Interim relief in the International Court: New Zealand and the Nuclear Test cases

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In May 1973 New Zealand and Australia each commenced proceedings against France in the International Court of Justice. At issue was the alleged violation of the rights of the applicants and other states by France's conduct of atmospheric nuclear tests in the South Pacific. Eventually, in December 1974, the Court declared the dispute moot as a consequence of certain undertakings supposedly given by France. Stephen Kós examines New Zealand's record of opposition to nuclear testing and the history of its dispute with France. He goes on to analyse the first phase of proceedings in 1973 when the applicants sought and obtained interim orders enjoining France against the further conduct of atmospheric nuclear tests.

I. THE HISTORY OF THE DISPUTE

New Zealand's decision to place the dispute between itself and France attracted considerable criticism. First, it was said to be anti-French:[1]

> motivated by something other than a concern for the preservation of the environment, protected absolutely, and for the norms of international law, respected absolutely. Behind certain of these campaigns does there not lie a willingness to obstruct our defence policy and to oppose our will for independence?

Secondly, it was said to be a discriminatory action. China was also conducting nuclear tests in the atmosphere, yet the action was brought against France alone.[2] Thirdly, the action was said to be hypocritical, in view of New Zealand's past support for, and involvement in, British and American atmospheric testing:[3]

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1 *Livre Blanc Sur Les Essais Nucléaires* (Comité interministérial pour l'information, Paris 1973), 21. See also Stockholm International Peace Research Institute *French Nuclear Testing in the Pacific* (Stockholm, 1974), 19.

2 *Livre Blanc* op. cit. n. 1, 14. See also diplomatic notes I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 16-17.

3 Sur "Les Affaires Des Essais Nucléaires Devant La I.C J." (1975) 79 Rev. Générale de Dr. Int. Pub., 975; Diplomatic note (6 September 1965) I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 16-17. See also separate opinion of Judge Gros [1974] I.C.J. Rep. 481-482, 280, 285; dissenting opinion of Judge Ignacio-Pinto [1973] I.C.J. Rep. 164, 132-133; S.I.P.R.I. op. cit. n. 1, 19; *Livre Blanc* op. cit. n. 1, 11; Lellouche "Nuclear Tests Cases: Judicial Silence v. Atomic Blasts" (1975) 16 Harv. Int. L.J., 632-633.

> L'Australie et la Nouvelle Zélande, après avoir approuvé et même favorisé dans un passé récent les expériences brittaniques et américaines, feignaient de découvrir soudainement une prétendue irrégularité internationale des expériences français, alors qu'aucune règle internationale opposable à la France ne prohibait les essais nucléaires, et qu'aucun dommage concret ne pouvait être invoqué par les demandeurs.

Fourthly, it was said that the International Court action was simply the implementation of the electoral promises of the newly-elected socialist[4] Labour Governments of New Zealand and Australia.[5] Thus the applicants had, for purely political ends, chosen to [eschew] " . . . conventional diplomatic negotiations . . .".[6] Lastly, it was claimed that New Zealand's action was premature, in that the dispute was not governed by norms or conventions of international law.[7] It followed that the dispute was therefore political and not a proper subject for international adjudication.[8]

This part of the article will briefly examine New Zealand's attitudes to atmospheric nuclear testing since the early 1950's. It will be shown that New Zealand had, since at least 1958, a consistent policy of opposing atmospheric nuclear tests by any nation, and one which transcended internal political boundaries.[9] Particular emphasis will be given to the considerations which eventually led New Zealand to institute proceedings against France in the International Court.

It is convenient to divide this study into four chronological periods, each of which reflects a different attitude to atmospheric testing and to the dispute with France.[10] The periods are: prior to 1958, 1958-1966, 1967-1972 and 1972 onwards.

A. New Zealand's Attitude to Atmospheric Nuclear Testing Prior to 1958

New Zealand's attitude to nuclear testing in the early and mid-1950's was dictated by Western notions of international security. Traditional military alliances were pursued with Australia and the United Kingdom under A.N.Z.U.K., and a newer alliance with the United States was developed under A.N.Z.U.S. The United Kingdom had been engaged in atomic testing in the Pacific since 1952 and the United States since 1946.

In the circumstances outlined above, New Zealand was committed to a policy of supporting atmospheric testing by her treaty partners. Unlike Australia, however, her direct involvement was slight. Whereas Australia, between 1952 and 1957, supplied test sites,[11] scientific facilities, equipment and staff for the British

4 McWhinney *World Court And The Contemporary International Law Making Process* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1979), 38.
5 Separate opinion of Judge Gros [1974] I.C.J. Rep. 480-481, 280.
6 McWhinney op. cit. n. 4, 40.
7 *Livre Blanc* op. cit. n. 1, 21. See also [1974] I.C.J. Rep. per Judge Gros, 276, 286-288, and per Judge Petrén, 487-488, 305-306.
8 *Livre Blanc* op. cit. n. 1, 20; dissenting opinions of Judges Petrén and Ignacio-Pinto [1973] I.C.J. Rep. 161-162, 164.
9 It is sometimes wrongly stated that New Zealand's policy of opposition began in 1963. This was the date when its protests against Pacific tests by France began.
10 An excellent treatment is given in Nigel Roberts *New Zealand and Nuclear Testing in the Pacific* (N.Z. Institute of Int. Affairs, Wellington, 1972).
11 Maralinga, Woomera and Monte Bello Island.

tests,[12] the New Zealand contribution was little more than the provision of a meteorological station and two frigates to monitor the 1956 British tests at Christmas Island.[13]

In 1954 the people of the Marshall Islands petitioned the United Nations Trusteeship Council after fallout from American testing harmed the people of the atolls of Rongelab and Utirik.[14] Then New Zealand voted against a motion[15] sponsored by India calling for an advisory opinion from the International Court as to the legality of atmospheric testing.

While there was wide public concern at the risk of radiation hazards, there was general ignorance at the time of the extent of the risk. In 1974 the New Zealand Attorney-General, the Hon. Mr Finlay, Q.C., made reference to the scientific context of the 1950's:[16]

> In the world of the 1950s shoe shops in my country and in many others had X-Ray machines through which the customer could see the bones of his feet in the shoes he was trying on. In the world of the 1970s we are appalled by, and forbid, these unnecessary exposures to the damaging effects of radiation. This may well be a case of acquiring wisdom by hindsight but it is also one of keeping in step with advances in scientific knowledge.

The Government took the view that the risks to international security from opposing testing outweighed those to health from supporting it.

B. 1958-1966: Opposition to Atmospheric Testing: Diplomatic Negotiation with France

On 12 December 1957 a Labour Government was elected. One of its electoral policies had been the opposition of all future nuclear tests.[17] Henceforth New Zealand began to adopt an independent stance on atmospheric testing. The cessation of nuclear testing was a part of the wider ideal of disarmament.[18] In 1958 the United States, United Kingdom and the Soviet Union declared a moritorium on testing. The 1958 Geneva Conference on the Discontinuance of Nuclear Weapon Tests, while achieving almost complete agreement on a system of controlling testing, was unable to reach agreement on the inspection of test sites.[19] At the same time, resolutions, supported by New Zealand,[20] were passed in the General Assembly calling for international agreement on the cessation of nuclear weapon tests.

In the early 1950's France had decided to develop nuclear weapons. The official order to proceed with a testing programme at Reganne, in the Algerian

12 Roberts op. cit. n. 10, 5; *Livre Blanc* op. cit. n. 1, 12.
13 N.Z. External Affairs Rev. (November 1956), 16; Roberts op. cit. n. 10, 5; *Livre Blanc* op. cit. n. 1, 12, 77.
14 T. Pet. 10/28.
15 Draft Resolution T/L 498 (15 June 1956).
16 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 255.
17 Roberts op. cit. n. 10, 6.
18 Cf. ibid., 6-7.
19 "X" "Nuclear Test Ban Treaties" (1963) 39 Brit. Year Book Int. L., 449.
20 General Assembly Res. 1252 A & B (XII) (4 November 1958).

Sahara, was given in 1958.[21] Upon that announcement thirty-two Middle-East and African nations introduced a General Assembly resolution expressly condemning French testing, for the threat it posed to the moritorium, and for ". . . causing anxiety among all peoples, and more particularly those of Africa." The motion was passed and was supported, significantly, by New Zealand.[22] The United States, United Kingdom and France all voted against it. Australia abstained. This was the most striking evidence yet of New Zealand's developing independent stance.

At the end of 1960 a National Government, under the Rt. Hon. Keith Holyoake, resumed power. It adopted the pro-disarmament policy of its Labour predecessor. After the 1961 breakdown of the Geneva Conference and the cessation of the moritorium on testing, the Government expressed profound dismay[23] at the decision of the United States and the Soviet Union to resume testing, citing as reasons:

1. Nuclear weapons are a threat to world security;[24]
2. Nuclear weapons testing poses a threat to the lives of present and future generations.

These reasons, having their birth in General Assembly Resolution 1379, have consistently remained the bases for New Zealand's opposition to atmospheric testing.[25]

During 1962 the testing programmes of both East and West were exceptionally extensive.[26] New Zealand established a monitoring system in the Islands to monitor fallout, in the interests of public health, and to allay public disquiet.[27] Then, later that year and as a consequence of the Cuban missile crisis, the Soviet Union indicated willingness to sign a draft partial test ban treaty provided a non-aggression pact was entered into at the same time.[28] The Moscow Partial Nuclear Test Ban Treaty of 1962 prohibited all nuclear tests in any environment but underground. Significantly, New Zealand was the fourth nation to sign, following only the three sponsors of the treaty.[29]

France had earlier abandoned atmospheric testing at Reganne in favour of underground testing at Hoggar. Of the nineteen tests conducted in Algeria between February 1960 and February 1966, only four were atmospheric.[30] The last had been in April 1961.[31] Upon Algeria's independence in 1963, France had the use

21 S.I.P.R.I. op. cit. n. 1, 12. The first French explosion, a 60-70 Kt. test, occurred on 13 February 1960.
22 General Assembly Res. 1379 (XIV) (20 November 1959). Roberts op. cit. n. 10, 7, also notes the Soviet bloc, Canada, Norway and Denmark as supporters. The latter three strongly supported New Zealand efforts in the 1970's.
23 Roberts op. cit. n. 10, 8.
24 Contrast that with the earlier Holland Government attitude.
25 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 17-19, 22 (diplomatic notes 12 September 1963 and 27 May 1966).
26 S.I.P.R.I. op. cit. n. 1, 38.
27 Roberts op. cit. n. 10, 8-9.
28 "X" op. cit. n. 19, 453.
29 N.Z. External Affairs Rev. (October 1963), 26.
30 *Livre Blanc* op. cit. n. 1, 3.
31 S.I.P.R.I. op. cit. n. 1, 33.

of the Sahara test sites upon sufferance only. France thereupon decided to establish its Pacific Tests Centre at Mururoa Atoll in the Tuamotu Archipelago. For engineering and economic reasons atmospheric testing was to be resumed.

