INTERNATIONAL LAW-MAKING AND THE JUDICIAL PROCESS: THE WORLD COURT AND THE FRENCH NUCLEAR TESTS CASE

Edward McWhinney*

I. SOCIOLOGICAL JURISPRUDENCE AND JUDICIAL LAW-MAKING

The decision of the French government to conduct high altitude nuclear test explosions in the South Pacific in 1973 and 1974 has, quite obviously, some important implications for that new international environmental protection law that burgeoned so suddenly in the late 1960s and that may already have passed its apogee.[1] The world energy crisis has, after all, from the end of 1973 onwards, turned national decision-makers' attention increasingly to problems of international trade and balance of payments, at the expense, if need be, of interests in ecology and the human life-style. In another, more general way, the French government's nuclear test explosions represent a phase in the definition and concretization of that older international law of good neighborliness or comity that, in its international relations aspects, draws heavily upon the best civil law and common law national legal traditions.[2] Our concern in the present study is not with these more general, substantive international law questions except insofar as they arise interstitially to our consideration of essentially adjectival law, institutional questions—here, the *rôle* of the World Court in the international law-making process. These adjectival law, institutional questions go to the special competence of the Court in the elaboration and refinement of new norms of international law, and to the limitations necessarily imposed on the Court by essentially the same considerations that cabin and confine judicial review when it operates in a purely internal, national or municipal law context[3]—namely, procedural limitations inherent in the case/controversy system and even in the advisory

* Queen's Counsel; Barrister and Solicitor; Professor of International Law and Relations, Simon Fraser University, Vancouver, Canada; Membre de l'Institut de Droit International.

1. *See* Goldie, *The Nuclear Test Cases: Restraints on Environmental-Harm*, 5 J. MARITIME L. & COMM. 491 (1974); *see generally* McWhinney, *Changing Science and Technology and International Law*, 6 IND. L. REV. 172 (1972).

2. *See generally* Andrassy, *Les relations internationales de voisinage*, 79 RECUEIL DES COURS 77 (1951); *see also* Trail Smelter Arbitration, 3 *U.N.R.I.A.A.* 1905 (1949); Sneider, *Trail Smelter-Fall*, 13 WÖRTERBUCH DES VÖLKERRECHTS, 447 (Strupp-Schlochauer eds. 1962); *see also* Corfu Channel Case (Merits), [1949] I.C.J. 22.

3. *Cf.* E. MCWHINNEY, JUDICIAL REVIEW 233 *et seq.* (4th ed. 1969).

opinion base to the exercise of Court jurisdiction; intellectual limitations imposed by the canons of construction and by conventional legal reasoning, both civil law and common law; limitations of expertise stemming from highly specialized judicial training and academic legal formations, whether civil law or common law, that traditionally do not extend outside law as strictly defined to other social sciences like economics, commerce, and sociology, or a fortiori to the natural sciences and engineering; political limitations resulting from the dependent character of the judicial office, the essentially indirect modes of judicial selection and the absence of anything approaching the "political mandate" that only a direct popular election can confer; and, finally, the limitations of effectiveness, stemming from the lack of any practical, institutionally-based authority to follow up Court decisions with concrete enforcement procedures against recalcitrant parties refusing to accept the Court's decisions or even to acknowledge its jurisdiction in the first place.

II. THE HISTORICAL BACKGROUND TO THE FRENCH NUCLEAR TEST EXPLOSIONS IN THE SOUTH PACIFIC

The ultimate historical foundations of the French government's high-altitude nuclear tests in 1973 and 1974 are to be found in more than a decade of "Third Force" thinking on the subject of an independent French and European foreign policy, spurred on by the rapid approach of the Soviet-U.S. détente and foreshadowed by the peaceful resolution of the Cuban Missile Crisis in October, 1962. In its specifically Gaullist manifestations, European "Third Force" doctrine looked to the development of a distinctively French or continental European nuclear *"force de frappe"* as a deterrent to possible Soviet adventurism in continental Europe consequent upon the Soviet-U.S. détente and any resultant withdrawal of the U.S. nuclear strike force from Europe.[4]

4. *See, e.g., French Nuclear Tests*, Comments by Michel Jobert, French Minister of Foreign Affairs, July 24, 1973, (*Ambassade de France, Service de Presse et d'Information, New York*); Declaration on Disarmament, Statement by His Excellency Louis de Guiringaud, Ambassador, Permanent Representative of France to the United Nations before the General Assembly First Committee, November 1, 1973; see also the comment by the long-time Gaullist leader and former Prime Minister, Michel Debré, in LE MONDE (Paris) of July 24, 1973 (cited in 78 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 793 at 811 (1974)):

"Si la France n'avait pas fait l'effort de devenir Puissance nucléaire ou si elle cessait de l'être, son siège permanent au Conseil de Sécurité de l'O.N.U. lui serait bientôt enlevé." (Editors Note: The immediately following and all subsequent English translations were inserted by the Editors. Trans. T. Pitegoff.)

[If France had not made the effort to become a nuclear power, or if she ceased

Some of the more intransigent Western political opponents of the late President Charles de Gaulle have argued that the quest for French or continental Europen nuclear weapons and the concomitant French government investment in a systematic nuclear test program represented no more than a stage in the development of a "*politique de grandeur*," involving the pursuit of symbols and national prestige unrelated to specific and immediate national foreign policy objectives. Be that as it may, the French government did not sign the Moscow Test Ban Treaty of August 1963, and has certainly refused to accept the avant-garde legal argument that the principles of the Test Ban Treaty, with their interdiction of nuclear tests in the atmosphere and in certain other specific places have, by virtue of the near universality (though not unanimity) of national acceptance, become part of general, customary international law binding even on non-signatories to the Treaty as a sort of international *jus cogens*.

By contrast, the Australian and New Zealand governments, during the earlier, pre-détente era when they were each part of the United States-created interlocking system of Western defensive military alliances, had cooperated freely, and indeed most positively and enthusiastically, with the United States and British governments in those governments' development and testing of their own nuclear weapons in the South Pacific. The active assistance and involvement of the Australian and New Zealand governments in these nuclear test explosions had extended, specifically, to territories and areas under the jurisdiction and control of those governments themselves. The political justification for the Australian and New Zealand support for, and direct participation in, nuclear test explosions in the South Pacific in that earlier historical era, had to be founded upon the argument that the possession by the Western political-military bloc of properly-tried and tested nuclear weapons was a crucial element in the policy of nuclear deterrence—itself part of the over-all Western policy of "containment" during the Cold War.

The present political switch of the Australian and New Zealand governments from their erstwhile uninhibited direct involvement in the U.S. and British nuclear testing in the South Pacific area has to find its own special political justification, if at all, in the ending

to be one, her permanent seat on the U.N. Security Council would be quickly taken from her.]

of the Cold War era and concomitant emergence of the Soviet-U.S. détente. These special societal facts of the world community from the early 1960s onwards lead to the politically more contentious argument—contentious, since not accepted by France or by China or by certain other lesser powers—that the achievement and concretization of Soviet-U.S. détente in the Moscow Summit Accords of May, 1972, has rendered otiose and unnecessary both the nuclear deterrence policy in general and, specifically, the acquisition of new nuclear technology on the part of countries not now having their own nuclear *force de frappe*. Actually, the political switch of the Australian and New Zealand governments over nuclear testing in the South Pacific area after 1972 finds its explanation in simpler, internal political considerations—the replacement that year, in both countries, of long-term, right-wing, conservative governments that had been committed, from the beginning of the Cold War era onwards, to a strong Western military and nuclear posture vis-à-vis the Soviet Union, by Socialist, Labour Party governments with long historical traditions of political neutralism and of support for general, or if need be, unilateral disarmament.

III. THE POLITICAL BACKGROUND TO THE FRENCH NUCLEAR TEST EXPLOSIONS IN THE SOUTH PACIFIC

By the beginning of 1972, there had been a total of 869 nuclear test explosions of which nearly two-thirds had been U.S. explosions and nearly a third Soviet; the French contribution being 43 tests (or just under 5 per cent), and the Chinese 12 tests.[5] The tests divided almost evenly between aerial and underground explosions, with a slight preponderance in favour of the underground tests. This preponderance was most marked in the case of the United States—being almost two to one—though the ratio was increasing all the time, in the case of the two super-powers, the Soviet Union and the United States, as a result of their compliance with their obligations under the Moscow Test Ban Treaty of 1963, and as a result also of their scientific perfection of their own national systems of underground nuclear testing. In the case of France, however, the 43

5. LIVRE BLANC SUR LES EXPÉRIENCES NUCLÉAIRES, (*Ministère des Affaires étrangères, service de presse et d'information*, Paris) (June, 1973), at 3 [hereinafter cited as LIVRE BLANC]; *See generally France: 1° Nouvelle série de'expériences nucléaires dans le Pacifique (25 juin - 29 juillet 1972)*, 77 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 840 (1973); *France: 1° Nouvelle série d'expériences nucléaires dans le Pacifique (21 juillet - 28 août 1973)*, 78 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 793 (1974).

nuclear test explosions up to the beginning of 1972 were broken down into 30 above-the-ground, and 13 underground explosions. All French underground explosions were conducted in the Sahara, as were 4 atmospheric tests; while the remaining 26 atmospheric tests were conducted in the Pacific.[6]

The particular French tests which were the subject of the Australian and New Zealand complaints in 1973 and 1974 were conducted at the site of the atolls of Mururoa and Fangataufa in the Tonamotou Archipelago in French Polynesia. The reasons given by the French government for the choice of this site were that the territory concerned was French and also that it was uninhabited and situated in a zone seldom frequented by maritime lines or commercial airlines. In addition, the site was far away from inhabited regions—1,200 kilometres from Tahiti; 990 kilometres from Pitcairn Island; between 2,500 and 2,800 kilometres from Tonga and Fiji; 6,400 kilometres from the South American coast; and, lastly, 4,200 kilometres from Auckland, New Zealand and 6,700 kilometres from Sydney, Australia.[7]

