations.

The first French argument I have identified, it will be recalled, is that the parties in 1928, when they adopted the text of the General Act, intended that it should not outlive the League of Nations. The history of the matter belies this view. The British delegate in the First Committee at the time of the drafting of the General Act, Sir Cecil Hurst, in fact criticized the suggestion that it should be an integral part of the structure of the League on the ground that it was intended to provide for peaceful settlement on a global basis, whereas the League was not accepted, he said, by a good many States. (*Records of the Ninth Ordinary Session of the Assembly*, Minutes of the First Committee, p. 68.)

The Rapporteur, Mr. Politis, reassured delegates that the authors of the General Act did not have any intention of considering the General Act as a constitutional document, a sort of annex to the Covenant. He said that "its adoption would simply signify that the League of Nations would think well of any States which, being willing to accept collective engagements, should adhere to the Act" (p. 69 of the Minutes of the First Committee).

Mr. Rolin, who was the Belgian delegate, quieting the fears of Sir Cecil Hurst, pointed out that arbitration and conciliation had a much longer history than the League, and were not procedures peculiar to it. They were, he said, "concurrent with, but not competing against, the League of Nations, for they aimed at the same objects". As to the jurisdiction of the Permanent Court contained in Article 17 of the General Act, he, Mr. Rolin, pointed out that that Court was only in a partial sense an organ of the League of Nations, open to States not members of the League, and the same was true of arbitration. He said, and this is most significant for the present case:

> "The intervention of the Council of the League was not implied as a matter of necessity in the General Act: the latter had been regarded as being of use in connection with the general work of the League, but it had no constitutional or administrative relation with it. No constitutional or administrative relation with it." (Minutes of the First Committee, p. 71.)

The resolution adopted by the Assembly of the League opening the General Act for accession in fact declared that the undertakings in the General Act were not to be held to restrict the duty of the League to take at any time whatever action was necessary to safeguard peace. This was the resolution adopted on 26 September 1928, which is set forth in the *Records of the Ninth Ordinary Session of the Assembly*, Nineteenth Meeting, at page 182. To put beyond any doubt whatever this rather obvious preservation of the over-riding but distinct competence of the Council of the League, some parties in fact made a reservation on the point in their acceptances of the General Act, Australia and France among them.

The intention to open the General Act to adherence on the part of non-members of the League, given expression in the draftsmanship of Article 43, also makes it clear that the General Act was not integrated in the League, but was a parallel device. The final sentence of Article 17 was added in preference

to that which was found in the equivalent provisions in the Locarno treaties, which referred to Article 13 of the Covenent; and additional changes were made in the drafting of the General Act to take account of the possibility that parties thereto might not be members of the League.

All this, Mr. President, makes it abundantly plain that the intention of the draftsmen of the General Act was that it should be independent of the League, although, obviously, taking advantage of the League's organizational concern with pacific settlement. It could not, therefore, have lapsed in 1946 merely because, in its inception, it was promoted within the organs of the League. On the contrary, since it had as its purpose to create obligations which were over and above the obligations of Members of the League and to extend the machinery of pacific settlement to States which stayed outside the League, there is sufficient reason why it did not lapse.

No more striking affirmation of the mutual independence of the General Act and the Covenant of the League of Nations exists than the history of France's own adherence to the General Act. When the question of France's ratification of the General Act was referred to the French Parliament the latter's Commission des Affaires étrangères made a most detailed and thorough examination of the General Act in the context of the whole history of postwar efforts of pacific settlement. I believe a copy of this has been deposited with the Registrar.

Article 36 of the Statute of the Permanent Court was discussed, as also the Geneva Protocol of 1924. The General Act was described as the culmination of the movement towards pacific settlement.

> "L'adhésion à l'acte général est la chose essentielle, parce qu'elle constitue l'affirmation intégrale d'une politique pacifique sans arrière-pensée." (*Journal officiel, doc. parl., Chambre*, 1930, p. 194.)

And always the contrast is made between the General Act and the Covenant of the League: for example, the Report says:

> "Alors que, dans le système conçu par les fondateurs de la Société des Nations, l'action du conseil, telle qu'elle est prévue par l'article 15, constitue un mode normal de règlement des différends au même titre que la procédure d'arbitrage, l'acte général, au contraire, ignore complètement le conseil de la Société des Nations." (*Journal officiel, doc. parl., Chambre*, 1929, p. 407.)

The General Act was no more connected with the League of Nations because it was promoted within it than a host of other treaties, which are referred to in Annex IV and paragraph 113 of the Australian Memorial, and which did not lapse in 1946. The General Act could only have been brought down then if a large part of the structure of international treaty relationships collapsed with the demise of the League. Yet, manifestly, this did not occur.

I now turn, Mr. President, to my second major submission, which is that the demise of the machinery of the League of Nations used by the General Act had no effect upon the vitality of the General Act.

So, Mr. President, we are led to the second of the arguments that the General Act has lapsed, namely that it has broken down because it has been deprived of the operational devices of the League of Nations.

The question here is not whether the General Act was so organizationally integrated in the League as to have been coincidental in time therewith, but whether the use made in the General Act of the machinery of the League rendered its existence intrinsically dependent upon the continuing availability of that machinery.

Now, of course, the machinery which the General Act made use of disappeared in 1946, and certainly in some ways the operation of the General Act was impaired. Otherwise no one would have thought it worthwhile to promote the revision of the General Act in 1949. But until France alleged in this case that the General Act failed because of its references to the League of Nations, no one had scrutinized closely what the exact effect might have been of the withdrawal of the machinery of the League upon procedures for peaceful settlement which a party to the General Act might be contemplating using.

Mr. President, it is not sufficient for judicial purposes to deal with this question of machinery in generalities or to be content with mere suppositions. One must get down to it article by article and ask oneself the question, has the General Act become unworkable so far as procedure such-and-such is concerned, because a party can no longer invoke certain modalities? Even if the answer were that some procedures had become unworkable, that would still not be the end of the matter because the primary aims of the General Act might still be found capable of achievement. But the fact is that the failure of the League machinery is not significant.

Here, Mr. President, I must confess to finding myself surprised that I am almost the only writer to have even drawn attention to the fact that a question might be raised respecting the status of the General Act, by which I meant the continuing availability to parties of all of the procedures which it embodies. Practically every other writer—and in the Australian Memorial 16 writers are cited to this effect, including five leading French authorities and all of the authors of specialized works on arbitration and peaceful settlement—without question either states or assumes that the General Act functions.

When one examines closely the Articles of the General Act which make reference to the League of Nations one finds that the questions raised as to the effective functioning of the treaty by reason of the disappearance of the League are not substantial. The fact is that the references to the machinery of the League of Nations turn out on investigation to be either highly ancillary provisions, or alternatives to other procedures, or that other alternatives have become readily available. Let us look briefly at these references.

May I mention that for convenience copies of the English and French texts of the General Act have been lodged with the Registrar, and I invite Members of the Court to follow me through the relevant Articles.

May I invite Members of the Court to turn first of all to Article 6 of the General Act. This concerns machinery for the parties to request the Acting President of the Council of the League to choose conciliation commissioners. This is only an alternative to other ways of selecting them, and the Article indeed provides for the very case where the parties cannot make this request. There are, in fact, altogether five methods of appointment of conciliators, of which the method involving the League is but one. Obviously neither the obligation of conciliation nor the procedures affected by it are affected merely because this one possible avenue of appointment of conciliators has ceased to be available.

Then if we may turn to Article 9, we find this providing that the conciliation commission shall meet at the seat of the League, or at a place chosen by the President of the Commission. Obviously the fact that there is no longer a seat of the League is immaterial to the setting up of a conciliation commission, since it is for its President to choose the seat. The Commission could also, under Article 9, seek the assistance of the League. It was not required to do so, and it can still function without any disability in the absence of facilities it might have sought from the League.

In the Australian Memorial it is pointed out that the three parts of the General Act are really autonomous, and that the above two Articles are the only ones in Chapter I referring to the League, and that there are no references to the League in Chapter 2, which is the Chapter relied upon in this case. The problem raised by the disappearance of the Permanent Court is the only one in this Chapter, and it is resolved for States parties to the Statute of this Court by Article 37 thereof.

So much then for the connection between the General Act and the League in the first two parts. What of the third Chapter, which deals with arbitration? Article 23, paragraph 3, makes reference to the Permanent Court in connection with the appointment of members of the Arbitral Tribunal, but this is a matter of last recourse. First, the parties to a dispute must fail to agree upon the composition of the Arbitral Tribunal in the manner envisaged in Article 22. Then they must fail to agree on the nomination of a third Power—an umpire in effect—to make the necessary appointment. Then the different Powers designated by each party must fail to act in concert to appoint the members of the Arbitral Tribunal. Only in the relatively unlikely situation where all of these methods of appointment have failed does the Permanent Court enter into the matter at all.

Even then, I submit, would not the question of the officers of the Permanent Court acting in this way as umpires be a "matter" within the meaning of Article 37 of the Statute of this Court? The *travaux préparatoires* of Article 37 in fact reveal the intention that powers conferred upon the President of the Court would be a "matter" in this sense. I quote from the San Francisco drafting history:

> "The point was made with reference to Article 37 that certain existing agreements conferred powers upon the President of the Court, and it was thought that appropriate provision might be made in the Article. However, it was thought that the interpretation would be clear, and it was decided not to include this reference in the Article." (*Report of the Sub-Committee IV/1A on the Question of Continuity of the International Court and on Related Problems*, Doc. 477, IV/1/A/1, 22 May 1945.)

The Treaty of Conciliation, Compulsory Arbitration and Judicial Settlement between Romania and Switzerland of 1926 authorized the President of the Permanent Court to appoint members of a permanent conciliation commission in the event of the parties failing to agree. In 1948 the President of this Court acted under these provisions. I refer to the *Yearbook* of the Court, 1948-1949, page 40. In the work published in The Hague recently by Dr. de Waart called *The Element of Negotiation in the Pacific Settlement of Disputes between States*, 1973, which, incidentally, discussed the General Act at great length on the assumption that it is still in force, this action of the President is said to have been taken under Article 4 of the Treaty with Article 37 of the Court's Statute (p. 135).

If Article 37 covers the point, the difficulty raised by Article 23 of the General Act is non-existent. But even if this were not so, and even if, to this very limited extent the status of the General Act, in the sense of the modalities it uses to produce its full effect, might in some particular case, be impaired, the obligation to arbitrate would still remain. The existence of that obligation could, in fact, be in itself a question for this Court, as in the *Ambatielos* case; and I repeat that the problem only arises if one party to the General Act seeks to avoid fulfilling that obligation by exploiting the fact that one of the teeth with which the General Act was invested has been drawn. This would be bad faith, but bad faith is something which a Court may not presume. In the event of good faith the role of the President would be redundant.

The only other reference to the Permanent Court in this Part is Article 28, but this is only incorporation by reference to a text and does not presuppose the continued existence of the Permanent Court. Obviously, the General Act has not lapsed by reason only of a possible difficulty in compelling performance of the obligations its parties undertook.

So much, then, for Chapter 3. It is in Chapter 4 that most of the references to the League of Nations and the Permanent Court are to be found. So far as the latter is concerned—the references to the Permanent Court—they are to be found in Articles 30, 33, 34, 36 and 37. Article 30 requires a conciliation commission to suspend proceedings if the matter is already before the Permanent Court or an Arbitral Tribunal until the Court or the Tribunal has pronounced upon its competence. Obviously, if this Court is invested with jurisdiction pursuant to Article 37 of its Statute, the intention of Article 30 would be given effect to accordingly. The remaining Articles have their identical equivalent in the Statute of the present Court, so that, again, the effect of these Articles is covered by Article 37 of the Statute.

As to the references to the League of Nations in Chapter 4, these are all in the nature of final clauses. They concern only two categories of items for our purposes, namely the accession clause, which restricted entry to the General Act to Members of the League or to non-members to whom the Council of the League had communicated the text; and they concern the depositary functions of the Secretary-General. Neither of these could bring down the General Act without at the same time bringing down a host of other treaties which are, however, manifestly in force.

So it is, Mr. President, that I turn to these last two points, and you will pardon me if I lead the Court into a certain amount of intricacy respecting the fate of similar accession clauses on the one hand, and the transfer of the depositary functions of the Secretary-General of the League to the Secretary-General of the United Nations on the other.

There is nothing special about the General Act's accession clause. The General Act was one of 72 treaties in respect of which the Secretary-General of the League exercised depositary functions, many of them being treaties made under the auspices of the League. For the purpose of this enumeration, Mr. President, I have omitted amending protocols and ancillary instruments and my figure of 72 refers to principal treaties.

A large number of these 72 treaties contained accession clauses in much the same form as the accession clause in the General Act. There were differences but these do not matter since the point is that States wishing to accede must either be Members of the League or have participated in some requisite way in the League's promotion of the treaty.

No one has ever suggested that these treaties lapsed because the League of Nations expired. Many of them have been invoked or appear in lists of treaties in force or in respect of which the Secretary-General acts as depositary. A number of them have even been the subject of procedures in the United Nations to open them to wider participation.

I do not wish to try the Court's patience, Mr. President, by recalling the intricacies of these procedures but it is necessary to say something about the matter because of the fact that the General Act was not included in the group of treaties which the United Nations sought to open up and the question may be raised why this omission occurred. The answer is quite simple, but it does involve some little explanation.

Had it not been for the fact that the attention of the International Law Commission when it was considering the Law of Treaties had been alerted to the

problem of the exclusion of newly independent States from some quite important treaties of the League period, all of these treaties whose accession clauses had been closed by the termination of the League would have remained closed —although not, of course, inactive.

It was the question of deprivation of newly independent States in matters such as counterfeiting of currency that stimulated the International Law Commission to recommend to the General Assembly that the question of opening up some of these treaties should be investigated. The United Nations in its early days had done this in the cases of some very important League treaties by means of protocols and this is something I shall later have occasion to refer to. This procedure might have been used again or other methods of extending participation might be reviewed.

It was never intended that all closed treaties should be opened. For one thing the procedure finally adopted to open up these treaties, that is by General Assembly resolution, being a procedure which was open to the obvious criticism that it was an unusual way of amending an express accession clause, would only work politically for certain types of treaties. It was thus a question of selecting the treaties.

The subsequent history is set out in Annex 4 to the Australian Memorial. Originally 26 treaties were chosen for examination as being, and I quote from General Assembly resolution 1766 (XVII), "treaties of a technical and non-political character which would be suitable for extended participation".

Partly because of the exclusive aim of the treaties themselves, partly because it was thought that States would not be very interested in further participation, this list of 26 was whittled down to 21 and eventually to 9, which were the subject of resolution 2021 (XX) of the General Assembly in 1965 and in respect of which invitations were issued to non-parties with a view to extended participation.

All of the 26 treaties contained accession clauses similar to that of the General Act. At no time was it suggested that any of these treaties had ceased to be in force for that reason. The final selection of the 9 treaties for opening up was on the basis that they were suitable for wider participation. This meant, *inter alia*, political suitability; it did not imply that any treaty was no longer in force. The General Act was obviously not suitable for one very good reason: the United Nations now has its own Revised General Act in almost identical terms and to promote it rather than the 1928 Act was obviously the pertinent point.

Had this process of extended participation occurred before 1949 is it possible that the General Act would then have been regarded as suitable and have been included in the list? And if it had been, would there be any question today of its being in force? The General Act is not in limbo. It is in the same category as the other treaties not finally included in the list of 9 for extended participation.

So, Mr. President, when we examine the references to the League of Nations which appear in Part IV of the General Act, we find that United Nations practice has covered the points that arise: the depositary functions of the Secretary-General of the League were transferred under resolution 24 (1) of the General Assembly to the Secretary-General of the United Nations and the termination of the League had the effect, under some accession clauses, of making a large number of treaties closed treaties, only a few of which have been opened up, without affecting the treaties themselves. Of course, when I speak of closed treaties, I mean treaties which, under the original terms of eligibility, cannot acquire new parties other than those already entitled to accede. It may be that a State invited to accede to a League treaty at the time of its adoption would still be free to accede but the treaty would be closed to other accessionaries.

If the argument were correct that the General Act had been brought down because of the references it contains to the organs of the League, the General Act would not have been the only treaty to suffer this fate. Every clause it contains which refers to the League is paralleled in some other treaty or treaties, both multilateral and bilateral. A list of bilateral arbitration treaties of the same epoch as the General Act, and similar to it in most important respects, is given in paragraph 113 of the Australian Memorial, all of which contain some reference to the League along the lines of the references in the General Act.

Without going into too many details, I should like to draw the attention of the Court to the fact that one of those treaties in that list, the Danish-German Arbitration Convention of 1926 which was invoked in the *Peterson* case referred to in paragraph 115 of the Australian Memorial, made an appearance in the Special Agreement between Denmark and Germany referring the *North Sea Continental Shelf* case to this Court. The relevant paragraph reads:

> "Recalling the obligation laid down in Article 1 of the Danish-German Treaty of Conciliation and Arbitration of 2 June 1926 to submit to a procedure of conciliation or to judicial settlement all controversies which cannot be settled by diplomacy." (*I.C.J. Pleadings*, Vol. I, p. 6.)

And in the parallel Special Agreement in the same cases between Germany and the Netherlands there is an identical paragraph referring to "Article 1 of the German-Netherlands Treaty of Conciliation and Arbitration of 20 May 1926" (*ibid.*, p. 8).

Judge Jessup, at the end of his separate opinion in those cases, said:

> "Difficult as the problems are, it is fortunate that the three States which confront them are expressly committed to various methods of amicable settlement. They are aware of their right, under Article 60 of the Statute, to return to this Court for further guidance, or they may, if the need should arise, resort to the procedures of arbitration and conciliation set forth in the treaties of 1926 which are cited in the Special Agreements of 2 February 1967." (*I.C.J. Reports 1969*, p. 84.)

Is it conceivable that this Court would find that the General Act, alone of all this range of treaties—well over 100 in all which, in the aggregate, parallel the relevant features of the General Act—has lapsed? To pose the question, Mr. President, is to answer it. If the General Act could fall this could only be because the whole 100 or so treaties fell. Yet so catastrophic an undermining of the world's treaty system is, I submit, beyond contemplation.

The Court adjourned from 4.15 p.m. to 4.40 p.m.

Mr. President, I have shown, I submit, that the obligations of the General Act could be fulfilled notwithstanding the fact that certain ancillary features may have become inoperative by virtue of the disappearance of the League of Nations. But, even if one assumed that these features were vital to the performance of the relevant obligations, so that when they were rendered inoperative the obligations themselves became inoperative, it still would not follow that the whole of the General Act would have ceased to be in force.

The General Act, it will be recalled, did not envisage that the parties would necessarily be bound by all its parts, so that even on its own terms it reveals the intrinsic severability of its provisions. It was, in fact, never designed as a single instrument, but was an amalgam of three quite separate draft conventions on conciliation, arbitration and judicial settlement which were put together for

convenience at quite a late stage in the drafting. Under Article 38 parties might accept Chapter I only or Chapters I and II, or Chapters I, II and III, in each case together with the final clauses set out in Chapter IV and which were originally intended to be the final clauses of each of the three draft conventions. Just as it was intended that commitment to the General Act might be partial, so it was stated that withdrawal from it might be partial. I refer to Article 45. Whichever way a party to the General Act might elect to enter the General Act, it had to accept Chapter I. But having accepted Chapters I and II, it might, under Article 45, withdraw from Chapter I, leaving Chapter II only binding. If Chapter I were to fall to the ground rather than be denounced, this would still leave Chapter II in force.

Mr. Politis, explaining the draftsmanship of the denunciation clause of the General Act on behalf of the Liaison Sub-Committee which had been entrusted with the task of bringing together into one convention the three separate texts on conciliation, arbitration and judicial settlement which had been prepared, in fact endorsed this view in 1928. He said:

> "if a country which had committed itself to a certain extent by the Act dealing with the settlement of international controversies found in it later some objectionable feature—instead of being obliged at the end of the period to make a complete denunciation which would take it out of the Treaty—it was given the possibility of denouncing the Treaty only in part; that was to say, if it had accepted two chapters, it might denounce one chapter and remain bound in respect of the other... The theory of this General Act was exactly the same as that of the three Conventions. The first chapter corresponded to Convention C, the second to Convention B, the third to Convention A, and, finally, the fourth brought together the general provisions, in many instances identical, which had been repeated in each of the three Conventions." (*Records of 9th Ordinary Session of the Assembly, Minutes of 1st Committee*, 9th Meeting, 20 September 1928, pp. 59-60.)

Now, I have demonstrated that in Chapter II no mention is made of the League of Nations, and the references therein to the Permanent Court are now references to the present Court, while the references to the League in the final clauses of Chapter IV had no more effect upon the fate of the General Act than the comparable provisions of a large number of other treaties. It must surely follow, I submit, that Chapter II, under which this case is brought, at least has survived, which is all that the Government of Australia is obliged to prove.

It is difficult, in fact, to think of a treaty more obviously susceptible of treatment according to the rules of Article 44 of the Vienna Convention of the Law of Treaties. This says that where a ground for invalidating, terminating, withdrawing from or otherwise suspending the operation of a treaty relates solely to particular clauses that ground may be invoked only with respect to those clauses where first those clauses are separable from the remainder of the treaty with regard to their application and, secondly, that it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential part of the consent of the other party or parties to be bound by the treaty as a whole and continued performance of the remainder of the treaty would not be unjust. The termination of particular clauses, in this Article, might apply, for example, to the appointment of conciliation commissioners under the General Act. So the ground for termination would then be invoked only with respect to those clauses.

I shall not burden the Court with citations on the law relating to severability but they will be included in the transcript of what I say. Severability has long been an intrinsic element of treaty law. The Court will recall how it has operated in the case of the effect of war upon treaties, whereby only a few provisions of the Jay Treaty of 1794 have been upheld by the United States and Canadian courts as having survived the war of 1812.

[Lord McNair in his *Law of Treaties*, 1961, Chapter 28, urged that it be recognized as a general principle of treaty law. The Harvard Research on the Law of Treaties regarded it as such, 1935—*AJIL*, Vol. 29, No. 4, pp. 1134-1139. The Permanent Court expressed itself in regard to the interpretation of self-contained parts of treaties in the *Free Zones* case, *P.C.I.J., Series A/B, No. 46*, p. 140, and *The Wimbledon* case, *P.C.I.J., Series A, No. 1*, p. 24; and in this Court severability has been discussed by Judge Lauterpacht in the *Certain Norwegian Loans* case, *I.C.J. Reports 1957*, p. 9 at p. 56; and by Judge Jessup in the *South West Africa* cases, *I.C.J. Reports 1962*, p. 6 at p. 408; and by Judge Morelli in the *Barcelona Traction* case, *I.C.J. Reports 1969*, p. 5 at p. 95 and by the whole Court *passim* at p. 37.]

The International Law Commission, in its comment to what eventually became Article 44 of the Vienna Convention, summed the matter up in words that exactly fit the present contention:

> "Acceptance of the severed clauses must not have been so linked to acceptance of the other parts that, if the severed parts disappear, the basis of the consent of the parties to the treaty as a whole also disappears." (*Yearbook of the International Law Commission*, 1963, Vol. II, p. 212.)

In the General Act the link between Chapter II and the other two Chapters was essentially formal. The convenience of having conciliation, arbitration and judicial settlement brought under the one umbrella was the only consideration. Judicial settlement might well have remained a separate subject of treaty making, as was originally intended. If it had, the present contention of France that the obligations have lapsed because the League of Nations has disappeared could hardly have been advanced, simply because Chapter II makes no reference to the League, while the references to the League in the final clauses are no different from the references in a host of other League treaties which are very much alive.

Even from the point of view of the formal nature of the undertakings, Chapter II is obviously quite independent of Chapters I and III, just as it was originally intended it should be. It concerns itself with "disputes with regard to which the parties are in conflict as to their respective rights". It is concerned, then, with rights. Chapter I is concerned with conciliation respecting "disputes of every kind". There might, or might not, be rights involved. Chapter III refers to disputes "not of the kind referred to in Article 17". It therefore excludes any intrinsic connection between itself and Chapter II. One could only say that Chapters I and II were intrinsically linked if one could only proceed to judicial settlement after conciliation. But conciliation and judicial settlement deal with separate categories of disputes.

So, Mr. President, I conclude my submission on the point with a *quod erat demonstrandum*. The Government of Australia is required only to show that Article 17 is in force. France has tried to obscure this simple requirement by scorning the General Act as such. No fact, nor principle of law, I submit, can be advanced against the continuance in force of Article 17.

So much then for the point that the General Act is no more because of its references to the League of Nations. Close scrutiny of the matter demonstrates that the point is unsustainable and the difficulties, which may look real at a

superficial glance at the text of the General Act, evaporate and vanish when put to the test.

But before I leave the point altogether, the Court might like me to dispose of what can only be described as a "red herring", but which may be puzzling until explained. I refer to the list of treaties, of which he is depositary, which the Secretary-General of the United Nations publishes under the title of *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions*. That list is divided into two parts. Part I contains United Nations treaties and Part II contains League treaties. The General Act does not appear in Part II.

The casual reader of this publication, unaware of the way in which the Secretary-General draws up Part II, might well be pardoned for jumping to the conclusion that the General Act does not appear there because it is not in force. But no such supposition is warranted.

I shall not weary the Court with the tedious details of the matter, which are again set forth in section *(b)* of Part II of Annex 4 of the Australian Memorial, but the briefest statement of the relevant points may prove helpful.

The first edition of this publication, which then had a different title, appeared in 1949. It listed both the General Act and the Revised General Act. After that date, League treaties—of which it will be remembered there were 72 covered by General Assembly resolution 24—were no longer included, until the edition following the opening up of the nine treaties by the General Assembly in 1965.

But the Secretary-General did not in 1965 list all 72 treaties. He selected only 26. Why? Because these were the treaties in respect of which he had been called upon by a party to exercise his functions under resolution 24. Was that list complete? Obviously no, because in 1969 he added another treaty to it, the Railways Convention of 1923. And why did he do that? Because in that year Malawi claimed to have succeeded to it. This is a particularly significant treaty because not only had it been omitted from the Secretary-General's lists but it had also been deliberately excluded from the procedures of wider participation on the ground that it was of no further interest to States.

What is equally intriguing about the list of 26 treaties drawn up in 1965, which became 27 in 1969, is that it included several League treaties that were also excluded from wider participation on the ground of being of no further interest, but which had been denounced by individual parties and so had activated the Secretary-General's depositary machinery. But for these denunciations they would not have been in the list at all, and one might have been tempted to suppose because of this that they were not in force.

Now where does the General Act fit in with all of this? I repeat that in 1949 the Secretary-General listed it on the supposition that it had survived the demise of the League and was included in resolution 24. He did not list it subsequently because no States called upon him to exercise depositary functions concerning it. The nearest he came to doing so before this case began was in 1969 when Barbados wrote to him on the subject of State succession to treaties. Barbados had made a general declaration of succession pursuant to customary international law, with an undertaking to notify the Secretary-General of those treaties which, after legal examination, were considered by Barbados to have been succeeded to, or not succeeded to, by virtue of customary international law. Barbados wrote to say that after examination it did not regard itself as a party to the General Act. The Secretary-General accepted this notification and circulated it for information. Since it required no nominal alteration in the list of parties, such as would have been the case in the event of an accession, denunciation or declaration of succession, no formal depositary action on his part was

required, and so he did not put the General Act into his list as he did in the case of the Railways Convention.

But now the Secretary-General has received and circulated among Members of the United Nations and Switzerland, which is a party to the General Act but not a member of the United Nations, two denunciations of the General Act, one from France and one from the United Kingdom.

A Memorandum from the Secretary-General to the Government of Australia dated 12 June 1974 will be found among the list of documents submitted to the Court for the purpose of this hearing and is listed as No. 5[1]. In this Memorandum the Secretary-General discloses that he has now in fact exercised his depositary functions pursuant to resolution 24 in relation to the General Act—actually invoking that resolution—and that when he releases his issue of *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions* covering the period of 1974, he will now include the General Act. His action is a striking vindication of the arguments in paragraph 121 and following of the Australian Memorial and the annex thereto. If the question had never arisen in this case, a future reader of the Secretary-General's treaty list including the General Act would be pardoned for taking it for granted that the General Act continues valid, just as he now takes for granted the continuing validity of the Railways Convention, which, even more than the General Act, belongs to the era of steam trains and has even been officially treated as of no further interest.

Mr. President, I return from this diversion—important as it has been—to the primary point I wish to make, that the demise of the League did not undermine the global treaty situation.

The General Act was far from unique in its utilization of the machinery of the League of Nations. When the League was dissolved the whole system associated with it was not swept aside. Take the International Labour Organisation for example. It had arrangements linked with the League. Its Constitution was amended in 1946 to take into account nominal and substantive changes to eliminate references to and functions of the League, its organs and officials. No one thought that the ILO was in need of resuscitation.

Indeed, the fact that the obligations assumed under ILO Conventions before 1946 were unaffected is borne out by a United States reference of 21 May 1961 to Convention No. 53, which was said to be applicable to the Trust Territory of the Pacific Islands by virtue of the understanding contained in the ratification of 1938, and the wording used by the United States seems to be significant:

> "The inclusion of the above-quoted understanding in the United States instrument of ratification is regarded by my Government as fully meeting the requirements of Article 7, paragraph 1, of Convention No. 53 . . . paragraph 2, of the Constitution of the International Labor Organization as in force when the United States ratification was registered in 1938. No part of that understanding has been cancelled by any subsequent declaration as provided for in Article 7, paragraph 3, of Convention No. 53." (Whiteman, *Digest of International Law* (1963), Vol. 1, p. 831.)

I have already mentioned that some of the 72 League treaties to which I have referred were repaired by Protocols adopted by the General Assembly of the United Nations and adhered to by most parties, but not all, to the original treaties, covering drugs, traffic in persons, obscene publications and slavery. Let me take only one of these, drugs. The international system of narcotics

[1] See p. 553, *infra*,

control was closely tied in with the League system. For some six months before the relevant protocol was drafted, and after the demise of the League, that system continued in operation, including the Permanent Central Board established under the 1925 Opium Convention, whose members had been appointed under Article 19 of that treaty by the Council of the League of Nations.

While it is true that the power to make new appointments to the Board was transferred to the United Nations, the point remains that some juridical basis for the Board's functioning during this interim period, and afterwards in the case of non-parties to the Protocol, must exist other than the protocol itself. The United Nations own suggested explanation of the phenomenon is that the system continued in operation for the same reason that the obligations of the Mandatory Powers continued. I quote from the United Nations *Commentary on the Single Convention on Narcotic Drugs*, 1961, prepared by the Secretary-General in accordance with Economic and Social Council resolution of 3 August 1962:

> "The Legal Adviser of the Plenipotentiary Conference also pointed out that the authority of the International Narcotics Control Board to carry out in regard to non-parties to the Single Convention the functions of the Permanent Central Board and Drug Supervisory Body... could probably also be based on the reasons of the advisory opinion given by the International Court of Justice on the International Status of South West Africa." (*UN Sales No. E.73.XI.1*, p. 459.)

The Court will recall that it said in that case that it rejected the contention of South Africa that "the Mandate has lapsed, because the League has ceased to exist" (*I.C.J. Reports 1950*, p. 132).

The general conclusion is that obligations under international conventions concluded and developed in connection with the League of Nations system were not considered to have lapsed on the ground that the League had ceased to function.

In none of the international organizations connected with the League was the conclusion reached that there was a gap following the demise of the League. The Protocols in the cases of some of the treaties did not revive these treaties but repaired them. The point is the continuance of obligations, not of institutions as such, a point which is beyond any doubt since this Court in the *Namibia* case again held that the obligations of the Mandatory did not lapse with the League.

Finally, we have the authority of the French Cour de Cassation. In a case decided on 19 January 1948 concerning the exemption of refugees from payment of the *cautio judicatum solvi* under the Refugees Convention of 1933 which, incidentally, is not listed by the Secretary-General in the annual document I have referred to, the question was raised of the continuing validity of a certificate issued by the Refugees' Office after the termination of the League of Nations. The Cour de Cassation refused to disturb the decision of the Cour d'Appel de Paris on this contention, saying:

> "Attendu qu'interprétant ainsi la convention de Genève du 28 octobre 1933, il a, par là même, *nécessairement écarté l'allégation de sa caducité, alléguée par Ditte sous prétexte de la cessation du fonctionnement de la Société des Nations* et tous autres arguments invoqués par ce dernier" (*Clunet*, 1946, p. 48).

So, Mr. President, the point that the General Act came to an end with the machinery of the League of Nations which it utilized has, on analysis, I submit, nothing in it.

I now turn to the third major submission which I wish to make, that the General Act has not suffered from desuetude. In connection with the third of the points I have identified that France has made we have seen the Secretary-General including in his list treaties which could certainly be described as "out-of-date", and were, indeed, excluded from wider participation precisely on that ground. If they are still in force, why not the General Act which no one previously has said to be "out-of-date"?

Mr. President, I have sought to demonstrate that there is nothing in the argument that the General Act lapsed with the demise of the League either because that was the intention of the parties or because it was the result of the objective operation of the treaty clauses. Termination by intention or operation of the treaty being excluded, what other grounds of treaty termination known to international law exist?

At this point the Government of Australia finds itself in an unusual position, to say the least, by virtue of the peculiar way in which France has brought her contentions to the notice of the Court. Under the rules of law and the ordinary notions of judicial procedure, Australia, having established that a treaty came into force and did not manifestly terminate upon its face, would be entitled to rely upon the presumption of treaty continuity. It would then be on the opponent to establish that the treaty had ceased to be in force because of some other rule of law, whose existence and scope would have to be proved, as well as its application to the existing case.

But France has chosen to present its views in a way which disturbs this ordinary way of proceeding. As this Court said in its Judgment of 2 February 1973 in the *Fisheries Jurisdiction* case, this "is to be regretted" (*I.C.J. Reports 1973*, p. 7). There is no defence to the Australian case that the General Act came into force between Australia and France and did not lapse upon its own terms. There is no orderly shifting of the burden of proof. There is nothing but denigration of the General Act, delivered before the hearing even began, which aims to preclude the General Act's effect by cumulative opprobrium, in advance of the General Act's existence and presumed effectiveness being established.

In these circumstances the Government of Australia finds itself in the unusual position of feeling constrained to confront this denigration at all stages of the case instead of meeting in the proper way arguments advanced by the opponent by way of his defence. All that Australia is required to prove is that the matter is well founded, and this should not mean that one is required to go further than if France were present. In particular, Australia should not be required to prove that the General Act did not lapse by reason of operations of rules of law which France has neither identified precisely nor sufficiently proved, when the true position is that France is obliged to prove that it did lapse.

Even though there are no strict rules of evidence in this Court, the Government of Australia believes itself justified in taking its stand on the ordinary rules of the burden of proof. Australia has established that the General Act came into force between the parties and has not terminated by virtue of its own provisions. That, Mr. President, is the end of the matter from the point of view of strict law, and at this point I would be entitled to sit down and take it no further.

It is therefore only by way of assistance to the Court that the Government of Australia is prepared to discuss the implications of France's contention that the General Act has lapsed because it is out-of-date, and so I turn now to the third of the grounds I earlier identified for seeking to overturn the General Act, namely desuetude.

The unexampled vagueness of the French allegation on this point is no help to the Australian Government in its endeavour to reassure the Court that there

is nothing in the allegation which calls for proof on Australia's part. In the eighth paragraph to the French Note to the Court we find a reference to "la désuétude dans laquelle il est tombé depuis la disparition du système de la Société des Nations". Twice again the expression "désuétude" is mentioned, but that is the sum total of the French contention.