The New Zealand Government learnt of the impending move through media reports. In two notes to the French Government New Zealand stated its position:[32]

> There is widespread public apprehension that fallout from any tests in this vicinity will produce hazards to health and contaminate food supplies, both land and marine, in the Cook Islands and indeed in New Zealand itself.
>
> In international forums and in public statements, the New Zealand Government has repeatedly stressed over recent years its opposition to the continuation of nuclear testing. It is the Government's earnest desire to see the cessation of all nuclear tests by means of an effective international agreement which it regards as a valuable means of creating a climate in which progress towards substantive measures of disarmament would be encouraged. In addition, it would end the danger of continued contamination from radioactive fallout.

After noting the serious anxiety felt by the New Zealand public, the second note called upon the French Government to reconsider its position.

The French reply outlined that Government's position. "Mais en l'absence d'une telle politique et aussi longtemps que d'autres puissances posséderont les armes modernes il estime de son devoir de conserver sa liberté dans ce domaine."[33]

By 2 July 1966 (the date of the first French Pacific test), the New Zealand Government had established a consistent and non-discriminatory policy of:

1. absolute opposition to atmospheric testing, in the interests of international security, health and welfare (evidenced in diplomatic notes between New Zealand and France);[34]
2. exchanging scientific information with the French authorities;
3. independently monitoring Pacific nuclear fallout levels; and
4. stating its intention to ". . . hold the French Government responsible for any damage or losses incurred as a result of the tests by New Zealand or the Pacific Islands for which New Zealand has special responsibility or concern."[35]

C. 1967-1972: Engaging World Support: A Global Role for New Zealand

While replying politely to New Zealand's diplomatic protests, France showed no sign of reconsidering its 1963 decision. Thus the New Zealand Government adopted a new tack. The individual diplomatic notes addressed to France between late 1967 and mid 1971 took on the appearance of standard form documents. In these notes the world disarmament objective and the fear of contamination

32 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 13-15 (diplomatic notes 14 March 1963 and 25 May 1963). It will be noted that the latter note preceded the Partial Test Ban Treaty by 2½ months.
33 Ibid., 16 (diplomatic note 25 June 1963).
34 Ibid., 20-24.
35 Ibid., 22 (diplomatic note 27 May 1966).

are stressed relatively evenly.[36] The New Zealand Government continued to support the numerous General Assembly resolutions calling for a comprehensive test ban treaty.[37] In debates the New Zealand representatives criticised France and China particularly. New Zealand sought to include an express reference to these two nations in one of these resolutions but received more abstentions than affirmative votes.

In 1971 New Zealand adopted a more aggressive role. In August 1971 New Zealand joined and transmitted the communique of the first meeting of the South Pacific Forum, held at Wellington, which expressed ". . . concern at the potential hazards that atmospheric tests pose to health and safety and to marine life . . .".[38] In June 1972 the prime ministers of Australia and New Zealand addressed a joint statement to the chairman of the United Nations Committee on Disarmament protesting the French programme.[39] Later that month the A.N.Z.U.S. Council issued a communique calling for adherence to the Partial Test Ban Treaty.[40]

In July 1972, the Minister for the Environment, the Hon. Mr MacIntyre, addressed the full Stockholm Conference on the Human Environment:[41]

> My Government believes that it is time the principles guiding national policies in activities such as operations of nuclear power stations were applied internationally, and that all activities such as nuclear testing which increase the radiation dose experienced by the world's population should be justified in terms of the benefits they bring to the population. So far as my Government is aware no one has been prepared to argue that continued nuclear testing brings any such benefits.

New Zealand and Peru co-sponsored the Conference resolution against radiation contamination from atmospheric nuclear tests. New Zealand (together with Japan and Peru) sought to include a demand that nations immediately cease such testing, but the motion failed after intense opposition from China.[42] In August 1972 New Zealand, Australia, Canada, Chile, Colombia, Fiji, Indonesia, Japan, Malaysia, Peru, Phillipines, Singapore and Thailand introduced a draft resolution against nuclear testing creating marine pollution at the United Nations Seabed Committee meeting.[43] New Zealand was chosen by those states to introduce the draft.

The Government's activist policy was neatly summed up by the Prime Minister in answering a Parliamentary question:[44]

36 Cf. Roberts op. cit. n. 10 who appears to suggest that much greater weight was being placed on the disarmament objective. The diplomatic correspondence would not seem to bear this out. It was, however, certainly the case later in this period of study.
37 General Assembly Ress. 2032 (XX); 2163 (XXII); 2343 (XXII); 2455 (XXIII); 2604B (XXIV); 2661A (XXV); 2663B (XXV); 2828 (XXVI).
38 N.Z. Foreign Affairs Rev. (August 1971), 6-7; I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 154.
39 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 73.
40 Ibid., 74.
41 N.Z. Foreign Affairs Rev. (August 1972), 26.
42 Ibid., 20.
43 Ibid., 38.
44 Ibid., 102.

> [The failure in the General Assembly in 1971] . . . was . . . clear indication that New Zealand's opposition to testing in its own region would stand a greater chance of success if it was acknowledged that it was part of the broader problem of nuclear testing. The Government's efforts during this year have therefore been directed to mobilising international opinion against nuclear testing in general with a view to the achievement of a comprehensive test ban treaty.[45]

D. 1972 Onwards: A Dynamic Foreign Policy

On 25 November 1972, a Labour Government was re-elected.[46] The new Government had fewer inhibitions than its predecessor:

> . . . [The Government] will avail itself of every possible means to convince those responsible that the tests in the Pacific must be halted.[47]
>
> The Government will oppose more vigorously the continued testing of nuclear weapons, especially in the atmosphere and in the Pacific. The co-operation of our neighbours will be sought in the pursuit of all effective and practical means of achieving an end to such tests.[48]

In the latter part of 1972, the Ministry of Foreign Affairs, in the course of advising its then minister, the Rt. Hon. Sir Keith Holyoake, had considered the prospects of putting the dispute before the International Court. At that time the ministry's legal division had concluded that there was little chance of being able to maintain contentious proceedings because of the French reservation to its 1966 declaration of acceptance of the court's jurisdiction under the optional clause.[49] The prospects of obtaining an advisory opinion were also canvassed. France would have vetoed any move in the Security Council. The advisers took soundings in the General Assembly. To have obtained the necessary majority in the General Assembly would, at that time, have proved a difficult task. Even if the majority were obtained, the Court might decline to render the opinion on the basis of the *Eastern Carelia*[50] doctrine that advisory proceedings are not to be abused as a back-door means of obtaining a decision in a reservation-barred contentious case. And even if the Court gave a favourable opinion, that would not bind France to any course of action.

In October 1972 Professor D. P. O'Connell was instructed by the states of South Australia, Western Australia and Tasmania to research the legality of nuclear testing. His report contained the suggestion that the International Court would have jurisdiction over the dispute under article 17 of the General Act for the Pacific Settlement of International Disputes of 1928. New Zealand, Australia and France had all acceded to this instrument on the same day, 21 May 1931.[51] This discovery was transmitted to the Federal Government who

45 N.Z. Foreign Affairs Rev. (October 1972), 60.
46 A Labour Government was elected in Australia on 5 December 1972. It had not held office since 1949.
47 N.Z. Foreign Affairs Rev. (December 1972), 9.
48 N.Z. Foreign Affairs Rev. (February 1973), 30 (extract from the Speech from the Throne).
49 Pursuant to art. 65(1) of the I.C.J. Statute and art. 96(1) of the U.N. Charter.
50 (1923) P.C.I.J. Ser. B., No. 5, 166.
51 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 150.

in turn consulted the New Zealand Government. By the time of the New Zealand general election in November 1972, neither state had committed itself to a recourse to law.

On 19 December 1972, the Prime Minister, the Rt. Hon. Mr Kirk, wrote to the French ambassador, summarising New Zealand's position. He stressed New Zealand's two-fold objection to nuclear testing, and added to it the region's ". . . resentment that a European power should carry out such experiments not in its own metropolitan territory but in . . . the region in which we and Pacific peoples live."[52] The note ended:[53]

> My Government is committed to working through all possible means to bring the tests to an end, and we shall not hesitate to use the channels available to us in concert as appropriate with like-minded countries. It is my hope, however, Mr Ambassador, that you will convey to your Government while in Paris my earnest desire to see this one element of serious contention removed from what is in other respects an excellent relationship between our countries. For my part, I see no other way than a halt to further testing.

On both sides of the Tasman legal teams were established to study the possibility of seeking relief through the International Court. The Australian Government instructed Professor O'Connell, Mr E. Lauterpacht Q.C., and Mr Robert Ago, an Italian lawyer who later became a judge of the Court. Following their advice, and upon the urging of the Prime Minister, the Rt. Hon. Mr Whitlam, and the Attorney-General, Senator Murphy, the Australian Government committed itself to going to the International Court. This decision, not publicly announced, was communicated to the New Zealand Government before the end of 1972.

Nothwithstanding this consideration, the New Zealand Government refused to commit itself. Close consultation with Australia followed. Members of the New Zealand team (Professor R. Q. Quentin-Baxter, Mr K. J. Keith (both of the Faculty of Law at Victoria University of Wellington), Mr C. D. Beeby (head of the Legal Division, Ministry of Foreign Affairs), and National Radiation Laboratory Director, Mr H. J. Yeabsley), flew to Australia on a number of occasions.

On 10 January 1973, the Rt. Hon. Mr Whitlam issued a press statement:

> The Australian Government has communicated its position to the French Government that the conducting of the tests would be unlawful and has invited an assurance that no more atmospheric tests would be held this year or in the future. And in the event of the Australian Government not receiving satisfactory assurances from the French Government, the Australian Government proposes to institute proceedings in the International Court of Justice to restrain the conducting of future tests in the Pacific by the French Government.

