DISSENTING OPINION OF JUDGE GROS

[Translation]

In my view, the documents by which New Zealand and Australia instituted proceedings in the *Nuclear Tests* cases are drawn up in similar terms, the same considerations of fact and law are relied on therein, and the submissions are directed to an identical object. In his opening address on 24 May 1973, counsel for New Zealand stated that:

> "New Zealand's case arises out of the same set of circumstances as that of Australia, and has comparable objectives."

The claims by these two Governments should have been joined, from the outset of the proceedings, their object being the same. It is artificial to keep up the appearance of there being two cases, and while a joinder might raise drafting problems for subsequent decisions of the Court, this could not constitute a serious obstacle to a joinder. In the *South West Africa* cases, the Court joined the two claims at the time when the two Applicants nominated the same judge *ad hoc*, which is what New Zealand and Australia have also done in the present cases. Since the Court has decided not to effect a joinder of the two claims from the outset of the cases, and to reserve its decision on the question, I have nothing further to say at present on the problem of joinder. But since the request made by New Zealand for interim measures of protection has been made the subject of a separate Order, I should state the reasons which have led me to dissent from that Order. In the circumstances referred to above, these reasons are the same as those set out in my dissenting opinion appended to the Order of the same date concerning the request made by Australia.

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The declaration of acceptance of the Court's jurisdiction made by the French Government on 20 May 1966 excludes from that jurisdiction: "... disputes concerning activities connected with national defence." In a communication made to the Court on 16 May 1973 by the French Government that reservation was formally invoked. The bounds placed by that Government on its acceptance have been deemed by the Order not to create an impediment to the exercise of the Court's power to grant provisional measures in application of Article 41 of the Statute, since the Court considered that the title invoked by the Applicant to found the jurisdiction of the Court, namely the General Act of 1928, seemed

sufficient, prima facie, both to justify its competence provisionally and to rule out the application of the 1966 reservation in the interim measures phase, without prejudging its later decison on these questions. I have therefore nothing to say on the substance of the problems of jurisdiction and admissibility, since every question, without exception, concerning the Court's power to take jurisdiction in the case as presented in the Application of New Zealand has been deferred to the next phase of the proceedings, instituted in the operative part of the Order.

But the decision of the Court indicating provisional measures constitutes an application which I cannot approve of two Articles of the Statute of the Court, Articles 53 and 41, and it is therefore proper that I should give the reasons for my dissent, successively on these two points which relate to the one phase of provisional measures.

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When the Court was seised on 9 May 1973 of the Application instituting proceedings and indicating the French Republic as respondent, and then on 14 May 1973 of a request for the indication of interim measures of protection, the fact was signified forthwith to the Government of the French Republic, which replied on 16 May 1973 by a document formally contesting the jurisdiction of the Court and submitting that the case should be removed from the list. This was a document of 20 pages which constitutes a reply to the communications of the Court. The Court, before the first hearing, examined as in every case the question of the communication to the public of the documents in the proceedings, in accordance with Article 48 of the Rules of Court; in a letter to the Court dated 23 May 1973 the Agent of the Applicant made express reservations to the communication of the French document of 16 May 1973. On 24 May 1973, at the first hearing, counsel for the Government of New Zealand stated:

> "I recall and adopt the proposition put forward by Australian counsel that this document was not submitted in accordance with the Rules of the Court."

The proposition thus adopted was as follows:

> "Neither the Court nor Australia should have to deal with contentions advanced by a party if not made in Court but irregularly or outside the Court. We submit that strict adherence should be had to the requirements that parties must put their case regularly before the Court and that, if they fail to appear, then the Court should not take notice of any statement they may make outside the framework of the Court's established process. This rule has been a fundamental one throughout the ages for maintaining the integrity of the judicial process at every level. We trust that the Court will make clear that it will not take such statements into account."

And still, on the date of the present Order, the French document has not been communicated to the public, whereas the New Zealand Application and the records of the oral arguments of New Zealand were made public as from 24 May 1973.

The foundation for such an attitude can only be found in a certain interpretation of Article 53 of the Statute or of the procedure of the Court in preliminary matters.

