AVOIDING A DECISION ON THE MERITS IN THE INTERNATIONAL COURT OF JUSTICE

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One of the expectations addressed to judicial tribunals in Western societies is that the tribunal will provide a definitive solution to the dispute before it: that it will fully consider the issues at stake and resolve them. At times this may involve a Court in publicity of a kind which is invidious to the judges: this is especially so in constitutional cases where matters of public policy are decided which may be highly controversial. It is always tempting for a judge to try and avoid resolving such an issue on the merits: if he can, by procedural techniques, avoid assuming jurisdiction at all the Court will not have to face criticism for a substantive decision.

It must be of increasing concern to international lawyers that the International Court of Justice has in recent years tended to avoid deciding on the merits in some cases on which a decision was vitally necessary, where the Court's reasons for not definitively deciding the law seem unconvincing and where it has been suggested that the Court has been unduly influenced by the anticipated criticism that a decision on the merits would undoubtedly arouse. Such results defeat a party's legitimate expectations that the case which it has put before the Court will be examined and decided.[1] Foremost among the cases which some might criticize on this ground are the *South West Africa Case 1966*[2] and the *Nuclear Tests Case (Australia* v. *France)*[3].

1. *Decisions on Jurisdiction and decisions on the Merits*

In a national legal system a court must always first assure itself that it has jurisdiction to decide a case. There is a good reason for this. In allotting competence to various units to decide certain issues the polity has agreed to enforce decisions taken in accordance with that division of powers. A Court is always dependent on external authority for the enforcement of its decision: if it exceeds its competence it can no longer count on that support. If the decisions of a decision-maker are not enforced it will gradually lose prestige.

In the International Court questions of jurisdiction are equally important, but for different reasons. The Court is largely dependent on the willing co-operation of its litigants for the execution of its judgments. With no polity standing behind it to enforce compliance on the unwilling litigant, not only the fact of jurisdiction, but also the willingness of the litigating parties to

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[1] *Nuclear Tests Case*, 1974 ICJ Reports 253, Joint Dissenting Opinion, 312, at 317.

[2] *South West Africa Case (2nd Phase)*, 1966 ICJ Reports, 6.

[3] *Nuclear Tests Case (Australia v. France)*, 1974 ICJ Reports 253.

respect the Court's decision, becomes very important. It is in this area that the Court seems to have become involved in a difficult situation: even if the grounds for establishing jurisdiction seem sound, the Court will be reluctant to give a decision on the merits, if it appears that one or both parties are patently unlikely to carry it out.

National Courts do, of course, also seek to avoid a decision which may fail to receive the acceptance of the organized community. Schubert points to the example of the U.S. Supreme Court in the late 1950's. Decisions on civil liberty revealed a new liberalizing trend in the Court which provoked considerable right wing criticism of the Court. In 1958-59 Congress was even considering a bill to impeach the Chief Justice. During that period there was a sudden drop in the number of civil liberties cases pronounced on by the Court. The number rose sharply again in 1960 after the political storm in Congress had subsided.

> [T]his, suggests that the jurisdictional decision-making of the Court was even more sensitive to the external stimuli than was the substantive decision-making on the merits. . . .[4]

In the International Court of Justice decisions about jurisdiction are made by taking "Preliminary Objections" to the claims of the Applicant State (Rules of Court Art. 67). The most obvious objection to make is that a State has not accepted the Court's jurisdiction. If the Court agrees that it has not, there is an end to the matter (*Anglo-Iranian Oil Case*).[5] Such preliminary objections on the ground of lack of jurisdiction should be resolved before the Court proceeds to the merits of the dispute. To argue the merits is a wasteful procedure if the matter can be otherwise disposed of: any remarks which the Court may make on the merits may also embroil the Court in the very contumely which it wishes to avoid.

Sometimes, however, a State has bound itself to accept the Court's jurisdiction, although it may now be unwilling to accept it—this was for example the case with South Africa: it had had an obligation to submit to the Court's jurisdiction imposed on it in the Mandate Agreement. Such a State is likely to raise other "preliminary" issues in an attempt to prevent adjudication on the merits. Its motives are obvious—for discussion on the merits could be embarrassing—but it is a serious matter for the Court, being satisfied that it has jurisdiction, to refuse to adjudicate the merits, or where it refuses to adjudicate on the basis of some preliminary objection other than an objection to jurisdiction, without even deciding whether it has jurisdiction or not. A refusal to adjudicate on these grounds must be scrutinized very carefully. Such objections have generally been described as objections to the admissibility of the claim.

The procedure as to preliminary objections developed over a long period of time.[6] The Rules of the Permanent Court contained no provision relating to them and it was only by amendments adopted in 1926, 1936 and 1946 that the Rules regulated the procedure. According to Art. 62 of the 1946 Rules the Court could give a decision on the preliminary objections or join them to the merits. These rules have now been amended (see below § 4). A State desiring to prevent adjudication on the merits will, as Rosenne writes, exploit every preliminary objection which it can find.[7] As a result, preliminary

[4] G. Schubert, *The Judicial Mind*, 1965, 278.
[5] 1952 ICJ Reports, 93.
[6] S. Rosenne, 1 *The Law and Practice of the International Court*, 1965, 448-454.
[7] *Id.* 457.

objections have come to be characterized by excessive sophistication and subtlety, and the multiplication of objections is now a common feature of litigation before the International Court.[8] Gradually more and more reasons are urged upon the judges as to why they should not adjudicate on the merits of a case. The Court must in such cases be strong enough to resist the temptation to avoid deciding difficult issues. This possibility had already been foreseen by Rosenne, who warned that the Court's "function, its *raison d'être* is to decide cases, and only essential deficiencies, or overriding requirements of judicial propriety, can lead it to refrain from adjudication. . . ."[9] The Joint Dissenters in the *Nuclear Tests Case*, in language reminiscent of this passage, but even more strongly worded, suggest that in that case the Court had improperly refused to proceed to the merits. Worse, it even refused to decide on its own jurisdiction.[10]