On the same day, the Rt. Hon. Mr Kirk said:

> New Zealand is giving serious consideration to the possibility of joining with Australia in an approach to the International Court of Justice in an attempt to halt continued nuclear testing in the South Pacific. . . . We have known for some time of this intention on the Australian Government's part and our studies of the legal issues and procedures involved is well in hand with a view to discussion with Mr Whitlam during his forthcoming visit to Wellington.

52 Ibid., 31-33.
53 Ibid., 33.

At no stage did the Kirk Government see the International Court as the only remaining avenue of protest. New Zealand continued to pursue the issue at international forums, particularly in the United Nations. It still hoped to hold a regional conference devoted to testing in the Pacific.[54] Secondly, it continued to press for accession by all states to the Partial Test Ban Treaty. Thirdly, it promoted the concept of a comprehensive test ban treaty. Fourthly, it sought opinions on the possibility of establishing an embargo against the export of nuclear materials to states refusing to accede to the Partial Test Ban Treaty. Fifthly, it considered the concept of a nuclear-free zone in the South Pacific.[55] Sixthly, as a last resort if all other methods failed, it would consider sending a frigate to patrol the high seas off Mururoa. But, seventhly, it did not give up hope of directly negotiating a settlement with France.

After the New Zealand - Australia Prime Ministerial Conference in late January 1973, the Rt. Hon. Mr Kirk announced:[56]

> We have considered the approach Australia is making to the International Court, we are interested in it, we have undertaken some legal studies, and we are examining the possibility of joining Australia in that respect, although that is not all we are examining. We have similarly considered consultations with other countries and we will continue with that.

On 19 February 1973, the French ambassador replied to the Rt. Hon. Mr Kirk's December letter. The French policy was ". . . dictated by the overwhelming requirement of national security."[57] The French programme was responsibly conducted well within the parameters of accepted scientific standards. The French Government ". . . veut espérer celui-ci s'abstiendra de tout acte de nature à porter atteinte aux droits et intérêts fondamentaux de la France."[58]

At about the same time the New Zealand legal team prepared a paper for Cabinet assessing New Zealand's chances at law. It noted that Professor O'Connell had advised the Australian Government that in order to succeed on the merits a real possibility of damage would need to be proven. This created a problem for New Zealand as it had adopted the attitude that the real risk was potential, not actual.[59] Consequently the New Zealand advisers concluded that while there was a good chance of succeeding on jurisdiction, the battle with regard to admissibility and the merits would be uphill for two reasons.

First, the Partial Test Ban Treaty had acquired such wide international acceptance as to produce an *opinio juris* and to become part of customary inter-

54 N.Z. Foreign Affairs Rev. (August 1973), 9 et seq. (P.M.'s address to the Institute of International Affairs).

55 Labour mooted this while still in opposition. The Pacific Basin countries meeting in 1972 came nearest to this objective.

56 *Evening Post,* Wellington, New Zealand, 23 January 1974, 5.

57 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 35-37.

58 Ibid., 36.

59 Although it is noteworthy that New Zealand and the United Kingdom were so conscious of the risk that they moored a vessel, the "Sir Percival", off Pitcairn Island, ready to evacuate Islanders to New Zealand in the event of an accident: N.Z. Foreign Affairs Rev. (August 1973), 11.

national law.[60] On the other hand, two of the five nuclear weapon testing states had not acceded to the Treaty.[61] *Opinio juris* would be difficult to maintain. Secondly, whether or not atmospheric testing was unlawful ipso facto, the consequent fallout was an "abuse of right" and an unjustified invasion of territorial sovereignty in the absence of any countervailing benefit.

Two problems arose with regard to the last argument. First, the precedents[62] were somewhat slender. However the Court would be aware of popular international support for New Zealand's case and this might encourage it to hold in the applicant's favour. Secondly, the Court would require at least some proof of damage.[63] Australian scientists had calculated that the tests to 1972 would have produced 26 cases of thyroid cancer and 14 cases of leukemia.[64] New Zealand advisers were not wholly convinced by such extrapolations. They preferred to advance the fear and resentment of citizens as the principal "injury".

Given that it might be two years before the Court gave judgment on the merits, the advisers argued that New Zealand's prime objective should be to obtain interim measures of protection. The advisers assessed the pros and cons of proceeding. If the request for interim measures was declined that could first, prevent New Zealand sending in a frigate to the test zone (as that could be seen as effectively aggravating the dispute before the Court); secondly, have the effect of stifling public discussion in the General Assembly (on the basis of some sort of sub-judice consideration); and thirdly, set back the development of a customary rule of international law. Thus the advisers would have recommended against going alone to the International Court on the basis that the damage of losing would exceed the benefit of succeeding.

The advisers went on to point out, however, that the presence of Australia strongly encouraged a New Zealand initiative. First, any decision regarding Australia would be bound to affect New Zealand. Secondly, the Australian case would be severely weakened if New Zealand failed to join. The obvious absence of the principal protagonist would attract an adverse inference. Thirdly, New Zealand's presence would greatly strengthen the Australian, and indeed regional, case. New Zealand's standing was very much better than Australia's. It had a longer and consistent record of protest, had established a wider monitoring network,

60 New Zealand also pointed to numerous other treaties, General Assembly and other U.N. resolutions, scientific standards, the Stockholm resolutions and principles, international protests, and the writings of publicists: I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 203.

61 France and China.

62 Principally the *Corfu Channel* case [1949] I.C.J. Rep. 15, 22 and *Trail Smelter Arbitration* (1931-1941) 3 U.N.R.I.A.A. 1905. See also Eagleton *The Responsibility of States in International Law* (New York University Press, New York, 1928), 80.

63 *Trail Smelter Arbitration*: ". . . no State has the right to use or permit the use of its territory in such a manner *as to cause injury* . . . to the territory of another . . .". (Emphasis added).

64 S.I.P.R.I. op. cit. n. 1, 23.

and moreover, was very much closer to the test site, particularly when the Cook Islands were considered.[65]

At the end of February 1973, Cabinet decided that New Zealand would take the dispute to the International Court. This decision was not publicly announced. Before filing the application, New Zealand attempted a last-ditch direct diplomatic initiative. The Deputy Prime Minister, the Rt. Hon. Mr Hugh Watt, visited Paris in mid-April. In a letter preceding his visit, the Rt. Hon. Mr Kirk wrote: "My Government regards [the testing] as unacceptable and in violation of New Zealand's rights under international law, including its rights in respect of areas over which it has sovereignty."[66]

The Watt meeting was inevitably compromised by the considerations and decision that had gone before it. The assurances sought from France were not given. But it was later claimed that one good thing came of the visit:[67]

> . . . [The Deputy Prime Minister] managed . . . to persuade the Government of France that the feeling about nuclear testing in New Zealand was not just a political campaign on the part of the Government, but that it reflected deep and widespread ill-ease in the community on this question.

On 4 May 1973, the Rt. Hon. Mr Kirk wrote to the French President informing him that New Zealand was submitting the dispute to the International Court. Of this decision, the Rt. Hon. Mr Kirk later said:[68]

> When we failed to gain an assurance that the test programme would come to an end, we placed our dispute before the International Court of Justice, demonstrating our belief in the integrity of treaties, and our belief in the rule of law.

II. INTERIM MEASURES OF PROTECTION: THE NEW ZEALAND PLEADINGS

A. Summary of the New Zealand Argument

New Zealand advanced, in common with Australia, two titles of jurisdiction upon which to indicate interim measures. First, the Court was asked to indicate those measures in accordance with article 33 of the General Act for the Pacific Settlement of International Disputes, 1928. This provided:

> 1. In all cases where a dispute forms the object of arbitration or judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute, or the Arbitral Tribunal, shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures.
>
> . . .
>
> 3. The parties undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute.

65 See *Evening Post*, Wellington, New Zealand, 23 January 1974, 7/vi, where the Rt. Hon. Mr Kirk refers to the proximity advantage. See also N.Z. Foreign Affairs Rev. (August 1973), 4.

66 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 38.

67 N.Z. Foreign Affairs Rev. (August 1973), 12.

68 Idem. (P.M.'s address to New Zealand Institute of International Affairs).

New Zealand and France had acceded to the General Act on the same day. Neither party had taken advantage of the express provision for denunciation. Its validity had never been questioned. The 1948-1949 Revision proceeded on the basis that the 1928 Act continued in force. Its validity was affirmed by the practice of states and international organisations. In particular, France had relied upon the General Act in the *Norwegian Loans*[69] case, and affirmed its obligations under the instrument in a ministerial answer to the National Assembly in 1964.[70] Prima facie it was applicable to this dispute.[71]

The second title advanced was article 41 of the Statute of the Court, read in conjunction with article 66 (as it then was) of the Rules of the Court. Article 41 provided, inter alia:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

Rule 66 provided, inter alia:

> 1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures of which the indication is proposed.

Having established jurisdiction upon which to indicate interim measures, New Zealand then argued that this was a "proper case" for the indication of such measures. First, counsel, the Solicitor-General of New Zealand, Mr Savage, Q.C., addressed the requirement that the applicant advance real rights, the preservation of which demanded the interim measures sought. In indicating interim measures under article 41 of the Statute there were at least three, and probably four, different tests which could be considered:[72]

> 1. . . . [W]hether interim measures are necessary to preserve the rights forming the subject of the dispute.
> 2. . . . [W]hether in the absence of an indication of interim measures there would be irreparable prejudice or damage to those rights.
> 3. . . . [Whether] particular actions likely to be taken by one of the parties would affect the possibility of the full restoration of the rights claimed by the other party in the event of a judgment in its favour.

The application of any or all of these tests pointed to the indication of interim measures.[73] In addition, counsel noted that a fourth, slightly wider, test existed:[74]

> 4. . . . [Whether] interim measures . . . [are] necessary to prevent the aggravation and extension of a dispute [before the Court].

This, he argued, was entirely consistent with article 41. "In the great majority of cases, action by one party . . . which aggravates or extends a dispute will tend to have a prejudicial effect on the rights of the other party."[75]

69 I.C.J. Pleadings, *Norwegian Loans case* vol. i, 172-173, 180, 301. The Court did not eventually consider the validity of the General Act: [1957] I.C.J. Rep. 24-25. Judge Basedevant considered it applicable: [1957] I.C.J. Rep. 74.
70 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 102-103.
71 Ibid., 103.
72 Ibid., 116-117.
73 Ibid., 116.
74 Ibid., 117.
75 Idem.