What does it amount to? A statement of fact that the General Act has fallen into desuetude and an inference of law that a treaty which has so fallen into desuetude is no longer in force.

As to the statement of fact two points would need to be established by France. First, that the General Act has been altogether inoperative and neglected since 1946 and since this alone would be insufficient, that, secondly, there was something about the General Act and the circumstances to show that this neglect was due to an intention to abandon it. In face of the occasions mentioned by my learned friend the Attorney-General when the General Act has been resorted to in judicial and other practice since 1946, and in face of the fact that it has been treated as in force since that date by a large number of jurists and appears in treaty lists issued by Governments as well as publicists and in the 1949 list issued by the Secretary-General, it is difficult to believe that France has established these points merely by loftily waving the General Act aside, as in effect, a "lot of old hat".

Let me just summarize this for the sake of convenience: the General Act since 1946 has been resorted to twice in proceedings before this Court, the *Certain Norwegian Loans* case and the *Temple of Preah Vihear* case; has been assumed to be in force in one treaty, the treaty of 1946 between France and Thailand; and in the drafting of two others, the European Convention for the Pacific Settlement of Disputes of 1957 and the Revised General Act; has been said to be in force by the French, Norwegian and Netherlands Foreign Ministers, the Governments of Denmark and Sweden and the United States State Department; has been included in official, semi-official and unofficial national treaty lists, has been treated as in force in at least one exchange of diplomatic correspondence—Norway and New Zealand; and has been assumed to be in force by 17 leading publicists. If statistics mean anything, this amounts to around 50 positive indications of varying value that the General Act remained in force after 1946.

And what are the negative indications? So far as we can find, there is not a single judicial, diplomatic or other governmental statement, and not a single categorical statement on the part of any jurist or expert.

All this is set out in the Australian Memorial, and I shall concentrate upon one or two points only that perhaps have special significance. Obviously the intentions of the draftsmen of the Revised General Act, of those associated with it, and of the parties to it, are of special importance. Mr. Nisot, the Belgian representative, who promoted the Revised General Act, said emphatically three times that the original General Act was still in force. The French representative, from the chair itself, said it was still in force. (*Australian Memorial*, paras. 142, 153, 154 and 155.)

Dr. Liang, at the time Director of the Division for the Development and Codification of International Law in the United Nations Secretariat, in the 1948 issue of his annual series of "Notes on Legal Questions Concerning the United Nations" in the *American Journal of International Law*, Volume 42, page 897, footnote 40, said "This General Act is now binding upon twenty-two States". In the following year's Notes he added:

"As explained by the Belgian representative in the Interim Committee,

> the consent of the parties to the Act was unnecessary, since the proposal of his government did not suppress or modify the General Act as established in 1928, but left it intact as regards the rights of the parties under the Act." (*AJIL*, Vol. 43, p. 706.)

And again I recall the Secretary-General in that same year 1949 listed both the General Act and the Revised General Act as treaties in respect of which he exercised depositary functions.

Five parties to the General Act have become parties to the Revised General Act: Belgium, Denmark, the Netherlands, Norway and Sweden. None of them has regarded the one as substituting for the other. On the contrary, four of them —Denmark, the Netherlands, Norway and Sweden—have stated that the General Act would continue to bind them in relation to the parties thereto which would not be parties to the Revised General Act. The Netherlands document is referred to in paragraph 239 of the Australian Memorial and a translation of the relevant passages in the other official documents has been lodged with the Registrar and appears as items 13, 14 and 15 in the list of documents supplied to this hearing.

As evidence of the view that the General Act survived the extinction of the League of Nations, few texts could be more important than the report relative to the creation of a permanent organization for the peaceful settlement of disputes between Members of the Council of Europe. This was presented to the Assembly of the Council of Europe on 22 November 1950 by Mr. Bastid on behalf of the Committee on Legal and Administrative Questions.

In dealing with the settlement of non-justiciable disputes the Committee suggested—

> "... that the Committee of Ministers be invited to consider the expediency of extending effectively to all the Members of the Council of Europe the principle of the mandatory procedure of conciliation set out in Article 8 of the Brussels Treaty, by maintaining the uniform adhesion of all Members to Chapters I and IV at least of the General Act" (*Consultative Assembly of the Council of Europe, Ord. Sess. 1950*, Doc. 149).

Does it seem likely that a Committee of which the Chairman was Sir David Maxwell-Fyfe, the former British chief prosecutor at Nuremberg, and which included Professor Rolin, would recommend that the implementation of obligations under the Brussels Treaty concluded in 1948 should be procured by adhesion to the terms of an obsolete treaty?

When the Report was debated in the Consultative Assembly on 24 November 1950, the same point was repeated by Mr. Bastid in his opening speech when he said:

> "In our view that result should be obtained by the uniform accession of our States to the General Act, or at any rate to its Chapter 1, which deals with conciliation, and to its Chapter 4, which contains general provisions." (*Council of Europe, Consultative Assembly*, Second Session, Reports, 27th Sitting, p. 1678.)

There was no dissent from what Mr. Bastid said; indeed no one else wished to speak in the debate and the draft recommendation was adopted by 92 votes in favour, none against and one abstention.

The Court need not be burdened by the details of the elaboration of the text of the European Convention on the Pacific Settlement of Disputes. But it is worth recalling a statement by Professor Rolin when replying in the debate on

the draft recommendation presented by the Committee on Legal and Administrative questions:

> "I think, too, that Mr. Lannung was a little pessimistic when he spoke about the Geneva General Act for the Pacific Settlement of International Disputes. Although this Act is somewhat different from ours it will not thereby lose any of its importance and indeed provides the only means of establishing links between our Members and third States..." (Council of Europe, Consultative Assembly, 7th Session (1st Part), *Official Report of Debates*, Vol. I, p. 314.)

France may not blow hot and blow cold as circumstances change. The Attorney-General has pointed out that of all countries she is the one most frequently on record since 1946 that the General Act is in force. We have in mind her conduct in the *Certain Norwegian Loans* case. We recall the reference to the General Act in her treaty with Thailand in November 1946, and the fact that three senior French diplomats, as members of the French-Siamese Commission of 1947, invoked the General Act, which would be incredible if they thought that their Government regarded it as dead.

There is the statement of the French Foreign Minister in 1964. And there is the consideration given by French jurists to the General Act. No other national group of international lawyers has given the General Act so much attention. And what do we find? The most eminent of them, Professors Rousseau, Bastid, Scelle and Reuter, obviously consider the General Act to have remained in force. Professor Reuter in fact says so in unqualified terms, and Madame Bastid, not only in her textbook, but also in her study of the Franco-Siamese Conciliation Commission writes as if the General Act was in force when the Commission met (in "La technique et les principes du droit public", *Etudes en l'honneur de Georges Scelle* (1950), Vol. 1, p. 9).

How, may I ask the Court, can it be said in face of this that France has, by launching her barrage against the General Act, discharged the burden of proof that the General Act is not in force because of desuetude? France attempted demolition by smoke-screen and has manifestly failed.

Leaving aside the facts; and turning to the law, as to the legal basis for the alleged lapse of the treaty we have not a scintilla of indication.

One French lawyer, Mr. Siorat, in 1962 in the *Annuaire français* at page 319, considered the General Act in a study of the effects of Article 37 of the Statute of the Court. This was before the *Barcelona Traction* decision of 1964, and what he said on the point was nullified by that decision. But he did, in relationship to the question of the Court's jurisdiction, advert to the arguments which might be made against it in respect of the original parties to the General Act who did not become parties to the Revised General Act. What he says is significant.

He raised two possible grounds for avoiding the General Act. The first would be "impossibilité d'exécution", for which it would be necessary to prove, he said, that the functions of the League of Nations had not devolved on the United Nations, and that the situation resulting from non-devolution would make the execution of the treaty "littéralement et réellement impossible", creating "une impossibilité totale, complète et permanente". I have already given ample reasons for concluding that the execution of the treaty does not involve a total, complete and permanent impossibility, and that not a single government has thought that it did.

The second ground he offers would be "désuétude mutuellement acceptée". He goes on to doubt the existence of a general principle according to which treaties can lapse merely because of effluxion of time and neglect. The consent

of the parties to abrogate the treaty must be established. The question is, has it been established? And the answer, I submit, can only be no.

Mr. President, at the risk of wearying the Court by restating the obvious, I shall return to basic principles. A treaty once in force, a legal situation once established, continues until terminated by a method known to law. The subjective wishes or intentions of the parties have nothing to do with it unless they amount to agreement to terminate the treaty. The problem, of course, is that such agreement can, on occasions, be tacit, and hence we need some guidelines laid down by the law as to when and how tacit consent can be indicated.

This is the context in which desuetude is to be placed. The law knows no category of treaty termination called desuetude or obsolescence. Mere out-of-dateness is not of itself a ground of termination. The fact that a treaty has been neglected because its terms are no longer consistent with circumstances may be relevant but as the International Law Commission said:

> "The Commission considered whether 'obsolescence' or 'desuetude' should be recognised as a distinct ground of termination of treaties. But, it concluded that, while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty." (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 237.)

This, indeed, was the point of view of the International Law Commission as early as 1957 (*ibid.*, 1957, Vol. II, p. 48).

In face of some 50 positive indications that the General Act is in force against none that it is not, how could it possibly be said that the consent of the parties thereto to abandon it is to be implied from their conduct in relation to the treaty?

The record makes it clear that contrary to what has sometimes been supposed, the General Act has not been altogether overlooked since 1946. Let me refer for a moment to a statement made by Mr. Rolin in 1959. The same Mr. Rolin who, remember, in 1950 had said the General Act was still in force. In 1959 he made this statement—a premature statement let me add, considering the subsequent record—that "il règne au sujet de l'Acte général un climat d'indifférence ou d'oubli qui fait douter de son maintien en vigueur". One would still be led to agree at least with his conclusion, when referring to adhesions to the General Act, that "elles semblent donc toutes en vigueur. Mais qui s'en souvient dans les chancelleries?" And I quote from "L'arbitrage obligatoire: une panacée illusoire", *Varia Juris Gentium*, 1959, page 260. Now Mr. Rolin was wrong in thinking that the General Act had been forgotten in all chancelleries but, even so, mere inactivity is not an indication of consent to abandon a treaty and if it were there would be precious few treaties left.

The fact is that between 1931, when the General Act came into force, and 1946 it was totally neglected. Whatever stirrings of life have occurred in it, have in fact occurred since 1946. No one would accept for a moment that it expired in 1938 or 1941 or 1945 because of inactivity. If it did not expire in 1946, and that is abundantly evident from what I and my learned friend the Attorney-General have said, when did it expire? When did the cumulative effect of neglect finally and definitely operate? To pose the question is to meet French ridicule of the General Act with equal ridicule.

If inactivity were the test, 21 of the 22 bilateral arbitration treaties of the League period listed in paragraph 113 of the Australian Memorial, which their

parties no doubt believe to be still in force, would have fallen by the wayside, not to speak of a host of venerable treaties upon whom ridicule could be more effectively turned. The United Kingdom has just celebrated the sixth centenary of a treaty with Portugal which requires her to provide bowmen for Portugal's defence, and in Latin moreover. The former colonies of the United Kingdom have exchanged notes with Sweden succeeding to a commercial treaty between Cromwell and Queen Christina under one article of which the parties are forbidden to supply halberts, petarts, granadoes, musket-rests and other baroque forms of munitions to each other's enemies. The last time that treaty was held judicially to be in force was in the English Prize Court during the Crimean War. Yet the parties, including Sweden, continue to treat it as in force. It was even mentioned as being in force before this very Court in the *Ambatielos* case (*I.C.J. Reports 1953*, p. 21) and again in the arbitration that followed it (*International Law Reports*, Vol. 23, p. 306 at pp. 312, 321 and 322).

The Court, too, will recall the remoteness of the treaties invoked in the *Right of Passage* case (*I.C.J. Reports 1960*, p. 37).

Silence, inactivity, venerability—all these are the familiar fate of many, indeed, one might argue, most treaties. To say the treaties wane and are extinguished thereby would be a most dangerous legal innovation and for this reason the suggestion has always been resisted. In effect, the French cry of desuetude, if heeded, would prove to be a demolition charge which could not fail to bring down a great part of the world's treaty system.

Even more to the point, would one expect the General Act to be a dynamic instrument? Its terms do not envisage daily and routine implementation but rather the exceptional and rare situation where a dispute needs to be settled. It is not a visa abolition agreement or a customs treaty. It aims at the situation where routine methods fail, and it presumes they will not fail. If no one ever resorted to a treaty of pacific settlement the explanation might well be that this is because disputes never reach that point and if this is so it testifies to a happy state of affairs rather than to disparagement of the treaty.

Wherein is the General Act in this respect exceptional? The fact that its conciliation procedures have never been invoked means nothing. The procedures for a commission of enquiry under The Hague Conventions of 1899 and 1907 were not utilized between 1916, the *Tubantia* case (Scott, *Hague Court Reports*, 2nd ser. 1932, p. 211) and the *Red Crusader* case in 1962 (*International Law Reports*, Vol. 35, p. 485). The Bryan Treaties have never been used. Students of the law of war have wondered whether The Hague Conventions of 1907 on contact mines and naval bombardments are still alive, considering the technological changes that have occurred in naval operations. It may well be that the Convention on mining does not literally apply to the modern acoustic mine but in the Viet-Nam war this was not beyond question. In the *British Year Book of International Law* for 1970 at pages 67 and 68 I have shown how the convention on naval bombardment could still be effective and indeed made doubly effective by reason of these technological changes. The intention to abandon these treaties is still questionable.

Dahm, in his *Völkerrecht*, Volume 3, page 168, sums up the law on the point of desuetude conveniently. He says:

> "The renunciation brings the right renounced to an end, but it is not to be presumed that this is the intention. In the case of a dispute over rights, the party which seeks to rely thereon must prove their existence. Mere non-usage of the rights alone does not mean a renunciation thereof. In so far as there is renunciation, it must be strictly interpreted."

Let me emphasize Dahm's last sentence. He says that if a treaty is to be renounced the intention to do so must be strictly interpreted. This draws attention to the fact that desuetude must be approached from the point of view of treaty interpretation. France seems to be asserting that the Court cannot even consider the intentions of the parties to bring the General Act to an end, merely because it alleges that the Court's jurisdiction is altogether eliminated upon the contention that the General Act is at an end. The basic rule that a party cannot in this fashion divest the Court of jurisdiction upon mere allegation was affirmed by this Court in the *ICAO* case, *I.C.J. Reports 1972*, at page 64. When dealing with India's contention that certain treaties had been suspended or were non-operative and therefore could not have been infringed, the Court said:

> "India has not of course claimed that, in consequence, such a matter can never be tested by any form of judicial recourse. This contention, if it were put forward, would be equivalent to saying that questions that prima facie may involve a given treaty, and if so would be within the scope of its jurisdictional clause, could be removed therefrom at a stroke by a unilateral declaration that the treaty was no longer operative. The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension,—whereas of course it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon. Such a result, destructive of the whole object of adjudicability, would be unacceptable."

That basic rule is embodied in fact in Article 41 of the General Act, to which I draw the Court's attention. It says that:

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

My submission is that that Article vests jurisdiction in this Court to decide if the General Act is applicable and whether the interpretation of the parties' attitudes towards it yields the conclusion that the General Act is not applicable. And this jurisdiction exists, as the *ICAO* case makes clear, even if the Court was to find that a treaty creating it is dead. That decision obviously cannot be pre-empted by mere allegation.

Not a single jurist has treated desuetude as a separate ground of treaty interpretation and if Pandora's box is to remain firmly shut it is desirable to probe into what elements of law underlie the French allegation that the General Act has lapsed because of desuetude. The very vagueness of the allegation makes it difficult to grapple with since the jurists who have discussed the implications of out-of-dateness have themselves been puzzled as to how to relate this to any objective rule of law.

Let us concede that France intends to go further and say that mere inactivity and neglect are only elements in the total situation bringing about the evaporation of the General Act. France would say that this inactivity and neglect —which, it must be recalled, is not substantiated in fact—is a symptom of the parties' intentions to treat the General Act as at an end because it was ideologically as well as technically connected with the League of Nations era.

But what are France's own views on how treaties can lapse? I have referred to the detailed and extensive study made by the French Parliament of the General Act in 1929 and 1930. One of the questions then considered was whether ratification of the General Act, which was then the up-to-date instrument, meant the supersession of other treaties on pacific settlement to which France was a party—if you like the out-of-date instruments. The Commission des Affaires étrangères said in this connection "les conventions intervenues avec nous ne deviendront caduques que du consentement des deux contractants" (*Journal officiel*, doc. parl., Chambre, 1929, p. 407). This doctrine excludes desuetude. And in passing it may be observed that the French Parliament, having gone to such lengths to bring France into the General Act, it is strange that one could now suppose that France could be withdrawn therefrom without the Parliament even being aware of this.

And this leads me, Mr. President, to my fourth general submission which is that the General Act has not lapsed for reasons of ideological changes, which deals with the fourth ground for attacking the General Act's existence advanced by France. What does it amount to in law?

In so far as the argument involves the references made in the General Act to the League of Nations, it is only an aspect of the point which I have already disposed of, that the General Act failed in 1946 because its machinery "seized up" as a direct consequence of the demise of the League. In so far as it involves notions of obsolescence by virtue of the effort to identify the General Act with a particular *Weltanschauung*, so to speak, it can only rely on the doctrine of *rebus sic stantibus*.

Lord McNair recognized this with his usual clarity. In his *The Law of Treaties* (1961), page 518, he separated the categories of "desuetude" and "obsolescence". Desuetude he treated in the context of mere effluxion of time and inactivity, and he rejected it as a separate ground of treaty termination. Obsolescence he treated under the heading of "Other Changes in Circumstances". It is clear that he believes that if any ground arises for termination of a treaty from the antiquated commitments made therein, it must be justified, if justified at all, upon the generic principle of *rebus sic stantibus*.

The Special Rapporteur on the Law of Treaties in the International Law Commission in 1957 was of the same view. He said that he did not believe that there is any objective principle of law terminating treaties as such on the mere ground of age, obsolescence or desuetude, and that where the doctrine of *rebus sic stantibus* is invoked, it is the alleged change of circumstances and not age or desuetude that forms the ground for the claim that the treaty is at an end. (*Yearbook of the International Law Commission*, 1957, Vol. II, p. 48.)

It would, of course, be impertinent of me to point out to the Court the dangers involved in the French effort to entice it up the path of *rebus sic stantibus* where hitherto angels have feared to tread. Members of the Court have from time to time in other contexts uttered their own warnings. You yourself, Mr. President, have pointed out that "events of the not too remote past offer most striking illustrations" of the abuse of law under this pretext, and how "they have brought the very notion of the clause *rebus sic stantibus* into disrepute" ("Reflections upon the Report of the International Law Commission on the Law of Treaties" in *Recueil d'études de droit international en hommage à Paul Guggenheim*, at pp. 397-398).

The whole Court, in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1973*, p. 63) gave short shrift to "vital interests" as a basis for *rebus sic stantibus* and refused to budge beyond the very narrow theoretical scope afforded to the doctrine by Article 62 of the Vienna Convention, which requires two things: first, the

existence of circumstances which were an essential basis of the consent of the parties to be bound by the treaty, and, secondly, that the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.

The Court, if I may remind it, repeated this last condition and elaborated upon it saying:

> "The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken." (*I.C.J. Reports 1973*, p. 65.)

The vague French reference to "intégration idéologique" is akin to the invocation of "vital interests" on the part of Iceland. It simply does not accommodate itself to the strict requirements of Article 62 of the Vienna Convention and this Court's definition of the scope of *rebus sic stantibus*. And even if it did, the Australian Government points out in paragraph 187 of its Memorial that France's own conduct in invoking the General Act several times since 1946 is inconsistent with the principle of good faith underlying the terms of Article 45 of the Vienna Convention, which denies the benefits of *rebus sic stantibus* to a State which, being aware of the grounds for termination, nonetheless by reason of its conduct acquiesces in the maintenance in force of the treaty.

But even that would not be the end of the matter, for international lawyers have never regarded *rebus sic stantibus* as operating of its own supervening power to annul treaties. On the contrary, they have allowed it limited entry into treaty law on the sole basis that the party which seeks to invoke it notifies the other party that there has been a change of circumstances and requests it to agree to the termination. As the Special Rapporteur on the Law of Treaties put it to the International Law Commission, the doctrine "simply gives a party a right to invoke it, and to request the other for termination or revision in view of the changed circumstances . . . Termination is not automatic" (*Yearbook of the International Law Commission*, 1957, Vol. II, p. 59; 1963, Vol. II, p. 80).

The French Government, when it invoked *rebus sic stantibus* in the *Free Zones* case (*P.C.I.J., Series C, No. 58*, pp. 578-579) itself emphasized that the principle does not allow unilateral denunciation of a treaty which is claimed to be out of date. Oppenheim (*International Law*, 8th ed., 1955, p. 941); Genet (*Traité de diplomatie et de droit diplomatique*, 1932, Vol. 3, p. 471); Anzilotti (*Opere di Dionisio Anzilotti*, 1935, Vol. 1, p. 381) and Fauchille (*Traité de droit international public*, 1924, Vol. 1, pt. 3, p. 384) all subject *rebus sic stantibus* to this condition of diplomatic request, and the Court itself in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1973*, p. 21) pointed out that the United Kingdom had contended that the doctrine never operates so as to extinguish a treaty automatically or to allow an unchallengeable unilateral denunciation by one party. But it only operates to confer a right to call for termination and, if that call is disputed, to submit the dispute to some organ or body with power to determine whether the conditions for the operation of the doctrine are present. It then went on to describe the condition of diplomatic request as "the procedural complement to the doctrine of changed circumstances" *(ibid.)*.

What evidence is there of any party to the General Act, let alone France, taking even the first diplomatic step which would be necessary to bring the General Act to an end because the ideological milieu has changed.

Furthermore, the gravest doubts exist whether *rebus sic stantibus* applies at all to multilateral conventions, simply because the requisite diplomatic modalities are unavailable short of a conference of all the parties. And the doctrine is really only apposite in the case of treaties of unlimited duration, or at least, as

the Special Rapporteur on the Law of Treaties said, those not terminable except at a remote date, whereas the General Act may be denounced at five-yearly intervals.

A party which considered itself to be adversely affected by the General Act by reason of the demise of the League of Nations, or any other change in the logical circumstances, had the opportunity to withdraw from the General Act only three years later, namely 1949, and could have withdrawn therefrom in 1954, 1959, 1964, 1969 and can withdraw this year.

The most, or the worst, that can be said of the General Act is that some parties have regarded it with indifference. France would ask the Court to surmise that this indicates a conviction that the General Act is no longer in force. But the fate of the General Act is to be looked at objectively, in the light of the facts. Given the fact that it has been invoked positively on a number of occasions since 1945, and has appeared as a treaty in force in several treaty lists, some explanation would surely be necessary for the total failure of foreign ministries to take, *ex abundante cautela* at least, measures to protect their governments if they really believed that necessity or vital interests required the termination of the General Act. This failure may be the product of several things: indifference, unawareness or even negligence. It cannot lead of itself to an inference against the continued applicability of the General Act, and this Court, surely, cannot be asked to redeem the consequences of bureaucratic failure.

Mr. President, I have tried the Court's patience with this tedious reiteration of what is well known to every Member of it about the doctrine of *rebus sic stantibus*, but only to make crystal clear that the suggestion that the General Act is no more because it was the product of an *intégration idéologique* with the League of Nations is really so much legal nonsense. That marvellous French expression *intégration idéologique*, despite its self-inflating propensities, can be scrutinized from the point of view of law only as referring to *rebus sic stantibus*, a doctrine which France does not openly recall.

And what are we to make of the contention that treaties vanish because of ideological changes? Where does that astonishing proposition leave us? What treaty would remain sacrosanct? Let us note the treatment of the point in the *Textbook on International Law*, published by the Academy of Sciences of the Soviet Union, which reads:

> "This clause *(rebus sic stantibus)* is frequently interpreted extremely broadly by capitalist States, in the sense that any change in the international situation gives the right to annul a treaty. Such an interpretation has been used by aggressor countries to justify expansionist foreign policies. Only a fundamental, radical change in the international situation can constitute grounds for the application of the clause *rebus sic stantibus*. The unilateral, arbitrary dissolution of international treaties contradicts international law." (P. 281.)

So, Mr. President, I submit that the Government of Australia has established that the General Act came into force between France and Australia and has not ceased to be in force between them according to its terms. And, although the Government of Australia is not, I submit, required to prove the negative, it has demonstrated, by way of rebuttal of what France might have formally pleaded had she chosen to do so, that nothing has occurred extrinsically to sever that *vinculum juris*.

Neither the mechanical association of the General Act with the League, nor the change in political circumstances that came about with the United Nations, could have a lethal effect upon the General Act, alone of the vast range of

treaties which are either of the same character or of the same epoch or both. If it were otherwise, the rule of *pacta sunt servanda* would be a frail creature indeed, and there could be no security for any State which made a treaty terminable on a fixed date.

The Court rose at 6 p.m.

SEVENTH PUBLIC SITTING (5 VII 74, 10.05 a.m.)

Present: [See sitting of 4 VII 74.]

Professor O'CONNELL: Mr. President and Members of the Court. There remains only one point for me to deal with, namely the revision of the General Act that occurred in 1949, and it is appropriate that I should deal with it in the present context since it relates to the question of the out-of-dateness of the General Act, of which so much has had to be made.

When one looks at the specialist treatment of *rebus sic stantibus* in the literature one is struck by two facts. The first is that, at the most, only about ten instances are recorded in the whole of modern treaty history of the invocation of *rebus sic stantibus*, and in all of these the effort made was, to put it at its highest, half-hearted. A compilation will be found in the *Harvard Research on the Law of Treaties*, at pages 1113 to 1124, or in Rousseau's *Droit international public*, 1944, pages 581 to 615. The second is that upon each of these occasions the change in circumstances was made the ground for a diplomatic approach seeking revision of the treaty, not a declaration of its annulment.

Treaty revision and change of circumstances thus go hand in hand in international law, and it is significant that the specialist authors assemble the same eight or ten precedents under the one or the other head, depending upon whether they are writing about treaty revision or *rebus sic stantibus*. If the General Act is outmoded because of its references to the League of Nations—a characteristic it shares, it must be remembered, with about a hundred other treaties—the available solutions would be withdrawal under the termination clause, or revision.

The problem about a multilateral treaty is that revision has to be a multilateral proces, and we all recall the difficulties faced by the Permanent Court in the *Oscar Chinn* case when the revision was not unanimous (*P.C.I.J., Series A/B, No. 63*, p. 65). It was with this type of problem in mind that the draftsmen of the Covenant of the League incorporated in Article 19 machinery for revision of multilateral conventions through the organs of the League. Although that machinery was not used, the desirability of it remained in people's minds, and so it was only to be expected that when Belgium sought to revise the General Act in 1949 she should have attempted to do so through the United Nations. How else was it to be done? And the fact that it was done in this way certainly does not mean that governments thought that the General Act was no more. How could they have thought this, when the Permanent Court in the *Free Zones* case (*P.C.I.J., Series A/B, No. 46*, p. 140) had held the relevant treaties in that case to be in force, even if they were declared to be inconsistent with the present conditions, when they had held that Article 435 of the Treaty of Versailles, which said they were inconsistent with the present conditions, was incompetent to abrogate them because Switzerland was not a party to it?

Treaty revision is a standard procedure whereby defects in treaties are cured which result from changed circumstances. Whatever be the effects *inter se* the parties to a revision, the very notion of revision presupposes two things which are so well established within the framework of treaty revision as to be incontestable, namely that first, the revised treaty is not abrogated save as between the revising parties, if at all, and then only to the extent of the revision and, secondly, revision presupposes that the previous treaty is in force to be

revised, otherwise the process would be negotiation of a new treaty, and not treaty revision.

The proposal introduced in 1948 to revise the General Act followed a well-established pattern and must be interpreted against the background of well-established law and practice recorded, for example, by Tobin in his *The Termination of Multipartite Treaties* in 1933 or by Hoyt, *The Unanimity Rule in the Revision of Treaties* in 1959. Professor Scelle, for example, in his second report to the International Law Commission on Arbitral Procedure in 1951, did not think of the Revised General Act as substituting for a moribund instrument. He said that the General Act was "révigoré" by the Revised General Act (*Yearbook of the International Law Commission*, 1951, Vol. II, at p. 113).

Now it is true, of course, that the Revised General Act is a new treaty. But then so are all acts of treaty revision. The only point of interest at present is whether the promoters of the Revised General Act thought that they were plugging a gap in the treaty system left as a result of the effluxion into oblivion of the old General Act, or whether they were intending to go through the ordinary motions of revision.

One would have imagined from the fact that they entitled their instrument "*Revised* General Act" that they thought they were engaged in a repair, and not a substitution operation, and it comes as something of a surprise to find France suggesting that it was not intended to be a revision after all. Be that as it may, we can take the point seriously, and, although the views of the promoters of the Revised General Act upon the General Act would not be more conclusive than other views upon it, we can take up the challenge to show what they, the promoters, had in mind.

The details of what was said and done in 1949 are set forth in paragraphs 144 to 162 of the Memorial of the Australian Government, and I shall not weary the Court by further reiterating what can be read there. I shall content myself with drawing attention to the key indications of the promoters' intentions.

The General Assembly resolution which opened up the matter did not recite the lapse of the General Act. It said that its efficacy had been impaired. Of course some of its chapters had been impaired. The fact that they utilized the machinery of the League of Nations necessarily impaired them, and I have shown exactly how. The point is that neither the General Act as a whole, nor any part of it, especially Chapter II, had been fatally impaired. All of the purposes of the General Act could still be realized, and other machinery was provided for in almost every contingency.

It may be thought that this is playing down the extent to which the General Act was affected by the demise of the League, and that I am suggesting that the Revised General Act was superfluous. What I would point out is that the promoters of the Revised General Act had prominently in mind the demise of the Permanent Court and the effect of this upon Article 17 of the original General Act. We know that that effect had been negated in practice by Article 37 of the Statute of the present Court, even respecting latecomers to the Statute, so that there was really no problem. But we know this with hindsight. It took the decision in the *Barcelona Traction* case to put the point beyond any doubt, and even though Article 37 was adverted to at the time of the revision of the General Act, no one could have been sure that it would have the effect which we now know it does have. The fact is that Belgium did give prominence to the problem of Article 17.

If it were a question of revising the General Act today, one wonders if it would have been thought worth the effort, since the problem of Article 17 is now seen to be cured for all parties to the General Act who are parties to the

Statute of the Court, and the accession clause might be dealt with by procedures of more extended participation, leaving really only the procedures for appointing conciliators and arbitrators in the event of disagreement still in need of repair. Would this have warranted a new treaty? Well, the question is really political rather than legal.

To come back to the point, the General Assembly resolution went on to say that the parties to the General Act who did not also become parties to the Revised General Act would be able to invoke it "in so far as it might still be operative", that is, to the extent that the prescribed machinery, including that of Article 17 was still available, about which at that time there was legitimate reason for doubt.

Belgium, who sponsored the Revised General Act, in fact took the trouble to emphasize that it would "not affect the rights" of parties to the General Act, to the extent that it was still operative and in fact the representative of Belgium said categorically in the debate on the matter that:

> "*The General Act was still in force*, but its effectiveness was decreased owing to the disappearance of certain essential parts of the machine, i.e., the Secretary-General, the Council of the League, and the Permanent Court of International Justice." (Memorial, paras. 152-153.)

He, the representative of Belgium, even admitted that the repair operation could be carried out without delay by a protocol to the original instrument, which he described as "one of the most important collective treaties which existed up to the present in the field of the peaceful settlement of international disputes" *(ibid.)*. I point out that the past tense there, "existed up to", is in the past tense only because of the *oratio obliqua* transcription of the debate.

We note too with interest that the French representative was chairman of a committee which reported on the proposal and said that "the General Act is still in force". This, as the Memorial indicates, was a statement repeated over and again, and one from which there was no dissent whatever. (Memorial, para. 154.)

What more is there to be said? Everyone in 1949 accepted that the General Act and the Revised General Act would continue to run along parallel tracks. The Secretary-General of the United Nations assumed this because he listed them together as both in force. Dr. Liang said as much from his vantage point in the Secretariat. Belgium, which sponsored the Revised General Act, was listed in 1973 as a party to the General Act in a list of treaties edited by the Director of the Treaty Section of the Belgian Ministry of Foreign Affairs. When the Netherlands accepted the Revised General Act in 1971, the Netherlands Foreign Minister told the States-General that the General Act was still in force for the Netherlands and the same happened in the cases of Denmark, Norway and Sweden.

To go further, Mr. President, would be to labour a point that has now become only too obvious and I shall only remind the Court of my reply to the question put by Judge Dillard to the Australian Government at the previous hearing: why did Australia not enter the Revised General Act? To what I then said I would only add that the close scrutiny to which all matters connected with the General Act have been subjected makes it clear that the object was to have stable relations of peaceful settlement with a specific group of States and the General Act was fully effective and quite sufficient to this end.

I would ask the Court's leave to conclude by recalling that the issues raised by this case more fundamentally concern the law of treaties than perhaps any previous case, and that the central issue concerns *pacta sunt servanda*, which is a

principle to which France is devoted. Commenting on the Treaty of Rome in an address to the Gaullist party parliamentary group on 17 March 1974, Mr. Jobert, the then Minister of Foreign Affairs said, "The respecting of treaties is something fundamental".

I thank the Court for the honour it has done me in hearing me in patience.

ARGUMENT OF MR. LAUTERPACHT

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. LAUTERPACHT: Mr. President and Members of the Court. Once again I have been given the opportunity to address the Court—an opportunity which, as always, is a source of pride and pleasure to me.

It falls to me to deal, in the first place, with the second ground on which the Government of Australia invokes the jurisdiction of the Court: the declaration which France made on 20 May 1966 relating to the Court's compulsory jurisdiction.

This declaration, which replaced one made on 10 July 1959, was terminated by France on 2 January 1974 with effect from that date. However, the position is well established in the jurisprudence of the Court that the moment at which to test the Court's competence in a case is that of the filing of the Application. The point is clearly stated in the *Nottebohm* case and I need not take the Court's time in arguing it further.

Thus the sole question in this part of the case is whether the present proceedings fall within the terms of the French declaration of May 1966. I shall submit that this question must be answered in the affirmative.

The Court is not unacquainted with the arguments which may be used in support of this submission. They were first developed by the Government of Australia in the course of the oral hearings in May 1973 and then again in the Australian Memorial filed in November 1973. Needless to say, I should prefer it if this argument could avoid going over ground already trodden. But in the absence of directions from the Court under Article 67 of the Rules of Procedure, I am not entitled to treat any point either as established or as requiring special argument. So I shall, within the intractable limits of the subject, seek to put the arguments to the Court as freshly as I can.

There appears to be only one principal issue in this part of the case. Is the final phrase in the third French reservation effective to exclude the case from the jurisdiction of the Court as established by the main operative part of the French declaration?

The reasons why this is the only issue are two in number: one is that no other issue has been raised by the French Government. The second is that there is no other issue to be raised.

On this latter point, it is clear beyond debate that the case falls within the positive operative part of the French declaration, being a dispute concerning facts or situations subsequent to the date of the declaration. The requirement of reciprocity obliges one, of course, to look at the Australian declaration also. However, there again the dispute is embraced within the positive operative part of that declaration and cannot conceivably fall within any of the Australian reservations.