With these scruples in mind, the *Nuclear Tests Case* requires closer examination. The Court disposed of the case on a preliminary issue—the continuance of a dispute. It used this argument (which was not pleaded before it) to dismiss the application before deciding the question of jurisdiction (though it had heard argument on that point) and without hearing any argument on the merits. A strong dissenting opinion voiced the view that whether or not a dispute existed was above all a question which went to the merits and should have been decided only after arguments on the merits and, of course, after a decision as to jurisdiction.[11]

The division of opinion revealed in this case reflects a continuing schism in judicial opinion about the order in which preliminary objections should be taken and the propriety of deciding certain of them without hearing argument on the merits. These problems have arisen many times before, notably in the *Interhandel Case*,[12] the *South West Africa Case (Preliminary Objections)* 1962,[13] the *South West Africa Case (2nd Phase)* of 1966,[14] the *Northern Cameroons Case*,[15] the *Barcelona Traction Case (Preliminary Objections)*[16] and the *Barcelona Traction Case (2nd Phase)*.[17] Two of these cases were of particular interest. One was the *Northern Cameroons Case* where the Court held that, because of subsequent events, a judgment would be without object. The other was the *South West Africa Case 1966* where, after argument had been heard on the merits and the Court had determined in favour of its jurisdiction, the Court held that the applicants had no "legal interest" in the subject matter of the dispute. The manner in which both these cases were disposed of caused dissent among the judges, and in the latter case, considerable public controversy. They are therefore worth looking at a little more closely.

2. *The Northern Cameroons Case*

In this case the Republic of Cameroon sought a declaration that the administrative union between the Northern Cameroons and Nigeria made by the United Kingdom while the Northern Cameroons were still a trust territory

[8] *Id.* 461.
[9] *Id.* 438.
[10] *Supra* n. 3, Joint Dissenting Opinion at 322.
[11] *Id.* 363-64.
[12] 1959 ICJ Reports, 6.
[13] 1962 ICJ Reports, 319.
[14] 1966 ICJ Reports, 6.
[15] 1963 ICJ Reports, 15.
[16] 1964 ICJ Reports, 6. Cf. esp. the Judgment, at 41-46.
[17] 1970 ICJ Reports, 3. Cf. particularly the statement by Fitzmaurice, Separate Opinion, at 110-13.

had been in breach of the Trust Agreement. The Republic of Cameroon argued that it therefore nullified the validity of the plebiscite which had determined that, after independence, the territory should become part of Nigeria. The General Assembly had not been persuaded that the administrative union, or other factors alleged by the Republic of Cameroon, had invalidated the plebiscite as a free expression of the will of the people. Indeed it recited the effect of the plebiscite in the Preamble to the Resolution which terminated the Trusteeship Agreement and whose effect had been the incorporation of the Northern Cameroons in Nigeria.

The Republic of Cameroon did not ask the Court to review the United Nations' decision, which it recognized the Court was not competent to do, but contended that it had a real interest in knowing whether the administrative union had been valid. It did not seek compensation or a transfer of the territory to itself. To this the Court replied:

> . . . the Applicant has stated that it does not ask the Court to invalidate the plebiscite; indeed as noted, it recognizes the Court could not do so. It has not asked the Court to find any causal connection between the alleged maladministration and the result of the vote favouring union with the Federation of Nigeria. As a result, the Court is relegated to an issue remote from reality.
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> If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application.
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> . . .
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> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.[18]

The Court also made it clear that this was a question to be discussed before discussion on the merits.

> The Court must discharge the duty to which it has already called attention—the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.
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> The answer to the question whether the judicial function is engaged may, in certain cases where the issue is raised, need to wait upon an examination of the merits. In the present case, however, it is already evident that it cannot be engaged. No purpose accordingly would be served by undertaking an examination of the merits in the case for the purpose of reaching a decision which, in the light of the circumstances to which the Court has already called attention, ineluctably must be made.[19]

Ten judges voted in favour of the majority judgment and five against.

[18] *Supra* n. 15, Judgment, at 33-34.
[19] *Id.* 38.

There were four separate opinions and four dissenting opinions. In the 8 individual statements thus given, a great variety of views is set out. Judges Wellington Koo, Spender, and Morelli in their separate opinions[20] all considered that the first question to be considered was whether there was a dispute, which was a question of admissibility; only after that should questions of jurisdiction be considered. And only after that, according to Spender,[21] should the Court consider whether the dispute *continued* to exist. Wellington Koo[22] and Morelli[23] gave some guidance as to what was a "dispute". Fitzmaurice[24] agreed entirely with the majority approach. Judges Koretsky[25] and Badawi[26] in separate dissents, thought that questions of jurisdiction should be considered before admissibility. Koretsky also stated that only questions of "non-observance of the purely formal requirements of the Rules" could be considered as questions of admissibility—any question relating to the substance of the claim should be decided after proceedings on the merits.[27] Judge Bustamante y Rivero, dissenting,[28] thought that the objections to admissibility and to jurisdiction were not clearly independent or distinct and that even though some objections touched upon the "very substance of the dispute"[29] he had "not in practice found it necessary to reach a decision upon the merits of the dispute for the purpose of examining the admissibility or non-admissibility of any particular objection".[30]

3. *The South West Africa Case 1966*

The *South West Africa Case 1966* made particularly clear the difficulties of deciding how preliminary issues should be disposed of. In 1962 the Court had dismissed the four preliminary objections made by South Africa and held that it had jurisdiction to decide the merits. After all the issues had been argued the Court then declared that there was still a question of "antecedent character" left unsettled. The Court, after 4 years' proceedings on the merits, held that Ethiopia and Liberia had no "legal interest" to obtain judgment and refused to decide the substance of the claim.

Several commentators saw this result as influenced by the Court's appreciation of the difficult situation which any substantive decision would have landed it in.