Counsel then considered article 33 of the General Act.[76] This mas said to be based on article 41 of the Statute, and entirely consistent with that provision. It ". . . sets out precisely the same principle in the form of a specific and unqualified undertaking by the parties . . .".[77] Thus:[78]

> There can . . . be no doubt that it would be entirely proper for the Court to base itself on Article 33. It would also . . . be appropriate, for the Article is intended plainly to constitute a comprehensive régime governing the matter of interim relief in any case that is before the Court involving two parties to the General Act.

Counsel then reviewed the rights claimed by New Zealand. He asked that, in the absence of an assurance by France that testing would cease, interim measures should be indicated to prevent irreparable prejudice to and violation of those rights.[79]

The agent for New Zealand, Professor R. Q. Quentin-Baxter, addressed the Court on the matter of jurisdiction *on the merits*. Two titles were adduced: First, article 17 of the General Act, read in conjunction with articles 36(1) and 37 of the Statute; and secondly, article 36(2) of the Statute. With regard to the latter head, the learned agent argued that the Court ought not to consider the effect of the French reservations[80] to its acceptance of compulsory jurisdiction under article 36(2). Professor Quentin-Baxter cited the *Anglo-Iranian Oil Co.*[81] and *Interhandel*[82] cases in support of this proposition. It will later be submitted that neither case supports the learned agent in the manner suggested.[83]

In the alternative, if the Court did choose to examine the reservations, the learned agent submitted that first, the French reservation was narrower than the American in *Interhandel,* and "[i]f the Court did not consider it appropriate to investigate the significance of the United States reservation in the *Interhandel* case, it would have . . . less occasion to do so here."[84] Secondly, the reservation was not conclusive:[85]

> . . . the validity, interpretation and effect . . . of the French reservation are issues which, as the Court well knows, can be the subject of debate; it cannot, we submit, be baldly asserted that there is a manifest absence of jurisdiction under Article 36, paragraph 2, of the Statute.

With regard to the first head of jurisdiction as to the merits (namely article 17 of the General Act), the learned agent repeated and expanded on the submissions made by the Solicitor-General with regard to jurisdiction to indicate interim measures.[86] The General Act was only marginally affected by the demise of the League of Nations; it was not terminated by the 1948-1949 Revision Act; neither

76 Ibid., 118-119.
77 Ibid., 118.
78 Ibid., 119.
79 Ibid., 120-121.
80 See I.C.J. *Yearbook 1972-1973* (The Hague, 1973), 60.
81 [1951] I.C.J. Rep. 89.
82 [1957] I.C.J. Rep. 105.
83 Part III(*B*) infra.
84 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 129. Again it will be respectfully submitted that this is a misinterpretation of the *Interhandel* case.
85 Idem.
86 The distinction between the two forms of jurisdiction is vital. It is discussed in Part III(*B*) infra.

party had denounced it; and state (including French) and other international practice supported its continuing validity.[87]

Having regard to all the foregoing submissions, the learned agent submitted that not only was there no manifest lack of jurisdiction, but that jurisdiction on the merits was indeed reasonably probable.[88]

B. New Zealand's Case Must be Distinguished from the Australian Case

The New Zealand and Australian cases were markedly different in a number of ways in both 1973 and 1974. A necessarily incomplete list of some of the principal distinctions follows.

1. *Equities favoured New Zealand*

New Zealand's past diplomatic and political conduct placed it in a far stronger position in litigating the issue than the Australian Government. Five instances may be noted.

First, New Zealand had only a very limited association with the United Kingdom atmospheric testing in the 1950's. Australia, which, having been given precedence at the oral hearings in 1973 and 1974,[89] was seen as the principal applicant, was attacked by several sources for want of clean hands.[90] This did not assist New Zealand's case.[91]

Secondly, New Zealand had had a consistent and outspoken record of opposition to all atmospheric nuclear testing since 1958. The Australian record indicated a lesser commitment to the issue until the abrupt decision of the Labour Cabinet to take it to the Court. At the 1972 Stockholm Conference on the Human Environment, for instance, the Australian Government had been reluctant to take any stand which would offend France.[92]

Thirdly, the territory of New Zealand was more proximate to Mururoa than that of Australia. The Cook Islands, over which New Zealand exercised sovereignty, were 1,050 miles from the test site; New Zealand 2,500 miles away and Australia (together with Chile and Mexico) was approximately 4,000 miles away. Conse-

87 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 130-140.

88 Ibid., 140, applying the tests of the majority in the *Fisheries Jurisdiction* case [1972] I.C.J. Rep. 15, 33, and of Judges Winiarski and Badawi (dissenting) in the *Anglo-Iranian Oil Co.* case [1951] I.C.J. Rep. 96-97.

89 As New Zealand filed its memorial on 2 November 1973, and Australia filed its memorial on 23 November 1973, it might be suggested that New Zealand deserved precedence at the 1974 oral hearings: See Rules of the Court, art. 50(1).

90 *Livre Blanc* op. cit. n. 1, 11; Judge Gros (separate opinion) [1974] I.C.J. Rep. 481-482, 285, 280; Lellouche op. cit. n. 3, 632-633; McWhinney op. cit. n. 4, 56-57; Judge Ignacio-Pinto (separate opinion) [1973] I.C.J. Rep. 163-164. As to the application of equity in international law, see Jenks *Prospects of International Adjudication* (Stevens, London, 1964), 316-427; and Chattopadhyay "Equity in International Law: Its Growth and Development" (1975) 5 Ga. J. Int. & Comp. L., 381.

91 Equity was applied in the *Diversion of Water from the Meuse* case (1937) P.C.I.J. Ser. A/B, No. 70.

92 Roberts op. cit. n. 10, 23.

quently, New Zealand would have been in a stronger position to sustain the abuse of rights argument at a merits stage.

Fourthly, the annex attached to the French Government's note to the Court of 16 May 1973, alleged that Australia had violated the General Act by purporting to modify her reservations on the commencement of World War II so as to exclude ". . . any events arising out of events occurring during [the] present crisis." Consequently France regarded itself as not bound to respect a treaty which Australia had ". . . ceased to respect since a date now long past."[93] The authors of the joint dissenting opinion, in 1974, alone considered the allegation, and eventually dismissed it on the basis that France equally had violated the terms of its acceptance of the optional clause.[94] However, they noted that New Zealand's modification was in conformity with the Act, and ". . . in consequence, no question of an alleged breach of the Act could even be suggested in the case of New Zealand."[95]

Finally, during the 1960's, Australia had publicly declared that it did not consider that General Assembly resolutions had any legally binding force:[96]

> The Solicitor General, Sir Kenneth Bailey, speaking in the Sixth Committee of the General Assembly at its Seventeenth Session, pointed out that resolutions of the General Assembly, whether in the form of recommendations or of declarations, did not create rules of international law which would be binding even on members of the Organisation.

This public attitude, not shared by New Zealand, would have weakened any Australian argument at the merits stage that there was a rule of customary international law prohibiting atmospheric testing without proof of injury.[97]

2. *Different rights asserted*

While the rights advanced by each applicant as violated by atmospheric testing appear similar, certain differences do emerge upon close examination.[98] First, New Zealand advanced certain rights it claimed were owned *erga omnes,* in equal measures to all states.[99] These were the rights of freedom from radioactive fallout-producing nuclear tests, and of freedom from ". . . unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment . . .". New Zealand, in view of its record of support for the Partial Test Ban Treaty and related General Assembly resolutions, and its proximity to the test site, was surely the most eminent applicant possible.[100] And further, as was stated in the *Barcelona Traction* case:[101]

93 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 352.
94 [1974] I.C.J. Rep. 356-357.
95 Ibid., 510.
96 O'Connell *International Law in Australia* (Law Book Co., Sydney, 1966), 74. Professor O'Connell was counsel for Australia. The foreword was written by Sir Garfield Barwick, the ad hoc Judge. Judge Ignacio-Pinto would no doubt have made something of this.
97 Australia ran the argument in its memorial, notwithstanding: I.C.J. Pleadings, *Nuclear Tests Cases* vol. i, 334.
98 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 8 (New Zealand); vol. i, 14 (Australia).
99 Ibid., vol. ii, 204.
100 New Zealand also advanced its case on behalf of the peoples of the Cook Islands, Tokelau Islands and Niue.
101 [1970] I.C.J. Rep. 32.

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*

Australia on the other hand phrased the rights advanced more in terms of harm to its own interests.

Secondly, while both applicants argued that the fallout constituted an invasion of sovereignty, New Zealand stressed the right to freedom from harm, ". . . including apprehension, anxiety and concern, to the people and Government of New Zealand and of the Cook Islands, Niue and the Tokelau Islands." Australia, however, asserted that its sovereign right to determine ". . . whether Australia and its people shall be exposed to radiation from artificial sources . . ." was violated by the French testing.

Thirdly, both applicants stated that testing was a violation of the freedoms of passage and exploitation on, over, and under, the high seas. Australia expressly referred to the interference to ships and aircraft, and pollution of the high seas, caused by testing. It is clear that the more widely phrased New Zealand submission also incorporated French naval interference with vessels crewed by New Zealanders, and cannot be read as limited to the effects of pollution and the creation of prohibited zones.[102]

3. *Different remedies sought*

Australia asked the Court to declare that ". . . the carrying out of *further* atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law."[103] (Emphasis added). Australia also sought coercive relief in the form of an injunction ". . . that the French Republic shall not carry out any *further* such tests."[104] (Emphasis added).

New Zealand, on the other hand, sought only a declaration that:[105]

> [T]he *conduct* by the French Government of nuclear tests in the South Pacific region that give rise to radioactive fallout *constitutes a violation* of New Zealand's rights under international law, *and* that these rights will be violated by any further such tests. (Emphasis added).

Two points may be made. First, nothing in those words indicates that New Zealand sought only a declaration as to future conduct. Secondly, the last twelve words indicate even more strongly that the declaration was sought as to the legality of such conduct past and future.

102 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 205. This is significant in that the unlawful acts of the French navy can be seen to be incorporated into the dispute before the Court.

103 Ibid., vol. i, 14-15.

104 Ibid., 15.

105 Ibid., vol. ii, 9. The idea of requesting an injunction had been contemplated at one time: N.Z. Foreign Affairs Rev. (May 1973), 32.

4. *'Injury' alleged*

As noted in Part I, infra, the New Zealand Government had serious reservations as to the harms to health that Australian scientists had extrapolated from the collected data. Transborder pollution was a fact of life elsewhere, as in industrialised Europe. New Zealand therefore advanced the fear and resentment of her people as additional evidence of the harm generated by the French conduct.