So one is brought back to the third phrase of the French reservations—disputes concerning activities connected with national defence. This was invoked by the French Government in its Note and Annex addressed to the Court on 16 May 1973. The Government of Australia has already had occasion to dwell on the extra-procedural character of this communication. Nothing has happened to cause the Government of Australia to change its position in this regard. At this juncture however, when the duty of the Court is to judge for itself

whether it is competent to act even in the absence of the defendant, nothing is to be gained by pressing further an essentially procedural complaint. The invocation by France of its third reservation can be and will be squarely met on its merits.

To say this, however, Mr. President, does not involve any abandonment by the Government of Australia of the contention that, even treating the French Note and Annex of 16 May 1973 as a valid step in the proceedings, this pair of documents still fails adequately to show that the present dispute falls within the scope of the reservation relied upon by the Government of France.

However, before pursuing this point further, it may be helpful if in a few broad strokes I sketch the outlines of my argument regarding the French reservation.

It falls into two parts. The first assumes the validity of the reservation and, as just stated, develops the contention that the conditions for the operation of the reservation are not satisfied in this case.

The second part of the argument raises basic questions of principle which, though they have been discussed in previous cases before the Court, have never actually been the subject of decision by it. On the present occasion, however, a decision will be essential unless the Court either accepts the General Act as an effective jurisdictional link between the parties or accepts the first part of my argument regarding Article 36, paragraph 2, as just outlined. The submissions in the second part of my argument which raise these fundamental questions are these: first, I shall submit that the third French reservation, in the respect in which it is here invoked, is void and must be disregarded by the Court. Secondly, I shall submit that it is severable from the rest of the French declaration with the consequence that the remainder of the declaration can stand and serve as an effective base for the exercise of the Court's competence.

Now, with your leave, Mr. President, I shall develop the first part of my argument. This is to the effect that the conditions of the third French reservation are not satisfied.

The reservation, if I may read it again, excludes:

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

Of the three separate situations contemplated in this reservation only the third is mentioned in the French Note, that is to say, "disputes concerning activities connected with national defence". Since it is this alone of the three situations which has been expressly invoked, it is evident that the other situations have equally expressly not been invoked. If the Court were inclined to examine the possibility of attributing any present role to those other situations, it would surely—may I respectfully suggest—first indicate the nature of its interest to the Government of Australia and provide it with an opportunity to comment specifically thereon.

The present question, then, is whether this dispute is one concerning activities connected with national defence. This phrase contains two conditions, each of which must be met before the reservation is operative. Of the first condition, that the dispute must relate to "activities", I need say no more.

As to the second condition, that those activities must be "connected with national defence", the important point is that any acceptance of its applicability must depend upon findings of fact.

The phrase "connected with national defence" is not a legal term of art. It is

an expression descriptive of a situation of fact. The proposition that in any legal process the party relying upon particular facts must prove them is too fundamental and well known to require any further elaboration by me. It is true there are certain matters which may be within judicial knowledge, for example, that there are four seasons and twelve months in the year. In certain situations there may be presumptions of fact. But in this case the facts upon which France must rely if the condition in its reservation is to be satisfied are not ones which fall within the established limits of judicial notice or of presumption. The relevant facts must be demonstrated.

And indeed, the French Note of 16 May 1973 accepts this, for it contains the following paragraph:

> "Now it cannot be contested that the French nuclear tests in the Pacific... form part of a programme of nuclear weapon development and therefore constitute one of those activities connected with national defence which the French declaration of 1966 intended to exclude."

Now this would be a fine introductory sentence to an exposition of the facts directed towards showing that the French tests did in truth constitute an activity connected with national defence. But unfortunately this introductory sentence is not followed by any material development of the theme.

The association between the French activity and the conception of national defence is treated as self-evident. Or, as the French communication puts it, "it cannot be contested".

In my submission this attempt to bring the nuclear tests within the conditions prescribed in the French declaration fails.

The Court is here faced by the need to choose between two possible assessments of the legal significance of the expression "national defence". One is broad enough to cover a mere reference to nuclear weapon development. The other is narrower and requires a showing that the activity in question is truly connected with national defence. At this point, however, the Court meets something of a dilemma. The choice between the broader and the narrower definitions becomes the equivalent of the choice between a subjective and an objective interpretation of the reservation. If the reservation is treated broadly, so that its requirements are met when France says simply that this is a case of nuclear weapon development, then it becomes a self-judging, automatic or subjective reservation. As such, I shall contend that it is invalid. If, on the other hand, the scope of the reservation is narrower and requires a showing that it is connected with national defence, then it becomes an objective reservation, and in order to approach it the Court must be put in a position where it can judge by reference to objective criteria whether the facts of the situation truly merit the description "activities connected with national defence".

The French Government in its invocation of the reservation has entirely failed to put the Court in possession of the facts which would enable the Court objectively to make an appreciation of the nature of French nuclear activity. There is certainly no presumption that because a State seeks to manufacture nuclear weapons, it is doing so for defensive purposes. Perhaps some might argue that since aggression is prohibited by the Charter of the United Nations, it cannot be thought that the French measures could be for aggressive purposes. Consequently, by a simple process of elimination, so it may be suggested, the development of a nuclear weapon must be assumed to be for defence purposes. This, however, is not enough. If the concept of defence is approached in this way, everything is defensive unless it is shown to be aggressive. Yet there is no more reason for making that assumption than there is for making the contrary.

The insufficiency of the French presentation of material in support of its reliance on this reservation can better be shown by a consideration of the type of argument which France might have presented if the facts had so warranted. Thus, for example, France might have said that as regards her metropolitan territories she needed constantly to be prepared to meet either a massive land attack by conventional forces or a possible nuclear attack. It is not for me to speculate on the additional considerations which France might adduce in this connection. The real point is that France does not adduce any considerations. If, however, the French Government now seeks in an international tribunal to rely upon the concept of "national defence" as something with an objective content, then it is for the French Government to show that the requisite conditions are specified. After all, it must be recalled, it was the French Government and not anyone else who introduced the notion into the French declaration. It was a voluntary act, presumably intended to achieve something. If it was the intention of the French Government to establish a reservation with an objective content, then it can have no cause for complaint if this Court requires that recourse to the reservation should be accompanied by some clear demonstration of the applicability of the reservation to the case in hand. It is no part of the judicial process, whether it be national or international, that a tribunal should decide cases without being placed in possession of the necessary facts by the parties concerned.

Nonetheless, it may be said, is not the Court obliged under Article 53 of the Statute, in the absence of the defendant State or if the defendant fails to defend his case, to satisfy itself that it has jurisdiction and may not, therefore, in this connection reach a conclusion on the basis of such facts as it knows or can conveniently ascertain for itself?

To the implementation of this suggestion in the present context there is at least one major obstacle: how is the Court to assess whether the French tests are an activity connected with national defence? What facts has it got? At the moment, the Court possesses only the French statement of the desired conclusion, nothing more. If the Court is going to carry out its own investigation, where is it to look? What material is it to take into consideration? To whose views is it to attach weight and where is it to find them expressed? Is it to take into account statements made in the French national press? And if so, what is it to make of the following observation in *Le Monde* of 2 July 1974—less than a week ago? In a substantial and serious article entitled "Pour un nouveau style de défense" one may find the following paragraph, which I have ventured to translate:

> "All the commentators and politicians, beginning with the President of the National Assembly, are agreed in recognizing that our nuclear force has been wanted less because of its supposed military effectiveness than for reasons of political importance in relation to other countries."

May the Court treat such a statement as material evidence? May it treat statements of reverse content as material evidence? And if so, will the Court be satisfied that nuclear weapon testing is an activity connected with national defence?

Yet, on the other hand, what if the Court were to find that the mere invocation by France of the reservation in its communication to the Court of 16 May 1973 is sufficient? That is to say, that it is sufficient for France simply to state that the tests are an activity related to national defence, as France does so state in this case. Does this not change the character of the reservation? Is one then not obliged to view the French reservation as no longer "objective" in character but rather as one which is "subjective" or "automatic"?

As I have already suggested, the concept of national defence as used in the French reservation is not a legal term of art; and there is no authority bearing on the legal meaning of those very words. But the Court will recall that on 11 December 1946 the General Assembly of the United Nations by a unanimous resolution comprehensively endorsed "the principles of international law recognised by the Charter of the Nuremburg Tribunal and the judgment of the Tribunal". Amongst the principles recognized in the Nuremburg judgment, and thus acknowledged by the General Assembly, was the principle that the plea of self-defence is open to judicial scrutiny and review. As the Court will immediately recognize, there is a great deal of common ground, if not a virtually total overlap, between the concept of national defence and self-defence. And while, of course, the situations of fact which underlie the expressions presently being examined are themselves totally outside comparison, there is room for comparison of the two concepts on the legal plane. It is a feature of judicial consideration of the plea of self-defence that insistence is placed upon the presentation of cogent evidence to support the plea. There is nothing automatic or subjective about the plea. The mere fact that a situation is said to be one of self-defence is not accepted as disposing of the matter in a sense favourable to the party raising the plea. When the claim of self-defence is raised, then—as the Nuremburg Tribunal said—it "must ultimately be subject to investigation and adjudication, if international law is ever to be enforced..." (see *Annual Digest and Reports of Public International Law Cases*, 1946, Vol. 13, pp. 210).

Is there any reason why the process of judicial review applied to the concept of self-defence should not equally be applied to the concept of national defence? Can the Court excuse the Party relying upon the concept from the task of pointing to the material facts and showing that they justify the application to them of the description of national defence? And if the Court should be inclined to extend the liberty of appreciation enjoyed by France in the present situation, how is the Court to formulate that extension in terms which do not in truth either convert the concept into one which is either essentially subjective or lead back to a situation in which a more or less objective reservation is invoked unsupported by adequate evidence?

It is this last question which brings me to the matter covered by my second submission. I thus conclude my first formal submission, to the effect that the French Government has entirely failed to show that the case falls within the scope of the third reservation to the French declaration under the optional clause. And so, with your leave, Mr. President, I turn to my second submission.

The starting point of this, the second part of my argument that the French declaration under the optional clause creates an effective jurisdictional link between the Parties, is the contention that the third French reservation is subjective, self-judging or automatic in character. As such it is invalid. However, as I shall go on to submit, it is severable from the rest of the French declaration which can, therefore, stand without it and form an effective basis for the competence of the Court.

The Court will, of course, appreciate that if it is satisfied that no connection has been established between the French tests in the South Pacific and the concept of national defence, then this part of my argument becomes unnecessary. The contention in the previous section of my speech was advanced on the basis that if the French reservation was assumed to have an objective content, the Court was quite without evidence on which to decide that the conditions of the reservation were satisfied.

Since no material has been made available to the Court in this connection, the only ground on which the Court can find that the conditions of the French

reservation are met is by a holding that the reservation is so wide in its scope that its mere invocation by France is sufficient to make it operative. The retention by a State making a declaration under the optional clause of so comprehensive a discretion to deprive the Court of jurisdiction after the institution of proceedings brings the reservation within the category of so-called "self-judging", "automatic" or "subjective" reservations.

The Court is familiar with the principal arguments against the validity of such reservations. They have been referred to and set out in the oral hearings of 1973 (*supra*, pp. 208-210) and again in the Australian Memorial of November 1973. I shall, therefore, present my argument on this aspect of the case under the following headings:

First, I shall develop the points of principle which exclude the acceptance of such a reservation;

second, I shall indicate that there is nothing in the previous decisions of the Court which in any way limits its freedom to hold that the reservation is void for inconsistency with the Statute of the Court.

First then as to the argument relating to the invalidity of a subjective reservation.

This invalidity flows from the inconsistency of a subjective or automatic reservation with a fundamental feature of the competence of any international tribunal. This is the exclusive right and power of an international court to determine for itself whether in any given case it possesses jurisdiction. The Court will recall that the general principle was affirmed, and its express reflection in the Statute of the Court acknowledged, in the *Nottebohm case* in 1953 (*I.C.J. Reports 1953*, p. 120). The Court there said:

> "The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case."

Now the Court led up to this statement with a number of general observations of sufficient importance to merit their recollection in detail: "Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration..." Then a few lines later the Court went on:

> "This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, in the present case, the principal judicial organ of the United Nations."

Mr. President, these are words of great importance—uttered, it may be remembered, by way of rejection of an argument advanced by the respondent State to the effect that, since the period of its acceptance of the Court's jurisdiction had expired after the date of the institution of proceedings, the Court was not only not competent to hear the case but also was not competent even to pass upon the question of its own jurisdiction. And, it is appropriate to emphasize, the Court laid stress upon the institutional character of its structure, from which it is clear that the Court considers that individual States could not unilaterally detract.

Can this weighty statement of principle be reconciled with the reservation by a defendant State of the right to decide for itself, once an application against it has been filed, that the Court may not have jurisdiction? It is impossible either in strict logic or in legal principle to escape a negative answer.

As a matter of logic, if the Court alone has the right to decide upon its own competence once proceedings have been commenced, then this must exclude the right of anyone else to exercise the same power of decision-making.

As a matter of legal principle—and this alone can override logic—one is bound to ask what effective legal purpose can be served by an acknowledgment of the right of States to pretend to accept the compulsory jurisdiction of the Court while at the same time retaining the power to escape from that obligatory competence. It must, surely, be quite contrary to that integrity, which we can safely assume is essential to legal principle, legally to permit that kind of acceptance of the Court's jurisdiction.

It is no answer to this condemnation of such acceptances to say that it is better that a State should at least open up a possibility of the exercise of jurisdiction by the Court than that it should, by reason of the unacceptability of an automatic reservation, exclude itself completely from the operation of the Court's compulsory jurisdiction. This type of argument is often adduced by those who call themselves realists in international affairs and who regard a compromise with principle as justifiable if it leads to a suitable political gain. But if one looks at the experience of the Court, the history can hardly be described as one of gain. Has the Court been more active because France, Liberia, Malawi, Mexico, the Philippines, Sudan and the United States of America have included automatic reservations in their declarations of acceptance of the optional clause? In the two cases in which France as a plaintiff invoked the Court's jurisdiction on the basis of the optional clause, the very presence of the automatic reservation led in one of them to the exclusion of the Court's competence. In the one case to which Liberia has been a party, the Court's jurisdiction was founded on Article 19 of the Mandate for South West Africa and was not, it may be observed in passing, excluded by Liberia's subsequent acceptance of an optional clause limitation. In one of the cases in which the Court's jurisdiction was invoked against the United States on the basis of the optional clause, recourse was had to the automatic reservation, though the Court found on other grounds that it was not competent. And in the one case in which as plaintiff the United States relied upon the optional clause the automatic reservation was invoked against it by Bulgaria.

So where has the gain to the Court's jurisdiction been? It is now nearly 30 years since this Court was established. One can no longer say: let us wait and see how things turn out. The automatic reservation may prove to be beneficial. After 30 years a tribunal should be able to assess what is or is not in its interest and in the interest of the system of law which it is responsible for applying. In my submission, the answer is clear. There has been no gain to the Court from the tolerance of automatic reservations, whatever their form; and they should now be clearly and emphatically condemned.

Interestingly enough, this submission is itself fully in accord with the views of the executive branch of the United States Government which, after all, was the initiator of recourse to the automatic reservation. In 1959, for example, the Department of State in a report to the Chairman of the Senate Foreign-Relations Committee said that it favoured the omission of automatic reservation from the United States declaration. The Department considered the existing reservation as inconsistent with Article 36, paragraph 6, of the Statute and observed that—

> "such a reservation could be regarded as rendering the U.S. declaration illusory and as evidencing a distrust of the Court, contrary to our policy of support for referral to the Court of international legal disputes which cannot be settled otherwise" (Whiteman, *Digest of International Law*, Vol. 12, p. 1308).

The Department of Justice took the same view. In supporting an amendment to remove the automatic reservation it said:

> "The proposed amendment would tend better to effectuate our settled national policy to encourage and develop the rule of law in the affairs of nations. The existing reservation of a unilateral right to determine what disputes are domestic has had the opposite tendency." (*Ibid.*, p. 1310.)

In 1960 President Eisenhower expressed himself in favour of such a change, as did his Secretary of State, and this view has been consistently shared by the executive branch of the United States Government ever since.

It is appropriate to recall also the terms of Article 35, paragraph 1, of the European Convention on the Peaceful Settlement of Disputes. This provides:

> "The High Contracting Parties may only make reservations which exclude from the application of this Convention disputes concerning particular cases or clearly specified [subject] matters, such as territorial status, or disputes falling within clearly defined categories."

These words, Mr. President, reflect a deliberate policy decision by the parties to that treaty that general subjective or automatic reservations are unacceptable. If this express provision had not been inserted in the Convention, the point which I am now making would still have been open for argument, just as it is here, in relation to Article 36 (2) of the Statute of the Court. But I cite the provision because it is helpful and important in demonstrating the reaction of the countries of the Council of Europe to the concept of an "automatic" reservation.

In the Advisory Opinion on *Reservations to the Genocide Convention* the Court, with a wisdom which has since been confirmed by the international community generally in the Vienna Convention on the Law of Treaties, identified the reasons why in certain circumstances the community might benefit from wider participation in multilateral treaties even at the expense of an accumulation of reservations. But none of those reasons apply in the case of automatic or self-judging reservations to the optional clause. Nor can such reservations be said to comply with the requirement, laid down in the same Advisory Opinion and adopted in the Vienna Convention, of compatibility with the purpose and object of the treaty.

These are, if I may respectfully so submit, fundamental and compelling reasons for a determination of the incompatibility with the Statute of self-judging reservations, and for a consequent holding of the invalidity of such reservations.

If I have not expressly referred to the views on this matter of Judges Guerrero, Klaestad, Armand-Ugon, Sir Percy Spender and Sir Hersch Lauterpacht the Court will I am sure not think me lacking in respect or in filial piety. The views of these distinguished judges are so well known that it is unnecessary for me to remind the Court of them, though they are in fact described at pages 309 to 311, *supra*, of the Australian Memorial of November 1973. My main purpose has been to recall to the Court's notice the main points of principle as recognized in the Court's own well-established jurisprudence.

The Court adjourned from 11.10 a.m. to 11.30 a.m.

However, the fact that these judges have had occasion to discuss the problem of automatic reservations in relation to specific cases pending before the Court raises the question as to whether there exists on this matter any influential precedent—I say "influential" rather than "controlling" precedent because Article 59 of the Statute excludes any formally binding precedent. The question really is whether the Court, as such, has in the past committed itself to an acceptance of automatic reservations. My submission is that the Court has not done so and that it is quite free today to reach the conclusion for which I have just been contending.

There have only been two cases involving automatic reservations. In the first, the *Certain Norwegian Loans* case, the Court expressly declined to consider the validity of the French automatic reservation as it stood at that date. The Court said:

> "The validity of the reservation has not been questioned by the Parties. It is clear that France fully maintains its Declaration, including the reservation, and that Norway relies upon the reservation.
>
> In consequence the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it." (*I.C.J. Reports 1957*, p. 27.)

The second case involving an automatic reservation was the *Interhandel* case. There were two stages in the case. At the interim measures stage the United States invoked the automatic reservation. However, the Court did not find it necessary to consider the validity of the reservation then because it held that the circumstances did not require the indication of the interim measures requested by the Swiss Government. Moreover, the Court stated in the recitals of the Order that "the decision given under this procedure in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction" (*I.C.J. Reports 1957*, p. 105, at p. 111). Three judges in a separate opinion, Judges Klaestad, Hackworth and Read, observed specifically that as to the question of the validity of the reservation there did not at that stage appear to exist any dispute which called for the consideration of the Court.

The second stage of the case dealt with the preliminary objections raised by the United States. One of these was to the effect that the issues concerning the sale or disposition of the vested assets of the General Aniline Corporation was a matter falling within the domestic jurisdiction of the United States as determined by it. As to this the Court said:

> "Although the Agent for the United States maintained the Objection throughout the oral arguments, it appears to the Court that, thus presented, part *(a)* of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the assets of Interhandel which have been vested in the United States. Having regard to the decision of the Court set out below in respect of the Third Preliminary Objection [which related to the non-exhaustion of local remedies] it appears to the Court

that part *(a)* of the Fourth Preliminary Objection is without object at the present stage of the proceedings."

Accordingly, the Court held that it was not necessary to adjudicate on that point.

It is thus quite clear, I would submit, that the Court has not only not expressed itself on the question of the validity of automatic reservations but has also been at pains to show that in its view that question did not arise for decision in the circumstances before it. It is, therefore, not possible to say that the Court has any substantive view on the question, or even that it has differed on the essence of the issue, as opposed to its relevance, from the views of those judges who have so powerfully argued that automatic reservations are invalid.

At this point then, Mr. President, I may turn to my submissions regarding the consequences of the invalidity of the French reservation.

My contention is that all that is affected by the finding of invalidity is the words which are relied upon by the French Government in this particular case. In other words, the consequence of a finding of invalidity of the French reservation is that all that falls to the ground is the expression "and disputes concerning activities connected with national defence". The declaration must now be read as if those words are not there.

The Court does not need to be reminded of the terms of Article 59 of its Statute which prescribe that "The decision of the Court has no binding force except between the parties and in respect of that particular case". It is no part of the Court's task in this case to pass generally upon the validity of the whole of the French declaration. The Court is not invited to do so by either Party. Indeed, each Party seeks the very contrary. France has invoked the declaration as a valid instrument containing the reservation in question and as overriding the terms of the General Act. Australia invokes the declaration as an effective text once the offending reservation has been struck out. But neither side is seeking to establish the invalidity of the French declaration as a whole.

Now the conclusion based upon this essentially formal—but nonetheless real, I must emphasize—approach to the consequences of the invalidity of the French reservation can be reached by another independent route: an assessment of the separability of the reservation from the rest of the declaration.

It is to be recalled that in the *Interhandel* case two Members of this Court found that the invalidity of the United States reservation relating to matters of domestic jurisdiction did not affect the operative value of the rest of the declaration. Thus the President himself, Judge Klaestad, approached the matter in terms of the will or intention of the State making the declaration. His method of determining the intention of the United States in this respect is of particular relevance and value in this case. He referred to the debates in the United States Senate and identified the considerations underlying the acceptance of the reservation in question, and he then continued:

> "It may be doubted whether the Senate was fully aware of the possibility that this Reservation might entail the nullity of the whole Declaration of Acceptance, leaving the United States in the same legal situation with regard to the Court as States which have filed no such Declarations. Would the Senate have accepted this Reservation if it had been thought that the United States would thereby place themselves in such a situation; taking back by means of the Reservation what was otherwise given by the acceptance of the Declaration? The debate in the Senate does not appear to afford sufficient ground for such a supposition.
>
> For my part, I am satisfied that it was the true intention of the com-

petent authorities of the United States to issue a real and effective Declaration accepting the compulsory jurisdiction of the Court..." (*I.C.J. Reports 1959*, p. 77.)

Given the limited character of the evidence before the Court in the *Interhandel* case regarding the intentions of the United States Senate at the time of the acceptance of the optional clause, the opinion of President Klaestad can only be read as representing the view that in the absence of evidence that the United States declaration would *not* have been made without the reservation in question, the presumption was that the declaration *would* have been made without the reservation in question had its objectionable character been known.

A comparable approach was adopted by Judge Armand-Ugon, also in a dissenting opinion in the same case. He too spoke of the "intention" of the United States and adverted to the fact that the United States had submitted to the Court's jurisdiction both as a claimant and a respondent (*I.C.J. Reports 1959*, p. 93). And, it should be added, there is no material distinction between the views of these two judges and those of Sir Hersch Lauterpacht. He used the same basic test in both the *Certain Norwegian Loans* case and the *Interhandel* case though he reached a different conclusion: a conclusion which, on this question of severability, I would respectfully suggest may not automatically be transferred from the cases which he was considering to the present case.

May I seek to apply to the present case the approach adopted by those judges? There is no extrinsic evidence of the intentions of the French Government specifically in relation to the reservation now under challenge. It appeared for the first time in the 1966 declaration—a declaration which, in common with its predecessor of 1959 but unlike the first declaration made by France towards this Court in 1947, was accompanied by no public statement whatsoever.

But the making of a declaration under the optional clause has always been, at any rate until, alas, a few months ago, a feature of French policy. Permit me, Mr. President, to recall what Mr. Bidault said in 1948 in the *exposé des motifs* which he presented to the Assembly in support of a *projet de loi* for the purpose of authorizing him to ratify the declaration made in 1947. The translation, I fear, is my own:

> "The French Government, which has always promoted, by all the means in its power, the progress of international institutions, has considered that it should be amongst the first to extend by a special declaration the compulsory jurisdiction of the new Court." (*Doc. parl., Ass. nat.*, 25 June 1948, Ann. No. 4733.)

This was clearly a serious declaration notwithstanding the inclusion in it of an automatic reservation relating to domestic jurisdiction. Yet it is to be observed that at that time the French Government appears to have been unaware of the weakness to which that reservation relating to domestic jurisdiction as determined by itself was prone. Thus, a few lines later, Mr. Bidault commented on this reservation saying that it was of "a general order *[un ordre général]*, similar to the one which had been made at the time of the acceptance by France of the General Act" *(ibid.)*.

However, after the comments made in the *Certain Norwegian Loans* case showed the flaw in the French reservation, a fresh declaration was made in 1959 omitting the automatic reservation relating to domestic jurisdiction. No explanation accompanied this change but presumably it must have been made with the intention of ensuring that no doubt could be raised in the future regarding the effectiveness of the French declaration. Hence, it may reasonably

be assumed that when the 1959 Declaration was itself modified in 1966 by the addition of the very reservation now in question there was no intention thereby to destroy the effectiveness of the declaration and that in so far as there could be any question relating to the validity of the addition, the intention would have been that the declaration should stand without the reservation.

If this attempt to identify the intentions of the French Government appears a bit notional, it is not the result exclusively of the difficulties inherent in any retrospective attribution of intention. It is because when the French Declaration of 1966 was made, there was small likelihood that anyone would have contemplated that the French Government would ever disregard the established procedural rules of the Court and invoke a reservation without at the same time accompanying recourse to the reservation with a detailed and proper argument. However it is from the course voluntarily followed by the French Government that the present position results and, I should stress, France should not in consequence be allowed the benefit of any doubt arising from its own decision not to play a full role in these proceedings.

This brings me, Mr. President, to the conclusion of my arguments in favour of the possession by the Court of jurisdiction under Article 36, paragraph 2, of the Statute.

Mr. President, I turn now to a consideration of the argument which appears on the final pages of the French Annex of 16 May 1973 under the heading "Inapplicability in situations excluded by the French declaration under Article 36, paragraph 2, of the Statute of the Court". The argument here advanced by France is, in effect, that its relatively unrestricted acceptance of the Court's jurisdiction in 1931 under the General Act must now be read as limited by the reservations attached to its current declaration under the optional clause.

It must be said at the outset that the problem does not arise for discussion if the Court accepts the submission which I made a moment ago to the effect that the French reservation under Article 36, paragraph 2, is not valid, for in that case the reservation is non-existent and therefore there can be no conflict between it and those of the General Act. This is true also, I must add, even if the Court were to reject the submission that the automatic reservation is severable from the declaration of which it forms part. For in that case in the absence of severability the invalidity of the reservation would lead to the nullity of the whole declaration, and while that would of course deprive me of Article 36, paragraph 2, as a basis for the jurisdiction of the Court, it would of course eliminate entirely any question of a conflict between the French declaration of 1966 and France's obligations under the General Act.

Now this French argument, the proposition that its acceptance of the General Act, its participation in a multilateral treaty, can be limited or qualified by its unilateral act in relation to an entirely distinct instrument is, to say the least, novel; and if for no other reason that that, it requires particularly close scrutiny. Moreover, the specific arguments adduced in support of it are characterized by a complete unconcern to grapple with a clear decision of the Permanent Court running quite contrary to the French proposition.

Any acceptance of the French contention on this point must involve a contradiction and rejection of the statement made by the Court in the case of the *Electricity Company of Sofia and Bulgaria (P.C.I.J., Series A/B, No. 77)*. Familiar though this statement is, it bears recollection:

> "In its [the Court's] opinion, the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than

to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain." (*Ibid.*, p. 76.)

This was the very passage which was quoted by Judge Basdevant in his dissenting opinion in the *Certain Norwegian Loans* case (*I.C.J. Reports 1957*, p. 75) when he took the view—now repudiated by the State of which he was so notable an embellishment—that if France could not effectively rely upon the optional clause as a basis for the Court's jurisdiction, it certainly could rely upon the General Act. The passage is, moreover, one which appears repeatedly in textbooks. It has, so far as I am aware, never been questioned except marginally by Judges Anzilotti and Hudson and then only in its application to the facts of the particular case.

But the passage which I have just read from the *Electricity Company of Sofia and Bulgaria* case is immediately followed by another which is not quoted so often, perhaps because the essential part of the Court's views was stated in the first passage. Nonetheless, I must read this paragraph:

"In concluding the Treaty of conciliation, arbitration and judicial settlement, the object of Belgium and Bulgaria was to institute a very complete system of mutual obligations with a view to the pacific settlement of any disputes which might arise between them. There is, however, no justification for holding that in so doing they intended to weaken the obligations which they had previously entered into with a similar purpose, and especially where such obligations were more extensive than those ensuing from the Treaty." (*P.C.I.J., Series A/B, No. 77*, p. 76.)

Those last words speak for themselves. Since, in that case as in this, it was the later instrument which was invoked in an attempt to narrow the jurisdiction of the Court. But the principal reason why I have read this second passage is to place emphasis on the reference made by the Court in each of the paragraphs to the element of intention. In the first paragraph there are the words "evidence that the parties *intended* to open up new ways of access...". In the second paragraph there are the words "there is no justification for holding that in so doing they *intended* to weaken the obligations which they had previously entered into...".

Intention, Mr. President and Members of the Court, is the key to the situation. There is no mechanical rule in these matters which prescribes that an optional clause declaration overrides every other acceptance of the Court's jurisdiction or that any later text overrides any earlier one.

This may explain why there is no reference in the French Annex to this, the only judicial statement which carries with it the authority of the Court as such. It may also explain why there is no reference even to the dissenting opinions of Judges Anzilotti and Hudson in the same case. It is, of course, well understood in international jurisprudence that regardless of the quality of the dissent it is only the decision of the Court itself, reached even by the barest majority, which thereafter stands as the official expression of the collective wisdom of the Court. But if the reasoning of judges of the distinction of Judges Anzilotti and Hudson had really supported the French contention, one might have expected that the French Government would have mentioned this fact in the hope that the majority of 9 votes to 5 in the *Electricity Company of Sofia and Bulgaria* case might no longer serve to persuade the present Court of the correctness of its predecessor's conclusions. However, as I ventured to indicate when I addressed the Court last year in reply to the question put by Judge Dillard and Judge Jiménez de Aréchaga, the essentials of the dissenting opinions of both Judges Anzilotti and Hudson far from favouring the French position in this case in truth confirm the

argument which I am now developing. Like the Court, both Judges Anzilotti and Hudson took the view that what really matters is the intention of the States concerned. The point of difference between them and the Court lay in the identification of what the Parties intended. The Court could see no evidence of an intention that the treaty should override the optional clause relationship. Judge Anzilotti, on the other hand, saw in the treaty provision that "it is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice" (*P.C.I.J., Series A/B, No. 77*, p. 91) an indication that the Parties intended the whole of their optional clause relationship to be absorbed into the treaty relationship. Judge Hudson also attributed a controlling significance to the element of intention—finding evidence of this first in the exclusion from the scope of the optional clause declaration of disputes for which a special procedure is laid down in conventions in force between the Parties and, second, in a variety of other considerations including the fact that the treaty came after the declaration, the pre-natal history of the treaty and the general policy of the two States.

The importance of intention in resolving difficulties which appear to arise when one source of the Court's jurisdiction is affected by a later source of an apparently more restricted character is demonstrated also by the Judgment in the *Corfu Channel* case (merits). The Court will remember that the jurisdiction of the Court in that case was established in the course of the Judgment on the preliminary objection (*I.C.J. Reports 1948*, p. 15) as resting on the unilateral Application of the United Kingdom coupled with the acceptance by Albania through its conduct of the proceedings thus started. This finding of jurisdiction related to an Application which stated that the purpose of the claim was to secure a decision of the Court on the international responsibility of Albania "And to have the reparation or compensation due therefor from the Albanian Government determined by the Court" (*ibid.*, p. 17). Subsequently, the Agents notified the Court of the conclusion of a special agreement for the purpose of submitting to the Court two specific questions regarding the respective responsibilities of the Parties (*ibid.*, pp. 53-54). The first of these questions was whether Albania was responsible under international law for the explosions which had taken place and for the resulting damage and whether there was any duty to pay compensation.

In the proceedings on the merits, the Government of Albania contended that this question so formulated in the special agreement did not give the Court jurisdiction to assess the damages. In effect, the Albanian Government was contending that the Court's jurisdiction under the special agreement was narrower than that established by the conduct of the Parties and acknowledged in the Judgment on the preliminary objection.

The Court's answer to this contention did not involve any formal or mechanical recourse to formulae or maxims regarding the relationship of *lex priori* and *lex posteriori*. Instead, all the Court's emphasis was put fairly and squarely on intention. The Court said:

> "The main object both Parties had in mind when they concluded the Special Agreement was to establish a complete equality between them by replacing the original procedure based on a unilateral Application by a procedure based on a Special Agreement. There is no suggestion that this change as to procedure was intended to involve any change with regard to the merits of the British claim as originally presented in the Application and Memorial." (*I.C.J. Reports 1949*, pp. 24-25.)

The comment made on these two cases, the *Electricity Company of Sofia and Bulgaria* case and the *Corfu Channel* case, by Dr. Rosenne in his magisterial study of *The Law and Practice of the International Court,* is appropriate for mention at this point:

> "There is, it is true, a subtle distinction between these two cases. The Permanent Court placed the issue squarely within the orbit of jurisdiction, whereas in the second case the language of the Court speaks of procedure. But common to these two opinions is the insistence of the Court in seeking the underlying intention of the parties, and while the Court will refrain from too broad a generalization, it appears implicit in what it has said that, where the parties manifest a general intention to confer jurisdiction on the Court, a multiplicity of titles of jurisdiction will not thwart the realization of that intention." (Vol. I, pp. 476-477.)

At this point it will, I venture to submit, be proper to look a little more closely at the intentions of the Parties to the present proceedings, and especially those of France, in relation both to the General Act and the declarations made under the optional clause. The Parties to this case, as well as the Court, are fortunate that French constitutional practice has, at any rate until relatively recent times, served to ensure a fairly full formal presentation of the official understanding of the content of instruments such as the General Act and declarations made under the optional clause. And, as the Court will see, this material is quite striking in its lucid demonstration of French official understanding that the General Act and the optional clause declarations belong to two legally quite distinct systems of conferring jurisdiction upon the Court, so that there could be no intention in an optional clause declaration that could affect or override the obligations assumed in the General Act.

Perhaps the Court would like to consider first the *exposé des motifs* accompanying the draft law authorizing the French Government to adhere to the General Act. This was presented to the Chambre des députés on 1 March 1929 by Mr. Poincaré and Mr. Briand. The fact that this particular *projet de loi* was amended before adoption in no way weakens the force of the general observations made in the *exposé* regarding the character of the General Act. Here, in translation, for the inadequacy of which I must again take responsibility, are some of the key passages in the *exposé*:

> "If you [that is to say, the French Chambre des députés] give the authorization now sought this will be the first time that France will not only have undertaken to have recourse to compulsory arbitration for the pacific settlement of disputes which may arise between her and this or that other State, but also that she will have undertaken in this connection an obligation—could one say 'in blank'—valid towards all other States who wish to assume the same commitments." (*Doc. parl., Chambre*, 1 March 1929, Annex 1368, p. 406.)

