DISSENTING OPINION OF JUDGE FORSTER

[Translation]

I am unable to add my vote to those of the majority advocating the cessation of French nuclear tests in the Pacific for the duration of the present proceedings, which will end on a date which neither the Court nor anyone can possibly foretell.

I have voted against the Order of today's date indicating a provisional measure in that sense.

My refusal was dictated by the following considerations:

The indication of provisional measures is essentially governed by Article 41 (1) of the Statute of the International Court of Justice, which provides as follows:

> "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."

To exercise this power conferred by Article 41, the Court must have jurisdiction. Even when it considers that circumstances require the indication of provisional measures, the Court, before proceeding to indicate them, must satisfy itself that it has jurisdiction. Neither the provisional character of the measures nor the urgency of the requirement that they be indicated can dispense the judge from the necessity of ascertaining his jurisdiction *in limine litis*; especially when it is seriously and categorically contested by the State proceeded against, which is the case at present.

I am aware of the existence of certain past decisions from which it has been deduced that this ascertainment of our jurisdiction does not need to be more than summary at the stage of provisional measures. But this practice in the jurisprudence of the Court cannot in my view be made into a rule. For my part I consider that, however 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.

In my view the Court does not have two distinct kinds of jurisdiction: one to be exercised in respect of provisional measures and another to deal with the merits of the case. The truth of the matter is that there are some cases in which our jurisdiction is so very probable as rapidly to decide us to indicate the provisional measures, whereas in other cases, like the present one, it is only after a thorough examination that our jurisdiction, or lack of jurisdiction, can become apparent.

I feel that the Court ought to have gone further in the examination of its jurisdiction before finding upon the Australian request for the indication of provisional measures.

The reason is that the central pillar upon which the Australian contentions rest is the General Act of 1928, to which France was a party and which conferred jurisdiction upon the Permanent Court of International Justice.

The 1928 General Act was revised on 28 April 1949, but France did not accede to that revised General Act. And it is precisely in this revised General Act of 1949 that the International Court of Justice, our tribunal, takes the place of the defunct Permanent Court of International Justice.

From a letter addressed to the Registrar of the Court on 16 May 1973 and its annex it transpires that France, in reply to the notifications made to it, considers that the 1928 General Act, an integral part of the defunct League of Nations system, has fallen into desuetude, is devoid of any efficacy and has been a subject of indifference for virtually all the signatory States, both before and after the dissolution of the League of Nations which gave it birth.

Against this moribund, if not well and truly dead General Act of 1928 France, while not appearing before the Court, firmly sets up its Declaration of 16 May 1966, which in conformity with Article 36, paragraph 2, of the Statute recognizes the jurisdiction of the Court as compulsory *ipso facto* on condition of reciprocity, except in relation to disputes concerning activities connected with national defence (third reservation to the Declaration of 16 May 1966).

This express reservation, which in terms that are crystal clear categorically excludes our jurisdiction when the dispute concerns activities connected with national defence, is no small matter, and the French nuclear tests in the Pacific do concern French national defence, or so it seems to me. I would have liked the Court to consider at greater length the problem of jurisdiction raised by the confrontation of the 1928 General Act with the third reservation to the French Declaration of 16 May 1966. That problem should have been solved before making an Order which disregards the French reservation and oversteps the limits placed on our jurisdiction on 16 May 1966. I am very much afraid that the Order made today may leave in the minds of many the impression that the International Court of Justice henceforth considers the French reservation concerning its national defence, hence its security, the vital interest of the nation, to be null and void.

In my view it was imperatively necessary to solve certain important problems as a matter of priority before making any Order:

the problem of the survival of the 1928 General Act;

the problem raised by the confrontation of two undertakings in regard to international jurisdiction, one a treaty obligation binding several States and dating from 1928, the other a unilateral and later commit-

ment which dates from 16 May 1966 and, by its reservations, restricts the jurisdiction of the International Court of Justice in comparison with the first;

the problem of the incompatibility of the undertakings under consideration.

These problems, moreover, should have been considered without ever losing sight of the fact that consent is an indispensable prerequisite to our judging any State.

The Order made this day is an incursion into a French sector of activity placed strictly out of bounds by the third reservation of 16 May 1966. To cross the line into that sector, the Court required no mere probability but the absolute certainty of possessing jurisdiction. As I personally have been unable to attain that degree of certainty, I have declined to accompany the majority.

Furthermore, an additional consideration leads me to differ from the majority of my colleagues. The interim measures requested by Australia are so close to the actual subject-matter of the case that they are practically indistinguishable therefrom. Ultimately the only alternatives are the continuance or the cessation of the French nuclear tests in the Pacific. This is the substance of the case, upon which, in my opinion, it was not proper to pass by means of a provisional Order, but only by a final judgment.

In addition, the Order, by recommending the cessation, even the temporary cessation, of the French nuclear tests in the Pacific, may suggest that the Court has already formed a definite opinion on the lawfulness, or rather the unlawfulness, of the said tests. This, it seems to me, is what the Applicant was counting on; this is what it said, through the Solicitor-General of Australia, at the hearing of 22 May 1973:

> "May I conclude, Mr. President, by saying that few Orders of the Court would be more closely scrutinized than the one which the Court will make upon this application. Governments and people all over the world will look behind the contents of that Order to detect what they may presume to be the Court's attitude towards the fundamental question of the legality of further testing of nuclear weapons in the atmosphere."

Thus this provisional Order is to permit of the detection of the Court's attitude towards the fundamental question of the legality of further testing of nuclear weapons in the atmosphere!

To my mind this warning by Australia, made in open court, reveals that the intention of the Applicant is to obtain, by means of a request for the indication of interim measures of protection, an actual judgment on the legality, or rather the illegality, of further nuclear tests.

I cannot lend myself to this, which is not what interim measures were intended for.

The purpose of an Order indicating interim measures of protection is clearly laid down in Article 41 of the Statute, quoted above: *to preserve the respective rights of either party*, and not judgment on the legality or illegality of the matters complained of.

At the public hearing of 21 May 1973, Australia defined the rights to be protected as follows:

> "Australia's rights under international law and the Charter of the United Nations to be safeguarded from further atmospheric nuclear weapon tests and their consequences, including:
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> (i) the right of Australia and its people to be free from atmospheric nuclear weapon tests by any country;
>
> (ii) the inviolability of Australia's territorial sovereignty;
> (iii) its independent right to determine what acts shall take place within its territory, and, in particular, whether Australia and its people shall be exposed to ionizing radiation from artificial sources;
>
> (iv) the right of Australia and her people fully to enjoy the freedom of the high seas;
> (v) the right of Australia to the performance by the French Republic of its undertaking contained in Article 33 (3) of the General Act for the Pacific Settlement of International Disputes to abstain from all measures likely to react prejudicially upon the execution of any ultimate judicial decision given in these proceedings and to abstain from any sort of action whatsoever which may aggravate or extend the present dispute between Australia and the French Republic."

France is absent from these proceedings; but I conceive that the right which it has and which is to be protected is that of every State, namely the right to undertake in full sovereignty on its own territory any action appropriate for ensuring its immediate or future national security and national defence. Of course, in the exercise of this right each State remains responsible for any consequent injury to third parties.

Does the Order recommending the temporary cessation of French nuclear tests protect or "preserve" the respective rights of either party—the rights of France as well as those of Australia?

Such are the considerations which have led me to append this dissenting opinion.

(Signed) I. FORSTER.