5. *French note to the Court: 16 May 1973*

This note,[106] declaring the Court incompetent to deal with the dispute, included an annex which contained extensive argument on the validity and applicability of the General Act. The Australian Attorney-General initially submitted that as this document was not properly introduced into the proceedings, the Court ought to ignore it.[107] The New Zealand Attorney-General, on the other hand, submitted that if it took the French Government twenty-two pages to argue the case against jurisdiction, then it could not be said that the absence of jurisdiction was manifest.[108] Australia later changed its position and used the French annex in argument.[109]

6. *French reservation of 20 May 1966*

The French acceptance of compulsory jurisdiction under the optional clause was amended in 1966 to exclude, inter alia ". . . disputes concerning activities connected with national defence."[110]

Australia advanced two alternative submissions in its memorial. First, if the reservation was self-judging[111] then it was null and void.[112] Secondly, if the reservation lent itself to an objective interpretation, it did not apply ratione materiae to this dispute.[113] New Zealand advanced only the second argument.[114] Its advisors took the view that if the reservation was declared void for subjectivity it could not be severed and the entire French declaration would thereby be anulled.[115]

It may be suggested that the second argument, inapplicability, was chronically weak. More so in the Australian case. The mere fact that the French testing also had as an objective national aggrandisement cannot mean that the activity

106 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 347-357.
107 Ibid., vol. i, 183.
108 Ibid., vol. ii, 103, 252.
109 Ibid., vol. i, 306, 392, 411.
110 The prior acceptance in 1959 did not include these words but was otherwise identical.
111 I.e. its applicability turned upon the subjective assessment of France.
112 Relying upon the observations of Judges Lauterpacht and Guerrero in the *Norwegian Loans* case [1957] I.C.J. Rep. 43 and 68; and of Judges Lauterpacht, Spender, Klaestad and Armand-Ugon in the *Interhandel* case [1959] I.C.J. Rep. 97-119, 55-57, 76-78 and 91-93; I.C.J. Pleadings, *Nuclear Tests Cases* vol. i, 306-311.
113 I.C.J. Pleadings, *Nuclear Tests Cases* vol. i, 311-313.
114 Ibid., vol. ii, 187-198.
115 I.e. ". . . having regard to the intention of the parties and the nature of the instrument . . ." the reservation constituted an "essential part" of the declaration, per Judge Lauterpacht in the *Norwegian Loans* case [1957] I.C.J. Rep. 56-57. The notion of consensual jurisdiction demands this conclusion.

is no longer connected with national defence. While it would be reasonable to require a real connection with the content of the reservation, a state must be permitted to make as wide an objective reservation as it wishes as a condition of accepting jurisdiction under the optional clause. This dual purpose argument would have had disastrous consequences for the Court had it adopted it. It would have represented a compelling disincentive to accepting the Court's jurisdiction under the optional clause.

7. *Reliance on the General Act*

New Zealand and Australia's submissions on the continued validity and applicability of the General Act were wholly complementary in Phase Two — that is, in the memorials and at the 1974 oral hearings. However, a substantial discrepancy occurred in the 1973 oral hearings. As a consequence the New Zealand argument was seriously weakened.

At the end of the Australian submissions, Judge Waldock asked:[116]

> Does the Government contend that the Court is competent to indicate interim measures . . . on the basis of Article 33 of the General Act of 1928, without having first decided whether or not the General Act is still in force between Australia and France?

Counsel, the Australian Solicitor-General, Mr Byers, responded on 25 May 1973, this being immediately after the New Zealand oral hearings closed. The Australians did not consult New Zealand before giving their answer. Mr Byers stated that the Court could act under article 33 provided it was not shown that the Court was manifestly without jurisdiction. It is submitted that that is a correct statement of the law. It properly puts the onus upon the French Government to dislodge a treaty provision that prima facie applies. However counsel continued in a manner that, first, indicated a lack of confidence in the validity of the General Act, and secondly, effectively amounted to an assumption on the part of the applicants of the onus to establish validity, contrary to his earlier statement:[117]

> However, in view of the dire urgency of the matter, the Government of Australia would not wish there to be any delay on the part of the Court in granting interim measures by reason of the fact that the Court found it necessary to go beyond what was needed to justify the indications of interim measures under Article 41. . . . [I]t [is] sufficient for the Government of Australia, as already stated, to rely at the present time exclusively upon the competence of the Court to indicate interim measures of protection under Article 41 of the Statute.

The New Zealand Government, which only a matter of minutes before had expressed reliance evenly upon article 33 of the General Act and on article 41 of the Statute, was understandably dismayed by the Australian answer. As was noted earlier, New Zealand attached particular importance to this interim relief phase.

116 I.C.J. Pleadings, *Nuclear Tests Cases* vol. i, 229.
117 Ibid., 231.
118 [1973] I.C.J. Rep. per Judges Forster, 148; Gros, 149; Petrén, 159; and Ignacio-Pinto, 163.

C. Decision Not to Join the Cases

Several of the judges considered that the Australian and New Zealand cases should have been joined.[118] Judge Gros, in particular, considered that the applications being similarly drafted, the considerations of law and fact being the same, and the submissions being directed to identical objects, meant that the cases should have been joined.[119] None of these conclusions is correct, however, as has been observed above.

Several considerations prompted New Zealand to remain separate. As has been noted, the New Zealand case had a stronger grounding in law, equity and in fact. There were substantial differences in the submissions, and particularly in the remedies sought. Two further considerations may be identified. First, it was more convenient to remain separate. At the same time New Zealand avoided unnecessary inconvenience to the Court by appointing the same judge ad hoc as Australia.[120] Secondly, the International Court action was only one of a number of measures taken by New Zealand, and had a broader objective than that of Australia:[121]

> The Governments of Australia and New Zealand do not have a joint approach to the presentation of their respective cases against the Government of France; nor did they bring these cases for the purpose of supporting each other. Actions taken in their region that may violate obligations *erga omnes,* or cause an identical threat to the well-being of the citizens of both their countries, are naturally of concern to both; but history and geography condition and differentiate their individual perceptions of a common threat.

III. INTERIM MEASURES OF PROTECTION IN THE JURISPRUDENCE OF THE INTERNATIONAL COURT

A. The Order in the Nuclear Tests Cases

The Court ordered:[122]

> That the Governments of New Zealand and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radioactive fallout on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands.

The order was delivered by a majority of eight votes to six.[123] Judges Forster, Gros, Petrén and Ignacio-Pinto appended dissenting opinions. The identity of the other dissentients is not known.[124]

119 [1973] I.C.J. Rep. 149.
120 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 340, 253-254.
121 Ibid., 254 per the New Zealand Attorney-General, Mr A. M. Finlay Q.C.
122 [1973] I.C.J. Rep. 142. The Australian order was similar: Ibid., 106.
123 The President, Judge Lachs, was hospitalised after the oral hearings, and Judge Dillard fell ill during the course of those hearings. Neither took part in the final deliberations.
124 It may be speculated, however, that they were Judges Morozov and Onyeama. The Russian Judge could be seen to have strong political reasons for leaning either way. The Nigerian Judge was a particularly conservative jurist. This speculation is based on a news article published in the *N.R.C. Handelsblad* (Rotterdam) on 2 June 1973: I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 387.

The majority first considered the Court's jurisdiction on the merits:[125]

> . . . on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet *ought not* to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a *basis* on which the jurisdiction of the Court *might* be founded. (Emphasis added).

Having regard to the titles of jurisdiction adduced by the applicants, and the objections contained in the French note of 16 May 1973, the majority considered that the applicants had satisfied the above requirement and accordingly said ". . . the Court will . . . proceed to examine the Applicant's request for the indication of interim measures for protection."[126]

Judge Forster considered that the Court was obliged to satisfy itself that it has jurisdiction before indicating interim measures.[127] Judge Gros stated that the Court ought, where jurisdiction on the merits is uncertain, to take time to make a sufficient examination of the matter so as to be able to determine it, notwithstanding any urgency.[128] Judge Petrén took a similar view:[129]

> The fact that New Zealand has requested provisional measures does not dispense the Court from the obligation of beginning by an examination of the questions of its jurisdiction and of the admissibility of the Application; indeed it makes that examination, if anything, more urgent.

The second stage of the majority reasoning is its decision to indicate interim measures under article 41 of the Statute alone. It held that it would not exercise its power under article 33 of the General Act ". . . until it has reached a final conclusion that the General Act is in force."[130]

The majority then, thirdly, considered the rights advanced by the applicants, stating ". . . the Court . . . cannot exercise its power to indicate interim measures of protection unless the rights claimed in the Application, prima facie, appear to fall within the purview of the Court's jurisdiction",[131] and concluding that:

> . . . it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the Government of New Zealand may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application.

Judge Petrén, on the other hand, considered that these rights were governed not by law but by political norms.[133] Judge Ignacio-Pinto considered the dispute to be political, and the rights alleged to be too uncertain, or alternatively, to conflict with the sovereign rights of France.[134]

125 [1973] I.C.J. Rep. 137, 101.
126 Ibid., 138, 102.
127 Ibid., 111.
128 Ibid., 155, 120.
129 Ibid., 159, 124.
130 Ibid., 139, 102-103 (where it refers to the Australian concession in oral argument). Judge Barwick seemed prepared to apply art. 33: Ibid., 146, 110.
131 Ibid., 139, 103.
132 Ibid., 140, 103.
133 Ibid., 161-162, 126-127.
134 Ibid., 163, 129-131.

Fourthly, the majority held that the Court could not indicate interim measures unless it considered that the ". . . circumstances so require in order to preserve the rights of either party."[135] The majority reviewed the history of French testing, noted that the immediate possibility of further testing had been shown, and noted that scientific evidence did not exclude the possibility of irreparable damage resulting from test-produced fallout. The interim measures sought were indicated.

B. Conceptual Assessment in Light of Authorities

1. *Jurisdiction to indicate interim measures*

It is essential to make a conceptual distinction between jurisdiction to indicate interim measures, and jurisdiction on the merits. The power to indicate interim measures derives from the Court's incidental jurisdiction, being conferred by article 41 of the Statute.[136] This confers a general discretion to be exercised, where required, to preserve the rights of parties. This broad power is expressly and further limited by article 66 of the Rules of the Court (since 1978, articles 73-78). Parties are taken to consent to the exercise of this incidental jurisdiction in appropriate cases in that by acceding to the United Nations Charter, ipso facto they become parties to the Statute of the Court.[137] No state has ever attempted to reserve away the Court's incidental jurisdictions.[138]

Jurisdiction as to the merits, however, derives from a separate consent to the judicial determination of particular kinds of dispute, pursuant to article 36(1) or article 36(2) of the Statute. Explicit consent is required.[139] Thus the bases of the jurisdictions can be seen as utterly distinct. However the Court has chosen to connect the two. A number of alternative formulations having received judicial support may be identified. They are listed as follows from the most conservative to the most liberal.

