SEPARATE OPINION OF JUDGE PETRÉN

[Translation]

If I have been able to vote for the Judgment, it is because its operative paragraph finds that the claim is without object and that the Court is not called upon to give a decision thereon. As my examination of the case has led me to the same conclusion, but on grounds which do not coincide with the reasoning of the Judgment, I append this separate opinion.

The case which the Judgment brings to an end has not advanced beyond the preliminary stage in which the questions of the jurisdiction of the Court and the admissibility of the Application fall to be resolved. Australia's request for the indication of interim measures of protection could not have had the consequence of suspending the Court's obligation to consider the preliminary questions of jurisdiction and admissibility as soon as possible. On the contrary, that request having been granted, it was particularly urgent that the Court should decide whether it had been validly seised of the case. Any delay in that respect meant the prolongation, embarrassing to the Court and to the Parties, of uncertainty concerning the fulfilment of an absolute condition for the justification of any indication of interim measures of protection.

In this situation, it was highly imperative that the provisions of the Rules of Court which were revised not so long ago for the purpose of accelerating proceedings should be strictly applied. Only recently, moreover, on 22 November 1974, the General Assembly of the United Nations adopted, on the item concerning a review of the Court's role, resolution 3232 (XXIX), of which one preambular paragraph recalls how the Court has amended its Rules in order to facilitate recourse to it for the judicial settlement of disputes, *inter alia*, by reducing the likelihood of delays. Among the reasons put forward by the Court itself to justify revision of the Rules, there was the necessity of adapting its procedure to the pace of world events (*I.C.J. Yearbook 1967-1968*, p. 87). Now if ever, in this atomic age, there was a case which demanded to be settled in accordance with the pace of world events, it is this one. The Court nevertheless, in its Order of 22 June 1973 [1] indicating interim measures of protection, deferred the continuance of its examination of the questions

[1] Having voted against the resolution whereby the Court, on 24 March 1974, decided to close the enquiry into the premature disclosure of its decision, as also of the voting-figures, before the Order of 22 June 1973 was read at a public sitting, I wish to state my opinion that the enquiry referred to was one of a judicial character and that its continuance on the bases already acquired should have enabled the Court to get closer to the truth. I did not agree with the decision whereby the Court excluded from publication, in the volume of *Pleadings, Oral Arguments, Documents* to be devoted to the case, certain documents which to my mind are important for the comprehension of the incident and the search for its origins.

of jurisdiction and admissibility, concerning which it held, in one of the consideranda to the Order, that it was necessary to resolve them *as soon as possible.*

Despite the firmness of this finding, made in June 1973, it is very nearly 1975 and the preliminary questions referred to have remained unresolved. Having voted against the Order of 22 June 1973 because I considered that the questions of jurisdiction and admissibility could and should have been resolved without postponement to a later session, I have *a fortiori* been opposed to the delays which have characterized the continuance of the proceedings and the upshot of which is that the Court has concluded that Australia's Application is without object *now.* I must here recall the circumstances in which certain time-limits were fixed, because it is in the light of those circumstances that I have had to take up my position on the suggestion that consideration of the admissibility of the Application should be deferred until some later date.