The French tests in the South Pacific were not merely above-the-ground; the blasts were effectuated under a balloon, and not on the ground's surface. According to the French government, the purpose of the blasts' being made under a balloon and at a certain altitude, was to avoid all interaction between the ball of fire resulting from the explosion and the surface of the earth. This was to avoid an effect that normally occurs in on-the-ground explosions, namely the tearing up of important quantities of radioactive debris and earth which, after vaporization and cooling off, fall to earth in the form of granules supporting fissionable products. In the case of explosions under balloons at high altitudes—following this scientific thesis—the radioactive particles which form are, because of the absence of intimate contact with the surface of the ground and the water, of minimal dimensions and they elevate themselves very rapidly into the upper atmosphere or stratosphere where they are dispersed and remain for long periods while their radioactive quality is diminished.[8]

The French government contended that the effects of the French nuclear test explosions in the South Pacific upon the complainant states, Australia and New Zealand (and also Fiji, which

6. LIVRE BLANC, *supra* note 5, at 3.
7. *Id.* at 4-5.
8. *Id.* at 3-4.

eventually sought, unsuccessfully, to intervene before the World Court) were slight. It was pointed out that the prevailing winds at all altitudes in the South Pacific over the French test site are from West to East—that is, in the opposite direction from the complainant states and towards an ocean zone devoid of inhabitants until the South American coast is reached 6,000 kilometres to the East. Further, it was contended, the French tests represented very small quantities of radiation in comparison to the over-all total of nuclear experiments—in fact 1.8 percent of the radiation resulting from the various U.S., Russian, Chinese, and British tests; and that the doses of radiation involved in the French nuclear tests were very much less than the total levels of natural radiation to be found in various parts of the world today (for example in Brittany, the Vosges, or the Central Massif of France itself; or in Minaes Geraes in Brazil or in Kerala in India). Again, it was contended that the annual levels of artificial radiation resulting, for example, from medical tests in the industrialized countries, or even from a simple intercontinental jet aircraft flight, were very much greater than the radiation doses resulting from the French tests in the South Pacific.[9] Statistically-based arguments of this sort are, of course, always open to counter-demonstration, and the French arguments on this point were in fact immediately contested by the Australian and New Zealand governments. Nevertheless, in the first phase decision of the World Court on the Australian-New Zealand complaints against France, handed down on June 22, 1973, Judge Ignacio-Pinto, in his dissenting opinion to the Court majority ruling, made telling use (against the Australian and New Zealand arguments) of a New Zealand study published in 1972 by the New Zealand Institute of International Affairs, which concluded that testing of nuclear weapons up to that time would "not present a significant health hazard to the people of New Zealand or the Pacific Territories with which it is associated"; and that the then proposed French nuclear tests in the South Pacific would "add *fractionally but not significantly* to the long-lived fall-out in these areas."[10]

9. *Id.* at 8-9.

10. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 164 (dissenting opinion of Judge Ignacio-Pinto). *See also* LIVRE BLANC, *supra* note 5, at 59-61 *Annexe A. VII, (Réunion entre experts scientifiques australiens et francais à l'Académie australienne des sciences à Canberra 7 au 9 mai 1973); 65-66, Annexe A, IX, (Citations de personnalités ou de publications étrangères sur l'innocuité de nos expériences, Australie, Nouvelle-Zélande); see also France: 1° Nouvelle série d'expériences nucléaires*

IV. THE JURIDICAL ASPECTS OF THE FRENCH NUCLEAR TESTS CASE

The political decision by the newly-elected Socialist governments in Australia and New Zealand to challenge the French government's holding of above-the-ground nuclear tests in the South Pacific in 1973, also involved a secondary, machinery-institutional decision involving the choice of means or techniques for effectuating that challenge—namely, the eschewing of conventional diplomatic negotiations and protestations in favor of juridical action before the World Court. The main lines of the Australian-New Zealand argument on the substantive issue of the legality of the French nuclear tests were easy enough to anticipate in advance of any actual pleadings, that is, the claimed existence of general principles of international law, recognized and re-stated by the Moscow Test Ban Treaty of 1963 (but not necessarily coterminous with that treaty or limited to it for purposes of their juridical force) outlawing above-the-ground nuclear tests; the claimed existence, at the international, not less than at the national law level, of principles of good neighborliness forbidding one state from gratuitously causing harm to the territory, people or property of another state and applicable to the case of fall-out from nuclear test explosions; and, finally, claimed interferences with well-recognized principles of state sovereignty caused by nuclear test explosion fall-outs and by the proclamation of security zones on the High Seas and by similar control measures during the pendency of such nuclear tests.

Before any such substantive law issues could be reached, how-

---

dans le Pacifique (21 juillet - 28 août 1973), 78 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 793, 821-22 (1974):

> *À la fin des experiences le directeur du laboratoire national des radiations de la Nouvelle Zélande, M. H.J. Yeabsley, déclara le 30 août que des traces de radiation provenant du deuxième essai nucleaire français, celui du 28 juillet, avaient été décelées à Apia, à l'ouest des Iles Samoa, les 3 et 4 aout, mais que ces traces étaient inférieures au niveau toléré et ne présentaient aucum danger. Le 18 novembre le directeur de l'Institut national d'énergie nucléaire du Perou, M. Walter Llamosas, confirmait que les radiations constatées dans son pays aprés les explosions n'atteignaient qu'un degré infinitésimal.*
>
> [At the end of the tests the director of the National Radiation Laboratory of New Zealand, Mr. H.J. Yeabsley, stated on August 30th that the traces of radiation which were produced on July 28th, in the second French nuclear test, were detected on August 3rd and 4th at Apia, west of the Samoan islands, but that these traces were at a tolerable level and presented no danger whatsoever. On November 18th the director of the National Institute of Nuclear Energy of Peru, Mr. Walter Llamosas, confirmed that the radiation recorded in his country after the explosions reached only an infinitessimal degree.]

ever, with all their implications for the development of a "new" international law as to environmental protection or a new species of *jus cogens* in the area of nuclear disarmament and control of nuclear testing, a formidable adjectival law issue had to be overcome—namely, the jurisdiction of the World Court to hear a complaint against France on the part of Australia and New Zealand. In World Court jurisprudence, not less than in national jurisprudence, the preliminary, procedural question of jurisdiction must normally be decided before the substantive legal issues can be canvassed by the court. Since the World Court's jurisdiction is, by definition in terms of Article 36 of the Court statute,[11] consensual and established in the ultimate by the will of the party against whom the jurisdiction is sought to be invoked, the first enquiry had to be directed to the nature and character of the French government's acceptance of the Court's jurisdiction. At the time of the Austrialian-New Zealand complaint to the Court, the relevant French acceptance of the Court's jurisdiction was that filed by the French government on May 20, 1966, in which the French government formally accepted the compulsory jurisdiction of the Court in terms of Article 36 (2) of the Court statute, but also excluded from that acceptance "disputes concerning activities connected with national defence."[12]

---

11. Statute of the International Court of Justice, Article 36:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes. . . .

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

25 YEARBOOK OF THE UNITED NATIONS 779, (1971).

12. *Déclaration française d'acceptation de la jurisdiction obligatoire de la Cour internationale de Justice (20 mai 1966)*, (M. Couve de Murville, signed at Paris, May 16, 1966).

Au nom du Gouvernement de la République française, je déclare reconnaître

In the French government's view, the then-current French nuclear tests in the South Pacific were activities connected with the French national defence and therefore ipso facto excluded from the World Court's jurisdiction, with the consequence that the Court would have no competence to proceed with the Australian-New Zealand complaint. On this ground, the French government refused to recognize the existence of any valid legal dispute concerning France of which the Court could take cognizance, and refused to enter a formal appearance before the Court. The French government, in a letter to the Court on May 16, 1973, formally invoked the "national defence" reservation to jurisdiction and submitted that the Australian-New Zealand complaint should be removed from the list. The Court itself had been advised of the Australian-New Zealand complaint on May 9, 1973, and on May 14, 1973, of a further Australian-New Zealand request for the indication of interim measures; and the Court had advised the French government accordingly.

France therefore took no further part in the proceedings of the Court, though the French member of the Court, Judge Gros, as a regularly elected judge, sat on the case and participated fully in the interim and final judgments.[13] The French government White Paper on the Nuclear Tests, published in Paris in June, 1973,[14] constitutes

---

comme obligatoire de plein droit et sans convention spéciale vis-à-vis des autres membres des Nations Unies qui acceptent la même obligation, c'est-à-dire sous condition de réciprocité, la juridiction de la Cour conformément à l'article 36, paragraphe 2, du Statut, jusqu'à ce qu'il soit donné notification de l'abrogation de cette acceptation, pour tous les différends qui s'élèveraient au sujet de faits ou de situations postérieurs à la présente déclaration, a l'exception . . . .

3. - des différends nés d'une guerre ou d'hostilités internationales, des différends nés à l'occasion d'une crise intéressant la sécurité de la nation ou de toute mesure ou action s'y rapportant et des différends concernant des activités se rapportant à la défense nationale . . . .

[In the name of the Government of the French Republic, I hereby recognize as compulsory without special agreements with respect to other members of the United Nations which accept the same obligation, *i.e.* under the condition of reciprocity, the jurisdiction of the Court, pursuant to article 36, paragraph 2, of the Statute, until notification is given of the abrogation of this acceptance, for all disputes arising from facts or situations subsequent to this declaration, with the exception . . . .

3. of disputes arising from war or international hostilities, from a crisis affecting national security or any measure or action related thereto, or disputes concerning activities related to the national defense . . . .]

LIVRE BLANC, *supra* note 5, at 93 *(Annex B XI)*.

13. *See generally* Eisemann, *Les effets de la non comparution devant la cour internationale de justice*, 19 ANNUAIRE FRANÇAIS DE DROIT INT'L 351 (1973).