Article 53 of the Statute of the Court deals with the situation of States which contest the jurisdiction of the Court by failing to appear or to present submissions. Such deliberate non-participation is an act recognized in the procedure of the Court, being dealt with by an article which is contained in Chapter III of the Statute, entitled "Procedure", and nowhere in the intentions of the authors of the Statute would one be able to find any will to penalize the State which does not appear. The contrary proposition has been pleaded without the support of any authority and should be dismissed. Certainly, the absence of a State ought not to prejudice the action instituted by another State, and may not be allowed to interrupt the course of justice. But non-appearance is regulated by Article 53, which lays down what its consequences must be and, when non-appearance is noted, that Article must be applied. But that is what the Court did not do; the Order notes failure to appear, in paragraph 12, but takes into account the submissions of the document addressed to the Court by the French Government for the purpose of requesting that the case be removed from the list. Now, if there exist submissions of the Government cited as respondent in the case, there is no default for want of submissions. By pronouncing neither in one sense nor in the other, and by deferring to a later date its decision on the submissions of the French Government, the Court is giving an interpretation of Article 53 which I find erroneous.

That is not a minor problem and I regret that the Court should have deferred it to a later phase. By indicating at the opening of the first hearing that the French Government's request for the removal of the case from the list, which had "been duly noted", would be dealt with "in due course", the President was only settling an immediate problem, but the Order has postponed the moment of decision still further. And that postponement implies that the Court considers it possible to treat the French Government both as a party to the main proceedings (cf. paras. 33 and 34 of the Order and the fixing of a time-limit for a French Counter-Memorial) and as being in default in the present phase, because its failure to appear is noted in paragraphs 12 and 35. But if the French Government has failed to appear and formally indicated its intention to remain outside the main proceedings, in a way which leaves no room for doubt, it was necessary to apply Article 53, which lays down the effects of default, and to apply it immediately.

It does not seem to me to be in accordance with the rules of procedure to suspend the application of Article 53 provisionally in the present case on the ground that this is an interim measures phase. Thus right from the

outset an error in interpretation has been made with regard to Article 53. I need not recall the consistent jurisprudence of the Court as to the interpretation of its Statute: "The Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 29). It was therefore for the Court to decide, on the basis of its own reasons, whether its Statute and Rules lay down formalities which are indispensable, so that submissions made in any other way are to be treated as inadmissible, and whether, on that hypothesis, Article 53 should be applied to a twofold default, absence from the proceedings and failure to make submissions. Nothing of the kind was done, and the status of the French document remains uncertain. Objection to it, on the level of its very existence, has been taken by the Applicant, the decision on the submissions made in it has been postponed; it is impossible to deduce from the Order whether this document is or is not a pleading in the case which should have been taken into account on a footing of equality with the observations of the Applicant. For if the Statute and Rules of Court do not forbid the making of "submissions" in the way which was selected in this case, the French document should have been admitted as the observations of the respondent; and on the opposite assumption, it should have been rejected, and Article 53 applied as it was in the Judgment of 2 February 1973 (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, para. 12).

The Court's postponement of the application of the effects of Article 53 until the later stages of the case is thus an implicit decision to refuse to apply Article 53 to an interim measures phase. This is a position which merits examination. Shortly expressed, the argument is that default does not necessarily have the same consequences in all phases of a case, and that while Article 53 does, in paragraph 2, lay down certain effects, those effects may be set aside when dealing with a request for interim measures of protection, despite the manifest intention of the State which is absent from the proceedings.

It could also be maintained that while Article 53 provides the party interested in note being taken of default with the right to have that done, it does not do more, and the Court cannot take note of it *proprio motu*. It will be sufficient to observe in this respect that even if this were so, which in my view it is not, the Applicant has in the present case implicitly invoked Article 53 in the circumstances mentioned above, by making reference to the applicable provisions of the Statute and Rules of Court. But the French Government has indicated in a letter of 21 May 1973 that it is "not a party to this case"; it would appear difficult not to see in its statements of 16 and 21 May a formal intention to fail to appear. The Court surely could not overlook both the position taken up by the Applicant and that of the absent State, when they were at one in seeking that it take note of a failure to appear.