> The Court can hardly have relished the prospect of becoming embroiled in the South West African controversy; and those who contributed to its lack of confidence in the compliance of nations with its Judgments and Opinions should feel some embarrassment in chastising the Court so roundly in the South West Africa Case. . . . Even those nations which have been comparatively well disposed towards the concept of the judicial settlement of disputes, have made it fairly clear by their international conduct that a decision on the merits of the *South West African Case* would be highly embarrassing to them politically. If men send up smoke-

[20] *Id.* Wellington Koo, Separate Opinion, 41 ff.; Spender, Separate Opinion, 65 ff.; Morelli, Separate Opinion, 131 ff.
[21] *Id.* Spender, Separate Opinion, at 96.
[22] *Id.* Wellington Koo, Separate Opinion, at 44.
[23] *Id.* Morelli, Separate Opinion, at 133-37.
[24] *Id.* Fitzmaurice, Separate Opinion, 97 ff.
[25] *Id.* Koretsky, Declaration, at 39-40.
[26] *Id.* Badawi, Dissenting Opinion, 150 ff.
[27] *Id.* Koretsky, Declaration, at 39.
[28] *Id.* Bustamante y Riviero, Dissenting Opinion, 154 ff.
[29] *Id.* at 180.
[30] *Id.* at 181.

signals, they must not be surprised if they are read.[31]

Verzijl suggested that the use of the "legal interest" doctrine, separated from issues of jurisdiction already decided in 1962 and incorporated as a further preliminary issue in the real merits was

> nothing more than an after-thought or after-wit, having presented itself to the defeated minority of 1962 as the only possible remaining escape from the otherwise ineluctable obligation to adjudicate upon the *real* merits of the dispute. . . .[32]

Another commentator attributed the outcome at least partly to the Court's awareness of the unlikelihood of its decision being accepted by the losing party in either event.

> [S]ome Members of the Court's 8-7 majority outcome which depended on the second or casting vote of the President of the Court (Sir Percy Spender) may have become convinced that it was better for the Court not to decide at all, than to decide and then have its decision ignored.[33]

There was much disagreement with the legal arguments of the majority within the Court. The same kind of dissension about the proper way to proceed with "preliminary issues" as occurred in the *Northern Cameroons Case* also occurred here. The majority thought that the question whether the Applicants had a "legal interest", although it "had an antecedent character"[34] was not an issue which either was or could have been determined at the Preliminary Objections Phase. Judges Wellington Koo, Koretsky, Tanaka, Jessup, Padilla Nervo, and Mbanefo all[35] thought that this issue had already been decided in the course of the Court's 1962 judgment. Jessup in particular thought that the issue had already been resolved, and reading the 1962 judgment it is difficult to believe (especially in view of the change of the minority judges in that phase to majority judges in the later phase) that the judges really intended any "preliminary issues" to be left over to the merits.

Another criticism was the lack of warning given to the participants that a preliminary matter remained to be settled.[36] In the *Barcelona Traction Case* two preliminary objections were joined to the merits (one relating to the applicant's *ius standi* and the other to exhaustion of local remedies)[37] and after full argument on the merits, the application was dismissed on the first of these preliminary issues,[38] but at least the parties were put on notice that the judges had reserved their decision on this matter. The "lack of warning" argument was to be strongly put by the dissenting judges in the *Nuclear Tests Case*.

The avoidance of a decision on the merits, after expectations had been raised that the Court would go ahead and decide the merits of the dispute was also much criticized. "Since in 1962," said Judge Forster, "the Court

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[31] Rosalyn Higgins, "The International Court and South West Africa: the Implications of the Judgment", 42 *International Affairs*, 573, 589-90.

[32] J. H. W. Verzijl, "The South West Africa Cases (Second Phase)", 3 *International Relations* (1966), 87, 91.

[33] R. A. Falk, "Realistic Horizons for International Adjudication", 11 *Virginia Journal of International Law*, 314, 317.

[34] *Supra* n. 14, Judgment, at 18.

[35] *Id.* Wellington Koo, Dissenting Opinion, 216; Koretsky, Dissenting Opinion, 239; Tanaka, Dissenting Opinion, 250; Jessup, Dissenting Opinion, 325 at 329; Padilla Nervo, Dissenting Opinion, 443 at 449-453; Mbanefo, 484.

[36] Jessup, *Supra* n. 14, Dissenting Opinion, 325; Higgins, *Supra* n. 20, 579; R. A. Falk, "The South West Africa Cases: An Appraisal", 21 *International Organization* (1967) 1, 6; W. G. Friedmann, "The Jurisprudential Implications of the Southwest Africa Case," 6 *Columbia Journal of Transnational Law*, 1, 10.

[37] *Supra* n. 16.

[38] *Supra* n. 17.

upheld its 'jurisdiction to adjudicate upon the merits of the dispute' it was its duty, today, to declare whether or not South Africa has committed abuses in South West Africa and is in breach of its obligations under the Mandate."[39]

4. *Amendment of the Rules concerning Preliminary Objections in 1972*

In the light no doubt of these and other cases, Rule 62 (now Rule 67) was amended in 1972. Sub-para (1) now reads:

> 1. Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial. Any such objection made by a party other than the respondent shall be filed within the time-limit for the delivery of that party's first pleading.

Sub-para (3), which is unchanged, provides for suspension of the proceedings on the merits. The last four sub-paragraphs are important:

> 5. The statements of fact and law in the pleadings referred to in paragraphs 2 and 3 above, and the statements and evidence presented at the hearings contemplated by paragraph 4, shall be confined to those matters that are relevant to the objection.
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> 6. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue.
>
> 7. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.
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> 8. Any agreement between the parties that an objection submitted under paragraph 1 shall be heard and determined within the framework of the merits shall be given effect by the Court.

Sub-paragraphs 5, 6 and 8 are wholly new. Sub-paragraph 7 has been reworded. In its old (1946) form it stated that the Court should either uphold the objection, reject it, or join the objection to the merits. The new provisions, instead of speaking of joining the objection to the merits, require the Court, by the use of the mandatory word "shall", if it does not accept or reject the objection outright, to *declare* that "it does not possess an exclusively preliminary character". By such a declaration, the parties should, presumably, be put on notice that issues relating to this objection may still be taken up by the Court and should be argued on the merits. Presumably this was to prevent the shock in circumstances such as the *South West Africa Case (2nd Phase)*[40] where no one had expected the judges to return, at the merits phase, to the issue of the applicant's legal interest.