14. LIVRE BLANC, *supra* note 5.

a succinct and well-reasoned statement of that government's position on the facts and law of the then-pending Court proceedings, and fills the gap created by the absence of French government presence in the actual oral pleadings before the Court. In many respects the French White Paper approaches the character of the *factum* or extended written brief, covering formal legal issues and the factual and legal argumentation advanced by any one party in support of his own position thereon, common in U.S. Supreme Court practice. In the context of World Court proceedings where a heavy—some would say too heavy—emphasis is given to oral pleadings, at the expense of written argument, it might be said that the French White Paper constitutes the clearest and most concise formal statement by any of the parties to the nuclear tests conflict as to its own position in the matter, and a very welcome extramural addition to the Court's records.[15]

By contrast, the Australian and New Zealand position had to be to deny that a French limited acceptance of the Court's jurisdiction concluded the matter of jurisdiction. The Australian and New Zealand governments pointed to the General Act for the Pacific Settlement of International Disputes of 1928, which they claimed to be still in force and binding France to the Court's jurisdiction in terms of Article 37 of the Court statute.[16] To this argument, the French government replied that the General Act of 1928 was intimately bound up with the League of Nations and must be regarded as having lapsed into desuetude with the collapse of the League of Nations system; and that, in any case, even if the General Act of 1928 were to be regarded as still in force, the latest 1966 French acceptance of the Court's jurisdiction with its "national defence" reservation, must, on normal principles of construction, reduce and restrict—to the extent of any incompatibility—the earlier, not so limited, French acceptance of the Court's jurisdiction based on the 1928 General Act.[17]

15. *See* Lacharrière, *Cour internationale de justice. Commentaires sur la position juridique de la France à l'égard de la licéité de ses expériences nucléaires*, 19 Annuaire Français de Droit Int'l 235 (1973).

16. Statute of the International Court of Justice, Article 37:

> Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

25 Yearbook of the United Nations 779 (1971).

17. Livre Blanc, *supra* note 16, at 19-20.

Strangely, the Australian and New Zealand governments do not appear to have stressed too strongly the issue of whether the "national defence" reservation was itself subject to judicial review and interpretation; either it was to be a purely subjective test and thus self-defining from the viewpoint of the French government, or it was to be objective, and therefore capable of scrutiny as to whether there was, in fact, a real and proximate relation to national defence of the activities in dispute. A more substantial objection of the French government, with important implications for the future of the World Court's jurisdiction, was that the question of nuclear tests now being submitted to the World Court by Australia and New Zealand was not fundamentally juridical, but purely political. This French objection thus raised the basic issue of the boundary between law and politics for purposes of the World Court's practical exercise of jurisdiction.[18] For the objection focused upon the very real question of whether the Court as, at best, a dependent policy-making organ, should not, in simple political self-defence and as a rule of elementary political prudence, apply canons of judicial self-restraint in the interest of immunizing itself as far as possible from great political *causes célèbres*.

V. THE WORLD COURT ORDER OF JUNE 22, 1973,[19] AND THE GRANT OF INTERIM MEASURES OF PROTECTION

If there were no Court jurisdiction in the first place, there would, presumably, be no Court jurisdiction to issue interim measures pending final determination; otherwise the Court would be hoisting itself by its own bootstraps into jurisdiction. On the other hand, to allow a mere denial of jurisdiction by any one party to end the matter then and there would be a most intolerable situation for

18. *Id.* at 20.

La Cour n'est pas compétente, enfin, parce que l'affaire qui lui est soumise n'est pas fondamentalement un différend d'ordre juridique. Elle se trouve, en fait et par divers biais, invitée à prendre position sur un problème purement politique et militaire. Ce n'est, selon le Gouvernement français, ni son rôle ni sa vocation.

[The Court lacks jurisdiction, in short, because the matter submitted to it is basically not a dispute of legal dimensions. The Court, in fact, is asked to take a position, by one approach or another, on a problem that is purely political and military. This is, according to the French government, neither its *rôle* nor its purpose.]

19. Nuclear Tests Case (Australia v. France) (Interim Protection Order) [1973] I.C.J. 99; Nuclear Tests Case (New Zealand v. France) (Interim Protection Order) [1973] I.C.J. 135; *see also* Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258 (1974).

any Court. The simple and certainly the most direct solution for the Court in the present case would have been to rule on the jurisdictional issue forthwith and then, if it found in favor of jurisdiction, to proceed to at least preliminary examination of the substantive legal issues, with the right to grant interim relief measures at any time once the issue of jurisdiction had been determined in favor of the existence of jurisdiction.

This part of the Court's Interim Order of June 22, 1973, and the supporting judicial opinions in the Nuclear Tests Cases are not, it must be said, completely satisfying. The jurisdictional issue did not, on its face, seem a particularly complex matter or one requiring unusual time for decision. It may be suggested that it called for either a strict application of the Court's statute with its stress on the consensual aspect of adherence by states to the Court's compulsory jurisdiction and a conclusion, presumably, against jurisdiction or a clear policy decision by the Court stressing why it felt it desirable to adopt a flexible approach to jurisdiction and to extend the Court's competence wherever possible—if need be against the direct wishes of the states concerned. None of the majority judicial opinions filed in support of the Court's Order of June 22, 1973, treat this point directly. Instead, the majority opinions proceed to the issue of the need to grant interim measures, without canvassing in depth the preliminary, procedural, adjectival law issue of whether jurisdiction exists in the first place—the necessary condition precedent to any ruling on the substantive legal issues.

The actual judicial holdings of June 22, 1973, in the Nuclear Tests Cases, taken in concert, constitute an enigma. We know that two of the judges—the President, Judge Lachs, and the American judge, Judge Dillard—were prevented by illness from participating in the case. Counting the ad hoc judge from Australia, Sir Garfield Barwick, this meant a bench composed of 14 judges deciding on the Interim Order. The Court, in its actual Order signed by the Vice-President, Judge Ammoun, indicates that its majority decision was rendered by eight votes to six.[20] Among the majority group comprising in all eight judges, four other judges—Judge Jiménez de

20. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 106. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 142-43.

Aréchaga,[21] Sir Humphrey Waldock,[22] Judge Nagendra Singh,[23] and ad hoc judge Sir Garfield Barwick[24]—filed individual, specially concurring opinions. Just who are the remaining three majority judges is not indicated in the Court's actual Order, and these remaining three majority judges are nowhere identified expressly by name. Among the minority judges, Judges Forster,[25] Gros,[26] Petrén[27] and Ignacio-Pinto[28] each filed individual dissenting opinions. But the other two minority judges are nowhere identified in the Court's Order, or in the various opinions filed in support of it.

What are we to make of the votes and opinions of the five judges unaccounted for in the Court's Order or in the various individual opinions, both majority and minority—Judges Bengson, Onyeama, de Castro, Morozov and Ruda? It is not, on its face, a very satisfying official explanation and rationalization of what is, even in terms of the Interim Order, a fairly novel decision that would have benefited by some substantial justification in terms of past Court jurisprudence. The logical conclusion must be that the internal differences of the Court were marked and deeply-felt, and that this accounts for an apparently deliberate decision on the part of a number of judges not to render explicit either their reasons or their actual vote on the Order of June 22, 1973.

---

21. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 106. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 143.

22. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 108. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 144.

23. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 108. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 145.

24. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 110. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 146.

25. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 111. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 148.

26. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 115. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 149.

27. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 124. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 159.

28. Nuclear Tests Case (Australia v. France) (Interim Protection Order), [1973] I.C.J. 99, 128. Nuclear Tests Case (New Zealand v. France) (Interim Protection Order), [1973] I.C.J. 135, 163.

VI. THE WORLD COURT JUDGMENT OF DECEMBER 20, 1974:[29] THE ISSUE HAS BECOME MOOT!

The final judgment of the Court in the Nuclear Tests Cases, rendered on December 20, 1974, throws some light on, but gives no complete explanation of, the internal politics of the Court's Interim Order of June 22, 1973. It is officially indicated, in the final judgment of the Court, that the decision was rendered by a vote of nine to six.[30] Judge-President Lachs and Judge Dillard had each returned to take part in the final judgment, President Lachs in fact signing the majority judgment, rendered by the vote of nine to six. This time the dissenting judges are clearly identified by name, in terms of a joint dissenting opinion, signed by Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock,[31] and in two individual dissenting opinions filed by Judge de Castro[32] and ad hoc Judge Barwick.[33] The change from the Court minority of four for purposes of the issuance of interim measures of protection on June 22, 1973, to the minority of six dissenting from the Court's final judgment of December 20, 1974, is partly accounted for by the absence from the Court rendering the final judgment of Vice-President Ammoun and by the evident defection of Judge Nagendra Singh from the erstwhile majority for the Interim Order. Since, however, Judge Dillard, returning from his sick bed to take part in the final judgment, now rallied to the erstwhile majority and new minority position in favor of jurisdiction, this would leave only one judge unaccounted for from the Interim Order majority of eight. Was it, perhaps Judge Bengzon, who publicly adhered to a joint declaration, signed by himself and Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock on the issue of the advance "leak" of the Court's actual vote on the final judgment of December 20, 1974, and appended to the Court's final judgment?[34] It is simply not clear from the final judgment and the individual judicial opinions filed with it. The new majority of December 20, 1974, only

29. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253; Nuclear Tests Case (New Zealand v. France), (Judgment) [1974] I.C.J. 457.

30. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 272; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 478.

31. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 312; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 494.

32. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 372; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 524.

33. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 391; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 525.

34. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 273.

shows, as we have said, the official judgment of the Court signed by Judge-President Lachs,[35] and individual, specially concurring opinions filed by Judges Forster,[36] Gros,[37] Petrén[38] and Ignacio-Pinto.[39]

The final judgment of the Court of December 20, 1974, addressed itself to questions, essentially, of procedural, adjectival law. Though, in the end result, it is a decision not to rule on the substantive international law questions, the Court nevertheless addresses itself to a special issue not adverted to in the earlier argument and in the earlier judgment and judicial opinions issued for purposes of the Interim Order of June 22, 1973. This special issue is one which, because of its particular factual base, could presumably not have been adverted to before. The Court majority judgment of December 20, 1974 is therefore not in formal conflict with the majority judgment of June 22, 1973, and in no way purports to overrule that earlier judgment; though, in the end, as suggested, it does effectively depart from or reject the judicial philosophy that dominated the earlier judgment.

The Court's reasoning, for purposes of the final judgment, adopts what may be called a basically "Anglo-Saxon" juridical approach to the exercise of Court jurisdiction. It concludes, in essence, that the original dispute between Australia-New Zealand and France, has become moot because of supervening facts affecting France's position; and that there is, in consequence, no longer, effectively, a case or controversy before the Court and no basis, therefore, for the Court's purporting to further exercise jurisdiction in the matter. The reasoning and internal logic is impeccable; and the result is one of which the late Mr. Justice Brandeis of the U.S. Supreme Court would certainly have approved in its insistence upon the existence of a proper jurisdictional base as a prior, adjectival law condition to the issuance of any judicial pronouncement upon substantive law questions.[40] As is noted in the Court's

35. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 254; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 458.

36. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 275; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 479.

37. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 276; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 480.

38. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 298; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 483.

39. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 308; Nuclear Tests Case (New Zealand v. France) (Judgment), [1974] I.C.J. 457, 493.

40. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 344-45 (1936) (Brandeis,

official opinion in support of its final judgment:

> The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have . . . arisen render any adjudication devoid of purpose" (*Northern Cameroons, Judgment*, I.C.J. Reports 1963 p. 38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.
>
> Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.[41]

Accepting the Judgement's fundamental procedural, adjectival law premise that the Court should not proceed to render substantive decisions on disputes that no longer exist, there could conceivably be an argument as to the nature and quality of the facts effectively causing the disappearance of the original dispute between Australia-New Zealand and France—in effect, the declarations by various high officials and spokesmen for the French government indicating the termination of any further above-the-ground nuclear tests on the part of France in the South Pacific. As the Court had little difficulty in establishing, these French governmental declarations were all made at the highest levels of political authority—by President Giscard d'Estaing himself, by the French Foreign Minister, and by the French Minister of Defence—and made in systematic, sustained and repeated fashion from June 8, 1974, onwards.[42] To be sure, these declarations were not, for the most part, made in formal exchanges with the Australian and New Zealand governments so as to give use to the more normal style of limited, *inter partes* estoppel. This part of the official opinion for the Court, however, is imaginative and innovative in the best traditions of World Court jurisprudence. It follows along lines already developed by the Court in earlier opinions in which it has essayed a new flexibility regarding the international law-making process in general and the

J., concurring); *see* P. FREUND, ON UNDERSTANDING THE SUPREME COURT (1949).

41. Nuclear Tests Case (Australia v. France) (Judgment) [1974] I.C.J. 253, 271-72.

42. Nuclear Tests Case (Australia v. France) (Judgment) [1974] I.C.J. 253, 264-66.

Court's duty of deference to the older juridical notion that the sources of international law doctrine constitute a group of closed categories that jelled once and for all in some bygone era and that are incapable of creative adjustment to new societal conditions in the world community. As the Judgment goes on to note:

> It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncment by the State was made. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.[43]

On the issue of the relative degree of formality necessary to confer juridical force and status upon such unilateral acts by states, the Court's Judgment is clear and categorical:

> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:

43. Nuclear Tests Case (Australia v. France) (Judgment) [1974] I.C.J. 253, 267.

> "Where . . . as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it." (*I.C.J. Reports* 1961, p. 31).
>
> The Court further stated in the same case: ". . . the sole relevant question is whether the language employed in any given declaration does reveal a clear intention. . ." (*ibid.*, p. 32).[44]

In the ultimate, this part of the Court's determination, involving the creation of juridical facts rendering moot the original dispute brought before the Court, was rested upon the principle of good faith, as part of the new international law of cooperation succeeding upon the international law of friendly relations (peaceful coexistence):

> Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[45]

VII. THE SPECIALLY CONCURRING OPINIONS IN THE WORLD COURT JUDGMENT OF DECEMBER 20, 1974: THERE NEVER WAS A JUSTICIABLE DISPUTE!

The official opinion for the Court majority, in the final judgment of December 20, 1974, is based, as I have noted, on procedural, adjectival law grounds, and in particular on the premise that courts should not proceed to render substantive law rulings once an issue becomes moot. If this may be called a ruling on a preliminary, jurisdictional question, there remains another such question which, it may be argued, the Court should decide, as a matter of logic, as its first priority question—namely whether a justiciable dispute existed in the first place. This is the basis (allowing for individual nuances of approach), of the four separate, specially concurring opinions filed in the Court's final judgment by Judges Forster, Gros, Petrén and Ignacio-Pinto, who rallied, nevertheless, to the official

44. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 267-68.
45. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 268.

Court opinion to help constitute the final, nine to six vote in favor of rejecting jurisdiction. The official opinion in fact bears all the evidence of a "Chief Justice's" opinion, of the sort made famous by the great Chief Justice Charles Evans Hughes of the United States Supreme Court, where the presiding officer of a tribunal seeks to bring the members of his Court together by maximizing the grounds of agreement and concord; and, where necessary, by basing his own opinion on deliberately modest grounds so as to rally the greatest number of wavering judicial votes possible.[46]

The confirmation of this thesis lies, perhaps, in the statistics of the two World Court decisions of June 22, 1973 and December 20, 1974, respectively: a majority of eight judges in favor of exercising jurisdiction, at least for purposes of issuing the Interim Order, which would become nine with the return from illness of Judge Dillard, finds itself reduced to a minority of six when the Court, for purposes of the final judgment, declines to give judgment on the argument that the affair has become moot. The minority position in the June 22, 1973, Interim Order, and the majority position in the December 20, 1974, final judgment are sufficiently similar, generically, to support the thesis that the crucial switch in votes within the Court to make up the new majority declining to give judgment was the product of political give-and-take and skills of compromise inherent in the exchanges in the Court conference room; and in these inter-personal dealings the *rôle* of the more senior members of the Court—especially of the President if he combines high juridical expertise and practical political-diplomatic experience—tends to become intellectually persuasive for purposes of the final decision.

In his specially concurring opinion attached to the final judgment of December 20, 1974, Judge Forster returns to the basic point made in his dissenting opinion attached to the Interim Order of June 22, 1973:

> That the Australian claim was without object was apparent to me from the very first, and not merely subsequent to the recent French statements: in my view it lacked object *ab initio*, and radically.
>
> The recent French statements adduced in the reasoning of the

46. *See* C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 56-64 (1928). *See generally* McElwain, *The Business of the Supreme Court as conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 19 (1949); Frankfurter, *The Administrative Side of Chief Justice Hughes*, 63 HARV. L. REV. 1 (1949); OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 1939-1956, at 133-44 (P. Elman ed. 1956); E. MCWHINNEY, JUDICIAL REVIEW 217-19, 231 (4th ed. 1969).

> Judgment do no more than supplement (to useful purpose, I admit) what I conceived to be the legal arguments for removal of the case from the Court's list.[47]

Judge Forster sought to refute any suggestion that the original Australian-New Zealand proceedings or the Court's Interim Order of June 22, 1973, whatever the doubts as to their jurisdictional base, might have contributed to bringing about a politically acceptable result, namely cessation of the French above-the-ground nuclear tests:

> . . . I personally have noted nothing in the French statements which could be interpreted as an admission of any breach of positive international law; neither have I observed in them anything whatever bearing any resemblance to a concession wrested from France by means of the judicial proceedings and implying the least abandonment of that absolute sovereignty which France, like any other State, possesses in the domain of its national defence.
>
> As for the transition from atmospheric to underground tests, I see it simply as a technical step forward which was due to occur; that, and no more.[48]

Judge Gros, in his specially concurring opinion to the final judgment, recurs to his own earlier, dissenting opinion attached to the Court's Interim Order of June 22, 1973, that there never was a legal dispute subject to the Court's jurisdiction. He also, however, enters into an extended historical examination of the Australian government's attitude vis-à-vis the French nuclear tests, demonstrating that from 1963 until the end of 1972 the Australian government had at no time advanced any argument as to the unlawfulness of the French nuclear tests. This particular claim was in fact put forward for the first time in an Australian Note of January 3, 1973, stemming directly from a change of government in Australia with the election of a Socialist (Labour) government that was officially committed to opposing the "development, proliferation, possession and use of nuclear, chemical and bacteriological weapons."[49] On the other hand, from 1952 onwards the Australian government had associated itself with various atmospheric explosions above or near its own territory, and by its conduct had expressed an unequivocal view in favor of the lawfulness of those tests in the

47. Nuclear Tests Case (Australia v. France), [1974] I.C.J. 253, 275.
48. *Id.*
49. *Id.* at 279-80.

Pacific—beginning with the British atmospheric nuclear explosion effected on October 3, 1952, in the Montebello Islands near the northwest coast of Australia, and continuing through the October 15, 1953, British test at Woomera in Australia; two further series of British tests on May 16 and June 19, 1956, in the Montebello Islands, and other British tests on September 27, and October 4, 11 and 21, 1956, in South Australia. On March 3, 1962, the Australian government has specifically approved the United States Government's decision to conduct nuclear tests in the South Pacific; and on March 16, 1962, had given permission to the United States to make use of Christmas Island for nuclear tests, more than 20 such tests actually being carried out between April 24 and June 30, 1962, with tests at very high altitude being carried out at Johnston Island from July 9 to November 4, 1962.[50] In contrasting the Australian government's approval and active endorsement of British and U.S. nuclear tests in the South Pacific with its condemnation of Communist Chinese and French nuclear tests, Judge Gros raised the issue of political special pleading:

> It is not unjust to conclude that, in the eyes of the Australian Government, what should be applauded in the allies who might protect it is to be frowned upon in others: *Quod licet Jovi non licet bovi. . . .*[51]
>
> The Applicant [Australia] has disqualified itself by its conduct and may not submit a claim based on a double standard of conduct and of law. What was good for Australia along with the United Kingdom and the United States cannot be unlawful for other States. The Permanent Court of International Justice applied the principle "allegans contraria non audiendus est" in the case of *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, page 25.[52]

The other main theme in Judge Gros's specially concurring opinion was the notion that the French nuclear tests constituted a political dispute, involving the independence, vital interests or honor of the state, and therefore sensibly beyond the jurisdiction of any court. Citing with approval the writings of the then Professor Hersch Lau-

50. *Id.* at 280-82; *compare* LIVRE BLANC, *supra* note 5, at 13; *id., Appendices B. III (Extraits du 168' Rapport du* Comité *des petitions du Conseil de tutelle), B. IV (Aide-memoire du Gouvernment Australien en date du 9 septembre 1963), B. VI (Loi Relative aux essais nucléaires de Montebello, adoptée par le parlement australien le 10 juin 1952).*

51. Nuclear Tests Case (Australian v. France) (Judgment), [1974] I.C.J. 253, 282.

52. *Id.* at 285.

terpacht and the French government's own draft law on its accession to the General Act of Geneva of 1928,[53] Judge Gros went on to conclude:

> There is a certain tendency to submit essentially political conflicts to adjudication in the attempt to open a little door to judicial legislation and, if this tendency were to persist, it would result in the institution, on the international plane, of government by judges; such a notion is so opposed to the realities of the present international community that it would undermine the very foundations of jurisdiction.[54]

Judge Petrén, in his specially concurring opinion, relies upon Article 67 of the 1972 Rules of Court to conclude that the admissibility of the original Australian-New Zealand application was of an exclusively preliminary character, consideration of which could not be deferred until the examination of the merits.[55] In Judge Petrén's view, the admissibility of the application depended on the existence of a rule of customary international law prohibiting states from carrying out atmospheric tests of nuclear weapons which give rise to radioactive fallout on the territory of other states. For these purposes, the resolutions voted in the United Nations General Assembly could not be regarded as equivalent to *legal* protests made by one state to another, but simply as indicating the existence of a strong current of opinion in favour of proscribing atmospheric nuclear tests. The Australian claim thus belonged to the *political* domain, and was situated outside the framework of international law as it exists today. It ". . . was, from the very institution of proceedings, devoid of any object on which the Court could give a decision. . . ."[56]

Judge Ignacio-Pinto, in his own specially concurring opinion, reaffirmed his earlier view, set out in his dissenting opinion to the Court's Interim Order of June 22, 1973, that in light of what he characterized as the "all too markedly political character" of the case, the Australian request should have been rejected from the outset as being ill founded.[57] Though regretting that the Court had not earlier set out to regulate the questions of jurisdiction and ad-

53. *Id.* at 283-4.
54. *Id.* at 297.
55. *Id.* at 304-5.
56. *Id.* at 306.
57. *Id.* at 308.

missibility,[58] Judge Ignacio-Pinto approved the Court's final judgment:

> [I]nasmuch as it respects the principle of sovereign equality of the member States of the United Nations. France must not be given treatment inferior to that given to all other States possessing nuclear weapons, and the Court's competence would not be well founded if it related only to the French atmospheric tests.[59]

Judge Ignacio-Pinto's most telling comment, however, is reserved for the general issue of jurisdiction, and the consensual basis on which the World Court's own jurisdiction is predicated:

> [T]he Judgment [of the Court] rightly puts an end to a case one of whose consequences would, in my opinion, be disastrous—I refer to the disregard of Article 36, paragraph 2, of the Statute of the Court—and would thereby be likely to precipitate a general flight from the jurisdiction of the Court, inasmuch as it would demonstrate that the Court no longer respects the expression of the will of a State which has subordinated its acceptance of the Court's compulsory jurisdiction to express reservations.[60]

VIII. THE DISSENTING OPINIONS TO THE WORLD COURT JUDGMENT OF DECEMBER 20, 1974

The dissenting judicial votes to the Court's final judgment of December 20, 1974, are represented by a joint opinion signed by Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, and by the separate opinions on the part of Judge de Castro and of ad hoc Judge Barwick.

The Joint Dissenting Opinion of the four Judges does take up specifically the point that the Court majority's procedural holding that the Australian-New Zealand complaint has become moot, logically presupposes an even prior procedural holding that the Court had jurisdiction in the first place:

---

58. *Id.* at 310-11.

59. *Id.* at 311; *compare*, *id.* at 284 (J. Gros, concurring):

> But there is more than one negative aspect to the want of object of the Australian claim. The principle of equality before the law is constantly invoked, reaffirmed and enshrined in the most solemn texts. This principle would become meaningless if the attitude of "to each his rule" were to be tolerated in the practice of States and in courts. The proper approach to this matter has been exemplified in Sir Gerald Fitzmaurice's special report to the Institute of International Law: "The Future of Public International Law" (1973, pp.35-41).

60. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 311.

> It is difficult for us to understand the basis upon which the Court could reach substantive findings of fact and law such as those imposing on France an international obligation to refrain from further nuclear tests in the Pacific, from which the Court deduces that the case "no longer has any object", without any prior finding that the Court is properly seised of the dispute and has jurisdiction to entertain it. . . .
>
> The conclusion thus seems to us unavoidable that the Court, in the process of rendering the present Judgment, has exercised substantive jurisdiction without having first made a determination of its existence and the legal grounds upon which that jurisdiction rests.[61]

It may be suggested that the main thrust of the four Judges' Joint Dissenting Opinion involves, however, a political conception somewhat different from that of the Court majority as to the basic approach to the exercise of jurisdiction and the extent to which the Court should feel itself constrained by traditionally respected case and controversy limitations in the exercise of a judicial lawmaking *rôle* at the instigation of individual parties.

Inherent in the majority opinion of the Court is the notion that it is for the Court to identify the object of the litigation before the Court and that it is not necessarily constrained by the subjective pleadings of the parties:

> Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. . . .[62]
>
> In the circumstances of the present case, although the Applicant has in its Application used the traditional formula of asking the Court "to adjudge and declare" . . . the Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used . . . .[63]

If the Judgment thus seems to establish an objective test as to the nature of the issue before the Court and, by implication, severely to limit the ability of the individual parties to shape and control the practical exercise of the Court's discretionary law-

61. *Id.* at 325.
62. *Id.* at 262.
63. *Id.* at 263.

making *rôle*, the Joint Dissenting Opinion concedes on this point to the subjective intentions of the parties:

> Basically, the Judgment is grounded on the premise that the sole object of the claim of Australia is "to obtain a termination of" the "atmospheric nuclear tests conducted by France in the South Pacific region" (para. 30). . . .
>
> In our view the basic premise of the Judgment, which limits the Applicant's submissions to a single purpose, and narrowly circumscribes its objective in pursuing the present proceedings, is untenable. In consequence the Court's claim of reasoning leads to an erroneous conclusion. This occurs, we think, partly because the Judgment fails to take account of the purpose and utility of a request for a declaratory judgment and even more because its basic premise fails to correspond to and even changes the nature and scope of Australia's formal submissions as presented in the Application.[64]

Concerning this joinder of issues between majority and minority judges in the Court's final judgment of December 20, 1974, it can be said that the intellectual conflict cannot be resolved by considerations of traditional legal logic. The basic conflict goes to differing conceptions of the nature and scope of the judicial office and of the proper *rôle* of courts in community policy-making, and to the differing approaches to the exercise of court jurisdiction inherent in those conceptions. The appraisal of the legal merits of each of these conceptions must turn, ultimately, on political considerations such as the relative degree of common-sense and realism involved in each, having regard to the necessarily dependent *rôle* of the courts, in general, as organs of community policy-making, and to the special limitations imposed upon the World Court in particular, in comparison to national supreme courts, for purposes of the elaboration, refinement and concrete application of new norms of law—the limited, "term-of-years" character of the judicial office on the bench of the World Court; the essentially voluntary, consensual aspect of its jurisdiction; the absence of a firm and effective enforcement power; and the diffuse, pluralistic character of the community in respect to which it must operate.

The second main part of the four Judges' Joint Dissenting Opinion goes to the question of whether the Court had jurisdiction over France in the circumstances of the present case.[65] This question

64. *Id.* at 312.

65. Note the Joint Dissenting Opinion's criticism of the Court's reasoning on this point:

had been passed over *sub silentio* in the majority opinion of the Court of December 20, 1974, though in the spirit of that opinion, it would be an irrelevant question in light of the Court's actual holding that the issue had become moot. The four majority Judges appending individual, specially concurring opinions to the final judgment —Judges Forster, Gros, Petrén and Ignacio-Pinto had, however, all firmly rejected any question of Court jurisdiction over France in the circumstances of the case, while embracing also the opinion of the Court that the affair had become moot.

The four Judges' Joint Dissenting Opinion's affirmation of the existence of jurisdiction over France in the present case[66] is rested principally upon France's accession to the General Act of 1928, upon the absence from such French accession of any exception as to "national defence," upon the rejection of the argument that the General Act of 1928 had fallen into desuetude with the disappearance of the old League of Nations system[67] and upon a conclusion as to the continued binding force of the General Act as between Australia and France.[68] The four Judges also rejected the argument that the French government's 1966 declaration of adherence to the Court's jurisdiction, with its exclusion, specifically and in terms, as to "national defence," prevailed over the French adherence under the General Act of 1928.[69]

It must be added that Judge de Castro, in his individual dissenting opinion to the Court's final judgment,[70] put forward essentially the same arguments in favor of the existence of Court jurisdiction over France in the facts of the present case. He went on from there, in contending for the admissibility of the Australian-New Zealand application, to argue that on the basis of the general duty

---

> It is difficult for us to understand the basis upon which the Court could reach substantive findings of fact and law such as those imposing on France an international obligation to refrain from further nuclear tests in the Pacific, from which the Court deduces that the case "no longer has any object", without any prior finding that the Court is properly seised of the dispute and has jurisdiction to entertain it. The present Judgment by implication concedes that a dispute existed at the time of the Application. . . .
>
> The conclusion thus seems to us unavoidable that the Court, in the process of rendering the present Judgment, has exercised substantive jurisdiction without having first made a determination of its existence and the legal grounds upon which that jurisdiction rests.

