DISSENTING OPINION OF JUDGE IGNACIO-PINTO

[Translation]

To my regret, I am unable to support the Order of the Court upholding Australia's request for the indication of interim measures of protection pending the settlement on the merits of the dispute between that State and France with regard to the nuclear tests which the French Government wishes to carry out in the South Pacific.

I voted against the grant of those interim measures because I find this decision legally unjust, or in any event without sufficient basis. But I wish to emphasize that my negative vote does not mean that I am in favour of nuclear tests,—on the contrary, I am strongly opposed to all such tests, and align myself with those who wish to see the prohibition of all these experiments which are dangerous for our planet, and of which the least one can say is that we do not yet fully know what harmful consequences they may have, and how long the effects of atomic tests last in the atmosphere.

In the dispute brought before the Court by Australia, however, we must not be swayed by sentiment, and still less must we permit ourselves to be affected by the feelings—which in fact are very understandable—prompted by the decision of the French Government to carry out nuclear tests, just as other States, in exercise of their rights of sovereignty, have carried out such tests, and a further State, and no minor one at that, still continues to do so, using devices which produce explosions which give rise to still greater pollution. It is therefore important that I should examine calmly and lucidly the question of the Court's jurisdiction, confining myself strictly to existing rules of international law.

It is to be observed that the case of which the Court is seised is *sui generis*, and is not on all fours with any other case in which, up to the present, the Court has had to examine in order to determine the question of its jurisdiction. It is in vain that reliance has been placed upon the *Fisheries Jurisdiction* case, by way of reference to recent jurisprudence of the Court, in order to claim that the Court has jurisdiction. In the *Fisheries Jurisdiction* case, the legal basis of the request for the indication of interim measures is clear and definite, and is to be found clearly set out in the Exchange of Notes of 11 March 1961 between Iceland and the United Kingdom, the penultimate paragraph of which reads as follows:

> "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such

extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

There is no possible doubt as to the consent of the parties; the recourse had to this precedent in order to justify Australia's request must therefore be rejected.

In the case now before the Court, there is nothing comparable to the legal situation created by the penultimate paragraph of the Exchange of Notes of 11 March 1961 between Iceland and the United Kingdom.

Australia does of course rely on the General Act of 26 September 1928, to which it and France were parties, but there is still doubt as to the validity thereof, and the controversy on the point is such that in my opinion the Act cannot possibly be a sufficient ground to turn the scale of the Court's decision, and result in the award to Australia of the interim measures asked for. Nor is there any more validity in the argument which has been based on another decision of the Court, the Judgment of 6 July 1957 on the *Certain Norwegian Loans* case, in which proceedings the Agent of the French Government relied on the validity of the General Act. The Court in fact did not accept this point, despite the contrary opinion expressed by Judge Basdevant.

Of what is it a question in the present case?

The request amply answers this question, adducing:

"(i) The right of Australia and its people, in common with other States and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated;

(ii) The deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:

(a) violates Australian sovereignty over its territory;

(b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources;

(iii) The interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radio-active fall-out, constitutes infringements of the freedom of the high seas."

The majority of the Court finds that these submissions are sufficient to enable it to say that this request appears to fall within the purview of international jurisdiction.

But the French Government, with full right, has from 1966 onward excluded from the Court's jurisdiction all "disputes concerning activities

connected with national defence", and its assent under Article 36, paragraph 2, of the Statute is therefore limited by the categorical expression of its will. In my view, this limitation has its raison d'être, moreover, in Article 2, paragraph 7, of the Charter, which provides:

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

The arguments put forward by Australia, in particular with regard to the validity of the 1928 General Act, are not relevant, for it is admitted in international law that a special rule overrides the general rule. In the present case, events after the war of 1939-1945 having completely overturned conceptions of national security through the introduction of the nuclear bomb, it is difficult not to accept that the reservation of the French Government overrides the General Act dating from before the Second World War, an era in which no State possessed the atomic bomb.

Moreover, whereas the General Act of 1928 is the subject of serious controversy and appears at all events never to have been invoked as a basis of the Court's jurisdiction by any State ever since its entry into force, the declaration of the French Government constitutes the fundamental element of its acceptance of compulsory jurisdiction under Article 36, paragraph 2, in so far as it is based on its formal and unequivocal consent.

There is another important point which does not seem to have been sufficiently taken into account in the arguments put forward by the French Government. I refer to its reiterated request to the Australian Government, expressed in its Ambassador's letter of 7 February 1973 to the Australian Prime Minister and Foreign Minister (Application, Annex 10, p. 57), that it be given some indication of the precise rules of international law which France is said to violate:

> "But the French Government finds it hard to see what is the precise rule on whose existence Australia relies. Perhaps Australia could enlighten it on this point.
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> In reality, it seems to the French Government that this complaint of the violation of international law on account of atomic pollution amounts to a claim that atmospheric nuclear experiments are automatically unlawful. This, in its view, is not the case. But here again the French Government would appreciate having its attention drawn to any points lending colour to the opposite opinion."

This request for specific enlightenment has received no reply, and Australia has confined itself to presuming the existence of a right which in my view does not really exist, alleging moreover more or less hypothe-

tical damage, the assessment of which is difficult in the extreme. Nevertheless the majority of the Court has seen fit to recognize that such damage, however uncertain or imprecise it may be, is sufficient to justify acceding to the request for the indication of provisional measures without any clear statement of the nature of the rights which have to be protected or preserved.