It should be added that it would be a sort of abuse of procedure to seek to make use of a failure to appear as a breach of the rules of procedure

incurring the loss of the right to be heard by the Court, and thus create a penalty which the Statute itself formally forbids in Article 53, the main effect of which is that, when a failure to appear has been noted, the Court "must... 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". It is not usual to advance at one and the same time an argument and its opposite; faced with a failure to appear, the Court, by postponing any decision on the effects of the failure to appear, has allowed some infringement of the equality which States must enjoy before a court.

The jurisdiction of the Court is limited on the one hand to the States which have accepted it, and on the other to commitments freely entered into. As a court of specific jurisdiction, the Court must above all take care not to exceed the competence it derives from its Statute and from the voluntary acceptance of its jurisdiction by States, each of which freely determines the scope of the jurisdiction it confers upon the Court.

A State either is or is not subject to a tribunal. If it is not, it cannot be treated as a "party" to a dispute, which would be non-justiciable. The position which the Court has taken is that a State which regards itself as not concerned in a case, which fails to appear, and affirms its refusal to accept the jurisdiction of the Court, cannot obtain from the Court anything more than a postponement of the consideration of its rights. This is not what Article 53 says. Failure to appear is a means of denying jurisdiction which is recognized in the procedure of the Court, and to oblige a State to defend its position otherwise than by failure to appear would be to create an obligation not provided for in the Statute. It has been argued that the only way of challenging the jurisdiction of the Court is to employ a preliminary objection. The way in which States challenge the Court's jurisdiction is not imposed upon them by a formalism which is unknown in the procedure of the Court; when they consider that such jurisdiction does not exist, they may choose to keep out of what, for them, is an unreal dispute. Article 53 is the proof of this, and the Court must then satisfy itself of its own jurisdiction, and of the reality of the dispute brought before it. A State which fails to appear does of course run a risk, that of not supplying the Court with all possible material for the consideration of its application for dismissal of the case. But that is a risk which the State, and it alone, is free to choose to take, and to compare with the risk which it would run as the result of a long drawn-out procedure in which it does not wish to participate, with regard to a matter which it considers to be wholly outside the Court's jurisdiction. Certain indications given in connection with the Order of 22 June 1973 show that the possibility of successive deferments is not ruled out.

The Permanent Court of International Justice gave a warning against the notion that an Application is sufficient to create a justiciable dispute: "... the Court's jurisdiction cannot depend solely on the wording of the Application." (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15.)

If, as I think, failure to appear as provided for in Article 53 is not in

itself subject to any sanction, it becomes evident that the reasons for such failure to appear, when they have been clearly stated, must be examined fully by the Court, and above all they must be formally accepted or rejected, and that without delay. The idea that a failure to appear is not opposable to the Court and to the Applicant because it is a case of a request for interim measures of protection is therefore, in my view, beside the point.

In the first place, no-one disputes "the connection which must exist under Article 61, paragraph 1, [now Art. 66, para. 1] of the Rules between a request for interim measures of protection and the original Application filed with the Court" (*Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, para. 12). A request for interim measures of protection is thus a particular phase, but one which is not independent of the original Application; there is no magic in words, and it is impossible to believe that problems of jurisdiction, admissibility and reality of the principal Application can be conjured away simply by stating that these points, which are essential for a court of specific jurisdiction like this Court, are just being taken for granted provisionally, prima facie, without their being prejudged. It is in each individual case by reference to the jurisdictional problems in the widest sense, to the circumstances, and to the "*respective rights of either party*" (Art. 41, emphasis added) that a decision should be taken as to whether it is possible to indicate interim measures, and the forms of words used must correspond to reality.

Such was not the analysis of the power instituted in Article 41 of the Statute which was carried out in the present instance. The Court, by putting off the decision on the effects of non-appearance, embraced the proposition that a request for provisional measures is utterly independent in relation to the case which is the subject of the Application.

It is no use referring to certain domestic systems of law which feature such independence, because the Court has its own rules of procedure and must apply them in its jurisdictional system, which, as a corollary of a certain kind of international society, has been established on the basis of the voluntary acceptance of jurisdiction. It is a fact of international life that recourse to adjudication is not compulsory; the Court has to take care lest, by the indirect method of requests for provisional measures, such compulsion be introduced vis-à-vis States whose patent and proclaimed conviction is that they have not accepted any bond with the Court, whether in a general way or with regard to a specified subject-matter.