I may perhaps interject here that it is made clear in another French parliamentary document that "the term 'arbitration' *[arbitrage]* is used here in its broad sense and clearly covers the case of judicial settlement by the Permanent Court of International Justice" (*Doc. parl., Chambre*, 11 July 1929, Annex 2031, pp. 1133-1134).

Now if I may continue with the quotation from the same *exposé des motifs*:

> "It [the General Act] is an undertaking with a universal scope, for once our adhesion is authorized by you and notified to the Secretary-General of

the League of Nations, it will no longer be for us to limit the extent of its consequences. Every State which signs this Act will in its turn have as against us, in the matter of arbitration [that is to say, judicial settlement] both rights and duties; and in the same way as we shall be entitled to seek from them the arbitral settlement of disputes arising between us, so they will be entitled to seek the same from us.

Secondly, it is general undertaking, in the sense that it is not related to such and such a category of disputes but to all disputes which may arise—subject to the reservations which will presently be mentioned and which contemplate only the possibility of recourse, in certain cases, to parallel procedures of pacific settlement." (*Doc. parl., Chambre*, 1 March 1929, Annex 1368, p. 406.)

Some pages later the *exposé des motifs* continues thus:

"Further, the Government intends to use only within very narrow limits, the power, granted by Article 39 of the General Act, to derogate from the procedures established by the Act: in respect of three clearly specified categories of dispute, whose political gravity may turn out to be such that reference to the Council becomes essential, and only when the Government considers it appropriate to make use of the right laid down in the Covenant of the League of Nations of bringing a dispute before the Council." (*Ibid.*, p. 407.)

I may say that the reservations which were then proposed by the French Government to the National Assembly were subsequently altered in the sense that they did not appear in the final *loi* which authorized the French acceptance of the General Act.

But here, Mr. President, is the clearest of all possible demonstrations of the intention of the French Government to accept the obligations of judicial settlement as laid down in the General Act, subject only to the reservations contemplated in Article 39 of the Act. The idea that the French Government retained a power unilaterally to restrict, by means of optional clause declarations, the competence of the Court under the General Act, clearly never struck the French Government as a possibility.

A few months later, on 11 July 1929, Mr. Paul Bastid, a deputy, produced in the name of the Foreign Affairs Committee of the Chamber a substantial and scholarly report on the Government's proposal. The report fully supported the Government's initiative—and went even further in suggesting a reduction in the number and range of reservations to be made, as I have just said. It may be added that this suggestion was closely reflected in the text of the French accession on 21 May 1931, printed as Annex 16 to the Application in this case. In the Conclusions leading to the final proposal Mr. Bastid said, and again this is my translation:

"Further, the text itself [that is, the General Act] by the play of partial adhesions and of reservations, provides States with avenues of escape.

We do not wish, for our part, to divest ourselves of any of the undertakings which it prescribes. We accept them up to their maximum. Our policy has never feared an authority authorized to lay down the law; it has never sought to escape the light. The organization of international justice implies, for the States which participate in it, the possibility of eventually losing their cases. National self-esteem may find itself bruised. But this is a small inconvenience compared with the advantages which ensue for the cause of peace. We have known judicial defeats. We have borne them with

good humour." (*Journal officiel, doc. parl., Chambre*, 11 July 1929, Annex 2031 at p. 1143.)

Now this declaration—to which, by the speeches made and the action taken, the French parliament and executive clearly subscribed—was made, it must be remembered, in the full knowledge that even at that time there existed the machinery of the optional clause under Article 36 (2) of the Statute of the Permanent Court. So much was this so that Mr. Bastid devoted a section of his report to "L'acte général et l'article 36" (*ibid.*, p. 1139). In it, he referred first to the fact that France had originally intended to make its acceptance of the optional clause dependent upon the entry into force of, what turned out to be, the abortive Geneva Protocol of 1924. And he then continued as follows:

> "On Article 36 the French Government's way of looking at things subsequently underwent some change. [That is, some change from the view adopted in relation to it's connection with the Geneva Protocol of 1924.] It seemed to it [that is, the French Government] that there was no room to fend off systematically, because it was fragmentary, an improvement in the general structure of peace. The Committee on Foreign Affairs was so told and by a resolution of 1 February 1928 it declared itself [that is, the Committee on Foreign Affairs of the Chambre declared itself] anxious to release our acceptance of the optional clause from its link of subordination to the protocol. But as the Committee on Arbitration and Security was still sitting, the Committee [that is, the Committee on Foreign Affairs] preferred to await the results of its work, which might render unnecessary any definite adhesion to Article 36 (2).
>
> The General Act, seen at its broadest, provides for something more than Article 36 (2), since it embraces every dispute, contemplating in principle not only judicial settlement for legal disputes, but arbitration for other disputes. Broader in its coverage, the Act was also wider in its scope in that it was open to States not members of the League of Nations.
>
> It is necessary however to ask if adhesion to the Act renders it quite useless to ratify Article 36 (2). Undoubtedly not, since some States may have ratified the optional clause which do not adhere to the General Act and, therefore, unless we have ratified Article 36 (2) no binding link would exist between such States and us for the settlement of legal disputes.
>
> But it is true that the optional clause of the Statute of the Court loses, as a result of the General Act, much of its interest and that in no case can its ratification be considered as a substitute for adhesion to the diplomatic text which is the subject of this report [that is, the General Act]." (*Ibid.*, p. 1139.)

This analysis, by Mr. Bastid, was soon afterwards supported in the *exposé des motifs* presented by Mr. Tardieu and Mr. Briand in support of a draft of a law to authorize the ratification of the declaration made by France on 19 September 1929 accepting the optional clause (*doc. parl., Chambre*, 1929, No. 2605, p. 335). In this *exposé* the Ministers said—I apologize for having to quote so much but these are texts I consider of major importance:

> "In the new conditions which have just been described, adhesion to the optional clause of Article 36 of the Statute of the Court does not have the same significance as international opinion would have given it if it had taken place before the establishment, and the adoption, by the Assembly of the General Act of Arbitration, it can no longer be considered as constituting an end. Its more modest significance is to ensure the practical

settlement of disputes defined in Article 36 of the Statute of the Court during the period until the General Act has received a sufficient number of ratifications to allow it truly to become an instrument of peace between peoples.

The various international instruments opened for the signature of the members of the League of Nations—whether the Protocol, the optional clause or the General Act—bind reciprocally only the States which have accepted them. However, the General Act has so far received only four adhesions; and two of them relate to the Act as a whole. Whatever hope we may be entitled to put in it, we must foresee certain hesitations and delays before its application becomes more general. On the other hand, the numerous signatures gathered by the optional clause of Article 36 already confer on the clause a quasi-universal practical value...

The previous Government considered that as the General Act of Arbitration was established France had no further reason for remaining outside this movement and for not sharing in the immediate advantages of the optional clause system. These are, gentlemen, the practical reasons which led the French delegation in the Assembly, on the same day as Great Britain signed the document, to review the signature given in 1924..."

The conclusions, Mr. President, to be drawn from these statements—the substance of which was in no way affected by subsequent parliamentary developments—are compelling.

First, as already stated, there was a clear understanding of the separate identities of the General Act system under Article 36 (1) of the Statute and the optional clause system under Article 36 (2). It is, moreover, manifest that flowing from this comprehension of their separate identities was an implicit appreciation of the fact that declarations under the optional clause were incapable of modifying acceptances of the General Act.

And this leads directly to the second conclusion. It is evident that in the minds of the French Government the acceptance of the Court's jurisdiction under the optional clause was secondary and subsidiary to acceptance of the Court's jurisdiction under the General Act.

The understanding and attitude of the French Government at the time of its adhesion to the General Act is thus clear. It is equally clear that in making its original declaration under the optional clause in 1931, the French Government regarded that declaration as separate from and supplementary to the adhesion to the General Act.

Now the question remains whether in fact or in law the French Government could or did generate any different intention effective to alter the situation as it existed in 1931. I take it, of course, that there is no question here regarding Australia's intentions. They have not been put in issue; and the Government of Australia has recorded its own view that the General Act belongs to a system of jurisdiction quite separate from the optional clause. We are concerned quite exclusively, in effect, with the attitudes and intentions of the French Government.

The understandings and attitudes which prevailed in France in the period 1929-1931, covered by the text which I have already mentioned to the Court, were still clearly operative in 1936—at the time of the first renewal of the French declaration under the optional clause of the old Court. The *exposé des motifs* of the draft law to authorize the renewal of the declaration, as presented to the Chambre des députés, after referring to the optional clause continues as follows:

"More limited in its scope [that is, the optional clause] than the General Act of Arbitration of 1928, which covers all disputes, political as well as legal, it fits into the overall plan of the General Act and, even after the adhesion of France to the latter, it retains an undoubted utility. Although, in its chapter relating to judicial settlement, the General Act to some extent duplicates the clause of Article 36 [that is to say Article 36, para. 2] these two texts remain no less distinct diplomatic instruments, taking effect separately between their respective adherents..." (*Doc. parl., Chambre*, 20 February 1936, Annex 6592.)

I also quote an extract from the report submitted to the Senate by Mr. Renoult on behalf of its Foreign Affairs Committee:

"In waiting until the adhesions of various foreign States to the General Act signed in 1928 should become sufficiently numerous to make this into an instrument of peace between peoples, the French Government has considered that it would be desirable to ensure at the very soonest a possibility of the practical settlement of disputes defined in Article 36 of the Statute of the Court. Thus it decided to adhere to the optional clause mentioned above." (*Doc. parl., Sénat*, 13 March 1936, Annex 264, p. 160.)

Once again one finds in these paragraphs the clearest acknowledgement of the separate character and independent standing of the General Act and the optional clause—each intended to open up new routes of access to the Court and neither overriding the other.

The next event which requires some examination is the making in 1947 of a new French declaration under the optional clause and its ratification in 1949. This event is important because for the first time—with the exception of the wartime reservation—the optional clause declaration became significantly narrower than the General Act acceptance. The element leading to this result was the introduction into the declaration of a reservation excluding from the jurisdiction of the Court matters falling essentially within French domestic jurisdiction as determined by the French Government.

One may reasonably ask: was anything said in the period 1947 to 1949 to suggest that this narrower reservation was intended—let alone was thought able—to alter the terms of French participation in the General Act system? The answer is to be sought in the *exposé des motifs* of the draft law authorizing the ratification of the French declaration of 1947 presented by Mr. Georges Bidault. After a brief general statement of the background, the *exposé* referred to the terms of the three reservations attached to the new declaration. I need not trouble the Court with the first.

As regards the second, the *exposé* said—once more in my translation:

"The declaration reserves the freedom for the Government to resort to any other method of peaceful settlement on which the parties have agreed or may agree. A similar provision appeared in the declarations of 1929 and 1936 which the French Parliament approved at the material times."

I will revert presently to the significance of this reservation, which reappears in the current French declaration.

But it is the reference to the third reservation in the *exposé des motifs* which specifically calls for attention now:

"The declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic. This reservation [and I am still

quoting from the *exposé* which is of a general nature] is similar to the one which was made at the time of the acceptance by France of the General Act of Arbitration." (*Journal Officiel, doc., parl., Ass. Nat.*, 25 June 1948, Annex 4733.)

The Court will no doubt be surprised to learn that this reservation was thought to be similar to the one which appeared in the French acceptance of the General Act, for the reservation that appeared in that earlier document was one of disputes "other than those which the Permanent Court may recognise as bearing on a question left by international law to the exclusive competence of the State". Nonetheless, the draft law was adopted without any objection being raised—as is shown by the following extract from the speech of Mr. Bidault, the Minister for Foreign Affairs, in reply to the debate in the Council:

"The first draft [the number first refers to the fact that other international texts were under consideration at the same time] concerns the jurisdiction of the International Court at The Hague. It has not given rise to any objection and I do not think that there is any reason for raising an objection to it. It is in conformity with legal tradition and with French moral tradition of long standing. Moreover, it includes, as regards the reservations of sovereignty, all the guarantees required to satisfy the most exacting purists. Consequently, I think that this Assembly will not wish to make difficulties which the National Assembly did not make as regards a major act by which France marks its faith in international jurisdiction, a faith which it would much like to see more widely spread." (*Annales du Conseil de la République, Debates*, Vol. 3, 1948, p. 1894, 9 July 1948.)

Can there then, in the period 1947-1948, be seen any indication of a French intention to utilize a declaration under Article 36, paragraph 2, as a means of attempting to reduce its obligations under the General Act? The answer is No, no, beyond any shadow of a doubt. Obviously in 1947/1948 the French foreign ministry was aware of the General Act, hence the French foreign minister's comparison between the declaration and the General Act. But no suggestion was made at the time that the declaration was intended to or could override the General Act. Indeed the reverse inference must be drawn from the facts. If the intention were to alter obligations under the General Act, then how could the French Government have hoped to achieve its end by a reservation which, on its own avowal to its parliament, was similar to, not different from, the General Act.

I come next, Mr. President, in the search for a French intention to override the General Act, to the remaining two declarations made under the optional clause—those of 1959 and 1966. Can they have been intended to achieve such a purpose? If so, there is nothing to go on except their actual words coupled with a theory—advanced now by the French Government—which runs counter to the express jurisprudence of this Court strongly reaffirmed but a short time before by the judge of French nationality. Certainly there was no public explanation given of the motivation of the French Government. The constitutional process followed theretofore was abandoned. No *projet de loi* was placed before parliament; there is no *exposé des motifs*; there is no ministerial statement; no parliamentary debate; no legislation; only an executive act.

Now it is no part of my task to speculate on the extent to which the international obligations contained in the declarations of 1959 and 1966 were assumed by the French Government in accordance with its established constitutional procedures. Clearly what has happened is not fully understood in terms of

French law even by Frenchmen. I quote, if I may, from a comment in a leading French periodical—the *Annuaire français de droit international* for 1969, where there appears, in my translation, the following passage:

> "The 1966 changes could leave observers more perplexed... And,... it must be remembered that the jurisprudence inaugurated in 1959 has not undergone any change. It is a question of a unilateral act of the French Government and not of a treaty in the sense of Article 53 of the Constitution of 4 October 1958. No debates, no parliamentary examination, are there to clarify its meaning, in contrast with the texts before 1959."

But what matters for present purposes is that the evocation of intention derived from the public processes associated with the events of 1931, 1936 and 1949 finds no equivalent in relation to the events of 1959 and 1966. There is no collateral evidence on those two occasions of any intention to modify the understanding which permeated the earlier statements of the French Government regarding the relative positions and functions of the General Act and the optional clause.

At this point, Mr. President, I wish to retrace my steps for a moment to mention one further passage in the report prepared by Mr. Bastid in 1929. Under the heading "Special agreements" and referring to Article 29 of the General Act, Mr. Bastid had this, amongst other things, to say:

> "And of course, it will always be possible, after the General Act, to conclude special agreements.
>
> But when the agreements are, on the contrary, more restrictive than the General Act, when they limit more narrowly the agreed obligations, what will happen then? Will it be necessary to apply those agreements to the General Act itself?
>
> Naturally, trouble can only arise in the case of agreements prior to the Acts, since it depends always on the intention of the two parties to reduce, in their mutual relations, the obligations which result for them from the General Act." (*Doc. parl., Chambre*, 11 July 1929, Annex 2031, p. 1136.)

Mr. Bastid discusses this matter further in relation to the effect of the General Act upon prior agreements for the pacific settlement of disputes which confer jurisdiction upon tribunals in terms narrower than those laid down in the General Act. Throughout he emphasizes the control exercised by the intention of both parties. Thus the question in this case resolves itself into whether there is any evidence of the intention of both parties, not just one party, that the French declaration under the optional clause should override the General Act. As indicated there is no evidence even of a unilateral French intention to this end; and there is certainly no evidence that Australia has ever contributed to the formation of a bilateral or common intention in this sense.

I must now, Mr. President, expressly state a caveat which will I think in any event have been generally understood in relation to this part of my speech. It is that in seeking to negate the existence or formation of a relevant French intention in the period subsequent to the acceptance of the General Act, I do not concede in any way that such an intention, even if established with crystal clarity—which of course it is not—could make any difference whatsoever to the obligations of France under the General Act. The Court is not here presented with a situation in which the formation or expression of unilateral intention is relevant. The General Act is a treaty. It can be modified only in accordance with its terms. These terms exclude the introduction of reservations by means of

unilateral declarations made within the framework of the optional clause. France and all the other parties to the General Act are perfectly aware of the clear distinction between the optional clause system, with its express allowance of unilateral modifications on the one hand, and treaties, bilateral or multilateral, which contain jurisdictional texts. The latter category, within which belongs the General Act, may be altered only in the traditional manner.

The French Government, in its Annex of 16 May 1973, seeks to escape from its difficulties by likening the situation to one in which there are two successive treaties governing a single situation. To certain aspects of that argument I shall return presently. But for the moment I would like to dwell on one aspect of the matter where even the French argument recognizes that a measure of absurdity may intrude. If the French contention that an optional clause reservation can override the General Act is correct—on the ground, say, that the reservation is a later and more specific treaty—then of course it should also be correct to say that any optional clause reservation is capable of overriding *any* prior undertaking for the judicial settlement of disputes. Such a conclusion would be absurd. And the French Government, recognizing this, seeks to limit the effect to texts "the exclusive object of which is the peaceful settlement of disputes, and in particular judicial settlement".

The distinction thus drawn between such treaties and other treaties which deal with other topics as well and also happen to include a judicial settlement provision is manifestly unfounded. No basis for it is suggested and none can be maintained.

However that is not the immediate point. What requires examination is the proposition that a unilateral declaration under Article 36, paragraph 2, can override obligations of judicial settlement assumed in treaties which have that process as their exclusive object.

In other words, let us take the French proposition that it is only in relation to such treaties, ones which have judicial settlement as their exclusive object, that the optional clause declarations can override.

With the Court's leave, it may be appropriate to look first at the implications of this proposition in relation to multilateral treaties for the peaceful settlement of disputes which include a reference to the jurisdiction of this Court. The question to be asked in each case is: if the French contention is correct, what effect does it have upon these treaties?

Examination of the "Chronological List of Other Instruments Governing the Jurisdiction of the Court", which appears at pages 83-96 of the latest issue of the *Yearbook* of the Court (1972-1973) reveals three relevant treaties.

The first is dated 17 March 1948—the American Treaty on Pacific Settlement (*UNTS*, Vol. 30, p. 56), concluded at Bogotá. So far as I have been able to gather there are nine parties to this treaty: Brazil, Costa Rica, Dominican Republic, El Salvador, Haiti, Honduras, Mexico, Panama and Uruguay. Of these, all except Brazil have made declarations under Article 36, paragraph 2, of the Statute. The Bogotá Pact contains in Chapter 4 a comprehensive acceptance of the Court's jurisdiction in terms virtually identical with Article 36, paragraph 2, of the Statute of the Court. Thus, if the French contention were correct it would be open to eight of the parties to this treaty unilaterally to modify their obligations by changing the terms of their declarations under the optional clause of the Court. It seems unlikely, to put it at its lowest, that the parties to this treaty after making specific provision for the transmission of reservations under the Pact to the Pan-American Union would have contemplated the existence of a parallel and unregulated mode of altering their undertakings. And more than that, if one reflects further, it would be absurd to think, too, that they should have con-

templated this possibility that would be operative only in relation to some of themselves and not to all of themselves.

It is especially significant that the United States which, although it did not ratify the Pact, nonetheless signed it, appended the following reservation:

> "3. The acceptance by the United States of the jurisdiction of the International Court of Justice as compulsory *ipso facto* and without special agreement, as provided in this Treaty, [the Bogotá Pact] is limited by any jurisdictional or other limitations contained in any Declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court, and in force at the time of the submission of any case." (*UNTS*, Vol. 30, p. 110.)

One must ask what is the function of a reservation expressed in those terms? The answer which the application of the reasoning in the French Annex suggests, might be that if the reservation had not been made the treaty undertaking, as a subsequent commitment, would have overridden the United States reservations made to its declaration under the optional clause made in 1946. If the American reservation to the Pact had been limited to earlier declarations, such an explanation would have been correct. But the American reservation goes further. The generality of its language covers future as well as past declarations—and was clearly intended so to do. Why should it have done so if the French contention were correct? There is no explanation, except the fact that the United States wanted to be free to limit its acceptance more stringently than permitted in the Bogotá Pact and considered that it would not be able to do so by the process of merely making a declaration under the optional clause unless a specific reservation to that effect were made.

Furthermore, as stated, seven of the States ratifying the Bogotá system were already bound by the optional clause. Why should they have thought it worthwhile subscribing to the Bogotá Pact if, as the French Government appears to suggest, its chapter on judicial settlement could never go beyond the limits of their optional clause declarations past or future? Again, the explanation must lie in the fact that those States saw in the Bogotá Pact an additional way of extending the jurisdiction of the Court. It must, of course, always be remembered that such States would have had in mind the straightforward and uncomplicated statements of the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case.

A second example is provided by the Revised General Act itself of 28 April 1949 (*UNTS*, Vol. 71). The parties to this treaty are now Belgium, Denmark, Luxembourg, Netherlands, Norway, Sweden and Upper Volta. All except Upper Volta have made declarations under the optional clause prior to their accession to the Revised General Act. Why, it may be asked, would they have troubled to accept Chapter II of the Revised General Act on judicial settlement if they had regarded their existing declarations under the optional clause as a sufficient and overriding basis for the Court's jurisdiction?

The third example, Mr. President, and the last with which with your leave I will deal this morning, is the European Convention for the Pacific Settlement of Disputes. This contains in Chapter I an undertaking to accept the jurisdiction of the Court in terms similar to Article 36, paragraph 2, of the Statute. Article 2, paragraph 1, of the European Convention—true to the intention of the parties to open up, rather than close, routes of access to the Court—provides that Article 1 shall not affect undertakings by which the parties have accepted or may accept the jurisdiction of the International Court for the settlement of disputes other than those mentioned in Article 1. However, the most interesting

provision in relation to the present argument is to be found in Article 35, paragraph 4:

> "If a... Party accepts the compulsory jurisdiction of the International Court of Justice under paragraph 2 of Article 36 of the Statute of the said Court, subject to reservations, or amends any such reservations, that High Contracting Party may by a simple declaration, and subject to the provisions of paragraphs 1 and 2 of this Article, make the same reservations to this Convention. Such reservations shall not release the High Contracting Party concerned from its obligations under this Convention in respect of disputes relating to facts or situations prior to the date of the declaration by which they are made. Such disputes shall, however be submitted to the appropriate procedure under the terms of this Convention within a period of one year from the said date." (*UNTS*, 1959, p. 260.)

What that is saying is that where after the acceptance of obligations under the European Convention on the Pacific Settlement of Disputes, a party makes or adds to its reservations under the optional clause, that alteration of its optional clause commitments does not automatically affect the European Convention commitment but may, by the making of a simple declaration, be made to have that effect. In other words, it excludes any automatic application of the optional clause reservation to the European Convention situation. Now it is known, I am sure, to at least one Member of this Court, who was a member of the Committee of Government Legal Experts which drafted the European Convention, that this paragraph was proposed by the United Kingdom and was unanimously accepted by the Committee of Government Experts, which included amongst its members at that time the then legal advisor to the French foreign ministry. This provision makes it amply clear that in the understanding of the Committee of experts the mere making of a reservation to an optional clause declaration would not automatically operate to create a reservation to the European Convention. This of course is the opposite of the view propounded in the French Annex of 16 May 1973.

The draftsmen of the European Convention, in order to enable parties thereto to keep their commitments under that instrument parallel with their optional clause declarations, specifically permit them to make declarations for that purpose under the European Convention. It is hardly conceivable that they would have so provided specially if the same result would have come about as a result of existing law. Their conduct is evidence of the view that in the Council of Europe, when specific thought was given to this very subject, it was not considered that optional clause reservations automatically overrode jurisdictional obligations under other instruments of pacific settlement.

The Court rose at 1 p.m.

EIGHTH PUBLIC SITTING (6 VII 74, 10.05 a.m.)

Present: [See sitting of 4 VII 74.]

Mr. LAUTERPACHT: Mr. President and Members of the Court. When the Court rose yesterday I was in the process of examining the suggestion in the French Note of 16 May 1973 that a declaration under Article 36 (2) of the Statute of the Court can override jurisdictional obligations which exist under the General Act. I was observing that the French Government had recognized the absurd results which would flow from the full logical application of its proposition and had, therefore, sought to temper or qualify the proposition by trying to limit it to treaties which dealt exclusively with the peaceful settlement of disputes. Having suggested that this limitation had no recognizable logical foundation, I nevertheless then began to consider what light practice relating to such treaties might shed upon the French contention. It was in that connection that I referred the Court in the first place to three multilateral treaties, the Bogotá Pact, the Revised General Act and the European Convention for the Pacific Settlement of Disputes, and I sought to show that the attitudes of the parties to these treaties indicated quite clearly that in the thinking of those States, international law did not include any doctrine to the effect that optional clause reservations automatically override or vary prior multilateral treaty commitments to the judicial settlement of disputes. And that was the point which I reached at the close of yesterday morning's session.

Generally, however, the relationship between a restrictive acceptance of the optional clause and prior jurisdictional commitments of the State making the declaration does not appear to have been the subject of express and specific discussion of the kind which I referred to yesterday morning. At most, attitudes on this matter are to be implied from the language used in considering other aspects of the jurisdictional system of the Court. Thus, in the case of the French parliamentary examination of the Act, which I referred to yesterday in some detail, the indication that the General Act is not overridden by the optional clause declaration is to be derived from the general language of the discussion rather than from a specific mention of the present problem.

The same is no less true of the discussion which has taken place in United States official and public quarters. Thus, repeated attention has been paid to the relationship between, on the one hand, United States participation in multilateral conventions with clauses which confer compulsory jurisdiction upon the Court and, on the other, the so-called Connally amendment to the United States declaration under Article 36 (2) of the Statute of the Court—the Connally amendment being, of course, the self-judging or automatic reservation.

In each case there has been clear identification of the separateness of the jurisdictional system of Article 36 (1) and (2), coupled with express repudiation of any suggestion that the so-called "Connally amendment" could override the specific jurisdictional commitments contained in various multilateral treaties.

By way of example, mention may first be made of the position adopted in 1960 by the Legal Adviser to the Department of State regarding Article XIII—that is the jurisdictional article—of the International Convention for the Prevention of the Pollution of the Sea by Oil. In a Memorandum dated 23 May 1960, the Legal Adviser said:

"This is a specific provision in a treaty permitting the parties to refer certain matters for determination to the International Court of Justice. The jurisdiction of the Court in such cases is provided in Article 36, paragraph 1, of the Statute of the Court. In my opinion, a submission to the Court under this specific provision would not be subject to the Connally reservation . . . that declaration was filed pursuant to Article 36, paragraph 2, of the Statute of the Court. The specific provision of Article XIII [that is Article XIII of the Convention] would govern references to the Court made under it. The Connally reservation would only apply to references where jurisdiction is premised on the declaration of general acceptance of jurisdiction [that is to say, Article 36 (2)]." (*US Senate, 86th Congress, 2nd Session, Executive Report No. 6*, p. 8.)

The same view was expressed by Mr. Arthur Dean, who had been head of the United States delegation to the 1958 Geneva Conference on the Law of the Sea in 1958, when, in 1960, he appeared before the Committee on Foreign Relations of the United States Senate in the hearings on the Geneva Conventions. After referring to the optional protocol to the Conventions, which provided for the compulsory jurisdiction of this Court, Mr. Dean observed:

". . . if you decided to assent to this optional protocol, with respect to these four conventions, there would be no reservation such as there is in the Connally amendment . . ." (*ibid.*, p. 9).

Or again, and even more explicitly, in 1967 the Committee on Foreign Relations of the United States Senate made the same point in recommending that the Senate advise and consent to the ratification of the Supplementary Slavery Convention. The Committee's report stated:

"Inasmuch as the Connally amendment applies to cases referred to the Court under Article 36 (2) it does not apply to cases referred under Article 36 (1) which would include cases arising out of this convention." (*US Senate, 90th Congress, 1st Session, Executive Report No. 17*, p. 5.)

Further and more recent instances could be cited in detail, but I only mention them in passing: that the Connally amendment would not affect a submission to the Court under the dispute settlement provision of the Protocol relating to the Status of Refugees and, once more, that the same amendment would not affect acceptance of the jurisdictional clause in the Tokyo Convention on Offences Committed on Board Aircraft.

It must, of course, be recognized that the examples which I have just given all relate to jurisdictional commitments assumed after the date of the Connally amendment. They do not serve, therefore, as evidence to rebut the assertion that a subsequent optional clause declaration can override a previously assumed obligation in another treaty. But they do serve, nonetheless, to show positively the clear and basic distinction in United States thinking between the system of Article 36 (1) and the optional clause system of Article 36 (2).

Yet, because I have referred to material subsequent to the Connally amendment, it must not be thought that there exists no indication of the United States attitude to the relationship between the Connally amendment and previously established international commitments—that is to say the problem closest to the one now facing the Court. It is, for example, useful to look at a letter dated 5 May 1969 from Mr. William B. Macomber, who was the Assistant Secretary of State for Congressional Relations. This letter was addressed to Senator Fulbright, the Chairman of the Senate Committee on Foreign Relations. The

subject of the letter was the relation between the jurisdiction clause in the Tokyo Convention, which I mentioned a moment ago, and the Connally reservation. In this letter Mr. Macomber stated:

> "It is not unusual for the United States to enter into a treaty which provides for disputes to be settled by the International Court of Justice. Enclosed is a list of such treaties." (*US Senate, 91st Congress, 1st Session, Executive Report No. 3*, at p. 23.)

It is significant that that list contains seven instruments containing references to the Permanent Court or the International Court effective before the Connally amendment and clearly regarded as unaffected by it. The seven texts thus listed are: The Hague Protocol of 1930 on Military Obligations in Certain Cases of Double Nationality; the 1931 Geneva Convention on Narcotic Drugs; and the constitutions of the International Civil Aviation Organization, the Food and Agricultural Organization, Unesco, the World Health Organization and the International Labour Organisation—there is the United States acknowledging that its jurisdictional obligation under seven texts in force prior to the self-judging Connally amendment remained effective notwithstanding the Connally amendment and unaffected by the Connally amendment.

In this connection, it is, I believe, also worth mentioning in passing the effect which the French contention, if it were valid, might have had on the course of the *South West Africa* cases before this Court in 1962. The Court remembers, of course, that those cases were commenced by two separate Applications by Ethiopia and Liberia respectively. Each claimant State had to satisfy the Court of the existence of jurisdiction in the case. The grounds of argument in the two cases were identical, but there was in fact a major difference between the two claimants: Ethiopia was not a party to the optional clause but Liberia was. I have already mentioned that Liberia had made a declaration effective at that time containing an automatic reservation. This reservation could have been invoked on a basis of reciprocity by South Africa had it been in any way relevant to the case, as by implication France now suggests that it is. But the fact to note is that neither South Africa, which was by no means backward in the presentation of argument, nor even those judges of this Court who considered that the Court lacked jurisdiction, ever suggested that the Liberian automatic reservation could be used to oust, in relation to the Liberian Application, the jurisdiction of the Court flowing from Article 7 of the Mandate Agreement.

Mr. President, what is true of multilateral treaties is equally true of bilateral treaties. In a list brought up to date in May 1973, the United States State Department noted 19 commercial treaties and two other treaties which contained provisions for the settlement of disputes by the International Court of Justice, being treaties to which, of course, the United States was a party. The same list also noted that:

> ". . . in addition, the United States concluded economic co-operation and aid agreements with 17 countries in 1948 which contain provisions for referral of disputes to the International Court of Justice subject, however, to the self-judging domestic jurisdiction reservation of the United States".

So here a clear distinction is drawn between those treaties which, on the one hand, are firmly recognized as possessing jurisdiction clauses entirely independent of the United States declarations under the optional clause, and, on the other hand, those treaties where the references to the jurisdiction of the Court have expressly had read into them the terms of the Connally amendment. It is evident beyond any doubt that, apart from these last cases specially provided

for, there has never been any thought in anyone's mind that the reservations under Article 36 (2) could affect submissions under Article 36 (1).

Reference may also be made to a leading instance of bilateral treaty practice from South America. The most recent *Yearbook* of the Court contains a reference to the General Treaty for the Settlement of Disputes concluded between Argentina and Chile in 1972. This, as is known, replaced the 1902 General Treaty of Obligatory Arbitration and instead established the compulsory jurisdiction of this Court in disputes arising between the two countries. Yet the French contention is to the effect that, this being a treaty exclusively for the pacific settlement of disputes, it is open to either party to render its terms nugatory by the subsequent unilateral adoption of a more restrictive reservation to their acceptances of the optional clause.

It hardly needs saying that any acceptance by the Court of the French contention would be the single most effective deterrent to the further conferment of jurisdiction upon the Court pursuant to Article 36 (1) of the Statute. Why should States incur the risk of the ineffectiveness of an agreed procedure for the settlement of disputes in treaties by including therein a reference to the Court? The advice that they would undoubtedly receive in such circumstances would be to insert provisions for arbitral settlement which would avoid exposure to failure of the kind here under consideration.

There remain, Mr. President, four additional but short points to be made regarding the French contention on the effect of the optional clause declaration.

The first rests upon the significance attached by Judge Hudson in his dissenting opinion in the *Electricity Company of Sofia and Bulgaria* case to a reservation in an optional clause declaration operative in cases where the Parties have agreed to have recourse to another method of pacific settlement (*P.C.I.J, Series A/B, No. 77*, p. 124). Judge Hudson found that although both the optional clause and the other relevant instrument conferred jurisdiction upon the Permanent Court, the two provisions belonged to separate systems of conferring jurisdiction upon the Court, that the case fell within the reservation and that the alternative source of jurisdiction was operative.

The French Declaration of 1966 contains, as all its predecessors have done, a reservation excluding disputes with regard to which the parties may have agreed or may agree to have recourse to another method of pacific settlement. It is evident from the citations which I have already given to the various *exposés des motifs* and reports in the French Parliament that the General Act and the optional clause were considered by the French Government as being each in relation to the other another mode of pacific settlement. It is clear also that, apart even from the evidence of the French assessment of the two texts, they in any event satisfy Judge Hudson's criteria. Hence, it may be concluded that the French optional clause declaration on its own language cannot stand in the way of effective reliance upon the General Act.

The second and third points both relate to the suggestion in the French Annex that the present problem is simply one of resolving a conflict between successive treaties dealing with the same matter.

Thus, the second point is that upon proper analysis, although the relationship between parties to the optional clause may derive from "conventional" international law as opposed to "customary" international law, that does not make the relationship a "treaty" relationship of the kind which even begins to attract consideration of the rules relating to successive treaties. It is very much to the point to recall in this connection one paragraph from Judge Hudson's dissent in the *Electricity Company of Sofia and Bulgaria* case, a passage to which reference has not previously been made in this case:

> "Note may here be made of Article 2 of the Treaty of 1931 which provides that 'disputes for the settlement of which a special procedure is laid down in other conventions in force' between the Parties 'shall be settled in conformity with the provisions of such conventions'. It is not a simple matter to give a precise meaning to this provision; but it would seem quite clear that the *Belgian and Bulgarian declarations are not in this sense a convention* laying down 'a special procedure' for the settlement of legal disputes covered by Article 36, paragraph 2, of the Statute." (*P.C.I.J., Series A/B, No. 77*, p. 124.)

Thus Judge Hudson took the view that two declarations linking States under the optional clause could not be regarded as a convention, at any rate in the kind of context which the Court is now considering.

At the same time, reference should be made to the discussion of the optional clause system which occurs in this Court's Judgment in the preliminary objections in the *Right of Passage* case (*I.C.J. Reports 1957*, p. 125). While the Court is there prepared to treat optional clause declarations as establishing a consensual bond between the Parties, it does not for a moment suggest that there is any element of a common intention in reservations. Reservations are unilateral. They create relations only within the framework of Article 36 (2) and in no other way whatsoever.