5. *The Nuclear Tests Case (Aust. v. France): The Decision*

The proceedings in this case, initiated by Australia against France in 1973, were based on the asserted jurisdiction of the Court according to the General Act for the Pacific Settlement of International Disputes of 1928, to

[39] *Supra* n. 14, Forster, Dissenting Opinion, at 482. *Cf.* also the comments in other Dissenting Opinions by Tanaka, at 248; Jessup, at 323 and Mbanefo, at 490.

[40] Petrén specifically states this to have been the reason for the amendment, *Nuclear Tests Case*, *supra* n. 3, Separate Opinion, at 304.

which both Australia and France were parties. France refused to appear before the Court, stating by letter to the Registrar that the Court was "manifestly not competent", that it did not accept the Court's jurisdiction and requesting that the case be removed from the Court's list.

On 22 June 1973 the Court made an Interim Order against France to refrain from nuclear tests causing the deposit of radio-active fall-out in Australian territory, but further tests had been carried out by the French in July and August 1973 and from June to September in 1974 causing fall-out on Australian territory clearly attributable to those tests.

In its judgment of 20th December 1974, the Court held that it would first examine a question which it found to be "essentially preliminary", i.e. the existence of a dispute.[41] The Court held by 9 votes to 6 that the Australian claim "no longer has any object".[42] The judgment stated that, on the Court's own interpretation of Australia's claims, Australia's only object had been to seek a cessation of atmospheric tests, that France had since announced that it would be holding future tests underground and that the proceedings therefore could achieve no further useful purpose.

Four of the nine judges voting against the Australian application appended separate judgments in which they stated that the Australian application had *never* had any object, and should have been dismissed on that basis. Underlying the opinions of these judges (Forster, Gros, Petrén and Ignacio-Pinto) was a clear dissatisfaction with the Court's Procedure in the case. Petrén, in particular, indicated how unsatisfactory it was for the case to be before the Court for 18 months before it was found not to be a "dispute".[43] Yet evidently some of the other five majority judges (Lachs, Bengzon, Morozov, Nagendra Singh, Ruda) did not think that clearly no dispute existed at the time when Australia lodged her claim, for, apart from having previously ordered arguments to be made on jurisdiction and admissibility, the majority judgment itself, as the Joint Dissenters[44] and Judge *ad hoc* Barwick[45] point out, conceded that the claim was prima facie admissible.

Six judges dissented. Onyeama, Dillard, Aréchaga and Waldock, JJ., in a vigorous Joint Dissenting Opinion, thought that a dispute did exist when Australia sought the Court's aid and still continued, despite the statements made by the French Government. These judges felt strongly that the Court should have proceeded to a judgment on the merits. Judge de Castro and Judge *ad hoc* Barwick came to similar conclusions in their individual Dissenting Opinions.

The case immediately bears an important resemblance to the *South West Africa Case 1966*. Both applications were dismissed on the basis of an issue "of a preliminary character" ("legal interest" in the first case, "existence of a dispute" in the *Nuclear Tests Case*). Both cases avoided stating that the Court had no jurisdiction: in the first case the Court had already decided that it had (*South West Africa Case 1962*); and in the second the Court's jurisdiction had been denied from the outset by France, and it was obviously a highly controversial issue.

There is also some similarity to the *Northern Cameroons Case* in that events subsequent to the filing of the application were held to render the

[41] *Nuclear Tests Case, Supra* n. 3, Judgment, at 260.
[42] *Id.* at 272.
[43] *Id.* Petrén, Separate Opinion, at 298-99.
[44] *Id.*, Joint Dissenting Opinion, 312 at 325.
[45] *Id.*, Barwick, Dissenting Opinion, 391 at 393.

proceedings without object. Yet there were also considerable differences to these two cases. In the *South West Africa Case* the Court had already found itself to have jurisdiction. In the *Nuclear Tests Case* the new event relied on was a unilateral declaration by France whose legal effect was of considerable doubt as opposed to a series of occurrences in the Northern Cameroons which had not only taken place, but whose effect had been approved by the United Nations, and whose legality was not called into question.

6. *The Policy Behind the Nuclear Tests Case Decision*

Let us look at the reasoning on which the Court based its disposal of the Australian claim:

> The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objecive determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means.[46]

This reasoning depends on two basic assumptions:

(1) that there was a dispute (which 4 of the majority judges denied)

(2) that it no longer existed.

To decide that it no longer existed the Court had to prove that all Australia sought was the cessation of the nuclear tests programme, and that France had by unilateral declaration made an undertaking to that effect. The first proposition could be seriously doubted: as the dissenting judges pointed out, Australia was also seeking a declaration as to the illegality of tests which had already occurred (on which a claim for compensation could later have been based if Australia had so wished). But the second assumption was even more questionable. The effect of the unilateral declaration in international law is not altogether clear, but on the terms of the French declaration, and in the context, it is difficult not to agree with Judge *ad hoc* Barwick:

> There seems to be nothing, either in the language used or in the circumstances of its employment, which in my opinion would warrant, and certainly nothing to compel, the conclusion that those making the statements were intending to enter into a solemn and far-reaching international obligation rather than to announce the current intention of the French Government. I would have thought myself that the more natural conclusion to draw from the various statements was that they were statements of policy and not intended as undertaking to the international community such a far-reaching obligation. The Judgment does not seem to my mind to offer any reason why these statements should be regarded as expressing an intention to accept an internationally binding undertaking rather than an intention to make statements of current government policy and intention.
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> Further, it seems to me strange to say the least that the French Government at a time when it had not completed its 1974 series of tests and did not know that the weather conditions of the winter in the southern

[46] *Id.*, Judgment, at 270-71.