When, in the Order of 22 June 1973, the Court invited the Parties to produce written pleadings on the questions of its jurisdiction and the admissibility of the Application, it fixed 21 September 1973 as the time-limit for the filing of the Australian Government's Memorial and 21 December 1973 as the time-limit for the filing of a Counter-Memorial by the French Government. This decision was preceded by a conversation between the Acting President and the Agent of Australia, who stated that he could agree to a three-month time-limit for his own Government's pleading. No contact was sought with the French Government at that same time. No reference is to be found in the Order to the application of Article 40 of the Rules of Court or, consequently, to the consultation which had taken place with the Agent of Australia. After the Order had been made, the Co-Agent of Australia, on 25 June 1973, informed the Acting President that his Government felt it would require something in the nature of a three-month extension of time-limit on account of a new element which was bound to have important consequences, namely that the Memorial would now have to deal not only with jurisdiction but also with admissibility. Although the Court remained in session until 13 July 1973, this information was not conveyed to it. On 10 August 1973 the Co-Agent was received by the President and formally requested on behalf of his Government that the time-limit be extended to 21 December 1973, on the ground that questions of admissibility had not been foreseen when the Agent had originally been asked to indicate how much time he would require for the presentation of a Memorial on jurisdiction. Following this conversation the Co-Agent, by a letter of 13 August, requested that the time-limit should be extended to 23 November. Contrary to what had been done in June with regard to the fixing of the original time-limits, the French Government was invited to make known its opinion. Its reply was that, having denied the Court's jurisdiction in the case, it was unable to express any opinion. After he had consulted his colleagues by correspondence on the subject of the time-limits and a majority had expressed a favourable view, the President, by an Order of 28 August,

extended the time-limit for the filing of the Australian Government's Memorial to 23 November 1973 and the time-limit for the filing of a Counter-Memorial by the French Government to 19 April 1974.

The circumstances in which the written proceedings on the preliminary questions were thus prolonged until 19 April 1974 warrant several observations. In the first place, it would have been more in conformity with the Statute and the Rules of Court not to have consulted the Australian Government until *after* the Order of 22 June 1973 had been made and to proceed at the same time to consult the French Government. Let us suppose that this new procedure were to be put into general practice and it became normal, before the Court's decision on a preliminary phase, to consult the Agents of the Parties regarding the time-limits for the next phase: any Agent who happened not to be consulted on a particular occasion would not require supernatural perspicacity to realize that this case was not going to continue.

To return to the present case, there is every reason to think that the French Government, if it had been consulted immediately after the making of the Order of 22 June 1973, would have given the same reply as it did two months later. It would then have been clear at once that the French Government had no intention of participating in the written proceedings and that there would be no necessity to allocate it a three-month period for the production of a Counter-Memorial. In that way the case could have been ready for hearing by the end of the summer of 1973, which would have enabled the Court to give its judgment before that year was out. After having deprived itself of the possibility of holding the oral proceedings during the autumn of 1973, the Court found itself faced with a request for the extension of the time-limit for the filing of the Memorial. It is to be regretted that this request, announced three days after the reading of the Order of 22 June 1973, was not drawn to the Court's attention while it was yet sitting, which would have enabled it to hold a regular deliberation on the question of extension. As it happened, the Order of 28 August not only extended the time-limit fixed for the filing of the Memorial of the Australian Government but also accompanied this time-limit with a complementary time-limit of five months for the filing of a Counter-Memorial which the French Government had no intention of presenting. Those five months merely prolonged the period during which the Australian Government was able to prepare for the oral proceedings, which was another unjustified favour accorded to that Government.

But that is not all: the Order of 28 August 1973 also had the result of reversing the order in which the present case and the *Fisheries Jurisdiction* cases should have become ready for hearing. In the latter cases, the Court, after having indicated interim measures of protection by Orders of 17 August 1972, had found, by its Judgments of 2 February 1973, that it possessed jurisdiction and, by Orders of 15 February 1973, had fixed the time-limits for the filing of Memorials and Counter-Memorials at 1 August 1973 and 15 January 1974 respectively. If the Order of 28