The third point involves adding a further reason to those already given in the oral hearings of May 1973 and in the Australian Memorial of last November as to why it cannot validly be pretended that a declaration under the optional clause is to be assimilated in quality to the Charter itself and thus enjoy the primacy accorded to the Charter by Article 103 thereof. This additional reason finds expression in an article by Sir Humphrey Waldock in the *British Yearbook of International Law* called "The Plea of Domestic Jurisdiction before International Tribunals". There Sir Humphrey was discussing the contention of Iran that Article 2 (7) of the Charter would establish a definite constitutional limitation upon the Court's jurisdiction in all contentious cases. Sir Humphrey observed:

> "Article 2, paragraph 7, does not appear to have the effect contended for by Iran. In the first place, it may be doubted whether in the phrase 'Nothing in the present Charter' the word 'Charter' was used as including, without mention, the Statute of the Court. The internal evidence of the Charter and Statute suggest that in either instrument the word 'Charter' is used to describe only the articles of the Charter itself." (Vol. XXXI (1954), p. 96.)

There then follows a footnote:

> "For example, despite the Statute being an integral part of the Charter, Article 93 provides that parties to the Charter are also to be parties to the Statute. Again, in Article 108 dealing with the machinery for the amendment of the Charter, the phrase 'the present Charter' cannot include the Statute of the Court which contains its own article dealing with amendments of the Statute. In the Statute itself the Charter is always referred to as if it were a self-contained separate instrument." (*Ibid.*, p. 122.)

The fourth and last point, Mr. President, involves recalling once again the inherent absurdity of the French proposition. What is the position when one or more of the parties to a bilateral or multilateral treaty for peaceful settlement of disputes is not a party to the optional clause? Clearly in such a case the French optional clause reservation must be ineffective to modify the relationships between that country and France under the General Act. The consequence is

that the intention which, so the French Government contends, is demonstrated in controlling terms by its optional clause reservation is ineffective and the alleged parallelism which is said to exist between French commitments under the two instruments disappears. Moreover, France then has two different sets of relations under the General Act, one with those States which have made optional clause declarations and another with those States which have not; and, since, if the French approach is correct, it will clearly be more advantageous, were one contemplating proceedings against France under the General Act, not to be bound by the optional clause, one could in theory have been faced by this spectacle of potential plaintiff States actually terminating their optional clause declarations before commencing proceedings against France, in order that there should be no restrictions on the scope of their mutual jurisdictional commitment under the General Act. The situation is too ridiculous to contemplate, but it is an obvious consequence of the application of the French theory and its absurdity constitutes yet another reason for rejecting the French contention.

This brings me, Mr. Président, to the end of my observations regarding the proposition advanced in the French Annex that the French optional clause declaration of 1966 overrides independent commitments to the jurisdiction of the Court arising under Article 36 (1) of the Statute.

So may I, by way of the most summary résumé of what I have said, conclude my argument with a number of specific submissions the general effect of which will in due course be incorporated into the formal submissions to be made on behalf of the Government of Australia.

1. The present dispute falls generally within the scope of the reciprocal declarations made under the optional clause by both France and Australia. Accordingly, the Court possesses jurisdiction by virtue of Article 36 (2) of the Statute.
2. The incorporation by France of the reservation of "activities connected with national defence" is not effective to deprive those declarations of their jurisdiction creating power. This is firstly because France has not provided the Court with the evidence which is the essential prerequisite for a judicial determination of the applicability of the French reservation. Alternatively, the French reservation is ineffective to deprive the Court of jurisdiction because it is invalid. It is, moreover, severable from the rest of the French declaration which remains effective without it.
3. The existence of the French declaration and reservation thereto in no way affects the jurisdiction established in this case by the General Act. The General Act and the optional clause create between the parties legal relationships which are separate and independent of one another. The 1966 reservation could only override the General Act if there were evidence of the incorporation in an acceptable legal form of the common intention of the parties that it should do so. There is no such evidence. More than that, there is the most overwhelming evidence in the French parliamentary papers, to which I referred at length yesterday, that both the French Executive and the French legislature have always regarded the General Act and the optional clause as two quite distinct and independent systems of conferring jurisdiction upon this Court.
4. In any case the General Act is another mode of pacific settlement the effect of which is expressly preserved by the first reservation in the French declaration of 1966.
5. Finally, it should be recalled that the reservation made to the French

declaration of 1966 cannot possibly affect the General Act relationships if, as has already been submitted, this reservation is invalid; and for this purpose it would not matter if, being invalid, the reservation could not be severed from the rest of the declaration. In that case the whole declaration would fall and *a fortiori* there would be no conflict between it and the General Act.

With these submissions made, Mr. President and Members of the Court, it only remains for me to thank you for the hearing which you have afforded me and respectfully to ask you to call upon the Solicitor-General of Australia, Mr. Byers, to present the last part of the case on behalf of Australia.

ARGUMENT OF MR. BYERS

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. BYERS: Mr. President and Members of the Court. May I at the outset express my appreciation of the privilege conferred on me of again addressing this Court. It may be convenient for me to recall Australia's understanding of the task which the Court's Order as to admissibility requires of it. I propose to do so concisely. In its Memorial that understanding was stated in these words which I take from paragraph 434, page 331, *supra*:

> "The Government of Australia will, therefore, now turn to show in more detail how it has a legal interest in respect of each of these elements in the claim. In so doing, the Government of Australia again emphasizes that at the present stage of the case it is not necessary for it, nor is it invited, to prove its substantive case. This is not in issue at this juncture. The Government of Australia will give such a detailed demonstration in the next phase of the proceedings, the one dedicated to the substance of the case. At present, the Government of Australia is required to show that it has a legal interest in its Application; and since this is to be treated as a preliminary question, the Court can only proceed on the basis of the presumed correctness of the Australian contentions on the merits."

That position, Mr. President, I now reiterate in the firm confidence that, should Australia's appreciation of its obligations be deficient in any respect, its attention will be directed thereto and opportunity of correction afforded to it. I would ask the Court to consider all I say hereafter as subject to and as an intended performance of that task as so understood.

The view expressed in the paragraph of the Memorial which I have quoted is not inconsistent with the Court's own jurisprudence and is consistent with both the language of the Court's Order and with Judge Jiménez de Aréchaga's commentary upon it and, of course, consistent also with the remarks of Sir Humphrey Waldock to which the Attorney-General has referred.

Paragraph 23 of the Order of 22 June 1973 reads as follows: "Whereas it cannot be assumed *a priori*... that the Government of Australia may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application." We read that language as directing us to address to the Court arguments showing how it is that Australia possesses a legal interest in respect of each claim made so that the Court may decide whether or not that interest entitles it to admit the Application. The Court is only concerned, so we submit, with the question of the admission of the Application into its curial processes. The decision by those processes upon the claims made in the Application arises only at a later stage. Put shortly the Court's Order, so we submit, envisages a decision only upon the question whether the Court will now entertain for later decision the claims made in the Application. And it poses now as the only question the following: Does Australia have a legal interest to propound the claims? That view necessarily involves, so we submit, that no decision presently may be made, consistently with the Order, upon the validity in law or in fact of any of the claims so made. To the extent that the claims may be elaborated the purpose and only purpose is an indication of the content of the claims so

that the Court may be adequately assisted in its decision of whether or not now to entertain them for subsequent adjudication.

May I, Mr. President, recall the observations of the Court in the *Interhandel* case:

> "... the Court does not, at the present stage of the proceedings intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law" (*I.C.J. Reports 1959*, p. 24).

The accord of what I have said with the comments of Judge Jiménez de Aréchaga on paragraph 23 of the Court's Order of 22 June 1973 is apparent from what I shall now quote from his declaration:

> "At the preliminary stage it would seem sufficient to determine whether the parties are in conflict as to their respective rights. It would not appear necessary to enter at that stage into questions which really pertain to the merits and constitute the heart of the eventual substantive decisions such as for instance the establishment of the rights of the parties or the extent of the damage resulting from radio-active fall-out." (*I.C.J. Reports 1973*, p. 108.)

The alternatives posed, namely establishment of the rights or extent of the damage from fall-out, both of which the remarks contemplate as being for the merits, should no doubt be read with the earlier observations: "The issue has been raised of whether Australia has a right of its own—as distinct from a general community interest—or has suffered, or is threatened by, real damage." (*Ibid.*, p. 107.)

From that contrast it would seem, as we would respectfully submit is legally correct, that if a right of Australia is infringed—a right in the sense of a right of Australia's own—a legal interest to propound the claim is established without more.

The right of course must be justiciable. No damage or threat of damage is, however, additionally necessary. If the claim is based, on the other hand, upon a general community interest, the suffering or threat of real damage suffices to permit the claim to be propounded, that is to say, a legal interest to propound or to enforce a general community interest arises, *inter alia*, from the threat of or substaining of real damage by the possessor of that interest.

Mr. President, the Australian Memorial contains in paragraphs 390 to 400 a reference to, and discussion of, the jurisprudence both of the Permanent Court and of this Court where admissibility is questioned. The Memorial concludes in paragraph 401 that the word is not used as bearing any fixed denotation. That is perhaps hardly surprising, but it does raise difficulties for Australia for it is left to grope for, except to the degree of the guidance afforded it by the Court, the precise question intended to be raised. But in the light of that guidance two things appear clear: the first is that Australia's task is to establish its legal interest to propound the claims and the second, that the validity of the claims in fact and in law is a question for another day. That being so it is apparent that the real, indeed the only question, is that of legal interest and, further, that an elaboration of the basis of the claims is necessary to resolve that very question.

I now turn to that task and shall endeavour consistently with what I have already said to outline the principal elements upon which we will rely. The course I propose to follow is to deal first with Australia's legal interest to obtain judgment that its sovereignty over and in respect of its territory is violated by the deposit on its territory and the dispersion in the air space of radio-active fall-out from the French atmospheric nuclear tests.

It would no doubt be a logical step to deal initially with this Court's jurisprudence as to what may constitute a legal interest, but in the case of this claim that interest will be manifest from this preliminary discussion of the legal considerations which, be they ultimately held right or wrong, constitute it. I shall begin by recapitulating those facts necessary to an understanding of the legal considerations, while emphasizing again that what I have to say is offered only pursuant to the Court's guidance, as an indication of what our case on the merits will at least include. This is not the time for a final or definitive treatment of what Australia's factual case on the merits will be. But I would emphasize that what facts I shall recall to the Court will be either indisputable or attested by the most weighty and sober of authoritative bodies whose status lends authenticity to their utterances. The facts in other words are orthodox and accepted.

Mururoa where the tests are held, is situated some 4,000 nautical miles to the east of Australia's eastern coast—I pause to interpolate that a map showing Mururoa's situation in relation to Australia is Annex 1 to our Application. Natural forces result in the carriage into the Australian air space and to the deposit on Australian soil and on the oceans of debris from atmospheric nuclear tests conducted at Mururoa. That debris is radio-active, and inevitably exposes the Australian population and the Australian environment to additional doses of ionising radiation. I would deal first with these natural forces, secondly with the manner in which radio-active fall-out from French atmospheric tests at Mururoa is carried to Australia and deposited there, thirdly, with the irradiation of the Australian population which occurs as a result of that radio-activity fall-out and lastly with the interaction of the ionising radiation with life. All I will have to say in this connection will be drawn from UNSCEAR Reports already before the Court and I will, for ease of reference to those Reports, state the volume and paragraph numbers as I proceed.

First, then, the natural forces. One marked feature of atmospheric circulation at high altitudes is a system of predominantly western winds, or jet streams, in mid-latitudes at altitudes of about ten kilometres. Australia and Mururoa are, I interpolate, situated in mid-latitudes as Annex 1 to the Application shows. At these heights, wind velocities of 100 to 300 kilometres per hour are usual and, at mid-latitudes, air is carried around the globe in a week or so. Paragraph 27 of the Australian Application describes how the earth's atmosphere may be divided, by virtue of its characteristics, into two zones called, in order of ascent, the troposphere and stratosphere and separated by the tropopause. A result of the existence of the predominantly westerly jet streams, to which I have referred, is the carriage by them, towards the east around the globe at high speeds, of matter which is injected into them or is transferred into them from above. An atmospheric nuclear explosion at Mururoa takes place in the context of these westerly jet streams. Radio-active debris which is injected into them is carried inevitably in an easterly direction.

The height to which the radio-active debris rises in any given nuclear explosion, its vertical distribution in the cloud and its subsequent dissemination in the atmosphere depend on a number of factors. They include the explosive yield of the device, the manner in which it is exploded and the meteorological conditions prevailing at the time and place of the explosion. In a word, atmospheric

explosions cannot be confined to Mururoa. The actual detonation occurs no doubt on territory which under the French Constitution is regarded as an overseas territory: its necessary consequences are not and cannot be. He who has the skill to cause the detonation has the knowledge of its consequences.

Secondly, the carriage of the radio-active debris to Australia and its deposit there. What I shall now say is a statement, in summary form, of material in the 1972 *UNSCEAR Report*, Volume 1, pages 39 to 41, paragraphs 147 to 165. In those paragraphs will also be found the material upon which my outline of the natural forces, which I have already undertaken, is based. After an atmospheric nuclear explosion, radio-active debris is present in the atmosphere in particulate form. The particles are small and consist mainly of material from the nuclear device (para. 150). Unless the nuclear explosion occurs in the stratosphere itself, the radio-active debris may be distributed initially, either in the stratosphere and the troposphere or, in the case of a nuclear explosion of lower yield, in the troposphere alone. In the stratosphere, the debris is zonally well mixed so that several months after a test the debris will be uniformly distributed around the circle of latitude (para. 153). Many mechanisms play a role in the subsequent transfer of radio-active debris from the stratosphere, through the tropopause, to the troposphere from whence it is deposited on continents and on the oceans below (para. 156).

Radio-active material in the troposphere, present either as a result of its initial injection there or as a result of transfer from the stratosphere, is mixed fairly rapidly in the hemisphere of entry (para. 159). The mean residence time of the debris in the troposphere is about 30 days (para. 162). As pointed out in that same paragraph, the fall-out particles may reside in the lower, rain-bearing layers of the atmosphere for a less period. Radio-active debris in the troposphere is carried down to the level of rain-bearing clouds mainly by turbulent mixing (para. 164). The radio-active particles are rapidly washed out of the lower troposphere by rain and are deposited on the continents and on the oceans (para. 164). In addition to the deposit through rain processes, there is dry deposit which is important in countries of low rainfall (para. 164). Much of Australia may be so described.

I pause to summarize:

1. Above Mururoa there are high speed, predominantly westerly winds; these winds circle the globe.
2. Debris from atmospheric nuclear explosions is carried in an easterly direction by these winds and reaches Australia.
3. The radio-active debris is deposited on Australia and on the oceans either by rain or dry fall-out.
4. Such deposit is inevitable.
5. The mechanisms which operate in the carriage and deposit of radio-active debris are complex and are subject to many causes of variance.

The presence, Mr. President, in the Australian air space and the deposit on Australia of radio-active fall-out from the atmospheric nuclear tests at Mururoa will be established at the appropriate time by the most compelling evidence. The Court will no doubt remember that paragraphs 56 to 57 of the Australian request contain mention of the comprehensive Australian programmes to monitor radio-active fall-out and of the publication of the results of that monitoring. In addition to publication in scientific journals and official Australian Government publications, the data from the Australian fall-out monitoring programmes are submitted to UNSCEAR as official Australian information. The Court will recall too that its records contain the text of a report of Aus-

tralian and French scientists after their meeting in Australia on 7-9 May 1973. That may be found at p. 170, *supra*. That report contains this statement:

> "There was general agreement that the technical methods used by the Australian authorities for measuring quantities of radiation fall-out are satisfactory and are in accordance with international practice."

I turn now to the third aspect: the irradiation of the Australian population which occurs as a result of the radio-active fall-out from the French atmospheric nuclear tests over Mururoa. The 1972 report of UNSCEAR contains at page 22 of Volume 1 a schematic diagram making abundantly clear the modes by which radio-active fall-out in the atmosphere from nuclear tests inevitably result in additional doses of ionising radiation to populations. There are two broad categories of these radiation doses: external and internal irradiation. External irradiation occurs as a result of the presence of radio-active fall-out in the atmosphere and more importantly from that which has been deposited on the ground. Fall-out on the ground remains subject only to its radio-active decay during which it emits the ionising radiation to which populations are exposed. It is subject also to the natural processes of weathering and leaching into the soil. Internal irradiation occurs in two ways. Firstly, by the inhalation into the lung of air-borne radio-active material but, more importantly, by transfer from the earth's surface, including the oceans, through the food chain to organs and tissues. The radio-active material concentrated there irradiates the cells of the organs and tissue it inhabits.

Strontium-90 for example is transferred to man through his diet, including milk (*1972 UNSCEAR Report*, Vol. 1, para. 185). It is deposited in his bones (para. 195) where it delivers a radiation dose to bone marrow and bone cells (*1972 UNSCEAR Report*, Vol. 1, pp. 47-50). Caesium-137 enters the body of man mainly through his consumption of milk, meat and vegetables contaminated with that radio-nuclide (para. 223). The caesium-137 is rapidly distributed in the human body, about 80 per cent. being deposited in muscle and 8 per cent. in bone (p. 52, para. 231) and results in radiation doses to body organs and tissues and particularly gonads, bone marrow and bone cells. Milk dominates as a source of iodine-131 ingestion in countries where milk is a major dietary component (para. 215). Inhalation is another mode of exposure from this radio-nuclide in fall-out (para. 218). Iodine-131 poses special problems because it is concentrated in the thyroid and irradiates that gland more than any other tissue (*1972 UNSCEAR Report*, Vol. 1, p. 4, para. 14). It is of particular importance with respect to infants who consume fresh milk (para. 215).

The additional radiation doses, both external and internal, from radio-active fall-out are in UNSCEAR reports expressed as dose commitments. Dose commitment is a term meaning the doses which, on the average, each person in a population has received, or will receive, because of that source of ionising radiation. May I refer again to the report by Australian and French scientists after their meeting in May 1973. That report [1], which is already before the Court, states: "A large degree of agreement was reached regarding the levels of dose commitment in Australia due to past French tests." It goes on to record the differing estimates of the dose commitments which are expressed in millirads. The words "a large degree of agreement was reached" demonstrate the fact that the Australian population has been committed to additional doses of ionising radiation from French nuclear tests in the atmosphere over Mururoa and that that is not in dispute.

[1] See p. 540, *infra*.

The fourth aspect relates to the inter-action of ionising radiation with life. I shall refer, with one exception only, to UNSCEAR reports and again I shall, as I do so, indicate the relevant parts of those reports. What then is the effect of ionising radiation upon the cellular matter of which living things are composed? Again, the response of UNSCEAR is unambiguous: "Cellular death is an overall and ultimate result of irradiation" (*1962 UNSCEAR Report*, Ch. II, para. 49, Ann. 4 to the request).

The Court adjourned from 11.10 a.m. to 11.45 a.m.

The Court will remember that I was addressing remarks—the purpose I will indicate in a moment—relating to the relationship between exposure to irradiation and the reports of UNSCEAR. May I then continue.

For man, exposure to irradiation may give rise, even in doses substantially lower than those producing acute effects (*1962 UNSCEAR Report*, Chap. VII, p. 35, para. 48) "to a wide variety of harmful effects including cancer, leukaemia and inherited abnormalities which in some cases may not easily be distinguishable from naturally occurring conditions or identifiable as due to radiation". Ten years later UNSCEAR stated "Leukaemia is the best known of the radiation-induced malignancies" (*1972 UNSCEAR Report*, Chap. IV, para. 52), and the same report in the first Chapter, at paragraphs 13 and 14 discussed the special problems of iodine-131, particularly for children, due to its concentration in and irradiation of the thyroid. Damage may also be done to, for example, the nervous system, particularly at the foetal stage (Chap. III, *1969 Report*), to the immune response (Chap. III, *1972 Report*). Lens opacity and sterility may be induced and longevity impaired (*1962 Report*, Chap. III, paras. 40, 41 and 44-48). Further, radiation can produce changes in genes and chromosomes of the cells, which changes may be transmitted to the descendants of the irradiated person. The great majority of radiation-induced genetic changes are harmful (*1972 Report*, Chap. II, para. 32).

An eminent scientist said in evidence before the Sub-Committee on Air and Water Pollution of the Committee of Public Works of the *United States Senate, 91st Congress*, 5 August 1970 at page 648, that where the irradiated cell survives, the consequences for succeeding generations may include death due to leukaemia or central nervous system cancers, mental retardation such as mongoloidism or physical deformity. That scientist is Dr. Karl Z. Morgan, then Director, Health Physics Division, Oakridge National Laboratory, Oakridge, Tennessee. The official publication containing this evidence was placed before the Court on the last occasion. I have taken the doctor's then position from that source.

I wish to make clear that I mention these deleterious biological effects —somatic and genetic—of exposure to ionising radiation for two reasons: first, to show its essential harmful character to human and other life and the environment and, second, by that means, to establish that the debris which emits such radiation is potentially dangerous and thus itself is harmful. There may, when the Court has concluded its hearing on the merits, be room for argument as to the extent of harm caused in fact. There will, we submit, be none as to the harmful nature of the deposit.

I ask the Court to bear with me a moment longer so that I may briefly indicate another and independent source of harm. On 6 November 1962 the General Assembly "viewed with the utmost apprehension" the data contained in the *1962 UNSCEAR Report* (General Assembly resolution 1762A (XVII), request, Annex 9). On 16 December 1971, it viewed "with the utmost apprehension the harmful consequences of nuclear weapon tests for the acceleration

of the arms race and for the health of present and future generations of mankind". Before this Court it is only the Assembly's apprehension for the health of present and future generations that I presently rely upon. (General Assembly resolution 2828 (XXVI), request, Annex 18.) Again the Assembly on 29 November 1972—and I quote only what is material—reaffirmed "its deep apprehension concerning the harmful consequences of nuclear weapon tests for ... the health of present and future generations of mankind" (resolution 2934 (XXVII)).

The apprehension of the international organ no doubt mirrored the fears of the inarticulate populations of the States comprising it. As early as 9 September 1963, the Australian Government in its aide-mémoire of that date to the French Government (Application, Annex 3) referred both to "the concern being expressed by Australian public opinion" and to its awareness that "scientific knowledge of the effects of radioactive fallout is incomplete and that the results of even a small overall increase in the general level of radioactivity cannot be predicted with certainty". In paragraph 47 of its Application, the Government refers to the mental stress and anxiety generated by fear in the Australian population even in the absence of positive identification of effects—that is specific effects—as a result of radiation from radio-active fall-out from the French tests. It refers also to the real concern felt by people in Australia that this testing may place their lives, health and well-being, and that of their children and future generations in jeopardy. In the light of the resolutions of the Assembly, together with the earlier and later reiterations of concern by the Assembly, the psychological injury sustained by the Australian population is credible and will at the hearing be the subject of convincing evidence. From the worldwide apprehension and concern which the resolutions so powerfully demonstrate, it would be strange indeed if substantial sections of the Australian people—a literate population—were alone exempt.

Mr. President and Members of the Court, may I now pause to summarize what Australia submits is the result of the foregoing. I do so, the Court has realized, for the purpose of indicating in outline what, in this respect, Australia at the appropriate time will seek to establish. I have confined my remarks on the nature of ionising radiation and its effect on living matter, both human and other, almost entirely to what UNSCEAR has said, for the purpose of showing that Australia's factual case is based on sober and received scientific evaluation of, and sober scientific opinion on, those matters reached by a responsible scientific body and after, one may well assume, the most painstaking analysis. Australia is therefore entitled to submit to the Court that its factual case will be cogent and convincing. The facts in summary disclose:

1. That radio-active fall-out from France's atmospheric tests at Mururoa has been deposited on Australian soil.
2. That such fall-out has been dispersed through Australia's air space and into its environment including adjacent seas.
3. That such deposit and dispersal is the inevitable concomitant of each Mururoa test series.
4. That France conducted the tests with knowledge that such fall-out and dispersal was their inevitable concomitant.
5. That radio-active fall-out is inherently harmful both to human and animal life and thus to the environment which that life inhabits.

Mr. President, before turning to a discussion of those legal principles which could and, on the better view, as we submit ultimately, will engage France in legal responsibility to Australia, may I offer some preliminary observations?

Australia's present claim is based on what France does on Australian territory. Australia's submissions will not deny to France exclusive and absolute authority to do in its territory what it wishes, subject only to that imperative of international law which commands all States to respect the territory of others. To that imperative Australia's sovereignty also is subject. These principles are, we will submit, amongst the oldest as they are amongst the most central and orthodox of international law. Australia also recognizes that States in their day-to-day commercial and industrial intercourse accept in practice the passage of smoke into their territories from those of their neighbours. Australia also recognizes that in their enjoyment of common resources, the rights of each State are accommodated to the rights of all. But radio-active nuclear fall-out is not smoke nor is the detonating of nuclear weapons a commercial or industrial use of territory. And what common right have France and Australia in Australian territory?

I mention these matters at the outset, Mr. President, to indicate their remoteness from the matters I shall now consider. I shall, however, come to them again. Lastly I would seek to remind the Court that France has not asserted in its communication to the Court that the deposit of fall-out may be justified in international law by considerations analogous to those which have been developed in relation to fumes passing into another State's territory or in relation to the adjustment of the rights of riparian owners.

I would not wish the Court to understand me as submitting an argument in however preliminary a form which would seek to engage France in legal responsibility to Australia merely because France has conducted atmospheric nuclear tests. That is not our primary argument. The Court must ultimately consider, in our view, France's responsibility based on the deposit of nuclear fall-out on Australian soil and its dispersion through Australian air space. Australia's primary argument is that the intrusion alone of a harmful substance violates her rights for which violation satisfaction may be awarded and that further, and additionally, the harmful substance which has intruded because of acts for which France is responsible inflicts serious, even though it may be presently incalculable, harm or damage to Australia and its population. Those rules of international law which have been long applied yield the result, so we will submit, that France is responsible. The factual situation in which the rules were first formulated, so Australia will submit, do not arise for consideration. They are well established and, as we will ultimately submit, clearly applicable. Additional arguments, of course, will be advanced relating to the effect of customary international law upon the atmospheric testing and the relationship of the law relating to freedom of the seas in relation to that testing.

I now turn to those legal principles which, Australia submits, will establish France's legal responsibility to Australia. First, we shall examine those aspects in which we submit Australia's sovereignty has been infringed or violated. Thereafter we shall advance considerations to show that France is legally responsible for those infringements. The aspects of Australian sovereignty to which injury has been done are the territorial and what I take leave to call the decisional. To the first I now address myself, and do so pursuant to the statement I made at the outset of my address.

Australia is sovereign and independent. From this flows, no doubt, its absolute and exclusive right of control over its territory, and from that in turn its right alone to determine what, if anything, may enter that territory. The Court has spoken, so we would submit, quite clearly and explicitly to this effect. I refer, of course, to the *Corfu Channel* case.

The paragraph I wish to quote occurs in a context in which the Court deals

with the consequences of the action of the British Navy in carrying out mine-sweeping operations in Albanian territorial waters without Albanian consent. Members of the Court will recall that the facts proved showed that this operation happened some time after the mining of two British destroyers which occasioned the main proceedings. The Court, rejecting the various British arguments of justification, said:

> "Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances... But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty."

The passage contains, so we will submit, in its first and last sentences, the Court's recognition of three crucial principles. The first is the right of each independent State to territorial sovereignty; the second is the duty of each other independent State to respect that sovereignty and the third is the Court's power to award satisfaction for violation of that territorial sovereignty. The recognition of the right, or what is treated as its legal equivalent, is implied in the Court's formulation in terms of duty in the first quoted sentence. The Court treated itself as bound by its declaration to give satisfaction to Albania for the wrong it had suffered. The Court recognized, in other words, that the very violation of the right implied, without more, loss or damage to Albania and thus engaged the United Kingdom in legal responsibility. To these latter two principles I shall again revert. What I would wish presently to emphasize is the first, the right of territorial sovereignty.

Of this right Arbitrator Max Huber in the *Island of Palmas* case observed: "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State." (*UNRIAA*, Vol. II, p. 839.) Naturally we emphasize the words "exclusive right" and we recall that that very distinguished international lawyer went on to state:

> "International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations." *(Ibid.)*

The point of this for Australia's case is that, given the exercise of the exclusive right to display the activities of the State—and who can deny that Australia has exercised that exclusive right in relation to Australian territory—the concrete manifestations which sovereignty may assume are without limit. One such manifestation may be the physical exclusion of an intruding thing and, where that is either impossible or undesirable, sovereignty may manifest itself in calling upon the organ of international law for satisfaction. Thus Albania's claim before this Court in the *Corfu Channel* case for satisfaction from the United Kingdom was an exercise of territorial sovereignty. For the existence of the sovereign right to territorial inviolability implies also the right to protect it in this Court by judicial declarations appropriate to the varying circumstances of each case. Of course, that right is subject to the imperative I mentioned earlier.

I wish now to refer to some expressions of States on the topic. The Court will naturally recall the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and all Members of the

Court remember that the General Assembly asserted that sovereign equality included a number of elements one of which was the principle that "*(d)* the territorial integrity and political independence of the State are inviolable" (resolution 2625 (XXV)). To like effect is Article III (3) of the Charter of the Organization of African Unity which affirms, amongst others, the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".

The Court will also recall that when a dispute between Israel and Argentina was raised in the Security Council in 1960 over the removal to the former of a resident in the latter, it appeared in United Nations document S/4334 that the Ministry of Foreign Affairs of Argentina delivered a Note to the Israeli Embassy in Buenos Aires which contains the following passage:

> "There is no need to point out that the power of a State to exercise its authority over all persons resident and things situated in its territory is an inalienable attribute of the exclusive jurisdiction essential to its very right to independence, and that the corollary of that right is the duty of every State to refrain from performing, through its organs or agents, any act which may entail any violation of the sphere of exclusive jurisdiction of another State."

I need not quote from the resolution of the Council relating to this matter—it is however that numbered 138 (1960).

In what manner, it may be asked, would Australia seek at the hearing to apply the various passages I have quoted or referred to? Might I recall my earlier remarks that Australia complains of what France does within Australia, both in its territory and its air space. Australia therefore says its exclusive right to its territory is infringed when, without its consent, radio-active nuclear debris produced by French weapon tests intrudes into Australian air space and falls upon Australian soil. That complete and exclusive sovereignty Australia possesses in its air space is violated by the percolation through that air space from above of this debris emitting, both as it falls and thereafter, harmful ionising radiation. In saying this, I would reiterate our understanding that the only question presently before the Court on questions of admissibility is Australia's legal interest to make that claim and that the question of the correctness of those claims falls to be determined at the hearing on the merits.

An illustration may serve to clarify my meaning. In the *Corfu Channel* case the ships of the British Navy in fact intruded upon the territorial sovereignty of Albania. But their presence within that territory might, in some circumstances, such as distress or the exercise of a right of innocent passage, be rendered innocuous and thus excused. But the matters of excuse would need to be established at the merits. The present case is in this regard much stronger. What recognized and accepted principle of customary international law, Australia asks, excuses France from the consequences of dispersing through Australian air space and upon Australian soil its radio-active nuclear debris? France advances none. The jurisprudence of the Court suggests none. But even were there one, its existence would be a matter for the hearing on the merits. And if the existence of harm or damage is essential to liability, Australia may point not only to the violation of its integrity since 1966, not only to the destruction of its incalculably valuable sovereign right to decide for its citizens and their environment the extent to which for their benefit they must suffer exposure to radiation, but also to harm, all the more real for being incapable of precise evaluation, to which its population, both present and future, and environment have been subjected for no benefit to them. Will this Court consistently with its juris-

prudence find itself able to say that the violation of a sovereign right should not receive satisfaction? How may that be said, bearing in mind the *Corfu Channel* case, without such a consideration of legal principle as itself and without more to involve questions beyond admissibility? Australia submits, of course, that such can never be said, but the present point is, how may these things, or any one of them, be said at this stage of the hearing?

Mr. President, may I now direct my argument to the second aspect of sovereignty I earlier mentioned, namely that Australia, because sovereign and independent, possesses the right alone to decide the extent of and conditions under which its people will be exposed to ionising radiation. The Court will remember that paragraph 49 (ii) of Australia's Application claims:

> "The deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:
>
> . . . . . .
>
> *(b)* impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources."

In indicating at this stage the principles that the Australian argument would seek to call in aid in support of each sovereign State's capacity freely to decide what course of action it should choose to adopt and pursue, subject, of course, to any relevant restricting principles of international law, I propose to recall for the Court some judicial and arbitral pronouncements to that effect and then to mention a few of the views by publicists.

The Court will remember that in the case of the *Customs Régime between Germany and Austria, Advisory Opinion*, 1931 (*P.C.I.J., Series A/B, No. 41*, p. 37) the Permanent Court was closely divided on the question whether the proposed customs union between Austria and Germany was compatible with the Geneva Protocol of 1922 concerning the maintenance of Austria's independence. In addition, seven of the eight judges forming the majority also thought the union would be incompatible with Article 88 of the Treaty of Saint-Germain of 1919 on the ground that it would be an act capable of endangering Austria's independence within the meaning of that Treaty. Speaking of Article 88 of the Treaty of Saint-Germain the majority said:

> "irrespective of the definition of the independence of States which may be given by legal doctrine or may be adopted in particular instances in the practice of States, the independence of Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political or any other field, these different aspects of independence being in practice one and indivisible".

If one deletes the reference to present frontiers the foregoing is a statement, so Australia would submit, of that independence entailed in the possession of sovereignty. The seven dissenting judges spoke of sovereign independence in terms identical with the context which I have just quoted. At page 77 they said this:

> "'Independence' is a term well understood by all writers on international law, though the definitions which they employ are diversified. A State would not be independent in the legal sense if it was placed in a condition of

dependence on another Power, if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, i.e., if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails."

This passage treats sovereignty as being constituted by or as comprising the right to exercise its own judgment in coming to a decision, that is an unconstrained capacity to decide. And that in turn implies unconstrained by such a violation of territory as either destroys the exercise of a right to judgment by usurping the choice or by impairing full choice, for example, by subjecting the State involuntarily, without its consent, to the evil which, with consent, it might accept or reject at will or by subjecting the State's territory to that quantum of intrusion in fact of some matter creating or thought by the State to create the evil and with that result to diminish the field of choice otherwise open to the State.

The Court will find in the Memorial of the French Government in the *Customs Union* case a telling collection of the views of publicists in support of this part of Australia's argument. The relevant passages are to be found in *P.C.I.J., Series C, No. 53*, pages 119-122. I should wish, however, to quote the passage cited from Rivier, and ask the Court's indulgence for my accent:

"L'indépendance de l'Etat est sa souveraineté même, envisagée de l'extérieur... On peut définir le droit d'indépendance: le droit d'agir, de décider *librement, sans aucune ingérence étrangère, en tout ce qui* constitue la vie de la nation. L'indépendance comprend et suppose l'autonomie, la souveraineté intérieure." (Rivier, *Principes du droit des gens*, sec. 21, p. 280.)

The passages quoted in the French Memorial from the second edition of Oppenheim's *International Law* may be found in the 8th edition, Volume 1, pages 286 and 287, sections 123 and 124.

Of course, Mr. President, that right is subject to the imperative that I have earlier mentioned. May I in this context also refer to the *Island of Palmas* case. In that report appears this passage: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."

Finally it will be remembered that the Academy of Sciences of the USSR stated that sovereignty at the present stage of historical development "can be defined as the independence of the State expressed in its right freely and at its own discretion to decide its internal and external affairs without violating the rights of other States or the principles and rules of international law" (*International Law*, p. 93).