If it were a question of a State whose non-appearance was due to the total absence of the Court's jurisdiction, whether for want of a valid jurisdictional clause or by reason of the inadmissible character of the principal claim, the immediate decision of lack of jurisdiction in regard to the Application instituting proceedings itself would be taken without delay; the decision of the Court in the present case is that, despite the affirmation that a certain subject-matter has been formally excluded from the jurisdiction of the Court, and the fact that the State which made that

affirmation considers itself to be outside the jurisdiction of the Court in regard to everything connected with that subject-matter, it is possible to indicate provisional measures without prejudging the rights of that State.

In the decision which the Court has to take on any request for provisional measures, urgency is not a dominant and exclusive consideration; one has to seek, between the two notions of jurisdiction and urgency, a balance which varies with the facts of each case. If the jurisdiction is evident and the urgency also, then there is no difficulty, but that is an exceptional hypothesis. When the jurisdiction is not evident, whether there is urgency or not, the Court must take the time needed for such an examination of the problems arising as will enable it to decide one way or the other, and that is something which it could have done without undue delay in the present instance with regard to various objections to its power to judge the case as described in the principal Application.

There is no presumption of the Court's jurisdiction in favour of the applicant, nor any presumption of its lack of jurisdiction in favour of the respondent; there is only the right of each of them to a proper and serious examination of its position.

A State does not have to wait two years or more for the Court to vindicate its claim that no justiciable dispute exists, for if that is the case there is nothing to be argued over; the other State, which has submitted the claim whose reality is contested, evidently has an equal right to have the Court acknowledge the existence of the dispute it invokes. But the equality between these claims is upset if, by the indirect means of the allegedly urgent necessity for the indication of provisional measures, a presumption operates in favour of the applicant without the Court's carrying out any serious appraisal of the objection. On behalf of the Applicant it has been pleaded that argument on all these problems will be presented later; that in itself is a negation of the claim of the other State to be immediately relieved of a dispute which it alleges not to exist. Thus, to maintain equality between the parties, in a case where objections relating to the very stuff of the dispute are raised, the priority treatment of these objections is a necessity. In their joint dissenting opinion, Judges McNair, Basdevant, Klaestad and Read wrote, with reference to the question of the obligation to submit to arbitration:

> "Since there is nothing in the Declaration of 1926 to indicate an intention that prima facie considerations should be regarded as sufficient, it is our opinion, based on the principle referred to above and the way in which this principle has been invariably applied, that the United Kingdom can only be held to be under an obligation to accept the arbitral procedure by application of the Declaration of 1926 if it can be established to the satisfaction of the Court that the difference as to the validity of the Ambatielos claim falls within the category of differences in respect of which the United Kingdom consented to arbitration in the Declaration of 1926." (*Ambatielos, Merits, I.C.J. Reports 1953*, p. 29.)

President Winiarski also expressed himself in favour of the priority of certain questions of admissibility over questions of jurisdiction (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962*, p. 449). Sir Gerald Fitzmaurice likewise, in a separate opinion, said:

> "There are however other objections, not in the nature of objections to the competence of the Court, which can and strictly should be taken in *advance* of any question of competence. Thus a plea that the Application did not disclose the existence, properly speaking, of any legal dispute between the parties, must precede competence, for if there is no dispute, there is nothing in relation to which the Court can consider whether it is competent or not. It is for this reason that such a plea would be rather one of admissibility or receivability than of competence."
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> "In the general international legal field there is nothing corresponding to the procedures found under most national systems of law, for eliminating at a relatively early stage, before they reach the court which would otherwise hear and decide them, claims that are considered to be objectionable or not entertainable on some *a priori* ground. The absence of any corresponding 'filter' procedures in the Court's jurisdictional field makes it necessary to regard a right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal." (*Northern Cameroons, I.C.J. Reports 1963*, pp. 105 and 106 f.)

It is this nexus of questions of jurisdiction and of admissibility which has been deferred by the Court to the next phase; it will then be for the Court, and then alone, to decide the fate of these questions in its judgment.