> hemisphere would permit them to be carried out, should pre-empt itself from testing again in the atmosphere, even if the 1974 series should, apart from the effects of weather, prove inadequate for the purposes which prompted France to undertake them. A conclusion that France has made such an undertaking without any reservation of any kind, such, for example, as is found in the Moscow Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, to which France is not a party, is quite remarkable and difficult to accept.[47]

All six dissenters threw doubt on the Court's interpretation of the French declaration as to the cessation of atmospheric testing as an undertaking to hold no future tests.[48] Judge Forster, who voted with the majority but for different reasons also expressly denied that the French declaration embodied a legal obligation[49] while Judges Gros and Petrén, both of whom likewise thought the Australian application to be prima facie inadmissible, made no finding on this aspect. Judge Ignacio-Pinto[50] expressed some approval of this reasoning, though it was not the major basis for his view.

Even counting Ignacio-Pinto's view, there were still only six judges who approved both major counts in the Court's reasoning: one being the argument that the French declaration did amount to a legal obligation, and the other being the adoption of a particular interpretation of the Australian claim which could enable the Court to hold that the claim had been met by the French Declaration. A maximum of six out of fifteen judges supporting the reasoning of the judgment, does, however, give some cause for concern. Judge Petrén expounded clearly the dilemma of the judge:

> The method whereby the judgments of the Court are traditionally drafted implies that a judge can vote for a judgment if he is in agreement with the essential content of the operative part, and that he can do so even if he does not accept the grounds advanced, a fact which he normally makes known by a separate opinion. It is true that this method of ordering the matter is open to criticism, more particularly because it does not rule out the adoption of judgments whose reasoning is not accepted by the majority of the judges voting in favour of them, but such is the practice of the Court. According to this practice, the reasoning, which represents the fruit of the first and second readings in which all the judges participate, precedes the operative part and can no longer be changed at the moment when the vote is taken at the end of the second reading. This vote concerns solely the operative part and is not followed by the indication of the reasons upheld by each judge. In such circumstances, a judge who disapproves of the reasoning of the judgment but is in favour of the outcome achieved by the operative clause feels himself obliged, in the interests of justice, to vote for the judgment, because if he voted the other way he might frustrate the correct disposition of the case. The present phase of the proceedings in this case was in reality dominated by the question whether the Court could continue to deal with the case. On that absolutely essential point I reached the same conclusion as the Judgment even if my grounds for doing so were diffierent.

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[47] *Id.*, Barwick, Separate Opinion, at 448-49.
[48] *Id.*, Joint Dissenting Opinion, 320; de Castro, Dissenting Opinion, 375; Barwick, Dissenting Opinion, 448-49.
[49] *Id.*, Forster, Separate Opinion, at 275.
[50] *Id.*, Ignacio-Pinto, Separate Opinion, at 310.

> I have therefore been obliged to vote for the Judgment, even though I do not subscribe to any of its grounds. Had I voted otherwise I would have run the risk of contributing to the creation of a situation which would have been strange indeed for a Court whose jurisdiction is voluntary, a situation in which the merits of a case would have been considered even though the majority of the judges considered that they ought not to be.[51]

Clearly, what all majority judges shared was a conviction that the Court should not continue to deal with the case. The difficulty was to find an appropriate justification for that course of action.

The reasons why the majority of the judges felt unwilling to deal with the merits of the case could not, by any means, provide that justification, understandable though they are. There is plenty of evidence as to why the Court was reluctant to deal with the merits, as is shown by the following passage:

> The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have . . . arisen render any adjudication devoid of purpose" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, *it is none the less true that the needless continuance of litigation is an obstacle to such harmony*.[52]

Judge de Castro (dissenting) shared the uneasiness of the Court, though he felt that they should have proceeded to the merits:

> I perfectly understand the reluctance of the majority of the Court to countenance the protraction of proceedings which from the practical point of view have become apparently, or probably, pointless. It is however not only the probable, but also the possible, which has to be taken into account if rules of law are to be respected. It is thereby that the application of the law becomes a safeguard for the liberty of States and bestows the requisite security on international relations.[53]

The reasons for the Court's reluctance to deal with the merits come out even more clearly in the Separate Opinion of Judge Gros:

> To speak of two parties in proceedings in which one has failed to appear, and has on every occasion re-affirmed that it will not have anything to do with the proceedings is to refuse to look facts in the face. The fact is that when voluntary absence is asserted and openly acknowledged there is no longer more than one party in the proceedings. There is no justification for the fiction that, so long as the Court has not recognized its lack of jurisdiction, a State which is absent is nevertheless a party in the proceedings. The truth of the matter is that, in a case of default three distinct interests are affected: that of the Court, that of the applicant and that of the respondent; the system of wholly ignoring the respondent's decision not to appear and of depriving it of effect is neither just nor reasonable. In the present case, by its reasoned refusal to appear the Respondent has declared that, so far as it is concerned, there are no proceedings, and this it has repeated each time the Court has consulted it.[54]

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[51] *Id.*, Petrén, Separate Opinion, at 306-07.
[52] *Id.*, Judgment, at 271. Emphasis added.
[53] *Id.*, De Castro, Separate Opinion, at 375 .
[54] *Id.*, Gros, Separate Opinion, at 290.

The Court could not but be aware that France had no intention whatever of listening to the Court's views, let alone carrying them out. To consider the merits of the case was therefore likely to be highly embarrassing to the Court and to be avoided if at all possible.

It would be rash to claim that these factual considerations play no part at all in the judges' processes of reasoning. Of course they do, and any organization which completely disregards the views of persons on which its continued existence as a functioning institution depends, is likely to destroy the social acceptance and support which alone confer authority and power on it. Yet awareness of the political difficulties to which a pronouncement on the merits may give rise is not an acceptable reason for the Court to refuse to adjudicate. The Court, in braver days, has taken this view. The Joint Dissenters urged that in such a case, the Court should grasp the nettle firmly, boldly discussing the issues without regard to the likely non-compliance, embarrassment or controversy. The Court has not fulfilled its duty to the international community if it refuses to decide the issue put before it. And it seriously damages its own prestige if the arguments it uses to cut off the procedure before the merits phase is reached seem contrived and unconvincing.