Naturally I have not attempted to cite to the Court the entire body of judicial opinion and of other opinions in support of the State's unfettered right to decide for itself what shall occur on its territory and to what, if any, exposures its citizens should be subject. The two aspects of sovereignty are, we submit, well recognized in international law and enough has been said, so we would submit, to indicate that arguments based upon their existence are substantial.

Mr. President and Members of the Court, it occurs to me that I have been somewhat cursory in my assumption that the air space above a State's territory is comprised within its territorial sovereignty and that the Court may not have been adequately assisted in maintaining those standards of scholarship which each of its distinguished Members so consistently displays unless I briefly indicate some international materials supporting that assumption.

A cogent and precise statement of general principle is contained in the remarks of the Military Collegium of the Supreme Court of the USSR in the report of a case of a foreign pilot who was charged with a criminal offence under Russian law for an intrusion into Russian air space. The Military Collegium said that such an intrusion:

> "constitutes a criminal breach of a generally recognized principle of international law, which establishes the exclusive sovereignty of every State over the air space above its territory. This principle, laid down by the Paris Convention of October 13, 1919, for the regulation of aerial navigation, and several other subsequent international agreements, is proclaimed in the national legislations of different States, including the Soviet Union and the United States of America" (*International Law Reports*, Vol. 30, p. 69 at p. 73).

Again Doctor Šahović and Professor Bishop in their contribution to the *Manual of International Law* under the editorship of Professor Max Sørensen wrote:

> "The basic rule for the status of airspace above land territory and the territorial sea is that it is an integral part of state territory and falls under the exclusive jurisdiction of the subjacent State. The régime of the airspace is determined by the laws and regulations of the subjacent state, which is completely free either to permit or forbid the overflight of foreign aircraft." (See: "The Authority of the State: Its Range with Respect to Persons and Places", *Manual of International Law*, pp. 343-344.)

Those authors later state:

> "After the First World War, there was general recognition of the sovereignty of states over airspace (see the Paris Convention of Air Navigation of 13 October 1919, 11 *LNTS*, 173). This was confirmed in the Chicago Convention of 7 December 1944, and it may be said that, today, the whole airspace over the land territory and the territorial sea falls within the exclusive jurisdiction and control of the subjacent State." (*Ibid.*, p. 344.)

Mr. President, all the Members of the Court will, I trust, pardon me if I recall that the words of Article 1 of the Chicago Convention are "The Contracting Parties recognize that every State has complete and exclusive sovereignty over the air space above its territory" and if I venture to remind them that Articles 1, 3 and 5 of the Paris Convention were to the same effect. Remembering the language of the Paris and Chicago Conventions and the municipal laws of many States, it is hardly surprising to read in their work on *Law and Public Order in Space*, 1963, that the authors, Messrs. McDougal, Lasswell and Vlasic, say this:

> "Both customary development and explicit international agreement, as is well known, have established an extraordinarily high degree of comprehensive, continuing, exclusive competence in States over the airspace above their territories. The claims advanced by States for a virtually unlimited control over access to such airspace, and for the same competence to prescribe and apply authority as over the other territory, has been accepted with an astonishing unanimity. This comprehensive, continuing, exclusive competence so established with respect to territorial airspace means, briefly, that access to such airspace is entirely dependent upon explicit permission of the subjacent State, which is free to decide unilaterally whether or not to admit foreign aircraft and under what conditions."

To like effect are the assertions made before this Court in the *Aerial Incident* cases (*Israel* v. *Bulgaria, United States* v. *Bulgaria, United Kingdom* v. *Bulgaria*). The Memorials do not take the point that Bulgaria did not possess complete and exclusive sovereignty over the air space above its territory, but rather that the shooting down and complete destruction of the commercial aircraft at a time when normal peaceful relations existed was contrary to international law. The relevant passage in the Memorial of Israel is found in *I.C.J. Pleadings, Aerial Incident*, page 86.

Many States have, of course, asserted their sovereignty in air space in terms identical with the formulation of international law made by the Military Collegium in the passage above quoted. Thus section 1108, paragraph *(a)*, of the Federal Aviation Act 1958 of the United States of America provides: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space of the United States." The legislative formula adopted is that of declaration, that is, the statute proceeds upon the basis that what it declares is already and independently the law. Thus Senate and Congress have proceeded on the basis that complete and exclusive national sovereignty was by customary international law vested in the United States, that is, in the international person.

Australia has acted in a way similar to, but not identical with, the course taken by the United States of America to which I have already referred. It is a party to the Chicago Convention and the action of the Australian executive in ratifying that Convention has been the subject of express legislative approval. By ratifying the Convention, Australia, of course, asserted as a contracting State that complete and exclusive sovereignty over the air space above its territory which Article 1 of the Convention provides for. In addition, the Parliament by Act No. 6 of 1947 approved for the purposes of Australian municipal law of the act of the Australian executive in ratifying the Chicago Convention. Thus Australian legislation is numbered amongst the national legislations of different States to which the Military Collegium of the USSR Supreme Court referred in the passage which I have quoted.

We would not wish, of course, that the Court should treat as exhaustive of those municipal courts which have expressed for the purposes of their law, the concept of State sovereignty as extending to the air space above the State, what I have said above. Thus, for example, the Federal Court of the Swiss Republic had to consider a dispute concerning the question whether target practice within the territory of the Canton of Aargau infringed the territorial sovereignty of the Canton of Solothurn. In relation to that question, the Federal Court made the following statement:

> "... it is an accepted fact with regard to external relations, that is, relations with other states, that definite absolute rights emanate from sovereignty and territorial jurisdiction which must necessarily be recognized by the other states, among them particularly the right of unrestricted dominion over land and people. This right, however, excludes all influence of another state upon the territory of the first state or of its inhabitants, and indeed not only the usurpation and exercises of sovereign rights of the first state, but also an actual encroachment which might prejudice the natural use of the territory and the free movement of its inhabitants. From this point of view the canton of Solothurn appears in fact to have been injured in its territorial majesty and in its sovereignty by the attitude of the Canton of Aargau." (See *Recueil officiel du Tribunal fédéral suisse*, 26, I, p. 450, 51, I, p. 137.)

It is, of course, true to say that the decision of the Federal Court seems to be concerned mainly with the question whether or not territorial sovereignty of one canton has been infringed by acts occurring within another but above the physical soil itself and that the decision does not in turn expressly refer to the question with which I am currently dealing. That, however, may be thought of as hardly surprising for there is some difficulty in entertaining the view that if a State possesses sovereignty over its territory that sovereignty is limited to the soil itself. Such a notion is, we submit, novel in the extreme, and it may well be that the international recognition to which I have earlier referred, that air-space is comprised in a State's territorial sovereignty, is but a recognition of the obvious. However, whether that is so or not, Australia feels that it can assert with some confidence the validity of the proposition at this prima facie stage that the territorial sovereignty of a State embraces the super-incumbent air space.

Australia does not wish, of course, to labour the obvious but it does feel that a further recognition of territorial sovereignty as comprising air space may be found in that consideration which the various States have given to the question of satellite broadcasts. Thus in 1972 the United Nations General Assembly adopted resolution 2916 (XXVII) on the subject, which contains a clear acknowledgement of the relevance of sovereignty:

> "*Mindful* of the need to prevent the conversion of direct television broadcasting into a source of international conflict and of aggravation of the relations among States and to protect the sovereignty of States from external interference."

Again, Article II of the Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange adopted by the General Conference of UNESCO in 1972 provides: "1. Satellite broadcasting shall respect the sovereignty and equality of all States."

Previously, in May 1970 at the Third Session of the Working Group on Direct Broadcasting Satellites, the French presented a paper on proposed principles to govern broadcasts from communications satellites. It included the following:

> "1. Any State shall be free to broadcast programmes directly from artificial satellites. It shall, however, abide by the rules of international law, including the United Nations Charter and the specific principle of space law and shall respect the sovereignty of States that do not wish their territory to be covered by these broadcasts." (A/AC.105/83, Ann. V.)

Then, of course, there was a draft treaty presented by the Soviet Union to the Twenty-seventh United Nations General Assembly, Article V of which provides:

> "States parties to this Convention may carry out direct television broadcasting by means of artificial earth satellites to foreign States only with the express consent of the latter."

As well, in a working paper presented to the United Nations Working Group on Direct Broadcast Satellites in 1972 by Canada and Sweden containing draft provisions, a similar provision occurs:

> "V. Direct television broadcasting by satellite to any foreign State shall be undertaken only with the consent of that State..."

In the area of satellite transmission of radio and television programmes, there would seem, therefore, to be a clear recognition of the right of a State to control what enters its territorial atmosphere. There is growing support,

so we would submit, for the view that there is no right to broadcast television programmes into a State no matter how innocuous, without the consent of the State whose sovereignty will be infringed.

May I now turn to another question, that is, whether the intrusion of these microscopically small radio-active particles constitutes an infringement of territory and air space where that intrusion occurs without the consent of the territorial sovereign.

It is, we would submit, difficult in principle to see why it should not. This is no case of some natural thing borne by winds across State boundaries. It is something inherently hostile to life—to whatever extent—created artificially and deliberately, because no mechanism exists to prevent this result, committed to natural forces that deposit it on another State's soil. It intrudes although each particle is small. If all the particles are bound up in a ball large enough to see there would be no doubt. What legal difference is there in the fact that each particle is separate? Australia submits there can be none. But there is in any event support from very distinguished international lawyers, so Australia will claim. For example, in a lucid contribution to *The Manual of International Law*, edited by Professor Sørensen, the then Professor of International Law of the School of Law of the University of Montevideo said:

> "A state substantially affecting other states by emanations from within its borders—nuclear tests, fumes, air or water pollution, diversion of waters—is not abusing its own rights, but interfering with the rights of another, for it is the integrity and inviolability of territory of the injured state that is infringed". ("Constituent Elements of International Responsibility", *The Manual of International Law*, p. 540, sec. 9.05.)

It is the latter part of the sentence that I presently rely on: the former I will seek to apply later.

Earlier the same learned and distinguished author had said:

> "Another example usually included in this context [the context, I interpolate, was the principle of strict liability in international law] the effect of atomic radiation resulting from nuclear tests—does not belong however to this category. It should not be included within the principle of risk, but under the general principle of State responsibility for unlawful acts, since a state is not entitled to conduct nuclear tests in its territory or on the high seas which cause damage in or to foreign states. If a nuclear test produces fall-out beyond the territorial limits of the state conducting it, that state should be absolutely liable under the normal rules of state responsibility." (*Ibid.*, pp. 539-540, sec. 9.04.)

The Court may gain some assistance by considering how, in this respect, in analogous circumstances, municipal law has proceeded. A reference to Article 38, 1 *(d)*, of the Court's Statute is perhaps apt. We would mention in this context two decisions of courts in the United States. The first is a decision of the Supreme Court of Oregon, which decision the Supreme Court of the United States refused to review (362 U.S. 918). The decision in question is *Martin* v. *Reynolds Metal Company* (221 Ore. 86, 342 P. 2d 790). The question was whether emission of fluorides by a plant manufacturing aluminium to the land in the possession of the plaintiff constituted that civil wrong known to common law countries as trespass. The wrong was traditionally considered to have been done when one, without right, entered land in the possession of another. The essence of the wrong was interference with another's possession, not his title to land. The relevant passage is as follows:

> "If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasise the object's energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or energy which can be measured only by the mathematical language of the physicist."

That view was applied by a court in the federal court system, the latter court saying that scientific developments "today allows the Court with the aid of scientific detecting methods, to determine the existence of a physical entry of tangible matter, which in turn gives rise to a cause of action in trespass". That being the relevant common law tort. (*Fairview Farms Inc.* v. *Reynolds Metal Company*, 176 F. Supp. 178.)

Mr. President, I have just referred to two decisions of courts in the United States. Although this does not call for justification, it might be useful if I recall the use made of decisions of municipal tribunals in the determination of international law. I refer in particular to what the late Wilfred C. Jenks wrote in *The Prospects of International Adjudication*, 1964, page 266:

> "It is now well established that the concept that 'the law of nations is but private law "writ large"', is substantiated by the history of international arbitration during the nineteenth century and the early part of the twentieth century."

Again there appears in Oppenheim's book, *International Law*, 8th edition, pages 31-32, the following passage:

> "The cumulative effect of uniform decisions of the Courts of the most important States is to afford evidence of international custom... judgment of municipal tribunals are of considerable practical importance for determining what is the correct rule of international law."

Whether the Court considers Article 38, paragraph 1 *(d)*, of its Statute applicable, it may find helpful as analogous the reasoning in and conclusions arrived at by these decisions. As it will, so we would submit the decisions of the Supreme Court of the United States and the Military Collegium of the Supreme Court of the USSR to which also I took the liberty of referring.

Mr. President, may I pause to recall and apply to the specific facts ultimately to be established the general principles referred to in the preceding section of my argument. The Court will remember that having mentioned paragraph 49 (ii) *(b)* of Australia's Application, I quoted distinguished international jurists who had given support to the evident proposition that included in the sovereign rights of States was the right freely and at its discretion to decide its own internal affairs. One such right, as paragraph 49 (ii) *(b)* of the Application asserts, is that of determining what acts shall take place within the sovereign's territory and, in particular, whether its population shall be exposed to radiation from artificial sources. The Court will, of course, recall that Australia, as paragraph 36 of the Application maintains, has adopted and applied in this respect the maxim that there shall be no such exposure without a compensating benefit. Obviously enough, its sovereign rights of decision extend to permitting it to choose and, if it wishes, apply that maxim. It has done so. Next I endeavoured to show another evident proposition, namely that Australia has complete and exclusive sovereignty over its air space. In other words, it and it alone is given the right to decide what shall enter that air space. And it may exclude nuclear

fall-out from weapon tests conducted by other countries. It desires to do so: it endeavours to do so by these very proceedings.

Lastly I endeavoured to outline an argument which, if accepted, would establish that nuclear fall-out permeating, *in invitum*, Australia's air space and falling upon Australian soil would infringe its sovereign integrity and inviolability. Again, it may be thought, an obvious enough proposition. What, then, follows? Given that radio-active fall-out is deposited and dispersed, and France concedes this, Australia's sovereign right to decide the conditions and circumstances under which its population shall be exposed to harmful radiation is denied and defeated. Furthermore, its jurisdiction over its air space is violated, not in a negligible or harmless respect, but in a substantial and potentially dangerous manner. Does international law recognize the right of France so to treat other sovereigns? Australia asks where is the rule laid down? France is not before this Court for seeking to establish in its favour an impairment or diminution of the sovereign rights of other nations including Australia. Australia will submit at the appropriate time that international law does not recognize, nor will it encourage, so drastic and far-reaching an impairment of sovereignty.

I turn now to the question of indicating in outline the duty of States to respect the sovereignty of others. The existence of such an obligation is clearly established. At the hearing on the merits both a precise examination of the content of the obligation and whether the facts then proved establish its breach will be called for. At this preliminary stage I indicate the obligation and its breach for the purpose only of showing Australia's legal interest to judgment on this claim. I propose, with the Court's indulgence, now to indicate a basis for France's legal responsibility upon the footing that the duty is the correlative of the possession of those rights which in sum make up sovereignty. I shall then and alternatively deal briefly with the view that the source of the duty may perhaps be found in the incorporation into international law of the maxim that each State must so use its own territory as not to injure the rights of other States. Lastly, I shall outline considerations suggesting that Australia's case may also find support in the doctrine which forbids a State in relation to another to abuse those rights the former possesses. I mention this doctrine as an alternative to the view which Australia has maintained, and now maintains, that is to say, that France has no right to deposit radio-active debris upon Australia. I turn now to the first basis mentioned—that the duty exists because sovereign rights must be safeguarded, that is to say, the duty is the correlative to the right.

In the *Corfu Channel* case the International Court formulated the obligation in these terms: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations." (*I.C.J. Reports 1949*, p. 35.) And it went on to state: "But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty." (*Ibid.*, p. 35.) I have earlier referred to this passage as establishing not only the existence of the duty but also by implication the possession of the right. I would recall and repeat those observations and also that remark, which I would respectfully urge again on the Court, that the two sentences I have quoted establish that the Court treated the violation of the right as itself and *per se* calling for satisfaction. The harm sustained by Albania for which satisfaction was given was the United Kingdom's violation of the right of Albania to territorial integrity. Put in other words, the harm which Albania sustained was intrusion into its territory, and the fact that that intrusion occurred, required, without more, the awarding of satisfaction.

Members of the Court will also recollect the remarks of Judge Anzilotti in the case of the *Customs Régime between Germany and Austria* who stated the relevant

rule of international law in these terms: "Similarly, according to ordinary international law each country must respect the independence of other countries." (*P.C.I.J., Series A/B, No. 41*, p. 59.) Again the duty is posed in terms suggesting that any violation is *per se* wrongful.

Might I, having mentioned one aspect of the *Corfu Channel* case, turn to another. I do so for the purpose of putting before the Court the submission that this arm of the decision did not involve considerations of fault as a condition of responsibility. The Court will remember that the particular question being dealt with was whether Albania was responsible to the United Kingdom for damage which that country's Navy sustained by reason of minefields which the Court found had been laid in Albanian waters with the knowledge of the Albanian authorities. The Court, having pointed out that possession of such knowledge imposed on Albania the obligation of notifying, for the benefit of shipping in general, the existence of the minefield and of warning approaching British ships of the imminent danger from the existence of the field, then said:

> "Such obligations are based not on the Hague Convention . . . which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of freedom of maritime communication; and [this is the relevant part] every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." (*I.C.J. Reports 1949*, p. 22.)

The considerations supporting the view that the Court did not envisage fault as an element of liability had been persuasively discussed by Judge Jiménez de Aréchaga in a contribution to the *Manual of International Law*, in a passage which appears at page 537 of that contribution. With that passage we would respectfully agree and would submit that both the words used by the Court in the *Corfu Channel* case and the analysis of that decision in this context establish a liability which is a strict liability.

QUESTION BY THE PRESIDENT

The PRESIDENT: Before the Court rises I want to address a question to the Agent, which is really destined to Mr. Lauterpacht. I would have preferred him to have been present here but I address the question to you in order not to delay unduly the proceedings and to give you more time for reflection. It is a question in my individual capacity which I address to Mr. Lauterpacht.

Counsel, in dealing with the French reservations yesterday, dwelt upon matters of nuclear weapons, and he quoted in this context an extract from the newspaper *Le Monde* of 2 July 1974. Now, the Government of Australia, as you will recall, has submitted to the Court a communiqué issued by the President of the French Republic of 8 June 1974, which, as indicated in another document submitted to the Court by the Australian Government, was transmitted to the Government of Australia by the French Ambassador in Canberra on 10 June 1974[1]. Counsel made no reference to this communiqué, and I therefore would invite him to kindly give his views on it.

Mr. BRAZIL: Mr. President, as you have observed Mr. Lauterpacht, the counsel, is not present. I shall bring the question to his attention and he will, of course, be dealing with the question as soon as possible.

The Court rose at 12.55 p.m.

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[1] See p. 550, *infra*.

NINTH PUBLIC SITTING (8 VII 74, 3.30 p.m.)

Present: [See sitting of 4 VII 74.]

ARGUMENT OF MR. LAUTERPACHT

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. LAUTERPACHT: Mr. President and Members of the Court. I must apologize for my absence from the Court at the close of the session on Saturday when you, Mr. President, addressed the question to me.

You have asked my views on the communiqué issued by the President of the French Republic on 8 June 1974. These views are invited in relation to that part of my speech in which I considered whether, in the absence of a defendant State, the Court in virtue of Article 53 of the Statute, must satisfy itself that it has jurisdiction (p. 444, *supra*). And I asked the question: how is the Court to assess whether the French tests are an activity connected with national defence? I went on to say that "At the moment, the Court possesses only the French statement of the desired conclusion, nothing more" and I pursued my point by asking where the Court is too look if it is to carry out its own investigation.

I sought to lend emphasis to the interrogative quality of my approach to the matter by asking further questions: in the pursuit of its enquiries under Article 53 what material is the Court to take into consideration? To whose views is it to attach weight? May it look at newspapers? If it does so, what weight is it to attach to statements such as the one which I quoted from *Le Monde*? I specifically posed the question not only whether the Court might treat such a statement as material evidence but also the question as to whether it may "treat statements of reverse content as material evidence" (p. 444, *supra*).

Mr. President, these questions were deliberately framed in a comprehensive —one might almost say, academic—manner. I was mindful of the fact that the matter had already been discussed in the Australian Memorial of November 1973 where, at paragraph 351, mention is made of the repeated and authoritative statements of the French Government. The reason why I did not refer to the Presidential statement of 8 June 1974 is that it seemed to me to add nothing to the unsubstantiated assertions already made by the French Government on the subject of the characterization of the French tests. It had, moreover, been mentioned by the Attorney-General in his opening address (pp. 389-390, *supra*).

That fact is that the Presidential statement of 8 June takes the Court no further than the unsubstantiated assertion made in the French Note of 16 May 1973. The Court will remember that I had suggested that the one sentence in this French Note which dealt with the characterization of French nuclear activity might be adequate as an introduction to an argument on this point, but that it in no way provided evidence to support the conclusion that the tests truly are "activities connected with national defence". That sentence, if I may burden you with it, read as follows, and I quote from the French Note:

> "Now it cannot be contested that the French nuclear tests in the Pacific ... form part of a programme of nuclear weapon development and therefore constitute one of those activities connected with national defence which the French declaration of 1966 intended to exclude."

One is bound to ask, what on close analysis does the Presidential statement of 8 June 1974 add to that sentence? The first paragraph of the Presidential statement contains only a reference to the re-introduction of security zones in the South Pacific. It has no bearing on the present problem.

The second paragraph, in stating that France will be in a position to move to the stage of underground firings after this summer, is no more than a statement of fact—and does not affect the matter in hand.

The fourth paragraph speaks of the harmlessness of the tests—and again is not relevant. Moreover, as the Attorney-General pointed out in his address to the Court, it is quite wrong.

Only the third paragraph introduced new phraseology into the situation. The paragraph reads:

> "Limited to the minimum imposed by the programme for perfecting our dissuasive force, the atmospheric tests that will be carried out this year will of course be conducted, as in the past, in conditions of complete security."

Now what is to be made of this paragraph? Is the Court to read the reference to "the programme for perfecting our dissuasive force" as bridging the gap between, on the one side, the mere assertion that the tests are an activity connected with national defence and, on the other, the proof, by the production of evidence, of that assertion viewed as an objective concept? At best the reference to "perfecting our dissuasive force" merely introduces into the situation a number of additional questions: what is the force? what elements of dissuasion does it contain? what is dissuasion as opposed, presumably, to "persuasion"? does the possession of nuclear weapons make the difference between "perfect" and "imperfect" dissuasion? What is the connection between "dissuasion" and "national defence"? And so on.

Mr. President, we must, I respectfully suggest, constantly recall that the discussion of this text is taking place only within the framework of the contention that the expression "activities connected with national defence" has an objective content, the conditions of which can only be established if evidence is available to show that what the French Government calls "national defence" really is national defence in the sense in which international law must interpret that expression as used in the French reservation. For the French Government to say that nuclear tests are an activity connected with national defence simply because they are related to "perfecting our dissuasive force" is merely to make the same general assertion in different words. And to suggest, as the only possible alternative, that "an activity connected with national defence" is whatever the French Government chooses so to call would be to convert an objective reservation into a subjective one open to attack on other grounds already submitted by me.

In brief the problem under consideration is what, on an objective as opposed to a subjective approach to the French reservation, is the evidence on which the Court can find that the French reservation is validly invoked? My reference to *Le Monde* was not meant to be exclusive or comprehensive. In the same context, I can see no formal objection whatever to the consideration by the Court of the French Presidential statement of 8 June 1974, and I am grateful to you, Mr. President, for having given me this opportunity to comment directly upon it.

I hope that I have dealt adequately with the problem which you had in mind in posing the question but I need hardly add that if there is some other aspect of the matter which you should wish me to examine, I will be happy to do so if you would direct me to it.

ARGUMENT OF MR. BYERS (cont.)

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. BYERS: Mr. President, Members of the Court. It may be remembered that at the conclusion of the proceedings on Saturday I had been dealing with the *Corfu Channel* case in so far as that case suggested the existence, as we submit, of an obligation to respect sovereignty of other States, and I had digressed in order to submit to the Court that no question of fault was involved in the liability established in that case.

Might I now go back to the question of the duty to respect sovereignty? In this respect we would seek to call in aid the observations of the Arbitrator in the *Island of Palmas* case, where he said there was a duty which was the corollary of the right of territorial sovereignty. The duty he expressed in these terms:

> "... the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory" (*UNRIAA*, Vol. II, p. 839).

It may be said, of course, that in the passage which I have quoted the Arbitrator was directing his attention to the obligation of a State within its own territory to protect the integrity and inviolability of other States. But that on one view is the precise question here, for the act which Australia says violates its territorial integrity is one which originates within territory which under the French Constitution is regarded as an overseas territory, but, of course, does not terminate there. We would therefore submit that the jurisprudence both of the Permanent Court and of this Court is one in formulating a duty of strict obligation not to violate the territorial integrity of other States.

That was the view taken, of course, by the Government of the Argentine in its Note to the Israeli Embassy in Buenos Aires of 8 June 1960 to which I have already referred, in connection with the Eichmann removal from Argentinian territory. It will be recalled that that Note, to which reference has earlier been made by me, refers to the power of the State to exercise its authority over all persons resident and things situated in its territory and that it treats that right as an inalienable attribute of the exclusive jurisdiction essential to the State's very right to independence.

The Note goes on to say:

> "... that the corollary of that right is the duty of every State to refrain from performing, through its organs or agents, any act which may entail any violation of the sphere of exclusive jurisdiction of another State" (UN doc. S/4334).

Again the Charter of the Organization of African Unity provides in Article III that respect for sovereignty and territorial integrity of each State is a principle of international law. To the same effect, is, of course, the Declarations of Principles of International Law concerning Friendly Relations adopted in resolution 2625 (XXV), for paragraph *(c)* states that each State has the duty to respect the personality of other States.

To the above I will only add a quotation from the *Principles of Public Inter-*

national Law 1973, the second edition by Mr. Brownlie. At page 223 of that work the author says this:

> "Thus jurisdiction including legislative competence over national territory, may be referred to in the terms of sovereignty or sovereign rights. The correlative duty of respect for territorial sovereignty, and the privileges in respect of territorial jurisdiction, referred to as sovereign or State immunities are described after the same fashion. In general, sovereignty characterises powers and privileges resting on customary law and independent of particular consent of another State."

Further citation would at the present stage in our submission serve but unnecessarily to lengthen this address. What has been quoted does seem clearly enough to establish that the duty of respect is one correlative to the right of territorial sovereignty and is a duty which international law imposes on every State as a State. It would follow that acts done by a State in breach of an obligation so imposed are imputable to the State.

It may, however, be that the source of the obligation is to be found not in considerations of mutual equality of States or indeed from the very concept of sovereignty, but rather in the incorporation into customary international law of obligations coextensive with those described in the maxim *sic utere tuo ut alienum non laedas*. Such seems to have been the view expressed in that contribution to Sørensen's *Manual of International Law*, to which reference has already been made. In section 905, at page 540, of that publication, the author under the heading, The Doctrine of Abuse of Rights, says this:

> "A state substantially affecting other states by emanations from within its borders—nuclear tests, fumes, air or water pollution, diversion of waters—is not abusing its own rights, but interfering with the rights of another, for it is the integrity and inviolability of territory of the injured state that is infringed. The acting state is in breach of a duty of non-interference established by customary international law, generally stated in the maxim: *sic utere tuo ut alienum non laedas*."

We would particularly emphasize, for present purposes, that part of the quotation which phrases the duty as one not to interfere with the rights of another. That duty is, of course, broken when the right itself on its proper formulation has been interfered with. Once one states that the right is a right to inviolability of territory, then the right is interfered with when that inviolability is violated. The Court on ultimate argument will, in the present case, be concerned only with the violation caused by the deposit of radio-active fall-out. Questions outside that will not arise.

Thus it would seem, and so Australia will submit, that whether the duty be one having its source merely as a correlative of a right to inviolability or whether it is more accurately stated as having its source in the maxim to which I have referred and the incorporation of that maxim into international law, the results are the same. I have, of course, not attempted in what I have said to refer the Court to every statement on this topic. The present, of course, is not the stage to do so.

It may be, therefore, of more assistance to the Court if I endeavour now to summarize what Australia will submit at the appropriate time is the effect of what has gone before. We have, we would submit, established a substantial basis to argue, first that each State, including Australia, possesses both territorial inviolability and decisional inviolability. It possesses these attributes or rights because of its sovereignty. Second, each State is subject to a general duty to each

other State to respect the territorial integrity and decisional integrity of the other. Third, a State may be in breach of that obligation although no fault exists in it. The obligation, in other words, is a strict one. Fourth, once the obligation is broken, international responsibility is engaged. Thus we would submit that once a right to territorial sovereignty has been violated, international responsibility falls upon the violating State. Fifth, territorial integrity is violated by interference with the exclusive authority of the sovereign. That is to say it is violated by intrusion. Decisional sovereignty is violated by such an intrusion as impairs or destroys the unfettered capacity to decide. The right to decide, in other words, must be a free one. Sixth, international responsibility is engaged although no pecuniary harm is inflicted. Such was the *Corfu Channel* case where satisfaction was given by way of a declaration. Lastly and alternatively and upon the basis that some substantial injury apart from the violation of the right is necessary to engage responsibility, the deposit of radio-active nuclear fall-out upon Australian soil is the infliction by France upon Australia of a substantial injury because of the essential and inherent deleterious character of the deposit.

The fact that the extent of the harm thus inflicted may be difficult or impossible of precise numerical statement in terms of injuries sustained or lives lost does not diminish the fact of injury nor deny its substantial character. Indeed Australia's right to decide the extent to which its population may be exposed to ionising radiation is a right of incalculable value. All sovereign rights are incalculable in value: it is difficult to say of the breach of any one that it is susceptible of a pecuniary evaluation. It is, so we will submit, clear that damage is suffered in the eye of international law although no pecuniary or patrimonial right is infringed. So much is established by the *Corfu Channel* case.

Mr. President, I have endeavoured in what I have said to emphasize that two cardinal principles coexist in international law. The first of these is that of the integrity and inviolability of sovereign rights. The second is the duty of each State to respect the sovereign rights of the others. The resolution in any given case of the interaction of these two principles and the consequences of that interaction is, of course, a matter of substance. But that resolution and those consequences cannot be determined at the admissibility stage. The validity of this view is evident if only from the reflection that the evidence posing the question is not now fully known to the Court and that the matters of grave legal interest raised may not now be finally passed on.

Having said so much, may I now outline the last legal doctrine by reference to which Australia's claim in paragraph 49 (ii) *(b)* of its Application may be supported. That is the sovereignty claim. I refer to the doctrine of abuse of rights. Australia as I have already said will advance this as an alternative to the arguments already outlined.

For the abuse of rights argument to be relevant in the first place, one must assume that France has a right to carry out atmospheric nuclear tests. This, of course, Australia disputes. The Court may take the view that such tests may be lawfully carried on. On this basis it can be argued that the deleterious nature of the radio-active fall-out, and its effects, actual and potential, upon Australia and upon its population, is such that testing which deposits such fall-out amounts to an abuse of the right to test.

The doctrine has, we would submit, now achieved a recognized place in international jurisprudence, although earlier writings have mentioned its controversial character. As Judge Alvarez said in the *Anglo-Iranian Oil Co.* case: "This... concept, which is relatively new in municipal law... is finding its way into international law and the Court will have to give it formal recognition at the appropriate time." (*I.C.J. Reports 1952*, p. 133.)

Writers such as Sir Hersch Lauterpacht and Bin Cheng have referred to the doctrine or principle as an application of the duty of the States to exercise their rights in good faith. Bin Cheng wrote:

> "... the principle of good faith governing the exercise of rights, sometimes called the theory of abuse of rights, while protecting the legitimate interests of the owner of the right, imposes such limitations upon the right as will render its exercise compatible with that party's treaty obligations" (*General Principles of Law*, p. 129).

There are, of course, others.

The Australian Government will contend that if the Court were to conclude that atmospheric testing was *per se* lawful, the inevitable deposit therefrom of injurious radio-active particles upon Australian soil affords Australia a clear legal interest to claim that such deposit is an abuse of rights. The deposit is in all the circumstances unreasonable and it is without benefit to Australia.

At this stage, it might be useful if, in passing, I remind the Court of certain instances where the principle appears to have been applied. One major area in this regard are the river cases. Here one has a common resource which it is generally recognized riparian States have a right to use. As a concomitant of this right, States must not in the use of the water unreasonably interfere with the rights of other users. A useful statement of this proposition occurs in *Société Energie électrique du littoral méditerranéen* v. *Compagnia Imprese Elettriche Liguri*, a decision of the Italian Court of Cassation in 1939, reported in the *Annual Digest, 1938-1940*, at page 121:

> "International law recognises [the Court said] the right on the part of every riparian State to enjoy, as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation. However, although a State, in the exercise of its right of sovereignty, may subject public rivers to whatever régime it deems best, it cannot disregard the international duty, derived from the principle, not to impose or to destroy, as a result of that régime, the opportunity of the other States to avail themselves of the flow of water for their own national needs."

Again, of course, there is the recognition of the treaty of respect.

Again, an important document bearing upon abuse of rights is the *Report of the Asian-African Legal Consultative Committee*, which adopted its final report at its 6th Session in Cairo in 1964.

That document indicates that international law recognizes the doctrine of abuse of rights and that a State affected by another State's abuse of rights has a clear legal interest in bringing a claim to protect its territory and nationals. The Report of the Committee concluded that State responsibility would arise from the exercise by a State of its rights in an arbitrary manner so as to inflict injury upon another State.

The Committee concluded in 1964 that, and I quote, paragraph 3 of its findings:

> "Having regard to its harmful effects as shown by scientific data, a test explosion of nuclear weapons constitutes an international wrong. Even if such tests are carried out within the territory of the testing State, they are liable to be regarded as an abuse of rights." (*Asian-African Legal Consultative Committee, Legality of Nuclear Tests*, New Delhi, p. 244.)

It may be, of course, that writers and indeed the Committee, have not always clearly distinguished between the doctrine of abuse of rights and applications

to State activities of the maxim *sic utere tuo*. It may indeed be that no clear distinction may yet be drawn between these theories of legal liability. But writers certainly have been firmly of the view that the maxim has been incorporated into international law. Such was the view of Sir Hersch Lauterpacht quoting Westlake in *The Function of Law in the International Community* (1933) at page 287 and of Professor Eagleton in his article on "The Use of the Waters of International Rivers", published in Volume 33 of the *Canadian Bar Review* (1955), 1018 at page 1021. But whether that be so or not, Australia does submit that the existence of the principle of abuse of rights is sufficiently attested to enable it to say that the application to the facts earlier mentioned and the consequences of that application afford a weighty question to be decided at the merits stage.

The Australian Government would take this opportunity to point to Article 74 of the Charter of the United Nations as support for the view that lawful activities must be carried out with regard to the interests of others. The Article provides that:

> "Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan area, must be based on the general principle of good neighbourliness, due account being taken of all the interests and well being of the rest of the world, in social, economic and commercial matters."