Of course, Australia can invoke its sovereignty over its territory and its right to prevent pollution caused by another State. But when the French Government also claims to exercise its right of territorial sovereignty, by proceeding to carry out tests in its territory, is it possible legally to deprive it of that right, on account of the mere expression of the will of Australia?

In my opinion, international law is now, and will be for some time to come, a law in process of formation, and one which contains only a concept of responsibility after the fact, unlike municipal law, in which the possible range of responsibility can be determined with precision *a priori*. Whatever those who hold the opposite view may think, each State is free to act as it thinks fit within the limits of its sovereignty, and in the event of genuine damage or injury, if the said damage is clearly established, it owes reparation to the State having suffered that damage.

There is, so far as I am aware, in international law no hierarchy in the exercise of the right of sovereignty, and the Order issued by the Court has—at least, for the moment—no legal ground for preventing the French Government from making use of its right of sovereignty and exploding an atomic device, as other States have done before it, and as one other State is still doing at the present time, in order to obtain the means of ensuring their own security.

Is Australia's right, in the exercise of its sovereignty, to be regarded as superior to the identical right possessed by France, which would thus rank second when it came to exercise of its own right?

By directing the French Government to "*avoid nuclear tests causing the deposit of radio-active fall-out in Australian territory*" (operative clause of the Order; emphasis added), the Court certainly oversteps the limits of its powers, and appears thereby to be innovating in declaring unlawful the exercise of a right which up to now has been regarded as falling within the sovereignty of a State. The Court is not yet a supreme court as in municipal law, nor does it have legislative powers, and it has no right to hand down a decision against a State which by a formal declaration excludes its jurisdiction over disputes concerning activities connected with national defence.

I entirely agree with Australia that that country runs considerable risk by seeing atomic fall-out descend upon its territory and seeing its people suffer the harmful effects thereof, and for my own part, I would like to see that risk finally exorcised, but I see no existing legal means in the present state of the law which would authorize a State to come before the Court asking it to prohibit another State from carrying out on its own territory such activities, which involve risks to its neighbours.

This is so pertinent that I find it expressed even in the Moscow Treaty of 5 June 1963, the object of which is in fact the prohibition of atmospheric nuclear tests—the French Government, incidentally, is not a party to this Treaty—for Article IV thereof embodies a reservation which is so substantial, probably in order to satisfy the major States which hold the greatest stocks of nuclear weapons, that the prohibition becomes practically ineffective. Article IV provides that:

> "This Treaty shall be of unlimited duration.
>
> Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that *extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country*. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance." (Emphasis added.)

Is it admissible that the reservation effected by these States should remain valid, so as to authorize them to recommence their nuclear experiments if extraordinary events should have jeopardized the supreme interests of their countries, while the Court's Order forbids France to exercise its right to carry out its tests at the present time, when no valid treaty obligation now exists to prevent it from doing so?

Does not the existence of such a treaty, containing such a reservation, demonstrate the lack of legal basis which should have led the Court to dismiss the Australian request for the indication of interim measures?

The point is that if the Court were to adopt the contention of the Australian request it would be near to endorsing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States. Yet Article 2, paragraph 7, of the Charter is categorical on that point.

In the present state of international law, the "apprehension" of a State, or "anxiety", "the risk of atomic radiation", do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests.

Those who hold the opposite view may perhaps represent the figureheads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of the law.

To conclude, there is one consideration which, or so it seems to me, has not sufficiently been taken into account and which it is important not to overlook. I refer to the fact that Australia had itself accepted the conducting by the United Kingdom of nuclear tests above its own territory, more particularly at Maralinga in South Australia, with

devices notably more powerful than those to be used in the French tests, which are located in an area over 6,000 kilometres distant from Australia.

If Australia thus allowed the United Kingdom, with its consent, to proceed to such actions directly above an area subject to its own national sovereignty, it ought to be declared without title to request that the French Government be prohibited from acting in the same manner above an area under French sovereignty.

Consequently, in my opinion, there is no reason to accede to the request for the indication of provisional measures. The question of the illegality of nuclear tests exceeds the competence of the Court and becomes, as I see it, a political problem. No further proof is in my view needed than the statements of the Prime Minister and Foreign Minister himself in his Note to the Minister for Foreign Affairs of the French Government, dated 13 February 1973 (Application, Annex 11, p. 62), in which we find the following words:

> "In my discussion with your Ambassador on 8 February 1973, I referred to the strength of public opinion in Australia about the effects of French tests in the Pacific. I explained that the strength of public opinion was such that, whichever political party was in office, it would be under great pressure to take action. The Australian public would consider it intolerable if the nuclear tests proceeded during discussions to which the Australian Government had agreed."

By way of conclusion, I am inclined to think that the decidedly political character of the case ought, or so it seems to me, to have prompted the Court to exercise greater circumspection and to have caused it to take the decision of purely and simply rejecting the request of Australia for the indication of provisional measures. It is not for the Court to declare unlawful the act of a State exercising its sovereignty within its own territorial limits, or at least to lend credence by its decision to the proposition that the act in question is unlawful. It was therefore wrong for Australia to have secured the benefit of the provisional measures which it sought, and a violation of Article 2, paragraph 7, of the Charter.

(Signed) L. IGNACIO-PINTO.