7. *Avoiding Discussion on the Merits: Justification in Legal Terms*

Whatever the Court's reluctance to adjudicate the merits, it was necessary to have a satisfactory justification in legal terms.

There were three ways of avoiding discussion of the merits: by a holding that the Court had no jurisdiction, by a holding that the claim was not admissible, and, possibly, by the dubious device of the "legal interest", used in the *South West Africa Case 1966*.

A decision as to jurisdiction would hardly have been less embarrassing than a decision on the merits. Had the Court asserted jurisdiction, France would have continued to flout it, with the worst consequences for acceptance of the Court generally. To deny jurisdiction the Court would have had either to state that the General Act for the Pacific Settlement of Disputes of 1928 was no longer in force, and thus to connive at a further setback for international adjudication, or to accede to the French argument (put before the Court by letter) that the reservation to the optional clause as to compulsory jurisdiction (1) prevailed over the broader acceptance of jurisdiction under the 1928 Act and (2) covered the present dispute ("disputes concerning activities connected with national defence".) The first would further restrict the availability of access to the Court and the second raises notoriously delicate and dangerous issues concerning reservations to the compulsory jurisdiction of the Court which the Court has been reluctant to explore on two previous occasions (*Norwegian Loans Case*;[55] *Interhandel Case*).[56]

It is hardly surprising that the Court should prefer to find some other ground on which to exclude an examination on the merits.

A Respondent may argue, among his Preliminary Objections that the claim is not admissible. Art. 17 of the 1928 Act conferred on the Court jurisdiction over "all disputes with regard to which the parties are in conflict as to their rights". (A similar jurisdiction is provided for under Art. 36(2) of the Court's statute.[57]) Was it therefore possible to object, before the merits of the case were examined, that there was no dispute or that the dispute was not about

[55] 1957 ICJ Reports, 9.
[56] *Supra*, n. 12.
[57] *Nuclear Tests Case, Supra* n. 3, Joint Dissenting Opinion, 358-59.

the legal rights of the parties? If so, should the Court have pronounced on these preliminary questions or should it have joined them to the merits?

The Court decided that before determining whether it had jurisdiction, and before deciding whether there was a dispute, it could decide that there was no dispute which continued to exist and that the claim no longer had any object.

> The scope of the present phase of the proceedings was defined by the Court's Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.
>
> In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when establishsed, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*Northern Cameroons, Judgment, I.C.J. Reports 1963,* at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.
>
> With these considerations in mind, the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings.[58]

Judge Gros defended the very flexible procedure of the Court in dealing with preliminary objections; he thought it was mere common sense to decide that if it is impossible to give judgment in a case, there is no need to examine other grounds. If the whole case depended on recognizing that an application was unfounded and that there was no legal dispute of which the court could be seised, "a marked taste for formalism" would be required to insist on the usual categories of phases. This would be to erect the succession of phases into a sort of ritual, unjustified in the general conception of international law, which is not formalistic. He concluded:

> To wait several years—more than a year and a half has already elapsed—in order to reach the unhurried conclusion that a court is competent merely because the two States are formally bound by a jurisdictional clause, without examining the scope of that clause, and then to join the questions of admissibility to the merits, only subsequently to arrive (perhaps) at the conclusion on the merits that there were no merits, would not be

[58] *Id.*, Judgment, 259-260.

a good way of administering justice.[59]

Although Judge Gros agreed there should be wide flexibility in the way the Court decided which issues had priority, he disagreed with the Court's conduct in this case. He felt that when questions of admissibility and jurisdiction had been written into the Order of 22 June 1973, certain Members of the Court felt that, as could be seen from the separate and dissenting opinions, the problem of the existence of the object of the dispute should be settled in the new phase, whereas a majority of the judges had made up their minds to deal solely with narrow issues of jurisdiction in that phase, and to postpone all other issues to the merits phase, including the question whether the proceedings had any object.[60]

Judge Petrén doubted that questions of admissibility and competence could be separated. He went on:

> One of the very first prerequisites is that the dispute should concern a matter governed by international law. If this were not the case, the dispute would have no object falling within the domain of the Court's jurisdiction, inasmuch as the Court is only competent to deal with disputes in international law.
>
> The judgment alludes in paragraph 24 to the jurisdiction of the Court as viewed therein, i.e., as limited to problems related to the jurisdictional provisions of the Statute of the Court and of the General Act of 1928. In the words of the first sentence of that paragraph, "the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings". In other words, the Judgment, which makes no further reference to the question of jurisdiction, indicates that the Court did not find that there was any necessity to consider or resolve it. Neither—though this it does not make so plain—does it deal with the question of admissibility.
>
> For my part, I do not believe that it is possible thus to set aside consideration of all the preliminary questions indicated in the Order of 22 June 1973. More particularly, the Court ought in my view to have formed an opinion from the outset as to the true character of the dispute which was the subject of the Application; if the Court had found that the dispute did not concern a point of international law, it was for that absolutely primordial reason that it should have removed the case from its list, and not because the non-existence of the subject of the dispute was ascertained after many months of proceedings.[61]

This view was very firmly rejected by the Joint Dissenting Opinion:

> . . . there is nothing in the concept of admissibility which should have precluded the Applicant from being given the opportunity of proceeding to the merits. This observation applies, in particular, to the contention that the claim of the Applicant reveals no legal dispute or, put differently, that the dispute is exclusively of a political character and thus non-justiciable.[62]

Furthermore those dissenting judges considered that the Court should first have determined its jurisdiction. (This procedural view was shared by

[59] *Id.*, Gros, Separate Opinion, at 278-79.
[60] *Id.* at 289.
[61] *Id.*, Petrén, Separate Opinion, at 302.
[62] *Id.*, Joint Dissenting Opinion, at 358.

Judge de Castro[62a] and Judge *ad hoc* Barwick[62b].) To the Joint Dissenters it appeared ". . . that the Court, in the process of rendering the present Judgment, has exercised substantive jurisdiction without having first made a determination of its existence and the legal grounds upon which that jurisdiction rests".[63]

Consequently there are altogether in the Judgment and Opinions at least five questions asserted to be preliminary.