It is submitted that this Article embodies a legal obligation applicable to all United Nations Members. Although appearing in Chapter XI of the Charter dealing with non-self-governing territories, the Article is extended by the words "no less than in respect of their metropolitan territories" to all States' territories. The Australian Government, therefore, submits that, even if atmospheric nuclear testing should be held lawful, then such testing in Mururoa, regarded as part of French metropolitan territory, is an activity in disregard of the general principles of good neighbourliness set out in Article 74 and that such activity because of its harmful and potentially harmful radio-active fall-out does not take due account of the interests and well-being of the rest of the world, in particular, Australia. That this Article imposes a binding obligation on member States of a legal order was discussed in Kelsen's *Law of the United Nations* at page 355, to which I would respectfully refer the Court. The view is supported by other eminent writers to which reference will be given. (See e.g., E. Jiménez de Aréchaga, *Curso de derecho internacional publico*, Vol. II, p. 527.)

I have now outlined, Mr. President, the bases of Australia's claim that the deposit of radio-active fall-out on Australian territory and its dispersion through Australian air space violates Australia's territorial and decisional sovereignty. This is the claim that paragraph 49 (ii) of the Application makes. The claim is clearly enough a legal claim. Has Australia a legal interest to make it? Whatever difficulties of law may arise in this regard in relation to its other claims—and Australia will submit that proper analysis reveals none—there is clearly none here. It is Australia's sovereign rights that are infringed. It is France alone that infringes them. Given the right and its infringement, what more is required to establish legal interest in the claim of infringement? Where a sovereign alleges a violation of its rights, for the Court to require more, so we would submit, would be to depart from its jurisprudence and the clear principles there established. For, as to its jurisprudence, does not the *Corfu Channel* case establish that intrusion upon a sovereign's territory—and that is part of Australia's claim—is, if without justification, the occasion for an award of satisfaction? Again, the Permanent Court in the *S.S. Wimbledon* case (*P.C.I.J., Series A*,

No. 1, at p. 20) said that each of four Applicant Powers had a clear interest in the execution of the provisions of the Versailles Treaty relating to the Kiel Canal, "since they all possess fleets and merchant vessels plying their respective flags". They are therefore, even though they may be unable to adduce a prejudice to any pecuniary interest, covered by the terms of Article 386, paragraph 1 of which is as follows:

> "In the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations."

The Court held that the applicant States were interested because Article 380 provided that the Canal and its approaches should be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality (*P.C.I.J., Series A, No. 1*, at p. 21). Each of the decisions, one dealing with a breach of customary international law, the other with the breach of a treaty obligation, treats the breach without more as conferring the interest to assert the claim. But if more is needed, then such exists here. Beyond the displacement of the right in each case is the harm from deposit of dangerous or potentially dangerous radio-active fall-out.

Thus, in relation to Australia's sovereignty claims, if I may so call them, the following conclusions emerge. The claims are legal in nature; whether supportable in law and in fact, as Australia submits, is a question for the merits. Those claims assert damage to the rights of Australia. That damage is occasioned by the acts of France performed only in its capacity as a State and thus as subject to international law. The damage lies in the infringement by France of Australia's sovereign rights and in breach, so Australia argues, of France's obligation to respect Australia's sovereignty, however that obligation may arise. Alternatively, Australia seeks to place France's legal responsibility to it on the basis of the doctrine of abuse of rights. Further, Australia says that if more is needed to establish France's responsibility, on any of the bases suggested, that added element lies in the damage to its people and environment, actual and potential, which Australia has in the past sustained and is likely in the future to sustain because of the harmful nature of the radiation emitted and to be emitted by the deposits.

That concludes, if the Court pleases, the outline of the argument in relation to sovereignty. In dealing with the question of legal interests, we submit that it can hardly be denied that damage from radiation may be sustained, and I wish to refer briefly to some of the statements and opinions supporting that. It is true that the radiation is and will continue to be emitted in low dosages. But there is a strong body of thought early arrived at and consistently applied which holds it a "cautious assumption that any exposure to radiation may carry some risk for the development of somatic effects, including leukaemia and other malignancies and of hereditary effects" and which makes the assumption that "down to the smallest levels of dose, the risk of inducing disease or disability increases with the dose accumulated by the individual. This assumption implies that there is no wholly safe dose of radiation" (*International Commission's Report on Radiological Protection, Publication 9*, para. 29).

However, in its 1966 report UNSCEAR stated in paragraph 31 of Chapter 3:

> "Although there are insufficient data for making satisfactory estimates of risk, it is clear that, with any increase of radiation levels on earth, the amount of genetic damage will increase with the accumulated dose. While

> any irradiation of the human population is genetically undesirable because of its implications for future generations, it should be pointed out that the proper use of radiation in medicine and in industry is important for the health of the individual and for the welfare of the community."

Again this is common ground. I recall the statement of the French delegate to which the Attorney-General referred when dealing with the 1973 UNSCEAR Report when he stated, "Mr. Delegate,... any exposure to radiation entails risk".

In addition, I would recall if I might the matter stated in the 1962 report of UNSCEAR:

> "It is clearly established that exposure to radiation, even in doses substantially lower than those producing acute effects, may occasionally give rise to a wide variety of harmful effects including cancer, leukaemia and inherited abnormalities which in some cases may not be easily distinguishable from naturally occurring conditions or identifiable as due to radiation. Because of the available evidence that genetic damage occurs at the lowest levels as yet experimentally tested, it is prudent to assume that some genetic damage may follow any dose of radiation, however small."

It is clear enough, we submit, that given the necessity or desirability of showing that real damage may be sustained, whatever its extent, Australia can show a real prospect of establishing that fact. When there is added to this the undoubted distress this population has suffered, Australia's expenditure on monitoring systems to ascertain the extent of risk of exposure, then it will undoubtedly be able to establish at the hearing that it has at once suffered and been threatened with real damage. It submits on the sovereignty aspect of its claims that such will not be necessary, but if it is, then it will be shown. For the atmospheric tests do deposit radio-active fall-out in Australia, that population and environment is exposed to ionising radiation and further that exposure down to the smallest quantity is harmful both to this and future generations.

May I now turn to the customary international law argument?

It is clear that Australia's claim, based on the breach of a customary law inhibition as illegal of all atmospheric testing of nuclear weapons, stands, on the legal interest question, on a different footing from that of breach of its sovereign rights. Australia submits that it sufficiently establishes its legal interest to make this claim in either of two ways. The first is by showing, assuming for present purposes the existence of a prohibition of atmospheric nuclear weapon testing under international law, that the duty not to test is owed by every State to every other State: it is owed *erga omnes*. The second is by showing, assuming in this instance the existence of a prohibition imposed on all, but not one owed *erga omnes*, that it has been or will be broken and Australia has suffered, or is threatened by, radio-active fall-out.

May I, Mr. President, before outlining the bases upon which Australia will contend for the existence of such a prohibition—and doing so, of course, only for the purpose of indicating the nature of the claim to be made at the hearing on the merits—briefly remind the Court of its observations in the *Barcelona Traction* case (*I.C.J. Reports 1970*, p. 32). I add in parentheses that the passage is quoted at page 328, *supra*, of the Australian Memorial:

> "By their very nature the former [that is, obligations owed towards the international community] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

The Court gave as examples of such obligations ones deriving from the outlawing of acts of aggression and of genocide as also from the principles and rules concerning basic rights of the human person such as protection from slavery and racial discrimination. The examples given were not exhaustive and serve but to indicate some obligations which possess the requisite importance.

If the prohibitions for which Australia contends exist, and that is the assumption to be made, how can one deny that the rights involved are of such importance that the obligations are *erga omnes*? To the extent that a purpose of the prohibition is the protection of populations from the effects of radio-active fall-out, it can be said to derive from the principles and rules concerning the basic rights of the human person. We submit that the elaboration upon which I shall shortly embark clearly establishes these contentions. Of course, if the obligation is one *erga omnes*, no question of damage can arise: the very formulation of the obligation in those terms denies the relevance or possibility of relevance of damage sustained by the applicant State. The formulation of principle both by the Court and by Vice-President Ammoun in the *Barcelona Traction* case (at p. 32 and p. 326 respectively) establish this. I should add that paragraph 446 and Annex 10 of the Memorial contain a discussion of the relevance of international concern for the protection of human rights.

But Australia would wish further to submit that if the obligation under international law requires additionally the suffering or risk of damage, that too is present. The deposit of inherently dangerous substances—harmful according to UNSCEAR in the smallest quantities—will certainly be established. The Court will recall that municipal legal systems are not strangers to the notion that a duty owed to all may be enforced by one of the class or of the public who may show a special interest. Such has long been the rule in the common law countries. The existence of such an interest may be found, in cases where the obligation is to all not to each, in the suffering, present or future, of special injury. A decision of the English courts, much quoted in this context, states the rule of English law as follows:

> "A plaintiff can sue without joining the Attorney-General [I interpolate, he being the proper plaintiff to enforce the public duty] in two cases:... secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right." (*Boyce* v. *Paddington Borough Council* (1903), 1 Ch. 109, p. 114.)

I would wish to make clear, Mr. President, that what I have called the additional submission of a special legal interest in the case of a breach of customary international law prohibiting atmospheric tests only arises for consideration if the obligation is not either one *erga omnes* or is one not owed by the testing State individually to each other State in the sense that each such State has under international law a right itself and for itself to enforce the duty owed to it as an individual. We say, of course, that this last is the case where Australia's sovereign rights are infringed and that in such a case the better view, as the *Wimbledon* case and the *Corfu Channel* case establish, is that no material damage is necessary but, that if it is, Australia can establish it by reference to the considerations I have earlier referred to.

May I now turn briefly to advance considerations to support the view that, even if the prohibition of atmospheric nuclear testing be not one *erga omnes*, it is nonetheless capable of being raised in these proceedings. The assumption for present purposes is that such a rule exists. I shall come shortly to outline the basis of that contention. If the obligation or right is *erga omnes*, as we have al-

ready orally and in our Memorial submitted, and for the reasons therein contained and herein adverted to, Australia has a legal interest to propound it. But a rule of international law which no State may raise in this Court, given its jurisdiction, is not a legal rule at all. Article 38 (1) of the Court's Statute obliges it to decide disputes submitted to it in accordance with international law. The Court's jurisprudence and that of the Permanent Court on what may amount to a legal interest to propound before it a particular international legal rule —which jurisprudence is considered at paragraphs 408 to 523 of the Memorial— reflect, so we would submit, this view. The work of the International Law Commission on State Responsibility contains in Article 1 the statement: "Every internationally wrongful act of a State entails the international responsibility of that State."

In this last connection the real question is: is one State which is in breach of an international obligation responsible where injury is threatened or caused to another? The answer must depend on the content of the obligation.

Thus, firstly, if the obligation is one not to conduct atmospheric nuclear testing, that obligation must be treated as one *erga omnes*. That follows at once from the importance of the obligation and the consequence of deciding otherwise.

If the obligation is not one *erga omnes* and is one to refrain from depositing radio-active fall-out outside the territory of the conducting State, deposit of that matter establishes the legal interest in the affected State to complain of the breach of the prohibition; it is the deposit of fall-out that is prohibited.

I have already indicated the nature of the harm which Australia says it can establish if necessary. That is a real harm. Additionally, Australia lies in the very area where France is engaged in breaking the obligation. Its seas and its environment are particularly exposed. If it may not complain, who may?

The Court adjourned from 4.30 p.m. to 5 p.m.

Mr. President, I proceed now to develop the argument that under existing customary international law Australia has a legal interest to obtain a judgment that France is obliged towards every State, and therefore towards Australia, to abstain from conducting atmospheric nuclear tests. I do so pursuant to and in accordance with the paragraph of the Memorial quoted at the outset of my address which expresses Australia's understanding of the Court's order on admissibility.

To support its contention that a norm of customary law has developed that prohibits, in particular, atmospheric nuclear tests, the Government of Australia will rely on the developments leading to, and the conclusion of, the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, and on the subsequent developments that support and confirm the rule laid down in that Treaty.

It will be the contention of the Australian Government that the Test Ban Treaty is one that embodied and crystallized an emergent rule of customary international law. It is the further contention of the Australian Government that the developments leading to the Treaty and the Treaty have generated a rule which, if it were not originally binding on all States, has since become a general rule of international law accepted as such by the *opinio juris* of the international community. Indeed, the rule may well have assumed the status of a rule of *jus cogens*, a possibility suggested by Judge Sir Humphrey Waldock during discussion at the International Law Commission of his Third Report on the Law of Treaties (*Year Book of the International Law Commission*, 1964, Vol. 1, p. 78).

It was clearly recognized by the Court in the *North Sea Continental Shelf* cases that the provisions of a multilateral treaty of the kind now in question may be regarded as reflecting or as crystallizing received or emergent rules of customary international law. The Court in that case decided that Articles 1 to 3 of the Geneva Convention on the Continental Shelf of 1958 were then regarded as provisions which reflected or crystallized the rules of customary international law relative to the continental shelf.

Article 1 of the Partial Test Ban Treaty of 1963, we will submit, is of the same character as Articles 1 to 3 of the 1958 Geneva Convention on the Continental Shelf. Article 1, which is set out in Annex 10 of the Australian Request for provisional measures of protection, states in part:

> "Each of the parties to this treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:
>
> *(a)* in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas; or
>
> *(b)* in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted."

It embodies a general rule which, at the time it was adopted, reflected the consistent and ever-increasing opposition by the world community to nuclear tests resulting in deposit of radio-active debris beyond a State's jurisdiction—a necessary result of atmospheric tests. There is an overwhelming body of State practice and other material that can be adduced, and which will be adduced at the appropriate stage, to support these propositions. The material takes the form of official statements on behalf of States in international forums, resolutions of the United Nations General Assembly and similar bodies and other concrete manifestations of international concern of which note must be taken. The Treaty reflected the expectations of the world community as a whole and a recognition that both concern for the future of mankind and the principles of international law impose a responsibility on all States to refrain from testing nuclear weapons in the atmosphere.

There is much to suggest that the 1963 Treaty created a prohibition binding on all States. But even if this were not so, there is powerful support for the proposition that the rule laid down in Article 1 of the 1963 Treaty has since acquired the status of a general rule of international law.

This statement, so we will submit, is in full accord with the Judgment of the Court in the *North Sea Continental Shelf* cases in these words:

> "In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed." (*I.C.J. Reports 1969*, p. 41.)

To this effect was the statement of the President, Judge Lachs, that:

"It is generally recognized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, *a fortiori*, capable of producing this effect, a phenomenon not unknown in international relations." (*Ibid.*, p. 225.)

I turn now, Mr. President, to recall some of the more significant events in the historical genesis of the Test Ban Treaty and the prohibition contained therein against the conduct of any atmospheric nuclear test. As I have already indicated, I do so not for the purpose of opening up issues that belong to the merits stage, but for two other reasons—to show, first the basis of Australia's claim; and second that the prohibition is couched in terms of an obligation *erga omnes*, as opposed to an obligation owed to particular States only. The obligation of the Treaty is to refrain from conducting atmospheric tests and tests which cause radio-active debris to be present *outside* the conducting State.

May I perhaps lay emphasis on the distinction between paragraphs *(a)* and *(b)* of Article I of the 1963 Treaty. Paragraph *(a)* contains an absolute prohibition on testing in the atmosphere. Paragraph *(b)* contains a conditional prohibition on testing in other environments. The condition is that such testing is prohibited only if it leads to the presence of radio-active debris outside the testing State. One must ask: what explanation is there of this significant difference? The answer is simple. Atmospheric testing does not require proof of fall-out or demonstration of a legal interest because everyone accepts that it is an activity which by its very nature is going to lead to fall-out of a potentially damaging character. Moreover the damage which happens is of a kind which is not readily measurable in terms which are familiar in the ordinary law of personal injury. Hence, because atmospheric testing is potentially harmful to all, each has an interest in stopping it.

By contrast, testing otherwise than in the atmosphere is not so inevitably accompanied by fall-out; and because of that it is prohibited only when it is shown that fall-out occurs. Again it is noted that what is prohibited is not damage, but fall-out. May I contrast the obligation so framed with one prohibiting a conducting State from depositing debris within or upon another. The former is clearly, we would submit, total in ambit, the latter partial only, and hence partial in operation. In the case of breach of the former obligation all States would have the right to complain; in the latter, those affected only.

The first explosion of a nuclear weapon in the atmosphere was conducted by the United States on 16 July 1945 in preparation for the bombing of Hiroshima and Nagasaki. In the post-war era the question of nuclear disarmament was pursued but testing continued and increased. The first thermonuclear explosions took place in 1952 and in 1953. They deeply moved public opinion but mostly still in relation to disarmament.

However, although the original opposition to nuclear testing was in the context of disarmament, the main consideration which first influenced the development of a legal prohibition was the emergence of a realisation of the consequences of atmospheric tests for present and future generations of mankind. The incident which first awoke public awareness of those consequences was the thermonuclear test conducted at Bikini Atoll on 1 March 1954, when the crew of a Japanese fishing vessel, the *Fukuryu Maru* was affected. Some months later one of the seamen died while the others only survived due to intensive and prolonged medical attention. Large quantities of fish caught in the area had also been affected by the blast and were condemned by the Japanese authorities. The response of the United States, at least on the monetary level,

was an *ex gratia* payment to Japan of two million dollars "without reference to the question of legal liability, for purposes of compensation for the injuries or damages sustained... in full settlement of all or any claims" *(Notes regarding Bikini Claims, US Department of State press release, No. 6, January 4, 1955)*.

That explosion also exposed residents of the Marshall Islands to radio-active fall-out. Public opinion was thus awakened to the dangers of nuclear testing in the atmosphere. Partly as a reaction to this event, the United Nations Scientific Committee on the Effects of Atomic Radiation was established by resolution 913 (X) of the United Nations General Assembly on 3 December 1955, to encourage the distribution of "all available scientific data on the short-term and long-term effects upon man and his environment of ionising radiation". Moreover, only 13 days later, resolution 914 (X) suggested that account should be taken of the proposal of the Government of India that experimental explosions of nuclear weapons should be suspended.

On 13 July 1956 a further proposal pointing out that:

> "While there may be certain authorities who may not feel fully convinced that experimental explosions on the present scale will cause serious danger to humanity, it is evident that no risk should be taken when the health, well-being and survival of the human race are at stake. *The responsible opinion of those who believe that nuclear tests do constitute a serious danger to human welfare and survival must, therefore, be decisive in such a contest.*" (UN, *The U.N. and Disarmament 1945-1970*, New York, 1970, p. 196; emphasis added.)

That will be found as a footnote to page 332, *supra*, of the Australian Memorial, and that proposal was placed before the Disarmament Commission.

After that time, intense activity was initiated to bring about an end to all nuclear testing. Thus in 1957 the petition of 2,000 United States scientists urging a stop to the testing was submitted to President Eisenhower, in which the fact was asserted that every nuclear bomb spread an added burden of radio-active elements over every part of the world. The petition received global publicity and the backing of scientists in 43 countries and, with signatures by 9,000 scientists, was presented to the United Nations Secretary-General on 13 January 1958.

At the First Geneva Conference on the Law of the Sea held in 1958, the view was widely expressed that nuclear testing was contrary to the freedom of the seas. The relevant opinions expressed at this Conference are the subject of Annex 11 to the Australian Memorial. The preamble to the resolution adopted by that Conference, mentioned in paragraph 18 of Annex 11, stated that there was "a serious and genuine apprehension on the part of many States that nuclear explosions on the high seas constitute an infringement of the freedom of the seas".

On 31 October 1958, the United States, the Soviet Union and the United Kingdom began negotiations in Geneva in an effort to reach agreement on a treaty for the discontinuance of all nuclear weapon tests. The opening of the discussions was marked by a moratorium on testing which came into effect after the Soviet test of 3 November 1958. The Conference was almost immediately deadlocked on the question of effective international control, although none of these three Powers were to test again until 1 September 1961.

In order to break this deadlock, President Eisenhower sent a message on 13 April 1959 to Premier Khruschev in which he suggested that it might be possible to enter, firstly, into a limited agreement which would attack the problem in phases, beginning with "the prohibition of nuclear weapon tests in

the atmosphere up to 50 kilometres"; there is a reference to that in the *Geneva Conference on the Discontinuance of Nuclear Weapons Tests*, the United States Department of State publication, pages 354 to 355.

Prime Minister Macmillan supported the President's proposal in a letter of the same date (*ibid.*, pp. 355-356).

It is relatively easy to discern the motives prompting this proposal. UNSCEAR had submitted its first report to the General Assembly on 13 December of the preceding year. In this report it was stated:

> "Radioactive contamination of the environment resulting from explosions of nuclear weapons constitutes a growing increment to world-wide radiation levels. This involves new and largely unknown hazards to present and future populations; these hazards by their very nature are beyond the control of exposed persons. The Committee concludes that all steps designed to minimize irradiation of human populations will act to the benefit of human health. Such steps include... the cessation of contamination of the environment by explosions of nuclear weapons." (A/3838, p. 41, para. 54.)

It is only logical to draw the conclusion that the growing fear of the unknown hazards of ionising radiation had led the States testing at that time to take steps to eliminate this hazard. This conclusion is borne out by the statement of the Soviet representative to the First Committee of the United Nations General Assembly in which he said:

> "Another point that emphasizes the urgency of a solution of the question of the cessation of tests is the rise in the level of atomic radiation as a result of the intensive testing of nuclear weapons which has been carried out in various parts of the world. If the testing of atomic and hydrogen weapons is not halted, the dangers of atomic radiation, which today already causes a hazard to the lives and health of many millions of human beings, will increase even beyond levels already reached.
>
> The report of the United Nations Scientific Committee on the Effects of Atomic Radiation has been submitted to the General Assembly and is on the agenda of the current session. This report has pointed out the extent of the danger. The members of the Scientific Committee, who are prominent scientists appointed by the Governments of fifteen countries, reached the conclusion that the continuance of nuclear test explosions involved new and largely unexplored hazards for present and future generations.
>
> The General Assembly must deal with this warning from the scientists with all the seriousness that it deserves. The urgency of a solution of the problem of the cessation of nuclear weapons tests is so manifest that there are few who would venture to take a stand openly in favour of the continuance of such tests." (A/C.1./PV.945, 10 October 1958.)

In 1959 the same fears generated a campaign of opposition against the forthcoming French tests in the Sahara. The objections were made primarily by the African and Arab States led by Morocco, and were voiced despite the assurance that the French Foreign Minister, Mr. Couve de Murville, gave to the General Assembly on 30 September 1959 that there would be no risk of radio-active fall-out on the territories of the African States.

On 20 November 1959 the General Assembly adopted resolution 1379 (XIV) which expressed "its grave concern over the intention of the Government of France to conduct nuclear tests and requested France to refrain from such tests". The preamble to the resolution noted "the deep concern felt over the

dangers and risks which such tests entail". It was during the debate on this resolution that delegations expressed the view that nuclear testing was contrary to international law, particularly atmospheric nuclear testing, because of the hazards involved.

When on 13 February 1960 France conducted her first atmospheric test, those same Arab and African States that had formulated the draft leading to the adoption of resolution 1379 (XIV) protested against the test. For example, the Ghanaian Head of State said on 13 February 1960:

> "... the Government of France, in total disregard of repeated protests by Ghana and other African States, and of the resolution of the General Assembly, has defied the conscience of mankind and exploded a nuclear device on African soil" (*Keesing's Contemporary Archives*, 27 February-5 March 1960, 17280).

Similar protests were made, for instance, by Morocco, Tunisia, United Arab Republic, India and Indonesia *(ibid.)*. The Nigerian Government was later, on 5 January 1961, to expel the French diplomatic mission from Nigeria because of these tests.

Further evidence of the then growing awareness of the dangers of radio-active fall-out is afforded by the Antarctic Treaty, Article V of which provides that "any nuclear explosion in Antarctica and the disposal of radio-active waste material shall be prohibited". This treaty was signed on 1 December 1959 by the Soviet Union, France, the United Kingdom, the United States, Australia and seven other powers.

On 11 February 1960, only two days before the first French atmospheric test which I have mentioned, the United States again proposed a phased agreement at the Geneva Conference that had reconvened on 12 January, the first phase of which provided for the "cessation of all nuclear weapon tests in the earth's atmosphere, in the oceans, and in outer space up to the greatest height with respect to which agreement can be reached on the installation of effective controls" as well as for the cessation of underground tests down to the lowest threshold for which adequate control was then feasible. (Geneva Conference on the Discontinuance of Nuclear Weapons Tests, *op. cit.*, pp. 414-419.)

It was in January 1960 that the Afro-Asian Legal Consultative Committee decided at its third session held in Colombo to undertake a study of the question of legality of nuclear tests as being a matter of common concern among the participating countries.

At the fifth session held in Rangoon in January 1962 the subject was fully discussed by the Committee on the basis of the materials on the scientific and legal aspects of nuclear tests collected by the Secretariat and of written memoranda by Japan and the United Arab Republic on the subject.

These statements within the Asian-African Legal Consultative Committee provide clear evidence of the developing *opinio juris* that nuclear tests which give rise to radio-active fall-out beyond the territory of the conducting State were illegal.

At the sixth session of the Committee held in Cairo in 1964—that is to say, after the conclusion of the Partial Test Ban Treaty in August 1963 the Committee unanimously adopted final conclusions on the subject, to which I have in part referred and to which I shall later refer. The concern which had been heretofore expressed was naturally intensified by the resumption of testing in the second half of 1961 following the failure of the Geneva Conference on the Discontinuance of Nuclear Weapon Tests.

On 3 September a joint statement was made by the President of the United

States and the Prime Minister of the United Kingdom proposing to Premier Khrushchev:

> "... that their three governments agree, effective immediately, not to conduct nuclear tests which take place in the atmosphere and produce radioactive fallout.
>
> Their aim in this proposal is to protect mankind from the increasing hazards from atmospheric pollution and to contribute to the reduction of international tensions" (Geneva Conference on the Discontinuance of Nuclear Weapons Tests, *op. cit.*, pp. 619-620).

In response to the announcement that the Soviet Union would test a 50-megaton bomb, a draft resolution was submitted by Canada, Denmark, Ireland, Iran, Japan, Norway, Pakistan and Sweden that the General Assembly solemnly appeal to the Government of the USSR to refrain from carrying out its intention.

The draft was approved by the Assembly on 27 October 1961, by 87 votes to 11, with 1 abstention, as resolution 1632 (XVI).

Here again is clear evidence of the growing international awareness and apprehension concerning the hazards of ionising radiation from nuclear tests.

As Canada's Secretary-General for External Affairs said at the United Nations:

> "The time has come when it is not sufficient merely to express concern and record blame. We must find means of compelling the countries responsible to cease the testing of nuclear weapons." (UN, *GA*, *OR*, A/PV1022, 3 October 1961.)

And then on 6 November 1961 the General Assembly adopted resolution 1648 (XVI) which emphasized: "both the grave and continuing hazards of radiation resulting from test explosions as well as their adverse consequences to the prospects of world peace".

On 27 November 1961, the then representative of the Argentine Republic stated that "nuclear tests of highly radio-active bombs in the atmosphere certainly engaged the responsibility of the State", and he referred to "a joint statement by the Foreign Ministers of Argentina and Brazil, dated 15 November 1961, which had deplored the recent nuclear tests in the atmosphere and had characterized them as crimes against humanity (UN, *GA*, *Sixteenth Session*, *Sixth Committee*, *720th meeting*, 27 November 1961, p. 150).

The year 1962 saw the acceleration of the developments leading to the crystallization of an international prohibition, so we would seek to submit, against in particular, nuclear testing in the atmosphere. The Geneva Conference had adjourned on 29 January 1962. It is also true that the United States and the Soviet Union continued to conduct heavy programmes of nuclear testing in the atmosphere. But on 14 March 1962 the Conference of the Eighteen-Nation Committee on Disarmament (ENDC) convened in Geneva for the first time. It called upon a subcommittee of the major nuclear Powers—the Soviet Union, the United Kingdom and the United States—to continue consideration of a treaty on the discontinuance of nuclear weapon tests.

Significantly, UNSCEAR was to report again in 1962, as it had in 1958, noting sharp increases in the levels of radio-active fall-out in many parts of the world resulting from the renewed discharge into the earth's environment of radio-active debris. The General Assembly resolution adopting the report declared:

> "... that both concern for the future of mankind and the fundamental principles of international law impose a responsibility on all States concerning actions which might have harmful biological consequences for the existing and future generations of peoples of other States by increasing the levels of radio-active fall-out" (resolution 1629 (XVI), 27 October 1962).

Mr. President, may I at this point observe that while varying views have been expressed by judges of this Court and by publicists on the legal effects of General Assembly resolutions, one aspect at this stage seems established. Resolutions of the General Assembly can be expressions of an *opinio juris generalis* and thereby make an important contribution to the development of customary law. As was said recently by you, Mr. President, some resolutions "take us into the legal realm and indeed may constitute an important contribution to the development of the law" (*Transnational Law in a Changing Society*, 1972, p. 103).

I go back to the history. I should mention next that on 6 November 1962, a short time after resolution 1629 was adopted, the General Assembly adopted by 75 votes to none with 21 abstentions, resolution 1762 (XVII) which condemned all nuclear tests and referred with "the utmost apprehension to the data contained in the report of the United Nations Scientific Committee on the effects of Atomic Radiation (Document A/5216)". It then went on to recommend:

> "... if, against all hope, the parties concerned do not reach agreement on the cessation of all tests by 1 January 1963, they should enter into an immediate agreement, prohibiting nuclear weapon tests in the atmosphere, in outer space and under water, accompanied by an interim agreement suspending all underground tests".

That resolution, so we will submit, evidences a conviction that conformity with such a prohibition was imperative in the interest of the welfare of present and future generations of mankind.

This plea was accepted almost immediately by all the nations then specially affected. The United States did not test in the atmosphere again after that date —its last atmospheric test having been conducted just two days prior, on 4 November 1962. The Soviet Union did, in fact, test until 24 December of that year but it has not tested again in the atmosphere since that date. France at this time had last tested in the atmosphere on 25 March 1961. The United Kingdom had ceased atmospheric testing in 1958.

And then, on 10 June 1963, three non-aligned members of the Eighteen-Nations Disarmament Committee, Ethiopia, Nigeria and the United Arab Republic, submitted a joint memorandum stating that direct talks between the foreign ministers and possibly between Heads of Government of the nuclear Powers, might solve the problem. (*Official Records of the Disarmament Commission, Supplement for January to December 1963*, doc. DC/207, Ann. 1.) On the same day it was announced that the USSR, the United States and the United Kingdom had agreed to hold talks in Moscow in mid-July on the cessation of nuclear tests. A short time later, in a speech made on 2 July 1963, in East Berlin, Premier Khrushchev announced the willingness of the Soviet Union to sign a limited treaty banning tests in the three environments about which there could be no controversy because of the harmful effects entailed.

On 25 July 1963 the Moscow Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water was signed by the foreign ministers of the then three nuclear Powers in the presence of the Secretary-General of the United Nations. It entered into force on 5 August 1963 upon the receipt of the ratifications of those States.

Australia will be referring to material of this character, to contend at the appropriate stage of the proceedings that when the text of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, was concluded in Moscow in 1963, its effect was to crystallize an emergent rule of international law.

I turn now to a brief survey of some of the developments since 1963. It will be our submission, at the appropriate stage, that these developments provide ample basis for a claim that, if the rule set forth in Article 1 of the 1963 treaty was not originally binding on all States it has since become a general rule of international law, accepted as such by the *opinio juris* of the international community. When the developments before 1963 are considered with those that have taken place since that date, a convincing case exists, so we will submit, to support the emergence of a general rule of international law prohibiting, in particular atmospheric testing, and that that rule is one owed *erga omnes*.

By the end of 1966, 116 countries including 109 Members of the United Nations, had signed, ratified or acceded to the Treaty. Now, a little more than ten years after the coming into force of the Treaty, 104 States are full parties to the Treaty.

It has been accepted by this Court, we suggest, that the act of a State in ratifying or acceding to a multilateral treaty which asserts, for the States who are parties to that treaty, the existence of a rule of a fundamentally norm-creating character is itself an act of State practice. Such a treaty may be compared to a series of bilateral treaties between States, all consistently adopting the same solution to the same problem of the relationships between them. The practice is concrete; each State party asserts not merely the desirability of the rule in question, but by a formal act accepts the rule for the regulation of its own activities. In this way it is possible, as this Court stated in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, at p. 42) for a custom to derive from the general, but not universal, ratification of a law-making treaty.

In his Third Report to the International Law Commission on the Law of Treaties did not Judge Sir Humphrey Waldock speak of the number of accessions as being the major determining reason why, in his opinion, the Nuclear Test Ban Treaty had been accepted into general international law so rapidly? (*Yearbook of the International Law Commission, 1964*, Vol. II, p. 33, A/CN.4/161.)

And, with respect, it is submitted that Sir Humphrey Waldock was perfectly correct in laying so much emphasis on this factor. One has only to recall the example of the Genocide Convention concerning which this Court has said "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (*I.C.J. Reports 1951*, p. 23). No dissent was voiced as to the principles of this Convention and it was adopted by the unanimous vote of 56 States. Yet it took ten years for it to obtain 59 ratifications and during that period the number of existing States making up the international community had increased very considerably; furthermore, by no means all the ratifications deposited were free from reservations, even if only on points of detail.

One feels, Mr. President, compelled to observe that the fact that the Test Ban Treaty was able to overcome all these difficulties, to the extent that, in the short space of three years, 116 States were to sign or accede to the Treaty in one or more of the capitals of the three original parties, is explicable only by the importance of the prohibition contained in the treaty.

It is the extensive acceptance of the treaty by so many States that provides the clearest possible evidence to substantiate the argument that the principle

contained in the treaty is one that international law has imposed upon all States for the benefit of all States.

And, of course, Article 38 of the Vienna Convention on the Law of Treaties makes it clear that the fact that a State or States decline to join that law-making treaty does not preclude a rule set forth in the treaty from becoming binding on those States as a customary rule of international law.

It would in fact, we submit, be contrary to principle to claim that the norm of general customary law was not able to emerge because two States, late-comers among nuclear powers, have declined to subscribe to the 1963 treaty, have shown their opposition to it and have continued to carry on nuclear experiments, unmindful of the prohibition it contains. It is certainly not a necessary character of international customary norms that they should come into being only when they get the express adherence of all States; nor is it necessary, in order to prove the existence of a customary norm, to adduce concurring acts on the part of all States subject to international law. This view, we submit, is reinforced by the opinions of jurists on the subject. As Cheney Hyde has written:

> "It is not suggested that the opposition of a strong and solitary State could ultimately prevail against the consensus of opinion of what, except for itself, might fairly be regarded as the entire civilized world, or that such a State would not be finally compelled to acquiesce in changes which it once opposed." (*International Law Chiefly as Interpreted by the United States*, Vol. I, p. 8, n. 1.)

These views reflect those of John Bassett Moore that—

> "It would be going too far in the present state of things to propose a mere majority rule. But it is altogether desirable that a rule should be adopted whereby it may no longer be possible for a single state to stand in the way of international legislation." (*International Law and Some Current Illusions*, p. 303.)

The reactions, Mr. President, of the other members of the international community to the dissenting behaviour of one or some of them can be an efficient and valid element of proof of the *opinio juris* which is the basis of that norm.

In this connection, the public protests, the resolutions of international and regional bodies and the opinions of distinguished jurists constitute evidence of this prohibition.

Annex 9 of the Australian Memorial, which sets forth only a selection of the protests and resolutions opposing the French tests and also the Chinese tests, of last year, gives some idea of the extent and depth of the opposition of the international community to this dissenting behaviour. I mention one important instance of the opinion of legal experts to which I have already referred—the conclusions adopted unanimously by the Asian-African Legal Consultative Committee at its Sixth Session held in Cairo in 1964 (*Asian-African Legal Consultative Committee, The Legality of Nuclear Tests*, New Delhi, p. 244). These conclusions, we submit, constitute an important contribution by that expert and representative body, expressive of an *opinio juris* which reflects the recognition of the illegality of atmospheric testing.