Id. at 325.

66. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 326-58.
67. *Id.* at 329-35.
68. *Id.* at 337-45.
69. *Id.* at 346-52.
70. *Id.* at 372.

of each state not to use its territory for acts contrary to the rights of other states[71] as exemplified by the Swiss federal litigation between the Cantons of Solothurn and Aargaut, and the U.S.-Canada Trail Smelter Arbitration, Australia and New Zealand were entitled to argue the substantive law question of France's duty to put an end to the deposit of radioactive fall-out on their territory.[72]

The remaining individual dissenting opinion, that of ad hoc Judge Barwick is the longest opinion filed in the Court's final judgment, but it does not go significantly beyond the international law arguments canvassed in the other dissenting opinions.[73]

IX. AN INARTICULATE MAJOR PREMISE TO THE COURT'S FINAL JUDGMENT? THE CONDUCT OF THE PARTIES: THE AUSTRALIAN "LEAK" OF THE COURT'S JUDGMENT ON THE INTERIM ORDER

The Australian government's enthusiastic endorsement of, or cooperation in, the British and U.S. nuclear tests in the Pacific, over a sustained period of years gave rise, as we have seen above, if not to a direct estoppel against the Australian government in its current complaint against the French nuclear tests, at least to the invocation of general equitable principles, going to equality of treatment and to the notion that a state cannot apply a double standard in its international relations, by reserving one treatment for its favored allies and quite another and lesser treatment for all others.[74] The relative insensitiveness on this point, on the part of the Australian government, is one of the more striking features of its political handling of the French Nuclear Tests Case: the Australian government never seemed aware that a mere change in the internal, political complexion of the government of a state cannot derogate from ordi-

71. Corfu Channel Case, [1949] I.C.J. 3, 22.

72. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 388-90.

73. *Id.* at 391-455.

74. There is an historical irony in the fact that ad hoc Judge Barwick (nominated by Australia and New Zealand, in terms of Article 31(2) of the Statute of the International Court of Justice, to sit on the Court for purposes of the French Nuclear Tests process) had been a key member (Attorney-General, 1958-64; Minister for External Affairs, 1961-64) of the Conservative coalition government of Australia, that held power at the federal level throughout much of the period of the Australian endorsement of and active cooperation in British and U.S. nuclear tests in the South Pacific region generally or in Australia itself. Appointed Chief Justice of Australia in 1964, directly from federal politics, Chief Justice Barwick had earlier had a distinguished career as an advocate at the Bar, (though never, because of the nature of Australian legal practice, having worked in international law). *See generally* WHO'S WHO IN AUSTRALIA 85 (21st ed. 1974).

nary international law principles as to the continuity of state personality and the notion that actions of any one government of a state are normally binding upon its successors.

Allowing, as the U.N. General Assembly Committee on Friendly Relations has recognized in its final report and accompanying Declaration of Principles,[75] that judicial settlement is only one method (and not necessarily the best method) of international problem-solving, one may wonder why the Australian government chose to escalate to the method of a formal complaint to the World Court without fully exhausting the more conventional and low-key diplomatic methods which the lack of substantial equities on its own part—due to the prior Australian involvement in its own allies' nuclear tests in the Pacific—might have suggested as the wiser course. Was it the fact that the present Australian government had chosen to make the non-proliferation of nuclear and other weapons a main plank in its successful election campaign that had unseated the long-time Conservative coalition government of Australia,[76] and that a judicial test seemed to offer more mileage from the public relations viewpoint? In any event, the World Court's final judgment of December 20, 1974, in taking the Court out of the affair altogether, removed any possibility of the Court's becoming embroiled, by indirection, in past internal, political conflicts with a litigating state.

One bizarre episode, associated with the Court's decision on the Interim Order of June 22, 1973, tends to confirm the reservations already suggested as to the political wisdom and good judgment of the Australian government's tactical approach to conflicts-resolution. On June 21, 1973, one day before the Court's decision on

75. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, 123, U.N. Doc. A/8028 (1971):

> Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.
>
> States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement, the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.
>
> The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

76. *See* Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 279-80 (J. Gros, concurring).

the Interim Order was read at a public sitting, the Prime Minister of Australia announced at a public dinner in Australia that the World Court's decision would be eight to six in favor of Australia,[77] thus correctly forecasting the actual announcement by the Court. In a subsequent letter of June 27, 1973, the Australian Prime Minister suggested that this forecast had been no more than speculation on his part.[78]

In a special declaration annexed to the Court's final judgment of December 20, 1974, Judge-President Lachs commented, on behalf of the Court majority:

> Good administration of justice and respect for the Court require that the outcome of its deliberations be kept in strict secrecy and nothing of its decision be published until it is officially rendered. It was therefore regrettable that in the present case, prior to the public reading of the Court's Order of June 22, 1973, a statement was made and press reports appeared which exceeded what is legally admissible in relation to a case *sub judice*.
>
> The Court was seriously concerned with the matter and an enquiry was ordered in the course of which all possible avenues accessible to the Court were explored.
>
> The Court concluded, by a resolution of 21 March 1974, that its investigations had not enabled it to identify any specific source of the statements and reports published.
>
> I remain satisfied that the Court had done everything possible in this respect and that it dealt with the matter with all seriousness for which it called.[79]

Judge Gros, in his specially concurring opinion, threw some further light on the episode, in commenting upon the Court's resolution, adopted by a majority vote of 11 to 3, on March 21, 1974,[80] to close its investigation of the Australian "leak." Judge Gros regarded the "leak" as a breach of Article 54(3) of the Court Statute, requiring the deliberations of the Court to "take place in private and remain secret."[81] In seeming to reject what he characterized as "the crystal-gazing explanation relied on by the [Australian] Prime

77. *Id.* at 293.

78. *Id.* at 294.

79. *Id.* at 273.

80. International Court of Justice, *Communiqué* no. 74/2, March 26, 1974 [1973-1974] I.C.J.Y.B. 127-128. *See also* Lacharrière, *Cour internationale de justice: Commentaires sur la position juridique de la France à l'égard de la licéité de ses expériences nucléaires*, 19 ANNUAIRE FRANÇAIS DE DROIT INT'L 235, 250-51 (1973).

81. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 293.

Minister . . . with the attribution of an oracular *rôle* to the Australian advisers,"[82] Judge Gros declared himself convinced that:

> [A] judicially conducted enquiry could have elucidated the channels followed by the multiple disclosures noted in this case, the continuity and accuracy of which suggest that the truth of the matter was not beyond the Court's reach. Such is the meaning of my refusal of the resolution of March 21, 1974, terminating an investigation which was begun with reluctance, conducted without persistence and concluded without reason.[83]

Judge Petrén, in his specially concurring opinion, also indicated that he had voted against the resolution to conclude enquiry:

> . . . I wish to state my opinion that the enquiry referred to was one of a judicial character and that its continuance on the bases already acquired should have enabled the Court to get closer to the truth. I did not agree with the decision whereby the Court excluded from publication, in the volume of *Pleadings, Oral Arguments, Documents* to be devoted to the case, certain documents which to my mind are important for the comprehension of the incident and the search for its origins.[84]

On the other hand, the four Judges taking part in the Joint Dissenting Opinion, joined this time by Judge Bengzon, issued a joint declaration upholding the Court against criticisms that it was tardy or dilatory in its follow-up to the Australian "leak":

> The examination of the matter carried out by the Court did not enable it to identify any specific source of the information on which were based the statements and press reports to which the President [Judge Lachs] has referred. When the Court, by eleven votes to three, decided to conclude its examination it did so for the solid reason that to pursue its investigations and enquiries would, in its view, be very unlikely to produce further useful information.[85]

The Australian Prime Minister, for his part, immediately after the Court's final judgment of December 20, 1974, refusing the Australian application, made his symbolic trip to Canossa by going to Paris and officially calling on President Giscard d'Estaing.[86]

---

82. *Id.* at 294.
83. *Id.* at 296.
84. *Id.* at 298, n.1.
85. *Id.* at 273.
86. *Le Monde*, (Paris) Sélection Hebdomadaire, January 2-8, 1975, at 4.

X. *JUDICIAL LEGISLATION AND THE FRENCH NUCLEAR TESTS CASE: AN APPRAISAL*

For the student of sociology of law (and especially for one in the tradition of Julius Stone) the most interesting aspects of the French Nuclear Tests case are those concerning the international law-making process, and the special political-institutional *rôle* of the World Court in comparison to other organs of world community policy-making.

The Court emerges as the proponent of judicial self-restraint in the final judgment of December 20, 1974, though, be it noted, a judicial self-restraint fully consonant with the rigorously procedural approach to judicial policy-making insisted upon by well-known judicial liberals such as Mr. Justice Brandeis and Mr. Justice Frankfurter of the U.S. Supreme Court. Though the Court's deliberations are obviously secret, in accordance with the judicial practice of the Court, the President is an ex officio member of the Drafting Committee and it may safely be assumed that the President has played a role in any opinion of the Court signed by him. President Lachs, like Brandeis and Frankfurter, has a proven record of judicial imagination and judicial innovation, demonstrated in concrete problem-situations where the jurisdictional grounds are right. As evidence of this, his approach to the international law-making process has always been flexible and creative, whether he has been wearing the hat of the lawyer-diplomat, the lawyer-jurisconsult or the lawyer-judge.