Was there a dispute cognizable by international law?
(Forster, Petrén, Gros)

Was there a dispute as to legal rights?
(Joint Dissenting Opinion)

Did the dispute continue to exist?
(Majority Judgment)

Did Australia have a "legal interest"?
(Joint Dissenting Opinion; de Castro)

Did the Court have jurisdiction?
(All judges)

The dissenters thought jurisdiction should be dealt with first, and that the first 2 questions above were questions relating to the merits. They also thought that the third claim related to the interpretation of Australia's claim also involved the merits and should also have been postponed. The concurring judges thought the first two questions (or one of them) should be discussed before the question of jurisdiction. The Judgment put the third question first.

It may be true that "the Court has been reticent in providing general guidance" in this area because the "decisions are always most intimately connected with the particular facts",[64] but the amount of disagreement among the judges and the vigour of their views, together with the lack of a clear pattern in the way in which the Court has dealt with preliminary objections in succeeding cases, can only leave prospective litigants in confusion.

8. *Questions of Jurisdiction and Questions of Admissibility: which should come first?*

In the practice of the Court a sharp distinction has not been drawn between preliminary objections to jurisdiction and admissibility.[65] To allay the confusion of the latest case, however, perhaps some rationalization should be attempted.

Questions of jurisdiction *stricto sensu* relate to the Respondent's submission to the jurisdiction of the Court, e.g. interpretation of the "compromis" if there is one; interpretation of behaviour suggesting acceptance of the Court's activity (e.g. Albania's conduct preceding the *Corfu Channel Case*);[66] interpretation of an international agreement conferring jurisdiction on the Court (e.g. a Mandate or Trust Agreement; the General Act for Pacific Settlement of Disputes) or interpretation of reservations to the Optional Clause (e.g. "domestic jurisdiction" reservations, reservation as to matters of national security, etc.)

Questions of admissibility seem to relate rather to the interpretation of the kind of dispute which the Court may adjudicate. An astute reader of

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[62a] *Id.*, at 123.
[62b] *Id.*, at 397.
[63] *Id.*, at 325.
[64] Rosenne, *supra* n. 6, 459.
[65] *Supra* n. 3, Petrén, Separate Opinion, at 303.
[66] 1949 ICJ Reports, 4.

the relevant clause of the Court's statute may be able to exploit every word in this sense:

> Art. 36 (2) The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

Thus the words "all legal disputes" can be suggested to have the most divergent meanings. It can be alleged that there is no real dispute, or that the dispute no longer exists, or that it is not a "legal" dispute. The latter may give rise to several arguments: that it is a dispute as to politics not law, that it is not a dispute susceptible to *legal* settlement, or (along the lines of Judge Petrén's reasoning in the *Nuclear Tests Case*)[67] that there are as yet no legal rules concerning this subject, and for that reason the application is inadmissible. The latter would seem virtually to be a declaration of "non liquet".[68] Against this view one would have to consider Judge Lauterpacht's opinion that any state of affairs whatever could be adjudicated by the International Court on the basis of legal rules and that the Court should not therefore ever refuse a decision on the ground that no international law exists on the subject. Such a basic disagreement on the function of the Court as a law-making body should at least be openly determined by the Court, rather than touched on in the course of deciding preliminary objections. The Joint Dissenters in the *Nuclear Tests Case* thought that a legal dispute was a dispute in which parties are in conflict as to their legal rights.

There is a further "preliminary issue" which may or may not be one of admissibility and that is the question of "legal interest".

There remains in the practice of the Court a continued disagreement among the judges as to whether questions of admissibility are preliminary questions or questions relating to the merits. The Court has twice (*Northern Cameroons Case; Nuclear Tests Case*) held that whether a dispute continues to exist is a question which can be determined before discussion of the merits. If this, however, involves a wide investigation into what the real nature of the dispute was (*Nuclear Tests Case*) as opposed to the agreed request of the Applicant State (*Northern Cameroons Case*) it seems really a question hardly to be decided before the merits are argued. And in any event, there seems some validity in the argument of the Joint Dissenters in the *Nuclear Tests Case*[69] that a decision as to whether a dispute exists at the date of judgment, presupposes that the Court has jurisdiction over the dispute to begin with—and hence that questions of jurisdiction should be dealt with first.

According to Art. 38 (1) of the Court's Statute, its function "is to decide in accordance with international law such disputes as are submitted

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[67] *Supra* n. 3, Separate Opinion 298 at 302-06.

[68] *Cf.* Sir Hersch Lauterpacht, "Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Legal Order", 1958 *Symbolae Verzijl* 196; J. Stone, "*Non Liquet* and the Function of Law in the International Community" 35 *British Yearbook of International Law* (1959) 124.

[69] *Supra* n. 3, Joint Dissenting Opinion, at 325.

to it". Judge Petrén felt that

> . . . the Court ought . . . to have formed an opinion from the outset as to the true character of the dispute which was the subject of the Application; if the Court had found that the dispute did not concern a point of international law, it was for that absolutely primordial reason that it should have removed the case from its list. . . .[70]

Furthermore, he stated that for an application to be admissible

> [i]t is . . . necessary that the right claimed by the applicant party should belong to a domain governed by international law[71]
>
> . . . the admissibility of the Application depends, in my view, on the existence of a rule of customary international law. . . .[72]

He then briefly reviews the state of practice on nuclear testing and concludes that no such rule has yet evolved.

Whether there are any rules of international law by which to adjudicate the case does appear to go very much to the merits in cases before the International Court. Both in the *South West Africa Case 1966* and the *Nuclear Tests Case* the Court was asked to decide whether a rule of customary international law had in fact become established. This was the essential basis of the dispute and, as the Joint Dissenters in the latter case pointed out, the Court should not

> . . . determine in *limine litis* the character, as *lex lata* or *lex ferenda*, of an alleged rule of customary law and adjudicate upon its existence or non-existence in preliminary proceedings without having first afforded the parties the opportunity to plead the legal merits of the case.[73]

There is much strength in the view that such an issue, *pace* Judge Petrén,[74] should not be decided as a preliminary question, but dealt with on the merits.