May I now mention some examples of previous comparable treaties regarded as reflecting or embodying customary international law.

It will be recalled that the unratified Declaration of London of 1909 exerted powerful influence upon events following the outbreak of war in 1914 because it was alleged on the part of important neutrals to embody the *opinio juris*, irrespective of whether or not it was textually binding on Great Britain.

The Nuremberg Tribunal decided that the Hague Convention rules of land warfare were customary law despite their formal inapplicability by virtue of the general participation clause (*International Law Reports*, Vol. 13, p. 212) or that the Pact of Paris was universally binding partly because 63 States were formal parties to it.

Mention may also be made of the rules of the Geneva Convention of 1929 which were held universally applicable, although the instrument had been in force for only eight years. One may perhaps refer also to the use made by this Court of the Conflict of Nationality Laws of 1930 in the *Nottebohm* case (*I.C.J. Reports 1953*, p. 4 at p. 23) despite the fact that neither Party had signed it, although both had cited it to the Court; and to the call, additionally, by the General Assembly of the United Nations on 5 December 1966 for ". . . strict observance by all States of the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases", or its Declaration on the Elimination of All Forms of Racial Discrimination calling for every State fully and faithfully to observe the provisions of the Universal Declaration of Human Rights.

Mr. President, a further matter which may affect the question is the significance to be attached to the denunciation clause contained in Article 4 of the 1963 Treaty. It may be suggested that the existence of this clause deprives Article 1 of the Treaty of any possible law-making effect but Article 43 of the Vienna Convention on the Law of Treaties declares that the denunciation of a treaty does not relieve the former party to it from the duty to fulfil "any obligation embodied in the Treaty to which it would be subject under international law independently of the Treaty". That Article undoubtedly constitutes a correct statement of customary international law. The point may be illustrated simply and conclusively by reference to the Genocide Convention. That Convention is undoubtedly expressive of the general rule of international law. Yet that Convention contains a denunciation clause which, I might say, is less circumscribed and limited in its operation than Article 4 of the 1963 Partial Test Ban Treaty.

The rights relied upon by Australia in this part of its case are, we submit, rights *erga omnes*. That is to say they are rights of a character which, if they exist—and the Court is not called upon to determine that question at this stage—clearly concern all States; each State has an interest in their protection. Again, authentic expressions of the fact that atmospheric tests have and still cause intensive international concern may be found in the numerous resolutions to that effect adopted by the General Assembly of the United Nations and in the Stockholm Conference on the Environment, which will be mentioned later.

Finally, if Australia does not have a sufficient legal interest to seek the enforcement of the prohibition relied upon, what country has? But if none has, the existence or non-existence of the obligation on which Australia relies would be completely prejudged. It was that distinguished international lawyer, Professor Brierly, who, in an article dealing as it happens with the 1928 General Act, quoted the following observation of Max Radin:

> "If he [the Judge] shuts his eyes and averts his face and cries out that he will not judge, he has already judged. He has declared it to be lawful by not declaring it unlawful." (*British Year Book of International Law*, Vol. XI, p. 128.)

But an alternative view is open. The language of the Treaty may be regarded as embodying an inhibition against such testing in the atmosphere as leads to the deposit outside the conducting State of radio-active nuclear debris. This

prohibition may not possess the character of an obligation *erga omnes*. Let it be so. But given such an obligation exists, the responsibility of the depositing State is engaged by the very act of the deposit. This is its special injury, regarded as such, as we have already submitted, without further proof.

Upon either of these bases therefore, we submit, Australia possesses a legal interest to propound this claim.

The Court rose at 6 p.m.

TENTH PUBLIC SITTING (9 VII 74, 4.20 p.m.)

Present: [See sitting of 4 VII 74.]

THE PRESIDENT: Before I call on the Solicitor-General of Australia, I wish to refer to a statement he made on Saturday 6 July. At the outset of his address on Saturday 6 July the Solicitor-General of Australia quoted a passage in the Australian Memorial expressing what the Solicitor-General described as "Australia's understanding of the task which the Court's Order as to admissibility requires of it", the reference being to the Court's Order of 22 June 1973. The Solicitor-General reiterated Australia's position, and referred to his confidence that "should Australia's appreciation of its obligation be deficient in any respect, its attention will be directed thereto and opportunity of correction afforded to it". It should be observed that it is for the Government of Australia to present its views to the Court as to the admissibility of its Application. The Court will, of course, appreciate the question of admissibility in all the aspects which it considers relevant.

Mr. BYERS: Mr. President, I turn now to Australia's legal interest to require that France respect Australia's right to its freedom of the seas. There are two aspects of this question, namely Australia's right to freedom of navigation and Australia's right to fish in uncontaminated waters.

Every legal right has its necessary correlative; necessary, because without it the right ceases to be such. Just as the right to territorial integrity has its correlative in the duty of each State to respect the integrity of each other State, so Australia's right to freedom of navigation has, as a correlative, the duty of other States neither to prevent nor impair its proper exercise. So too with Australia's right to fish. The correlative in this case also is the obligation neither to prevent Australia's proper exercise of its right nor to impair that exercise. The right is impaired, for example, either by denying the fishing fleets access to the fishing grounds or by contaminating the waters in which the fish are caught or those from which they migrate, whether by deliberately caused oil slicks or deliberately caused radio-active nuclear pollution.

Abstract considerations alone yield such a result. But the matter does not stop there, for on 17 December 1970, as the Court will remember, the General Assembly adopted resolution 2749 (XXV) part of which reads: "The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction... as well as [its] resources... are the common heritage of mankind."

It is no doubt true to say that the legal régime of freedom of the high seas differs from that which governs the international sea-bed viewed as part of the common heritage of mankind. But there is a common factor. In both cases one State may not appropriate those areas to the exclusion or limitation of the rights of others. The existence of this common factor and the necessarily related subject-matters make reference to the common heritage of mankind legitimate, indeed necessary, in a consideration of those two aspects of the freedom of the high seas which I have mentioned.

The course I propose to follow is to deal first with the closure by France of the high seas. Thereafter I shall discuss the effect of pollution of those seas by radio-active nuclear fall-out. I shall in each case do so only to the extent necessary to establish Australia's legal interest to propound its claim that France's action in each regard is a breach of Australia's legal rights and, of course, in an

intended performance of Australia's task as understood by it in the fashion I mentioned at the outset of my statement.

Let me now examine what the French Government has done. The French practice of declaring prohibited zones for aircraft and dangerous zones for shipping has been described in paragraph 45 of the Application. On 4 July 1973, in addition, it formally suspended navigation by all vessels in a proclaimed security zone surrounding Mururoa Atoll. The documents will be found on pages 363 and 364, *supra*, of the Australian Memorial. These authorize the French navy to expel all shipping from the zone, and in fact the American yacht *Fri* and the Canadian yacht *Greenpeace III* were forcibly boarded and seized and removed from the danger area. In 1974 the same powers have been reactivated in connection with the current tests.

Of the illegality of such closures of the high seas one of the foremost authorities on the law of the sea, Gilbert Gidel, had no doubt. He said, and this is my translation:

> "It is not possible, therefore, in our opinion, to avoid the conclusion that the conduct of nuclear tests affecting areas of the high seas is contrary to actual rules of law applicable to those areas and covered by the term 'freedom of the sea'." (G. Gidel, "Explosions nucléaires experimentales et liberté de la haute mer", *Fundamental Problems of International Law, Festschrift für Jean Spiropoulos*, p. 198.)

The security zone created around Mururoa Atoll means that Australian vessels have been forbidden to sail there, and Australian aircraft have been forbidden to fly there during the periods of prohibition. The fact that they may or may not then wish to do so is immaterial. The point is that there is a legal question as between Australia and France concerning their right to do so. That question requires decision, and legal argument needs to be addressed to the Court for that decision to be made. In every meaning of the expression, it follows that a case which raises this question must be admissible. The additional *zones dangereuses* mean that the Australian vessels and aircraft may not exercise their rights of passage without the possibility of being subject to gross hazards. On this point too there is an issue between Australia and France which requires decision. And on this point too it follows that the question must be admissible.

Involved in this question is the determination of the state of customary international law. It is sufficient to demonstrate the extent to which State practice would need to be evaluated for this purpose if I recall that, in marked contrast with the current French practice to which I have referred, the current United States practice in the Regulations of the Atomic Energy Commission issued on 30 October 1971, and published in the *Federal Register*, is to prohibit entry into a warning area of 50 nautical miles radius around Amchitka Islands only to United States citizens and to persons subject to the jurisdiction of the United States (Art. 112.3). A decision on the question of law would need to take into account the fact that the United States delegation to the Law of the Sea Conference at Geneva in 1958 was explicitly instructed as follows: that action against foreign ships in the warning areas in the high seas around the Bikini and Eniewetok test sites was predicated on the principle of voluntary compliance and that there was no intention to drive away ships which did not comply. The only vessel in fact interfered with was an American yacht, owned by an American, and arrested for violation of a United States law applicable to United States citizens in the high seas. All this is set out in Whiteman's *Digest of International Law*, Volume 4, at page 595.

It appears, then, to come down to this: the Court must determine whether there is a special rule of international customary law derogating from the freedom of the seas so as to enable enclosure of areas of the high seas for the purpose of nuclear testing. If enclosure is legitimate, this could only be by virtue of a claim that nuclear testing is itself an exercise of the freedom of the seas, to which other exercises have to accommodate themselves even to the point of being entirely excluded or substantially subordinated.

The question, which will need to be examined at the merits stage, is whether the freedom of navigation can be reduced because the seas are used for what is alleged to be defence purposes.

In their well-known essay on nuclear testing in the *Yale Law Journal*, 1955 (64 *Yale Law Journal*, p. 648), Professor McDougal and Mr. Schlei propagated the notion that battlefleets on manoeuvres had traditionally occupied areas of the ocean to the exclusion of other shipping. I do not wish to delay the Court by anticipating what will appear on this question in the Memorial on the merits of the case, but I do wish to indicate that in that Memorial Australia will recall that universal practice, as embodied in the clear range procedures of the navies of such countries as Great Britain and the United States, and of Australia and France as well, requires that the firing ship ensure that the range is clear before shell splash or missile splash is authorized, even in zones which are proclaimed as dangerous. Whiteman's *Digest*, again, furnishes details of Soviet protests and American replies amply verifying this. (Whiteman's *Digest of International Law*, Vol. 4, pp. 552-553.)

While no-one would claim that the right of navigation was so absolute that gunnery practice would be illegal, neither would one wish to say that a right to gunnery practice is so absolute as to cancel the right of navigation. I have already submitted that it is now established as a proposition of law that the testing of nuclear weapons in the atmosphere is illegal and this would deprive the prohibition of navigation of any justification. But even if it were legal, it still would not follow that the assertion of the legality of the prohibition of navigation would be plausible, because the situation would fundamentally be no different from any other naval exercise on the high seas.

Mr. President, I have perhaps delayed over long on this point of the illegality of the French enclosure of the high seas, since this is a matter for the merits and not for the present stage of the proceedings. But I have thought it worthwhile entering into this amount of detail because it puts squarely in context the question of Australia's legal interest to complain about the matter to this Court. I would wish, however, to add that obviously there exists a drastic difference between gunnery practice and the atmospheric explosion of nuclear devices, not only in their respective natures but also in their respective extents.

True it was that an American and a Canadian vessel respectively were interfered with by the French navy, not an Australian vessel. True it is that this is a remote part of the ocean, outside regular shipping routes. France might perhaps say that Australia has suffered no injury since no ship of Australian nationality has been interfered with, and the likelihood of any such ship diverting because of the prohibition is slight.

Let us for a moment consider the consequences of such an approach being upheld. It would mean that no State which asserts its authority in the high seas contrary to the rule now enshrined in Article 1 of the Geneva Convention on the High Seas could be challenged in that assertion unless and until it interfered with the ships of another.

Now we all know that for jurisdictional reasons international legal procedures for remedying such interference are not always available. So, the existence of

the remedy would then depend upon the fortuitous coincidence of interference with a flag ship of a State which has a jurisdictional basis for the remedy. The coincidence may or may not be likely, but one thing is certain, and that is that neighbouring States with the most immediate interest in resisting illicit encroachments in the high seas might have no remedy except resistance by force.

It is precisely to avoid conflict at sea that international law necessarily invests each State with an interest in the maintenance of the freedom of the seas. Were it otherwise, force would be the only defence to wrongful action. We all know the powerful role played by effectiveness in the creation of derogations from legal principles in international relations. How could the consolidation into customary international law of originally illicit claims be prevented if one had to await the coincidence of circumstances to which I have referred before arresting their effects?

This, Mr. President, may be one reason why States have the right to protest against excessive maritime claims. The right to assert freedom of the seas is not limited to those States whose ships are immediately or directly affected by the unlawful action. In other words, all States have a legal interest in the freedom of the seas and each State is free to seek the recognition of that freedom by all available means of legal redress.

Some examples of protests which have been made are given in paragraphs 468 and the following of the Australian Memorial. Two additional examples may be mentioned. On 18 September 1973 the Permanent Representatives of Egypt and the Syrian Arab Republic wrote to the President of the Security Council bringing to the attention of the Council the fact that a Cuban merchant ship had been attacked in the high seas by the Chilean Navy and Air Force and had suffered serious damage. The way in which these two countries expressed their interest is significant. They said that the attack was wholly incompatible "with the international rules of navigation recognized by States" (S/11001).

The Soviet Union made the same point when it protested on 11 May 1972 to the United States about the mining of Haiphong. Recalling Article 1 of the Convention on the High Seas, the Soviet Union protested at the alleged "violation of the universally recognized principle of freedom of navigation in direct threat to many States' vessels" (S/10643).

The fact, Mr. President, that States have a common interest in the freedom of the seas does not mean that they have no individual interest. Indeed, the International Law Commission in 1956 specifically drew attention to this parallelism, saying that: "States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States" (*Yearbook of the International Law Commission*, 1956, Vol. II, p. 278), and it went on to express the correlative of this obligation as follows:

> "Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community." *(Ibid.)*

Just how this general interest is also an individual one was made clear by this Court in the *Anglo-Norwegian Fisheries* case (*I.C.J. Reports 1951*, p. 116). The Judgment in that case confirms what may, at first, appear to be a slightly unusual proposition, namely that any maritime State, were it so minded, could have brought an action against Norway in respect of its claims. The Court spoke of: "The general toleration of foreign States with regard to the Nor-

wegian practice is an unchallenged fact." (*Ibid.*, p. 138.) Later it spoke of the United Kingdom as "a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas" (*ibid.*, p. 139).

Perhaps most importantly it said that:

> "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norways enforcement of her system against the United Kingdom." *(Ibid.)*

The first passage of interest in this question is the reference to "Great Britain's position in the North Sea". This consideration obviously played a major role in the development of the Court's reasoning. Naturally, the Court felt confident in asserting that a country in the position of Great Britain would have taken action, indeed may even have instituted proceedings before the Court much earlier, had it really considered Norway's claim to be opposable. That factor alone, quite separate from her own interest in the question, would have conferred a legal interest on Great Britain.

This is not the stage of the proceedings at which it would be appropriate to lead substantial evidence concerning Australia's maritime and marine interests in the Pacific Ocean. But I am sure that the Court will be well aware that those interests are extensive and are of importance in the area. Like Great Britain in the North Sea, Australia has an established position in the South Pacific and has her own interest in the question of freedom of navigation in that area. Thus, this factor, the position of the country bringing the proceedings, is a relevant consideration at this stage and of itself is sufficient to confer a legal interest upon Australia to have this matter determined by this tribunal.

But, in addition to this, I recall the Court's reference to the United Kingdom as "a maritime power traditionally concerned with the law of the seas and concerned particularly to defend the freedom of the seas". It indicates that this fact alone would have given Great Britain standing to protest. Australia does not pretend to rival Great Britain as a general maritime power, but in the South Pacific she falls in the same category.

It is this interest in the protection of the freedom of the high seas that, apart from considerations as to her position in the Pacific, constitutes in large part the Australian interest in the present case, and which gives Australia standing to allege a breach of the fundamental freedoms of the sea by the French nuclear activities in the South Pacific area.

The clear implication of the Court's Judgment in the *Fisheries* case is that a maritime State, faced with what it considers to be infringement of its rights on the seas where it has special interests, could and should seek a decision by this Court lest it be deemed to have acquiesced in the allegedly illegal practice. Australia acts upon that indication in bringing this case.

The consideration which this Court gave to the legal interest of States in the matter of fisheries leads me now to the question of Australia's interest in preventing the pollution of the sea by reason of nuclear fall-out. The fact that the tests are conducted at a remote place is not to the point. Fall-out occurs in varying levels around the globe. Fisheries can be contaminated in various places. We hear much talk, at Caracas and elsewhere, of legal interests in respect of different types of anadromous and other migratory fish, which swim over vast distances and can ingest food which is contaminated by radio-active fall-out far from their home rivers or the places where they are caught.

The general principles in this matter are undoubtedly, we submit, embodied in the General Assembly resolution of 17 December 1970, known as the Declaration of Principles Governing the Sea-Bed and the Subsoil Thereof Beyond the Limits of National Jurisdiction. Declaration 11 called on States to take appropriate measures for:

> "The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;
>
> The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment." (Resolution 2749 (XXV).)

This is regarded as an intrinsic component of the "common heritage of mankind". Progressively, from Article 25 of the Geneva Convention of the High Seas of 1958, the community of nations has seen to it that the grip of international law upon the preservation of the natural resources of the marine environment including the high seas from environmental hazards has become ever more tenacious. The process, of course, is not completed. Questions remain of coastal State rights to interfere with foreign shipping for this purpose. Australia will wish to argue that one thing is now absolutely clear, and that is the duty of States not to subject the natural resources of the high seas to any unwarranted environmental hazard.

It will wish to say that to deny that would be to fly in the face of the reiterated and virtually universal expressions of conviction and concern enshrined in terms of obligation so often in the past years. I may perhaps in the present context refer to only a few of such expressions.

The Declaration of Santiago on the Law of the Sea of 9 June 1972 proclaimed "the duty of every State to refrain from performing acts which may pollute the sea" (*International Legal Materials*, Vol. XI, p. 893). Again Draft Articles on Ocean Dumping adopted by the Intergovernmental Working Group on Marine Pollution on 12 November 1971 contained a pledge on the part of the contracting States "to take all possible steps to prevent the pollution of the sea by substances that are liable to create hazards to human health of harm resources and marine life" (*ibid.*, p. 1295). This pledge was carried into the Convention on the Dumping of Waste at Sea adopted at the Intergovernmental Conference on 13 November 1972 and into the Oslo Convention for the Prevention of Marine Pollution of 15 February 1972. Recommendation 92 of the United Nations Conference on the Human Environment at Stockholm in 1972 recommended that Governments endorse the following statement agreed upon at the second session of the Intergovernmental Working Group on Marine Pollution:

> "The marine environment and all the living organisms which it supports are of vital importance to humanity, and all people have an interest in assuring that this environment is so managed that its quality and resources are not impaired. This applies especially to coastal area resources. The capacity of the sea to assimilate wastes and render them harmless and its ability to regenerate natural resources are not unlimited. Proper management is required and measures to prevent and control marine pollution must be regarded as an essential element in this management of the oceans and seas and their natural resources."

Principle 7 adopted by the Stockholm Conference sums up the position in the clearest of terms:

> "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."

The Convention on the Prevention of Marine Pollution from Land-Based Sources adopted on 21 February 1974 a pledge—

> "... to take all possible steps to prevent pollution of the sea, by which is meant the introduction by man, directly or indirectly, of substances or energy into the marine environment resulting in such deleterious effects as hazards to human health, harm to living resources and to marine eco-systems" (*International Legal Materials*, Vol. XIII, 1974, p. 353).

In the Convention adopted then the parties undertake to eliminate pollution of the maritime area from land-based sources of substance. But more important perhaps for present purposes is the recognition afforded by the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, recognizing the common interest of mankind in the progress of the exploration and use of the sea-bed and the ocean floor for peaceful purposes. The Treaty entered into force on 18 May 1972. The Treaty contains the following recital:

> "Recognizing the common interest of mankind in the progress of the exploration and use of the sea-bed and the ocean floor for peaceful purposes." (*Treaties and Other International Acts Series 7337. Seabed Arms Controls*, p. 3.)

It affords a clear indication of the recognition by the *opinio juris* that this common interest exists and thus affords powerful support for the Australian contentions. The presuppositions of the recital are a common interest in freedom of the seas. This, of course, is but one example.

Australia will submit in the case on the merits that all of this signifies the emergence of a rule of customary law to outlaw acts whereby pollution can occur, not merely to establish the liability of the polluter for the damage that actually results. For, if we are to await the damage, and the processes of proof, what chance then would we have of conserving the common heritage of mankind? There has never been any doubt about State responsibility for actual harm, as witness the payment of damages by the United States when a cargo of radio-active contaminated fish was landed in Japan following the United States Pacific tests. The current effort is to enhance the tenacity of the law so that actual harm does not result. All of this obviously means that profound and important questions of law are in issue, which require a decision of the Court that cannot but influence the future role of international law in the environmental sphere.

People naturally fear to eat fish from waters in which fall-out has occurred. The consequence economically, upon the fishing and export industries, might not be inconsiderable. Indeed recently the Australian Department of Primary Industry was asked by an importer of fish to Italy for a certificate that the fish was free from radio-activity. It would seem that he was required by the Italian customs authorities to produce such a certificate before the fish could be landed. The requirement in question was an administrative one only, not backed, so far as Australia has been able to ascertain, by any law or regulation. The requirement does not seem to have been further enforced.

Nevertheless, this request strongly supports the existence of apprehension of

danger to health from radio-active marine pollution. It further indicates the possibility of the existence of special burdens placed on Australia as a result of French testing.

But in any event, Australia is a Pacific Ocean State and a party to a number of treaties and arrangements linking her to other countries in the Pacific region, particularly in the subregion of the Southern Pacific. For example, Australia and France are both parties to the agreement establishing the South Pacific Commission. The territorial scope of the Commission comprises all those territories in the Pacific Ocean which are administered by the participating governments and which lie wholly or in part south of the Equator and east from and including Papua New Guinea. The powers and functions of the Commission relate to the economic and social development of the territories within the scope of the Commission and the welfare and advancement of their peoples. Australia is deeply involved in the South Pacific area. It is there that her maritime activities are carried on and her economic interests are centred.

Countries in the region of the Southern Pacific are necessarily affected because of the direct effect of the nuclear pollution on the economic and marine activities, and the environment of the region as a whole. This fact was explicitly recognized in recommendation 92 of the 1972 United Nations Conference on the Human Environment in Stockholm which I have quoted in part. In this recommendation, which dealt with marine pollution, governments were asked to co-ordinate their activities regionally and where appropriate on a wider international basis, for the control of all significant sources of marine pollution. It was widely recognized that marine pollution can have international implications if it harms living resources that are part of the patrimony of all States, creates hazards to human health and hinders marine activities including fishing.

As the Australian Memorial notes, it is the protection of the freedom of the sea which constitutes in part the Australian interest in the present case and gives Australia a sufficient legal interest to allege a fundamental breach of that freedom by the French nuclear tests in the Pacific. The need of such an interest in all States was from Australia's point of view lent an additional emphasis by yesterday's nuclear explosion in the South Pacific.

May I, Mr. President, express to the Court my appreciation of each Member's courtesy, patience and attention. There remains but one thing for me to add: the Attorney-General, my colleagues and I, have made a number of submissions to the Court. I shall now summarize those submissions. They are:

The Government of Australia requests the Court to adjudge and declare as follows:

I. *Jurisdiction*

The Court possesses jurisdiction in the present case:

1. Under Article 36 (1) of the Statute, on the basis of Part II of the General Act for the Pacific Settlement of International Disputes, 1928, to which Australia and France are both parties, and which was a treaty in force on the date of the Application herein, read in conjunction with Article 37 of the Statute of the Court.
2. Further or alternatively, under Article 36 (2) of the Statute, on the basis of the declarations of acceptance of the jurisdiction of the Court under that Article filed by Australia on 6 February 1954 and by France on 20 May 1966.

II. *Admissibility*

1. The Application is admissible in that it relates to violations by France of the rights claimed by Australia in respect of:

(i) the sovereignty of Australia over its territory;
(ii) the right of Australia that nuclear tests should not be conducted in the atmosphere and, in particular, not in such a way as to lead to radio-active fall-out upon Australian territory; and
(iii) the rights of Australia to the unrestricted use at all times of the high seas and superjacent air-space for navigation, fishery and other purposes, free of physical interference and of risk from radiation pollution.

2. Alternatively, the Australian Application is admissible if any one of the Australian claims is admissible.

Further, if and in so far as any of the Australian claims involves, in whole or in part, questions not exclusively of a preliminary character, the Government of Australia submits that such questions should be heard and determined within the framework of the merits.

STATEMENT BY MR. BRAZIL

AGENT FOR THE GOVERNMENT OF AUSTRALIA

Mr. BRAZIL: If the Court pleases I shall now read the final formal submissions on behalf of the Government of Australia on the questions of jurisdiction and admissibility.

The final submissions of the Government of Australia are that:

(a) the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973; and
(b) that the Application is admissible.

And that, accordingly, the Government of Australia is entitled to a declaration and judgment that the Court has full competence to proceed to entertain the Application by Australia on the merits of the dispute.

QUESTION BY JUDGE SIR HUMPHREY WALDOCK

The PRESIDENT: I understand some Members of the Court have questions to address to the Agent of Australia.

Judge Sir Humphrey WALDOCK: I have one question connected with the issue of admissibility on which I shall be glad if the Agent and counsel for Australia would assist the Court. It concerns paragraphs 432 and 454 of the Memorial, in which Australia alleges that "France's activities in the South Pacific area are inconsistent with its obligation under general international law to respect the sovereignty of Australia over and in respect of its territory and thus to abstain from producing alterations of any kind in the Australian environment (atmosphere, soil, waters) by the deposit on its territory and the dispersion in its air space of radio-active fall-out".

I should be glad if Australia's representatives would state whether they consider that every transmission by natural causes of chemical or other matter from one State into another State's territory, air space or territorial sea automatically constitutes in itself a legal cause of action in international law without the need to establish anything more. I emphasize that I am not asking them to argue the general merits of their allegation. I wish only to obtain a clear understanding of the position which they take as to what elements constitute the legal cause of action in such cases. In other words, do they draw a line and if so where between a deposit or dispersion of matter within another State which is unlawful and one which has to be tolerated as merely an incident of the industrialization or technological development of modern society. Do they consider that the harm or the potentiality of harm which is referred to in various passages of the Solicitor-General's speech is a *sine qua non* for establishing the breach of an international obligation in such cases?

The PRESIDENT: I realize that the Agent will not be prepared to answer this question immediately, so perhaps we shall hear his reply at a further sitting of the Court because I understand he will receive some questions in writing from other judges. Would you be able to reply to this question and possibly to others on Friday?

Mr. BRAZIL: First of all I should say, Mr. President, that the Government of Australia is grateful for this opportunity, by answering this question and the other questions that you have foreshadowed, to assist the Court further on this important matter. I think we should be in a position to answer that question at an oral hearing on Friday.

The PRESIDENT: Shall we therefore fix a hearing for Friday at 10 o'clock to hear your reply?

Mr. BRAZIL: Might I ask, Mr. President, when the other questions, which I gather would be written, would become available to us?

The PRESIDENT: It is difficult for me to say now. I will have to consult Members of the Court. But should there be some delay with regard to the other questions then another delay will be granted to you.

The Court rose at 5 p.m.

ELEVENTH PUBLIC SITTING (11 VII 74, 12.35 p.m.)

Present: [See sitting of 4 VII 74.]

ARGUMENT OF MR. BYERS (cont.)

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

The PRESIDENT: I open the sitting in the case *Australia* v. *France* immediately after the previous one in order to avoid unnecessary formalities, and I call on the Agent of Australia in connection with the reply to be given to the question put by Sir Humphrey Waldock.

Mr. BYERS: Mr. President, Members of the Court. It will be convenient for purposes of reference to divide Judge Sir Humphrey Waldock's question into three parts.

In the first part Sir Humphrey has asked whether the Government of Australia considers that every transmission by natural causes of chemical or other matter from one State into another State's territory, air space or territorial sea automatically constitutes in itself a legal cause of action in international law without the need to establish anything more.

In reply to this question the Government of Australia states that it does *not* consider that every transmission by natural causes of chemical or other matter from one State into another State's territory, air space or territorial sea automatically constitutes in itself a legal cause of action in international law without the need to establish anything more.

The Government of Australia considers that where, as a result of a normal and natural user by one State of its territory, a deposit occurs in the territory of another, the latter has no cause of complaint unless it suffers more than merely nominal harm or damage. The use by a State of its territory for the conduct of atmospheric nuclear tests is not a formal or natural use of its territory. The Australian Government also contends that the radio-active deposit from the French tests gives rise to more than merely nominal harm or damage to Australia.

Further, every State is entitled to decide for itself, or in agreement with other States, whether or not it accepts and, if so, the circumstances and extent of any acceptance by it of artificial radiation risk. Deposit of radio-active fall-out without consent violates what I have called the decisional, as well as the territorial sovereignty of the receiving State. This violation is wrongful of itself and requires no proof of harm or damage to the population or environment.

In the second part of his question Sir Humphrey developed the first part by adding:

> "I wish only to obtain a clear understanding of the position which they take as to what elements constitute the legal cause of action in such cases. In other words, do they draw a line and if so where between a deposit or dispersion of matter within another State which is unlawful and one which has to be tolerated as merely an incident of the industrialization or technological development of modern society." (P. 524, *supra*.)

As to this the Australian Government states that it *does* draw a line between lawful and unlawful deposit or dispersion of matter within another State.

As already stated, a deposit or dispersion may be lawful if it is a consequence of a normal and natural user of territory. The Australian Government assumes that in referring to an incident of the industrialization or technological development of modern society the question is contemplating a normal and natural user of territory. Hence deposit or dispersion of chemical or other matter arising from such user may be lawful. The use of territory to conduct atmospheric nuclear explosions is, as I have already said, not a normal or natural user of territory.

The Australian Government puts its case in a number of separate ways. It says that a deposit of radio-active fall-out resulting from France's conduct of atmospheric testing is, without more, a breach of its territorial sovereignty. It says further that such deposits are a breach of its decisional sovereignty. In neither case is it necessary to show more. Further and additionally it says that radio-active fall-out is harmful and causes damage.

In the third part of his question, Sir Humphrey Waldock asks whether the Government of Australia considers:

> "... that the harm or the potentiality of harm which is referred to in various passages of the Solicitor-General's speech is a *sine qua non* for establishing the breach of an international obligation in such cases" (p. 524, *supra*).

As to this, the Australian Government states that it does *not* regard the harm or the potentiality of harm as the *sine qua non* for the establishment of the breach of obligation. This is because, as has already been stated, the intrusion constitutes a breach of sovereignty. Where that intrusion upon sovereignty is accompanied by harm—as it is in the case of atmospheric nuclear testing—the affected State has an even greater right to complain.

By way of elaborating the answers already given I would wish to say that the basic principle is that intrusion of any sort into foreign territory is an infringement of sovereignty. Needless to say, the Government of Australia does not deny that the practice of States has modified the application of this principle in respect of the interdependence of territories. It has already referred to the instance of smoke drifting across national boundaries. It concedes that there may be no illegality in respect of certain types of chemical fumes in the absence of special types of harm. What it does emphasize is that the legality thus sanctioned by the practice of States is the outcome of the toleration extended to certain activities which produce these emissions, which activities are generally regarded as natural uses of territory in modern industrial society and are tolerated because, while perhaps producing some inconvenience, they have a community benefit.

Any such practice of States is not a denial of the basic principle. Unless an exception recognized by customary international law can be established, that principle continues to govern the relations of States. There have been, for example, many references in connection with international telecommunications to the absence of any right in a State to transmit radio beams to foreign territory.

The Government of Australia accepts that there must exist a line between activities which are illegal because they fall under the operation of the principle and activities which are legal because they fall under the operation of some tolerated exception to the principle. Atmospheric nuclear testing clearly falls within the operation of the principle. Considerations have been advanced to show that it does not fall within the operation of any exception to it.

The Government of Australia does not believe that this case calls for a general determination of the line of demarcation between legal and illegal activities. But even if it did, this is not, as Sir Humphrey's question recognizes, the proper

stage to examine the evidence and the arguments that bear upon that determination. At the merits stage Australia will, in connection with establishing that atmospheric nuclear testing clearly remains within the area of illegality, advance legal and scientific criteria that relate to the question of determining that line.

That is Australia's answer, Mr. President.

The PRESIDENT: This brings us to the end of the oral proceedings in the present case concerning the jurisdiction and admissibility of Australia's Application against France. I therefore declare the oral proceedings closed, but obviously the Agent will remain at the disposal of the Court in connection with the further proceedings should the Court require any further assistance.

The Court rose at 12.50 p.m.

TWELFTH PUBLIC SITTING (20 XII 74, 3 p.m.)

Present: [See sitting of 4 VII 74, Vice-President Ammoun and Judges Petrén, Morozov, de Castro, Nagendra Singh, Ruda and Judge *ad hoc* Sir Garfield Barwick absent.]

READING OF THE JUDGMENT

The PRESIDENT: The Court meets today for the reading, pursuant to Article 58 of the Statute, of its Judgment in the present phase of the *Nuclear Tests* case brought by Australia against France. That phase was opened by the Court's Order of 22 June 1973 [1], by which it was decided that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application.

I regret to say that Vice-President Ammoun, who suffered an accident earlier this year, has been unable to participate in the case, and is not present today. A number of other Members of the Court are also unable to be present at today's sitting, although they participated fully in the proceedings and the deliberation, and in the final vote on the case. Judge Petrén and Judge *ad hoc* Sir Garfield Barwick are prevented from attending by other commitments; Judge Morozov, by a serious illness in his family; Judges de Castro, Nagendra Singh and Ruda have been obliged to leave The Hague before today because of the difficulties attendant upon international travel at the present season.

I shall now read the Judgment of the Court. The opening recitals of the Judgment which, in accordance with the usual practice, I shall not read, set out the procedural history of the case and the submissions, and then refer to a letter addressed to the Court by the French Ambassador to the Netherlands, dated 16 May 1973 [2].

The Judgment then continues:

[The President reads paragraphs 14 to 62 of the Judgment [3].]

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

[The Registrar reads the operative clause in French [4].]

I myself append a declaration to the Judgment; Judges Bengzon, Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock append a joint declaration.

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

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

It will be recalled that, by application dated 16 May 1973, the Government of Fiji applied for permission to intervene in the present proceedings, and by

[1] *I.C.J. Reports 1973*, p. 99.
[2] **II**, p. 347.
[3] *I.C.J. Reports*, pp. 257-272.
[4] *Ibid.*, p. 272.

Order of 12 July 1973[1], the Court decided to defer its consideration of that application until it had pronounced on the questions of jurisdiction and admissibility in respect of Australia's Application. In view of the decision of the Court contained in the Judgment I have just read, the Court decides, by an Order dated today, which will not be read out, that the application of the Government of Fiji for permission to intervene lapses and that no further action thereon is called for on the part of the Court.

Owing to exceptional technical difficulties, only the official sealed copies of the Judgment for the Parties have been prepared for today's sitting, and it will not be possible to carry out the usual distribution of the stencilled text of the Judgment and of the appended declarations, separate opinions and dissenting opinions. The usual printed edition will however become available some time in January 1975.

The sitting is closed.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

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[1] *I.C.J. Reports 1973*, p. 320.