Thus, as a U.N. General Assembly national delegate and as a law professor, Dr. Lachs cut through the sterile juridical formalism that would deny normative legal quality to the principle barring the orbiting of nuclear weapons in space vehicles, simply because it did not, in its origins and prior to its concretization in treaty form in the Space Treaty of January 27, 1967,[87] fit into the historical group of closed categories of formal sources of law. While the avant-garde might claim the principle as an international legal norm, prior to its rendition in treaty form, by virtue of its root in a U.N. General Assembly Resolution of October 17, 1963,[88] a seeming majority of contemporary jurists would deny any law-making quality to U.N.

87. Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, [1967] 3 U.S.T. 2410, T.I.A.S. No. 6347 (entered into force Oct. 10, 1974).

88. G.A. Res. 1884, U.N. GAOR Supp. 15, at 13, U.N. Doc. A/5515 (1964). *See also* Stevenson, *U.N. Calls on States to Refrain from Orbiting Weapons*, 49 DEP'T STATE BULL. 753 (1963).

General Assembly resolutions, as such. Rather than provoke an interminable debate over a complex political-institutional question of contemporary international organization, going to the arenas for international law-making, and thus delay recognition of an emergent new legal principle that is basic to international security and cooperation, why not cut through to the facts? The two key participants having the technological capacity to orbit nuclear weapons in space vehicles—the Soviet Union and the United States—had each sufficiently indicated their intention to observe the principle and to accept it as legally binding upon them; so why not accept this legal fact as creating, in itself, a congruent legal norm?[89] The law professor from Eastern Europe thus joins hands with contemporary North American post-legal realist thinking on law as fact!

In the North Sea Continental Shelf cases,[90] Judge Lachs, in his dissenting opinion, continued his creative approach to the international law-making process in suggesting that West Germany might be bound by the principles of the 1958 Geneva Convention on the Continental Shelf, even though West Germany had never ratified the Convention, since those principles, by virtue of the near universality of their acceptance by states, had now become part of general, customary international law.[91] On that occasion he also stressed the importance of governmental statements and the reliance upon them.[91.1]

This line of thought is continued in the World Court's Advisory Opinion of 1971 on South-West Africa,[92] where the Court makes important advances in regard to the development of new principles of international law and, perhaps even more importantly, in regard

89. *See* Lachs, *The International Law of Outer Space*, 113 RECUEIL DES COURS 1, 97-99 (1964); Lachs, *The Law-making Process for Outer Space*, NEW FRONTIERS IN SPACE LAW 13 (E. McWhinney & M. Bradley eds. 1969); M. LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING 109 (1972).

90. North Sea Continental Shelf Cases [1969] I.C.J. 3.

91. *Id.* at 229-30 (Lachs, J., dissenting); *see also* Goldie, *The North Sea Continental Shelf Cases: a Ray of Hope for the International Court?*, 16 N.Y.L.F. 327, 357-58 (1970).

91.1. States may obviously change their intentions, conduct and policies, but it would seriously undermine the words of and reliance upon statements made by governments if value-judgments of so important a nature were disregarded or held as not binding upon governments which made them.

Id. at 236.

92. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, [1971] I.C.J. 16. *See* Higgins, *The Advisory Opinion on Namibia: Which U.N. Resolutions are Binding under Article 25 of the Charter?*, 21 INT'L & COMP. L. Q. 270 (1972). *Compare* McDougal, 67 AM. SOC'Y INT'L L., PROCEEDINGS 293 (1973). *See generally* Bernhardt, *Homogenität, Kontinuität und Dissonanzen in der Rechtsprechung des Internationalen Gerichtshofs: Eine Fall-Studie zum Südwestafrika/Namibia-Komplex*, 33 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (1973).

to the giving of new content to old principles. The Court's opinion, taking a dynamic view of the concept of intertemporal law, goes on to give a new and contemporary connotation to illegality that has important implications for apartheid, and also displays an unaccustomed flexibility as to international legal fact-finding and the *rôle* of judicial notice. Finally, the Court's opinion easily crosses the legal positivist barriers against acceptance of the proposition that the general principles of international law may be binding even upon a non-member state of an international organisation.[92.1]

This review is prologue to the basic question of why a Court majority with a demonstrated record of imagination, innovation and leadership in the creation and refinement of new norms of law and in the international law-making process in general, should prefer the course of judicial self-restraint in the French Nuclear Tests Case. Sociological jurisprudence, with its attention to the wise choice of arenas and techniques for the effectuation of community policy-making can, I think, help us in understanding the Court majority's choice in the French Nuclear Tests Case.

First, recognizing that particular cases serve, in the ultimate, as the vehicles for judicial policy-making, there is obviously a certain margin of judicial discretion available as to the choice of the particular case to serve as the foundation for policy-making ventures.[93] While the World Court's docket is certainly more limited

92.1. *Compare, also,* Judge Lachs's declaration, made in the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan) (Judgment), [1972] I.C.J. 46, 72-75, where he stresses that "[g]reat caution and restraint have been exercised by this Court and its predecessor when ascertaining their own jurisdiction." *Id.* at 73. Judge Lachs then goes on to say that:

> This restraint has had its *raison d'être* in the clear tendency not to impose more onerous obligations on States than those they have expressly assumed. However, in regard to appeals from other fora, this very criterion imposes limits on the Court's caution in assuming jurisdiction.
>
> Indeed, the same reasons which underlie the necessity of interpreting jurisdictional clauses strictly impel one to adopt an interpretation of provisions for appeal that would lend maximum effect to the safeguards inherent in such provisions. For, as between the "lower forum" and the "court of appeal", there exists as it were a see-saw of jurisdictional powers. Hence to apply a restrictive interpretation of rights of appeal—and thus of the power of the "court of appeal"—would obviously entail an extensive interpretation of the jurisdictional powers of the "court of first instance."

Id. at 74.

93. *See* Sherrer v. Sherrer, 334 U.S. 343, 365-66 (1948) (Frankfurter, J., dissenting opinion); PESCATORE, LE DROIT DE L'INTEGRATION 74 *et seq.* (1972); *see also* Pescatore (with Donner, Monaco and Kutscher), *Aspects of the Court of Justice of the European Communities of Interest from the Point of* View of International Law, 32 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 239 (1972); Pescatore, *Fédéralisme et intégration: remarques liminaires*, in FEDERALISM AND SUPREME COURTS AND THE INTEGRATION OF LEGAL SYSTEMS, (McWhinney & Pescatore, eds. 1973).

than that of national supreme courts and so it cannot be quite as cavalier as those other courts in rejecting the obviously flawed records as possible candidates for "test case" status, the fact remains that the Australian-New Zealand Application, by national supreme court standards, hardly seemed an adequate base for any sustained judicial policy-making ventures. This conclusion flows inevitably, I think, from the compromised character of the Australian and New Zealand complaints against France, granted their past twenty years of positive support for British and U.S. nuclear test explosions in the Pacific area generally and in Australia itself. Pious protestations by the newly-elected governments could not wipe clean the slate from twenty years of practice by their predecessor governments. The supervening Fiji intervention in the case,[94] while no doubt free from this particular flaw, suffered from the fact that it arrived tardily and apparently without any prior record of concern or protest against nuclear tests in the Pacific, under whatever national sponsorship (British, American, French). A further fact contributing to the flawed character of the Australian-New Zealand Applications, and inhibiting their utility as a really satisfactory vehicle for sustained judicial policy-making was the never properly explained "leak" by the Australian Prime Minister of the Court's Interim Order and of the actual judicial vote thereon. It raised questions of the respect for the integrity of the judicial process on the part of the moving parties in what was, after all, an adversary proceeding. If the safeguarding of the judicial process might not necessarily suggest an automatic verdict for the respondent, in the absence of explanations from the applicants that the Court as a whole would regard as sufficient, it still would render very difficult any Court decision, on the merits, in favor of the applicants, granted the bizarre circumstances of the Australian "leak."

As a second question, on the particular facts of the Australian-New Zealand complaint, especially including those facts found by the complaining parties themselves and therefore presumably beyond their capacity to put in issue, it may be doubted whether the complaining parties satisfactorily discharged their burden of establishing even a prima facie case of damage to themselves resulting from the French nuclear tests in the South Pacific. This evident failure goes both to the substantive international law counts upon

94. Nuclear Tests Case (Australia v. France), Application by Fiji for Permission to Intervene, [1973] I.C.J. 320; Nuclear Tests Case (New Zealand v. France), Application by Fiji for Permission to Intervene, [1973] I.C.J. 324.

which the complainant states sought to base their application for relief against France, in which damage is a necessary element, and also to the existence even of a sufficient legal interest to give the complaining states *locus standi* in the case. This conjunction of *lacunae* in the Australian-New Zealand complaint going both to its substantive and its adjectival law bases, confirms the general impression that the two states' applications hardly represented a useful occasion for judicial legislation in an important developing area of the "new" international law—namely, the international law of environmental protection, involving the duty of any one state not gratuitously to do damage to other states.

As a third, and much more fundamental question, the Court's jurisdiction ultimately rests on the voluntary consent of the parties. The consensual basis of the Court's jurisdiction, in sharp contradistinction to those national supreme courts that effectively indulge in judicial legislation, means that the Court must exercise great prudence as to invoking strained or difficult legal constructions as a ground for seeking to impose its jurisdiction upon unwilling states. When so many states that are committed to expanding and strengthening the rule of law in the world community either have not accepted the compulsory jurisdiction of the Court or else, like Canada in regard to its Arctic Waters Pollution Prevention Act of 1970, have found reasons for cutting down and limiting the jurisdiction already conferred on the Court,[95] it may be suggested that it ill behooves the Court to try to drag states to the court-room door. The political consequence is likely to be that they may not appear, or that they may withdraw or cut down whatever jurisdiction they have already conferred on the Court. The French government's political response to the World Court's hair-line, (eight to six) majority granting the Interim Order of June 22, 1973, was a formal advice to the United Nations on January 2, 1974, that France was withdrawing forthwith her acceptance of the compulsory jurisdiction of the Court as of January 10, 1974.[96] This was a

95. *See generally* Pharand, *Oil Pollution Control in the Canadian Arctic*, 7 TEXAS INT'L L. J. 45 (1971); *compare* Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1 (1970).