1. "If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection."[140]

135 Ibid., 140, 103-104 (relying on art. 41 of the Statute).

136 Query whether it is part of the Court's inherent jurisdiction, deriving from general principles of international law: Dumbauld *Interim Measures of Protection in International Controversies* (Nijhoff, S — Gravenhage, 1932), 173-180; Elkind *Interim Protection* (Nijhoff, The Hague, 1981), 23-26. This latter work was published after the writing of this article and it has been possible to incorporate only limited references to Mr Elkind's valuable treatise.

137 U.N. Charter art. 93(1). Fitzmaurice "Law and Procedure of the I.C.J., 1951-1954" (1958) 34 Brit. Year Book Int. L., 107.

138 Another is the Court's power under art. 36(6) to determine its own jurisdiction. Reservations to constitutional documents are frowned upon, although the U.S.A. made a form of reservation to the W.H.O. Constitution: W.H.O. Off. Rec. 13, 77-80.

139 Mendelson "Interim Measures of Protection in Cases of Contested Jurisdiction" (1973) 46 Brit. Year Book Int. L., 308; Fitzmaurice op. cit. n. 137, 107; Stone *Legal Controls of International Conflict* (Maitland, Sydney, 1959), 132; *Aegean Sea* case [1976] I.C.J. Rep. 15 per Judge Jiménez de Aréchaga (separate opinion).

140 *Anglo-Iranian Oil Co.* case [1951] I.C.J. Rep. 97 per Judges Winiarski and Badawi (dissenting), although they rather modify their strict test later in their opinion; Judges Forster, Gros and Petrén in the *Nuclear Tests* case supra. nn. 127, 128, 129; Judge Morozov in the *Aegean Sea* case [1976] I.C.J. Rep. 21. In the P.C.I.J.: Judges Schücking and Van Eysinga (dissenting) in the *Polish Agrarian Reform* case (1933) P.C.I.J., Ser. A/B, No. 58, 188.

2. The Court has a wide jurisdiction to indicate interim measures, but ought not to exercise it unless jurisdiction on the merits is:
   (a) "reasonably probable"[141]
   (b) "within clear prospect"[142]
   (c) ". . . [conferred] *prima facie* . . . upon the Court . . . [without] reservations obviously excluding its jurisdiction"[143]
   (d) "not manifestly absent"[144]
   (e) "possible";[145]

   or where:

   (f) the titles of jurisdiction adduced ". . . appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded."[146]
   (g) it ". . . cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction."[147]

3. Jurisdiction to indicate interim measures is wholly independent of jurisdiction as to the merits. The latter ought not to be taken into account in exercising the former.[148]

As can be seen there is overwhelming support for the second category. Borrowing Rosenne's analytical dichotomy,[149] category two can be explained as follows: the Court has *jurisdiction* (or capacity) to indicate interim measures, but it is *not competent* to do so unless jurisdiction on the merits is a real possibility. The Court has limited the extent of its jurisdiction (as it is entitled to do under article 36(6)), but the limiting factor (judicial propriety) and the original jurisdiction remain distinct. This distinction is essential. Only if it is accepted can the interim order not prejudice the question of jurisdiction on the merits. In numerous cases the Court has denied this prejudicial effect.[150]

In this way, jurisdiction as to the merits can be seen to be a matter for

141 *Anglo-Iranian Oil Co.* case [1951] I.C.J. Rep. 97 per Judges Winiarski and Badawi (dissenting).
142 *Aegean Sea* case [1976] I.C.J. Rep. 17 per Judge Nagendra Singh (separate opinion).
143 *Interhandel* case [1957] I.C.J. Rep. 119 per Judge Lauterpacht; *Nuclear Tests* cases [1973] I.C.J. Rep. 145, 109 per Judge Nagendra Singh.
144 Dumbauld op. cit. n. 136, 144.
145 *Aegean Sea* case [1976] I.C.J. Rep. 16 per Judge Jiménez de Aréchaga (separate opinion).
146 *Fisheries Jurisdiction* cases [1972] I.C.J. Rep. 16; *Nuclear Tests* cases [1973] I.C.J. Rep. 138, 102; *Diplomatic & Consular Hostages* case [1979] I.C.J. Rep. 13.
147 *Anglo-Iranian Oil Co.* case [1951] I.C.J. Rep. 93.
148 Submission of the agent for Pakistan: I.C.J. Pleadings, *Pakistan P.O.W.'s case,* 44. Mendelson op. cit. n. 139, 308-309; Fitzmaurice op. cit. n. 137, 108-109 and Judge Jiménez de Aréchaga in the *Aegean Sea case* [1976] I.C.J. Rep. 15, might all three be seen to support this approach. However, it is submitted that they do in fact support a "liberal" form of No. 2 in that they all deny competence to indicate interim measures where jurisdiction on the merits is absent.
149 *Law and Practice of the International Court* (Sijthoff, Leiden, 1965), 302.
150 *Anglo-Iranian Oil Co.* case [1951] I.C.J. Rep. 93; *Fisheries Jurisdiction* cases [1972] I.C.J. Rep. 16; *Aegean Sea* case [1976] I.C.J. Rep. 13; *Diplomatic & Consular Hostages* case [1979] I.C.J. Rep. 20.

consideration after jurisdiction to indicate interim measures has been ascertained. The majority in the *Nuclear Tests* cases are perhaps open to criticism for reversing this order.[151] It is not a consideration which can, however, be described as ". . . simply another of the relevant circumstances" under article 41(1).[152] It is a consideration of primordial importance.[153] In the *Aegean Sea* case, Judge Jiménez de Aréchaga declared:[154]

> The fact that Article 41 is an autonomous grant of jurisdiction to the Court, independent from its jurisdiction over the merits of the dispute, does not signify that the prospects of the Court's jurisdiction with regard to the merits are irrelevant to the granting of interim measures. They are, on the contrary, highly relevant, but they come into play at a different level and at a subsequent stage: not as the basis for the Court's power to act on the request, but as one among the circumstances which the Court has to take into account in deciding whether to grant the interim measures.

If the foregoing reasoning is accepted it becomes possible to reconcile Judge Lauterpacht's dissenting opinion in the *Interhandel* case[155] with the majority order. The majority leapfrogged the question of jurisdiction on the merits and instead determined that the circumstances no longer required it to act under article 41.[156] Judge Lauterpacht criticised the majority for assuming jurisdiction under article 41.[157] The United States reservation:[158]

> . . . removed the basis for any assumption of a *prima facie* jurisdiction of the Court on the merits of the dispute and . . . the Court therefore lacked the power to exercise jurisdiction under Article 41 of the Statute.

This, it is submitted with the greatest respect, may be criticised in three respects. First, it confuses the distinction between the two forms of jurisdiction (as noted above). Secondly, the majority did not assume jurisdiction to indicate interim measures. That existed from the moment the United States acceded to the United Nations Charter. Thirdly, the majority did not purport to exercise its jurisdiction under article 41. It decided, on an alternative and secondary consideration, that the circumstances did not require it to exercise that power. However, had the majority chosen to exercise that jurisdiction, it would have been quite improper for them to have continued to ignore the issue of jurisdiction as to the merits. Thus the majority approach can be reconciled with Judge Lauterpacht's correct principle:[159]

> The Court may properly *act* under the terms of Article 41 provided there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause,

151 It is a minor reservation, however, and it lends weight to the next proposition that jurisdiction as to the merits is a consideration of primordial importance in deciding whether to indicate interim measures.

152 Mendelson op. cit. n. 139, classes it as such at 310, n. 3. Judge Jiménez de Aréchaga takes a similar view in the *Aegean Sea* case [1976] I.C.J. Rep. 15-16.

153 *Aegean Sea* case [1976] I.C.J. Rep. 25 per Judge Mosler.

154 Ibid., 15. Cf. Elkind op. cit. n. 136, 169.

155 [1957] I.C.J. Rep. 105.

156 Ibid., 112.

157 Ibid., 117.

158 Ibid., 117-118.

159 Ibid., 118-119. The P.C.I.J. took the self same approach in the *South Eastern Greenland* case (1932) P.C.I.J., Ser. A/B, No. 48.

emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction.

On this basis, also, the New Zealand agent's initial submission in the *Nuclear Tests* cases that the Court ought not to consider the applicability of the French reservation in determining whether or not to exercise its power to indicate interim measures[160] should be discounted. While a reservation would not be relevant to whether or not that jurisdictional power existed, it would undoubtedly be relevant to the question of jurisdiction as to the merits. It would, therefore, have to be considered before the Court considered itself competent to exercise its powers under article 41.

In the *Nuclear Tests* cases the eight-member majority rejected article 33 of the General Act as a basis for the indication of interim measures. Three members of that majority subsequently determined that the General Act was still in force.[161] In addition to comprehensive argument from counsel for both applicants in the *Nuclear Tests* cases, the Court had, by the time it delivered its order, also had the benefit of hearing the argument of counsel for Pakistan on the same subject in the *Pakistani Prisoners of War* case.[162] Why did the majority reject article 33?

First, the conceptualist would state that the notion of international jurisdiction as exclusively consensual means that the Court must be sure that the parties have agreed to the applicability of the title of jurisdiction adduced to the dispute before it. As noted above, this does not ordinarily present problems under article 41 of the Statute. Although the notion of desuetude has not acquired an established place in the law of treaties,[163] the judges could reasonably have entertained doubts as to the effect of the demise of the League of Nations and of the 1948-1949 Revision on the validity of the General Act. Secondly, as noted above, one of the applicants appeared to have evinced certain doubts about the validity of the Act. Thirdly, an indication under article 41 of the Statute would not, by virtue of its independent, incidental nature, have prejudiced the question of jurisdiction under article 36(2). However, such an indication under article 33 of the General Act would have prejudiced the question of jurisdiction under article 17. Fourthly, had the Court held that article 33 applied, it would, under article 33(1), have been obliged to exercise its discretion to indicate provisional measures.[164] Those measures would have been binding upon the parties.[165] A majority of judges might have been unwilling to create these obligations. Finally, building upon the pragmatic fourth consideration, the decision to indicate interim measures

160 I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 128-129.

161 Judges Jiménez de Aréchaga, Waldock and Barwick. It is not known where Judge De Castro stood in 1973, although it may be suspected that he voted with the majority making it fully half the 1973 majority which eventually came to the view that the General Act remained in force. The opposite vote is suspected of Judge Onyeama (n. 124 infra). Judge Dillard did not take part in the 1973 decision.