A certain tendency has arisen to consider that the Orders of 17 August 1972 in the *Fisheries Jurisdiction* cases have, as it were, consolidated the law concerning provisional measures. But each case must be examined according to its own merits and, as Article 41 says, according to "the circumstances". Now the case of Iceland was entirely different in circumstances. The Court had developed an awareness of the existence of its own jurisdiction, the urgency was admitted, the reality and the precise definition of the dispute were not contested; finally, the right of the Applicant States which was protected by the Orders was recognized as being a right currently exercized, whereas the claim of Iceland constituted a modification of existing law. It suffices to enumerate these points to show that the situation is entirely different today; so far as the last point is concerned, the situation is now even the reverse, since the Applicants stand upon a claim to the modification of existing positive law when

they ask the Court to recognize the existence of a rule forbidding the overstepping of a threshold of atomic pollution.

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Such was the situation with which the Court found itself confronted when the application of Article 41 of the Statute in the present case was to be considered. The objections which were made or could be made to the jurisdiction of the Court and the admissibility of the claim have a character of absolute priority. Article 41 does not give the Court a discretionary power but a competence bound by the conditions laid down in that text; it is necessary that "circumstances so require" and that the measures should be necessary to preserve "the respective rights of either party", which covers the same examination of fact and of law that Article 53, paragraph 2, imposes on the Court, in addition to the general obligation upon every judge, including a judge of urgent cases, to satisfy himself that he has jurisdiction; that is what Article 36, paragraph 6, recalls. Now, the examination of fact and of law which is the condition of any decision on provisional measures cannot be systematically put off until later with the indication that the Court's power under Article 41 of the Statute "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the matters in issue before the Court" (Order, para. 21). That is to solve by a mere assertion the problem of the existence of the "circumstances" to which Article 41 refers. Article 41 obliges the Court to see whether the circumstances require it to use the power of indicating measures and, even if circumstances so require, it can only exercise that power if its decision will be able to preserve the respective rights of either party. But if the State cited as respondent invokes the Court's total absence of power, and if the subject of the claim is really non-existent, what rights would there be to preserve?

What has been said above with regard to the character of absolute priority attaching to certain objections shows that it is impossible to escape from the necessity of settling such objections before indicating measures of protection; if there are no rights, there is nothing to protect. If the claim has no subject, the principal application falls to the ground, and with it the request for provisional measures. The objection is of so fundamental a nature in regard to the very bases of the Court's jurisdiction that it seems to me to be a misuse of language to say that a *jus standi* to act in such circumstances could exist prime facie.

When the Court declares on the basis of Article 41 that a decision indicating provisional measures prejudges neither the jurisdiction nor the merits, that is not a finding which is likely to reassure States as to the temporary and circumstantial nature of that decision; it is an assertion that the examination of the case by the Court in accordance with the criteria of Article 41 of the Statute enables it, in the circumstances of this

case, to consider that its decision cannot in fact prejudge either its jurisdiction or the question of *jus standi*. It is not just a kind of ritual formula, but a warranty that the Court is satisfied that Article 41 has been correctly interpreted and applied to a certain case. But if in reality an indication of provisional measures prejudges the jurisdiction or the existence of *jus standi*, the Court does not have the power to grant these measures, because the condition laid down by Article 41 of the Statute will not have been respected. These conditions not having been fulfilled in the present case, the application of Article 41 in the Order of 22 June 1973 indicating provisional measures constitutes an action *ultra vires*.

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In the present case, on a point of great importance, the Court has ignored one of the conditions for the acceptance of a request for provisional measures. In the case concerning the *Factory at Chorzów*, the Permanent Court of International Justice refused to indicate provisional measures because the request could be regarded as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application and that, consequently, "the request [was] not covered by the terms of the provisions of the Statute and Rules" (*P.C.I.J., Series A, No. 12*, p. 10). Here we have a condition of general scope for the interpretation of Article 41 of the Statute of the Permanent Court of International Justice, which was identical to the present Article 41, and the recognition of a procedural requirement operating in regard to interlocutory jurisdiction. For it would indeed, by definition, be contrary to the nature of interlocutory proceedings if they enabled the dispute of which they were only an accessory element to be disposed of.

Comparison between the principal claim (Application, para. 28, submissions of the Applicant) and of the request for provisional measures (Request, paras. 2 f, and 51) shows that the latter was indeed designed to obtain an interim judgment. The request for provisional measures ought therefore to have been rejected on that ground also.

(Signed) André GROS.