96. *See* Cot, *Affaires des essais nucléaires (Australie c/ France et Nouvelle Zéland c/ France): Demandes en indication des mesures conservatoires. Ordonnances du 22 juin 1973*, 19 ANNUAIRE FRANÇAIS DE DROIT INT'L 252 (1973) [hereinafter cited as Cot]; Pinto, *La France et al Cour internationale de justice*, Le Monde (Paris), Dec. 22-23, 1974, at 7, col. 1; Lachairrière, *supra* note 80, at 251. *See generally Retrait par le gouvernement français de son acceptation de lat juridiction obligatoire de la Cour internationale de justice (10 janvier 1974)*, 78 REVUE GÉNÉRELE DE DROIT INT'L PUBLIC 822 (1974).

body-blow that the Court could hardly afford to sustain from one of its long-time champions and original Founding Fathers,[97] but one, it may be suggested, that might have been anticipated as a political consequence of the majority decision on the Interim Order.[98]

97. *Les ordonnances rendues le 22 juin 1973 par la Cour internationale de justice dans les affaires des Essais nucléaires marquent un tournant décisif dans l'attitude de la France à l'égard de la juridiction internationale. Il est inutile de rappeler la tradition française. . . Notre pays a joué un role décisif dans l'institution d'une juridiction internationale. Les Contributions d'un Louis Renault, d'un Albert de Lapradelle ou d'un Jules Basdevant illustrent ce long combat de nos juristes, adossé a la ferme volonté des gouvernements successifs. Jamais, lorsque la juridiction internationale a été menacée, la France n'a ménagé son soutien à l'institution. Sur ce point, la Ve Republique, pourtant hostile à toute notion de supranationalité et jalouse gardienne de l'indépendence nationale, est restée fidèle à cette politique. Elle a détendu, au sein des Nations Unies, la Cour internationale de justice et la juridiction obligatoire. Aujourd'hui, le Gouvernement français rompt avec ce passé.*

[The decisions rendered on June 22, 1973, by the International Court of Justice on *Nuclear Tests* mark a decisive change in the attitude of France in regard to the jurisdiction of the Court. It is unnecessary to recall the French tradition. . . . Our country has played a decisive role in the institution of an international jurisdiction. The contributions of a Louis Renault, an Albert de Lapradelle or a Jules Basdevant illustrate the long struggle of our jurists, reinforcing the firm will of successive governments. When the jurisdiction of the court has been threatened, France has never withheld her support. On this point, the 5th Republic, although hostile to any notion of supranationality and protective of national independence, has remained faithful to this policy. It has defended the International Court of Justice and its compulsory jurisdiction in the United Nations itself. Today, the French government breaks with the past.]

Cot, *supra* note 106, at 252.

98. *Les ordonnances de juin 1974 ont provoqué le refus gouvernmental français d'accepter, à partir du 10 janvier 1974, la compétence obligatoire de la Cour internationale de justice dans ses différends d'ordre juridique avec d'autres Etats. Cette décision, prise sans consultation ni débat parlementaire, fait bon marché d'une tradition presque séculaire de notre diplomatie. . . .*

Ecartons l'un des motifs du retrait de la France, l'indiscrétion qui a permis au premier ministre australien de connaître le sens de la décision de la Cour et la majorité obtenue, sans pour autant que des sanctions soient prises, malgré plusieurs démarches officielles, contre les responsables. . . .

Beaucoup lus grave est le second motif de retrait. Le gouvernement français ne peut faire confiance à la Cour actuelle pour se déclarer incompétente dans les cas réservés par sa déclaration relative à la compétence obligatoire de la Cour. . . .

Les tensions actuelles ont rapproché dangereusement la Cour du point de la rupture. Fallait-il pour autant que la France frappe le coup de grâce sans donner l'occasion à la Cour, par sa présence, de se ressaiser?

[The decisions of June, 1974, have caused the French government, as of January 10, 1974, to refuse to accept the compulsory jurisdiction of the International Court of Justice. This decision, made without parliamentary consultation or debate, does away with a long standing diplomatic tradition. . . .

Let us set aside one explanation for the change in France's position, the indiscre-

The majority decision in the final judgment of December 20, 1974, thus appears in retrospect more and more like a necessary, even if somewhat belated, political corrective to what Charles Evans Hughes, speaking of the Dred Scott decision of the U.S. Supreme Court, characterized as one of the Court's great self-inflicted wounds.[99] The over-all lesson, from a comparison of the two judgments of the Court in the French Nuclear Tests Case, would seem to be that a high political dispute that might better, in all the political circumstances of the case, have been settled by conventional diplomatic means through the give-and-take of bilateral negotiations and exchange, in conventional international political arenas, was prematurely or over-hastily brought into the international judicial arena,[100] and that it just did not serve as a satisfactory vehicle for sustained judicial policy-making in a major new area of international legal concern.[101] The final judgment of December 20,

---

tion that has permitted the Australian prime minister to know the direction of the Court's decision and the positions of the judges, without any sanctions being imposed against those responsible, despite several official overtures. . . .

Much more serious is the second explanation for the change. The French government cannot trust the current Court to decline jurisdiction in those cases which are made exceptions in the French declaration concerning the compulsory jurisdiction of the Court. . . .

The current tensions have brought the Court dangerously close to the breaking point. Was it necessary for France to strike the final blow without giving the Court the chance, by its presence, to restore itself?]

Pinto, *supra* note 96 (footnotes omitted). *See generally* Waldock, *Decline of the Optional Clause*, 32 BRIT. Y. B. INT'L L. 244 (1955-56).

99. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). *See* C. HUGHES, *supra* note 46, at 50-51.

100. *Compare* H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 75-115 (1958); Fitzmaurice, *Judicial Innovation: Its Uses and Its Perils*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW; ESSAYS IN HONOUR OF LORD MCNAIR 24 (1965); Vallat, *The Peaceful Settlement of Disputes*, *id.* at 155, 165-67; Munch, *Das Wesen der Rechtsprechung als Leitbegriff für die Tätigkeit des Internati* Münch, *lerichtshofs*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLERRECHT 712 (1971); Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971); Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, in INSTITUTE DE DROIT INTERNATIONAL, LIVRE DU CENTENAIRE 1873-1973: EVOLUTIONS ET PERSPECTIVES DU DROIT INTERNATIONAL 196 (1973).

101. Compare the remarks by Judge Gros, made before the *Nuclear Tests Case*: *L'adage 'la paix par le droit' correspondait à un état d'esprit dans une certaine periode de l'histoire. Le vaste mouvement d'idées en faveur de l'arbitrage international, parallèlement au désarmement pour créer la sécurité, à la suite des tensions politiques qui culminèrent dans la première guerre mondiale, ne pouvait garder la même influence dans un monde où les conflits dont saisis soit par des organes politiques de Nations Unies, soit par des États directment intéressés, dont l'entente réalisée sur des bases politiques, s'avère indispensable pour le règlement de ces conflits.*

1974, should, on this thesis, succeed in minimizing any damage to the Court caused by the premature venture into judicial policy-making in the Interim Order of June 22, 1973,[102] and it offers the extra premium of some valuable new additions to international legal doctrine, particularly as to the normative legal effect of conduct, including unilateral acts or declarations, by individual states and as to the principle of good faith as a cardinal principle of the new international law of cooperation that one hopes is succeeding to the era of the détente.[103]

[The adage, "peace through the law," reflects a state of mind in a certain period of history. The vast movement of ideas in favor of international arbitration, paralleling disarmament for the sake of security following political tensions that culminated in the first world war, could not maintain the same influence in a world in which conflicts are resolved by the political organs of the United Nations or by the states directly interested, whose agreements at the political level prove to be indispensable to the settlement of conflicts.]

Gros, *À propos de cinquante années de justice internationale*, 76 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 5, 10-11 (1972). *See also* Gros, *Quelques remarques sur la practique du droit international*, in MÉLANGES OFFERTS À CHARLES ROUSSEA, LA COMMUNAUTÉ INTERNATIONALE 113, 124 (1974), wherein he writes:

Une saine autocritique montre les limites de toute amélioration du rôle de la Cour: nous sommes dans un domaine où le lyrisme ne peut voiler a réalité.

[A healthy self criticism shows the limits of any improvements in the role of the Court: we are in a domain in which lyricism cannot conceal reality.]

102. See in this regard, the remarks by Judge Petren, also made *before* the French Nuclear Tests Case:

It must. . .be kept in mind that a party that has raised an objection to the Court's jurisdiction to determine a case has the right to expect that the court will not give judgment on the merits therefore, should the said objection be upheld by the court. Would it not then be strange if the court, while upholding the objection to its jurisdiction, were nevertheless to examine the merits of the case, and to declare, for example, that the contentions of the applicant party were well founded in law? And would states not be still more reluctant to accept the court's jurisdiction than they are already today, if they were to learn that valid objections to the court's jurisdiction or to the receivability of an application will not always prevent the court from making statements on matters that the court, by upholding the objection, has found not to be properly brought before it?

Petrén, *Differences of Procedure between International and National Tribunals*, in THOUGHTS FROM THE LAKE OF TIME 27, 39 (Burchard ed. 1971); *see also* Petrén, *Quelques réflexions sur la revision du règlement de la Cour internationale de Justice*, in MÉLANGES OFFERTS À CHARLES ROUSSEAU-LA COMMUNAUTÉ INTERNATIONALE 187 (1974).

103. Nuclear Tests Case (Australia v. France) (Judgment), [1974] I.C.J. 253, 267-68.