162 Orol argument heard 4, 5 and 26 June 1973. I.C J. Pleadings, *Pakistani P.O.W.'s case,* 54-55.

163 McNair *Law of Treaties* (Oxford University Press, Oxford, 1961), 516-518; Sorenson *Manual of Public International Law* (MacMillan, London, 1968), 235.

164 I.C.J. Pleadings, *Nuclear Tests Cases* vol. i, 191, 196.

165 Ibid., vol. ii, 117-118.

under article 41 of the Statute alone may well have been the product of compromise within the majority.

2. *Assessment of jurisdiction as to the merits*

As noted in Part III(*B*)(1), the exercise of the Court's jurisdiction to indicate interim measures under article 41 depends upon the result of an assessment, *summaria cognitio,* of the prospects of jurisdiction on the merits. The standard of proof demanded has never been authoritatively declared to be absolute. In 1928 a Mixed Arbitral Tribunal declared the standard to be "Il suffit que son incompétence ne soit pas manifeste, evidente."[166]

In all cases where interim measures have been granted the Court has required the applicant to demonstrate, to a varying standard, the possibility or probability of jurisdiction on the merits.[167] Sir Hersch Lauterpacht noted:[168]

> . . . the established principle of international jurisprudence to the effect that a mere denial, by one party, of the jurisdiction of the Court on the merits does not prevent the Court from indicating provisional measures so long as there exists an instrument which *prima facie* confers jurisdiction upon it. . . . The practice of the Court on the subject . . . [may be seen] as an example not so much of an assertion of caution as of tempering of caution by reference to requirements of convenience and common sense.

Yet in the *Nuclear Tests* cases, at least three of the dissenting judges[169] would have required the applicants to satisfy the Court that jurisdiction on the merits does, finally, exist. Judge Forster stated:[170]

> I remain convinced that in these exceptional cases the International Court of Justice should have forsaken the beaten paths traditionally followed in proceedings on interim measures. The Court should above all have *satisfied itself* that it really had jurisdiction, and not have contented itself with a *mere probability.*

The stand taken by Judges Forster, Gros and Petrén can be criticised on two counts. First, it ignores the reality that interim measures are an urgent interlocutory remedy, granted in limited circumstances, to preserve rights:[171]

166 *Count Barcoczy Arbitration* (1928) cited in Mendelson op. cit. n. 139, 265. (Hungarian-Czech Mixed Arbitral Tribunal).

167 (1) *Sino-Belgian Treaty* case (1927) P.C.I.J., Ser. A, No. 8 — jurisdiction on merits not in doubt. (2) *Chorzow Factory* (*Indemnities*) case (1932) P.C.I.J., Ser. A, No. 12 — jurisdiction on merits already determined at time of request. (3) *Electricity Co.* case (1938) P.C.I.J., Ser. A/B, No. 79 — jurisdiction on merits already determined at time of second request. (4) *Anglo-Iranian Oil Co.* case [1951] I.C.J. Rep. 89 — ". . . cannot be accepted . . . that . . . claim . . . falls completely outside the scope of international jurisdiction." (5) (6) *Fisheries Jurisdiction* cases [1972] I.C.J. Rep. 12 — ". . . instrument . . . appears, *prima facie,* to afford a possible basis on which . . . jurisdiction . . . might be founded". (7) (8) *Nuclear Tests* cases [1973] I.C.J. Rep. 99 — ditto. (9) *Diplomatic Consular Hostages* case [1979] I.C.J. Rep. 7 — ditto.

168 *Development of International Law by the International Court* (Stevens, London, 1958), 254-255.

169 [1973] I.C.J. Rep. per Judge Forster, 171. Judge Gros, 151, 120, and Judge Petrén, 149, 124. Judge Ignacio-Pinto, 129, devotes his consideration to admissibility, although he appears to indicate that where there is doubt as to consent the Court ought not to indicate interim measures.

170 Ibid., 148.

171 *Interhandel* case [1957] I.C.J. Rep. 118 per Judge Lauterpacht.

> . . . the Court need not satisfy itself . . . that it is competent with regard to the merits of the dispute. The Court has stated on a number of occasions that an Order indicating, or refusing to indicate, interim measures of protection is independent of the affirmation of its jurisdiction on the merits and that it does not prejudge the question of the Court's jurisdiction on the merits. . . . Any contrary rule would not be in accordance with the nature of the request for measures of interim protection and the factor of urgency inherent in the procedure under Article 41 of the Statute.

Secondly, it is entirely at odds with the judges' positions in the preceding *Fisheries Jurisdiction,* and the subsequent *Diplomatic and Consular Hostages* cases.[172] There those judges acceded to the standard set by the majority in the *Nuclear Tests* cases. Why, then, alter the standard in 1973? Judge Forster stated that the past Court practice was not an immutable rule.[173]

> . . . [H]owever illustrious their reputations, our predecessors on the Bench cannot now take our place, nor can their decisions take the place of the one we have to render in an exceptionally difficult affair whose case-file they never held in their hands.

Judge Gros attempted to distinguish the *Fisheries Jurisdiction* cases on the basis that there the Court had already ". . . developed an awareness of the existence of its own jurisdiction . . .".[174] Judge Petrén simply ignored the standard applied by a near-unanimous Court in the *Fisheries Jurisdiction* cases.[175] None of those justifications convinces. While the first two might justify a different evaluation under the established standard, they do not justify modification of the standard itself.

3. *Real rights must be advanced*

Article 41 expressly limits the object of the indication of interim measures to the preservation of the respective rights of either party. It follows that the Court has no express jurisdiction to exceed this object.[176] In the *South Eastern Greenland* case,[177] where the Court was seized of the dispute by mutual consent, Norway sought interim protection ". . . to prevent regrettable events which it might be impossible to make good simply by the payment of an indemnity or by compensation or restitution . . .".[178] The Court questioned whether this object fell within the terms of article 41. It did not, however, decide upon the issue.[179] The Court held that the circumstances did not demand interim measures.

In the *Polish Agrarian Reform* case,[180] Judge Anzilotti said that a Court ought

172 Judge Petrén was no longer a member of the Court at the time of the *Diplomatic Consular Hostages* case.
173 [1973] I.C.J. Rep. 111.
174 Ibid., 156-157, 122.
175 Ibid., 160-161, 125-126. He chooses, however, to ignore the clear standard established in [1972] I.C.J. Rep. 16.
176 Query whether it may be an inherent power: Dumbauld op. cit. n. 136, 173-180; Elkind op. cit. n. 136, 162-163.
177 (1932) P.C.I.J., Ser. A/B, No. 48, 268.
178 Ibid., 281.
179 Rosenne op. cit. n. 149, 426, is therefore in error. Likewise Lauterpacht op. cit. n. 168, 253. See Fitzmaurice op. cit. n. 137, 121.
180 (1933) P.C.I.J., Ser. A/B, No. 58.

". . . to take into account the *possibility* of the right claimed . . . and the *possibility* of the danger to which that right was exposed . . .".[181]

In the *Anglo-Iranian Oil Co.* case[182] the Iranian Government objected to the Court's jurisdiction on two grounds which Mendelson says ". . . were less concerned with jurisdiction than with admissibility and the merits."[183] The Court dismissed the objections. It did not consider admissibility. It said ". . . it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction."[184]

However, in the *Nuclear Tests* cases, the majority held that not only must the Court give a cursory examination to jurisdiction on the merits, but (and here it alters the *Anglo-Iranian* approach) it found that:[185]

> . . . it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the Government of New Zealand may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application.

Here the attention of the Court is directed to the claim and not to the instrument conferring jurisdiction. A further hurdle[186] is created for the party requesting interim measures. It is submitted that this hurdle is an entirely proper one, and complements the requirement that the Court make an assessment, *summaria cognitio,* of its substantive jurisdiction. The Court ought not to indicate interim measures where the applicant has no legal interest in the matter, or is advancing a purely political claim. It remains to be seen what standard the Court imposes — at what height the hurdle is set.

On the result of this assessment, Judges Petrén and Ignacio-Pinto dissented. Their assertions that here was a non-legal political dispute have already been refuted. In addition it is submitted that the consideration by Judge Ignacio-Pinto of various matters strictly within the realm of the merits was regrettable, and contrary to the established judicial policy of limiting the range of considerations at an interlocutory stage so as not to prejudice later phases.[187]

4. *"If circumstances so require"*

The Court has on several occasions declined to indicate interim measures. In the *Chorzow Factory (Indemnities)* case[188] a request that would have had the effect of giving an interim judgment was declined.[189] In the *Polish Agrarian*

181 Ibid., 181.
182 [1951] I.C.J. Rep. 89.
183 Op. cit. n. 139, 271.
184 [1951] I.C.J. Rep. 93.
185 [1973] I.C.J. Rep. 140, 103.
186 Mendelson op. cit. n. 139, 288.
187 Judge Petrén properly stopped short of doing this: [1973] I.C.J. Rep. 162, 127. Judge Ignacio-Pinto's use of Nigel Roberts' pamphlet was also unfortunate. No estoppel could be founded upon it. It was simply an estimate made three years before testing commenced: I.C.J. Pleadings, *Nuclear Tests Cases* vol. ii, 255.
188 (1927) P.C.I.J., Ser. A, No. 12.
189 But cf. *Diplomatic & Consular Hostages* case [1979] I.C.J. Rep. 16.

Reform case[190] the request sought to protect rights not advanced in the application instituting proceedings. It was declined, without prejudice to a resubmission in proper form.

An applicant must show that, in the absence of the measures sought, there would be irreparable damage or prejudice to the rights advanced.[191] The damage may be of a kind that could be repaired by compensation or restitution, but that does not prevent the Court indicating interim measures.[192] Another basis upon which interim measures are awarded (to prevent anticipation of the Court's judgment) is directly connected to the rights of parties:[193]

> . . . the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour.