Petrén was obviously haunted by the spectre of the *South West Africa Cases* where, after four years' work on the merits, the case was still dismissed on a preliminary issue.

> The Court would have done itself the greatest harm if, without resolving the question of admissibility, it had ordered the commencement of proceedings on the merits in all their aspects, proceedings which would necessarily have been lengthy and complicated if only because of the scientific and medical problems involved.[75]

The majority were also concerned with this aspect.

> While judicial settlement may provide a path to international harmony in circumstances of conflict, it is nonetheless true that needless continuance of litigation is an obstacle to that harmony.[76]

The Joint Dissenters reviewed previous decisions and concluded

> . . . the consistent jurisprudence of the Permanent Court and of this Court seems to us clearly to show that, the moment a preliminary survey of the merits indicates that issues raised in preliminary proceedings cannot be determined without encroaching upon and prejudging the merits, they are not issues which may be decided without first having pleadings on the merits. . . .[77]

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[70] *Id.*, Petrén, Separate Opinion, at 302.
[71] *Id.* at 304.
[72] *Id.* at 305.
[73] *Id.* Joint Dissenting Opinion, at 367.
[74] Petrén's view also has some support from Judge Gros, *Id.*, Separate Opinion, at 305.
[75] *Id.*, Petrén, Separate Opinion, at 305.
[76] *Id.*, Judgment, at 271.
[77] *Id.*, Joint Dissenting Opinion, 312 at 365.

These judges felt that if the contentions of the applicant were "not manifestly frivolous or vexatious"[78] they should be determined at the merits phase. And indeed, it does seem startling that Judge Petrén's test would enable judges to dismiss, at the outset, a claim based on an emerging customary rule of international law before the parties had brought evidence in support of that rule. With the saving that the claims appear "to be based on rational and reasonably arguable grounds"[79] the Court should in justice to the parties proceed to the merits.

Finally, if the Court does decide to dispose of the case on a preliminary issue, it should at least put the parties on notice so that they can argue the issue. This was one of the criticisms made of the *South West Africa Case (2nd Phase)*. The Joint Dissenters drew attention to a similar unfairness in the *Nuclear Tests Case*.

> . . . the Parties had received definite directions from the Court that the proceedings should "first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application". No intimation or suggestion was ever given to the Parties that this direction was no longer in effect or that the Court would go into other issues which were neither pleaded nor argued but which now form the basis for the final disposal of the case.[80]
>
> No-one doubts that the Court has the power in its discretion to decide certain issues *ex proprio motu*. The real question is not one of power, but whether the exercise of power in a given case is consonant with the due administration of justice. For all the reasons noted above, we are of the view that, in the circumstances of this case, to decide the issue of "mootness" without affording the Applicant any opportunity to submit counter-arguments is not consonant with the due administration of justice.[81]

9. *Effect of the Court's Decision*

Almost all the important questions raised by the *Nuclear Tests Case* have been left unresolved. Issues such as whether the 1928 General Act is still in force, the ambit of the "national defence" reservation, whether any customary rules of international law have emerged concerning atmospheric nuclear tests and the legality of the unilateral creation of "danger zones" in the High Seas have all been left undecided, though dissenting and concurring judges have made some comment on these matters. About the only legal point on which the Judgment makes a really significant pronouncement is on the interpretation of the unilateral French declaration as a binding obligation: a pronouncement which met with vigorous dissent from certain other judges and does not seem compelling.

The Joint Dissenting Opinion of Onyeama, Dillard, Jimenez de Aréchaga and Waldock cogently criticizes the way taken by the majority.

> The Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" (Art. 38, para. 1, of the Statute), has the duty to hear and determine the cases it is seised of and is competent to examine. It has not the discretionary power of choosing those contentious cases it will decide and those it will not. Not merely requirements of judicial propriety, but statutory provisions governing the Court's

[78] *Id.* at 321.
[79] *Id.* at 366.
[80] *Id.* at 322
[81] *Id.* at 323.

> constitution and functions impose upon it the primary obligation to adjudicate upon cases brought before it with respect to which it possesses jurisdiction and finds no ground of inadmissibility. In our view, for the Court to discharge itself from carrying out that primary obligation must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require. In the present case we are very far from thinking that any such considerations exist.[82]

The major disadvantage of dealing with questions of admissibility first is, as these judges point out, that the Court may appear to be refusing cases which it should decide. For the Court to use procedural means to avoid deciding difficult cases must cause deep concern. When the justification of the refusal to examine the merits is as flimsy as it seems to be in *Nuclear Tests Case*, it causes dismay.

A second very serious problem has emerged from the confusion and dissent among the ICJ-judges about questions of jurisdiction and admissibility. This is the second time (the first was the *South West Africa Case 1966*) in which the Court, after lengthy proceedings, has decided a case on a "preliminary" issue without giving notice to the parties that it intended to do so, and without hearing argument on that particular aspect. Dissenters in both cases were concerned at this aspect of procedure and it, too, must give rise to grave misgivings. It is vitally important that, in the International Court which is still regarded with some suspicion, justice manifestly seem to be done. Justice does not appear conspicuous in a procedure which dismisses an Applicant's claim on the basis that there is no legal interest, or that his claim has already been fully settled by the Respondent's action, without allowing the Applicant a chance to argue these points and without, indeed, even giving him notice that the Court was considering them as a basis of decision.

The conclusion is that there must be serious concern about a case such as the *Nuclear Tests Case* where a decision on the merits appears to have been avoided by resort to procedural techniques and less than compelling reasoning. It is to be hoped that the Court in its future decisions will bear in mind the warning of the dissenting judges that the Court should hear and determine such cases as are submitted to it unless there are highly exceptional circumstances such as a manifestly vexatious or frivolous claim.

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[82] *Id.* at 322.