Hence in the *Interhandel* case, the majority went straight to this consideration and declined interim measures. As in the *South Eastern Greenland* case and the *Prince von Pless Administration* case[194] undertakings by the respondent obviated the need for interim measures.[195]

IV. SOME CONSEQUENCES OF THE ABSENCE OF FRANCE

Three consequences require particular comment. First, the Court directed its attention to the French annex of 16 May 1973 notwithstanding the fact that it was not properly filed in accordance with the Rules of the Court.[196] As noted earlier, the applicants acquiesced to this course of action. In several other cases the Court has considered notes to the registrar from a boycotting party.[197]

Secondly, the Court properly set comparatively close[198] time limits for the filing of memorials. Where jurisdiction is contested and interim measures have been indicated the disposal of the remaining phases becomes urgent; and more so where a state expresses its displeasure by boycotting proceedings.[199] Australia was unable to meet the 21 September 1973 deadline and sought and received a two-month extension. New Zealand, also having problems, and seeking to preserve some sort of contemporaneity, sought and obtained a six-week extension.

190 (1933) P.C.I.J., Ser. A/B, No. 58.
191 *South Eastern Greenland* case (1932) P.C.I.J., Ser. A/B, No. 48, 284; *Nuclear Tests* cases [1973] I.C.J. Rep. 141, 105.
192 E.g. *Anglo-Iranian Oil Co.* case [1951] I.C.J. Rep. 89; *Fisheries Jurisdiction* cases [1972] I.C.J. Rep. 12; Cf. the *Sino-Belgian Treaty* case (1928) P.C.I.J., Ser. A, No. 8, 7-8.
193 *Fisheries Jurisdiction* cases [1972] I.C.J. Rep. 16.
194 (1933) P.C.I.J., Ser. A/B, No. 54.
195 Mendelson op. cit. n. 139, 315-320 discussed this issue comprehensively.
196 See arts. 41-47, dealing with written procedure.
197 *Anglo-Iranian Oil Co.* case [1951] I.C.J. Rep. 89; *Fisheries Jurisdiction* cases [1972] I.C.J. Rep. 12; *Pakistani P.O.W.'s* case [1973] I.C.J. Rep. 328; *Aegean Sea* case [1976] I.C.J. Rep. 4; *Diplomatic & Consular Hostages* case [1979] I.C.J. Rep. 7.
198 The time limits were even shorter in the *Anglo-Iranian Oil Co.* case: two months as opposed to three.
199 *Aegean Sea* case [1976] I.C.J. Rep. 17 per Judge Nagendra Singh.

The actions of the applicants and of the President who, after consulting other members, granted the extensions, drew adverse comment in France,[200] and from Judge Petrén.[201]

Thirdly, in his dissenting opinion, Judge Gros argued that the absence of France meant that the Court ought to have applied article 53 of the Court's Statute.[202] No other judge advanced this argument. Article 53 provides:

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

It is submitted that Judge Gros' argument cannot be supported. First, the operation of article 53 depends upon its being invoked by one of the parties and, moreover, upon its being adopted by the Court.[203] This has occurred in only two cases: the *Anglo-Iranian Oil Co.* and *Fisheries Jurisdiction* cases. In both cases the provision was formally invoked by the applicants. In neither case was the invocation made at the interim measures phase. Judge Gros avoided this by arguing that the applicants in the *Nuclear Tests* cases implicitly invoked article 53.[204] The passage of the pleadings referred to by Judge Gros is that in which the Australian Attorney-General asked the Court to ignore the irregularly-submitted French annex of 16 May.[205] Not only has this nothing to do with article 53,[206] but the effect of this submission would be contrary to the terms of article 53(2). Secondly, the effect of accepting Judge Gros' argument could often be to deny a party interim measures when the other fails to appear. This seems contrary to the terms of the Court's Statute. It would, furthermore, give a defaulting party an undue advantage: unless the applicant was in a position to present comprehensive argument on jurisdiction or admissibility it could not seek interim measures. The Court is already at a disadvantage from not having the benefit of hearing the case of the defaulting party; its difficulty would be only compounded by requiring the hasty presentation of such complex matters as jurisdiction and admissibility.[207] Thirdly, despite the fundamental importance of Judge Gros' argument, if it were correct, he did not advance it in either the *Fisheries Jurisdiction, Aegean Sea* or *Diplomatic and Consular Hostages* cases. In short, he attempted to use article 53 to pull up by its bootstraps the restrictive standard he applied to competence to indicate interim measures. The argument was so weak that neither Judges Forster nor Petrén joined him in it.

200 Sur op. cit. n. 3, 977.
201 [1974] I.C.J. Rep. 298-301.
202 [1973] I.C.J. Rep. 151-154, 116-119.
203 Rosenne op. cit. n. 149, 590-591.
204 [1973] I.C.J. Rep. 152, 118.
205 I.C.J. Pleadings, *Nuclear Tests Cases* vol. i, 183.
206 Australia was not arguing that France had "failed to defend her case", but that her defence was irregularly submitted.
207 This was, as Judge Forster said, an "exceptionally difficult affair": [1973] I.C.J. Rep. 111.

V. CONSEQUENCES OF THE FRENCH VIOLATIONS OF THE 1973 ORDERS

A. Legal

The generally held view is that interim orders under article 41 do not create a res judicata between the parties. Dumbauld,[208] Hudson,[209] Fitzmaurice,[210] Lauterpacht,[211] and Fachiri[212] take this view. Verzijl[213] and Elkind[214] take the opposite. Lauterpacht, however, expresses the view:[215]

> . . . it ought to be clear that a party disregarding an Order indicating provisional measures acts at its peril and that the Order must be regarded at least as a warning estopping a party from denying knowledge of any probable consequences of its action.

The Court has not been called on to decide the matter. Its function is judicial, not enforcement-related. The Annual Report of the Court for 1930-1931 noted:[216]

> The addition to [Article 41] of a new paragraph concerning the course to be taken if the Parties did not conform to the Court's indications was proposed. It was held inexpedient, however, to make this addition: the Court's rôle was simply to indicate measures of protection and to notify its decision to the Council of the League.

The Court will, of course, take judicial notice of violations of its orders.[217]

A party may, however, raise the matter in the Security Council.[218] New Zealand chose not to take this course of action. The United Kingdom and the Republic of Germany likewise eschewed action in the Security Council over Icelandic infractions of the 1972 *Fisheries Jurisdiction* orders, presumably so as not to inflame the dispute further.[219] Three reasons for New Zealand's reluctance may be advanced.

First, if New Zealand had obtained the majority, France would have vetoed any motion condemning its violations. This would set the New Zealand cause back. Secondly, even if New Zealand had obtained a majority on the Security Council, it might not have taken any decisive action. In 1952 the Security Council adjourned a debate on the Iranian violations of the 1951 *Anglo-Iranian Oil Co.* order until the Court determined whether or not it had jurisdiction.[220] Thirdly,

208 Op. cit. n. 136, 146, 168.
209 *The Permanent Court of International Justice 1920-1942* (MacMillan, New York, 1943), 425: "The term *indicate* . . . possesses a diplomatic flavor, being designed to avoid offense to 'the susceptibilities of States'."
210 Op. cit. n. 139, 122-123.
211 Op. cit. n. 168, 253-254, 111: ". . . in strict law, there is no obligation to comply with the provisional Order."
212 *The Permanent Court of International Justice* (2 ed., Oxford University Press, Oxford, 1932), 111.
213 *International Law in Historical Perspective* (Sijthoff, Leiden, 1976), vol. viii, 522.
214 Op. cit. n. 136, 153.
215 Op. cit. n. 168, 254.
216 (1930-1931) P.C.I.J., Ser. E, No. 7, 293.
217 Fachiri op. cit. n. 212, 111. New Zealand and Australia both notified the Court of the French testing in 1973.
218 Pursuant to U.N. Charter, art. 94(1).
219 Ris "French Nuclear Testing: A Crisis for International Law" (1974) 4 Denver J. Int. L. & P., 129-130.
220 Mosler & Bernhardt (eds.) *Judicial Settlement of International Disputes* (Springer, New York, 1974), 251.

New Zealand assessed that it might not even get the required majority in the Security Council. The members were Australia, Austria, China, France, Guinea, India, Indonesia, Kenya, Panama, Peru, Sudan, the Soviet Union, the United Kingdom, the United States and Yugoslavia. An educated assessment of the likely voting of the members is as follows:

(a)	For the Applicants	6
(b)	Possibly for	2
(c)	Probable abstention	3
(d)	Possibly against	3
(e)	Against	1

B. Political

New Zealand therefore chose to pursue diplomatic and political avenues to put pressure on the French Government. A letter was sent by the Prime Minister, the Rt. Hon. Mr Kirk, to all heads of government within a week of the judgment, urging them to support its stand.[221] Two frigates, one carrying a Cabinet minister, made symbolic voyages to the high seas off Mururoa. They were refuelled by an Australian vessel. Explaining the Government's activist policy, the Rt. Hon. Mr Kirk said:[222]

> If we want that [disarmament], it is not much use coming here saying 'Yes, we are for peace, yes, we are against nuclear weapons'. If you want it you have to work for it. You cannot build a wall without picking up the bricks.

The frigates served to gain a very great international attention. Numerous states and international organisations responded and brought pressure to bear on France: Japan, Western Samoa, Chile, Ecuador, Peru, Colombia, Venezuela, Bolivia, Brazil, Argentina, Canada, Denmark, India, Indonesia, Libya, the Netherlands, Nigeria, Norway, Pakistan, the Phillipines, Singapore, Sweden, Tanzania, the South Pacific Forum, the South Pacific Commission, the World Health Organisation Assembly, and the International Labour Organisation, along with trade unions in New Zealand, Australia and the United Kingdom. Private protests abounded.[223]

Within France, public opinion began to turn. They had seen the frigates on television. They had read of the international condemnation. The clergy were outspoken.[224] At the time a commentator noted: "The confrontations with New Zealand, Australia and Peru over open nuclear testing were embarrassing."[225]

It may be concluded that New Zealand's decision to make French violations of the Court orders a matter for international political recourse was well-advised. As Ris notes: "It is, then, upon French attitudes and politics that the I.C.J. action, and the international response to it, may have had the most influence."[226]

221 N.Z. Foreign Affairs Rev. (June 1973), 10.
222 Ibid. (August 1973), 10.
223 S.I.P.R.I. op cit. n. 1, 16-19.
224 Ris op. cit. n. 219, 130.
225 Kolodziej *French International Policy Under De Gaulle & Pompidou; the Politics of Grandeur* (Cornell University Press, Ithaca, 1974), 166.
226 Op. cit. n. 219, 131.