August 1973 extending the time-limits in the present case had not intervened, this case would have been ready for hearing on 22 December 1973, i.e., before the *Fisheries Jurisdiction* cases, and would have had priority over them by virtue of Article 50, paragraph 1, of the 1972 Rules of Court and Article 46, paragraph 1, of the 1946 Rules of Court which were still applicable to the *Fisheries Jurisdiction* cases. After the Order of 28 August 1973 had prolonged the written proceedings in the present case until 19 April 1974, it was the *Fisheries Jurisdiction* cases which became entitled to priority on the basis of the above-mentioned provisions of the Rules of Court in either of their versions. However, the Court could have decided to restore the previous order of priority, a decision which Article 50, paragraph 2, of the 1972 Rules, and Article 46, paragraph 2, of the 1946 Rules, enabled it to take in special circumstances. The unnecessary character of the time-limit fixed for the filing of a Counter-Memorial by the French Government was in itself a special circumstance, but there were others even more weighty. In the *Fisheries Jurisdiction* cases, there was no longer any uncertainty concerning the justification for the indication of interim measures of protection, inasmuch as the Court had found that it possessed jurisdiction, whereas in the present case this uncertainty had persisted for many months. Yet France had requested the removal of the case from the list and, supposing that attitude were justified, had an interest in seeing the proceedings brought to an end and, with them, the numerous criticisms levelled at it for not applying interim measures presumed to have been indicated by a Court possessing jurisdiction. Moreover, as France might during the summer of 1974 be carrying out a new series of atmospheric nuclear tests, Australia possessed its own interest in having the Court's jurisdiction confirmed before then, inasmuch as that would have conferred greater authority on the indication of interim measures.

For all those reasons, the Court could have been expected to decide to take the present case before the *Fisheries Jurisdiction* cases. Nevertheless, on 12 March 1974, a proposal in that sense was rejected by 6 votes to 2, with 6 abstentions. In that way the Court deprived itself of the possibility of delivering a judgment in the present case before the end of the critical period of 1974.

The proceedings having been drawn out until the end of 1974 by this series of delays, the Court has now found that Australia's Application is without object and that it is therefore not called upon to give a decision thereon.

It is not possible to take up any position vis-à-vis this Judgment without being clear as to what it signifies in relation to the preliminary questions which, under the terms of the Order of 22 June 1973, were to be considered by the Court in the present phase of the proceedings, namely the jurisdiction of the Court to entertain the dispute and the admissibility of the Application. As the Court has had frequent occasion to state, these are questions between which it is not easy to distinguish. The ad-

missibility of the Application may even be regarded as a precondition of the Court's jurisdiction. In Article 8 of Resolution concerning the Internal Judicial Practice of the Court, competence and admissibility are placed side by side as conditions to be satisfied before the Court may undertake the consideration of the merits. It is on that basis that the Order of 22 June 1973 was drawn up. It emerges from its consideranda that the aspects of competence which are to be examined include, on the one hand, the effects of the reservation concerning activities connected with national defence which France inserted when it renewed in 1966 its acceptance of the Court's jurisdiction and, on the other hand, the relations subsisting between France and Australia by virtue of the General Act of 1928 for the Pacific Settlement of International Disputes, supposing that instrument to be still in force. However, the Order is not so precise regarding the aspects of the question of the admissibility of the Application which are to be explored. On the contrary, it specifies none, and it is therefore by a wholly general enquiry that the Court has to determine whether it was validly seised of the case. 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.

It is from that angle that I believe I should consider the question of the admissibility of Australia's Application. It is still my view that, as I said in the dissenting opinion which I appended to the Order of 22 June 1973, what is first and foremost necessary is to ask oneself whether atmospheric tests of nuclear weapons are, generally speaking, governed by norms of

international law, or whether they belong to a highly political domain where the international norms of legality or illegality are still at the gestation stage. It is quite true that disputes concerning the interpretation or application of rules of international law may possess great political importance without thereby losing their inherent character of being legal disputes. It is nonetheless necessary to distinguish between disputes revolving on norms of international law and tensions between States caused by measures taken in a domain not yet governed by international law.

In that connection, I feel it may be useful to recall what has happened in the domain of human rights. In the relatively recent past, it was generally considered that the treatment given by a State to its own subjects did not come within the purview of international law. Even the most outrageous violations of human rights committed by a State towards its own nationals could not have formed the subject of an application by another State to an international judicial organ. Any such application would have been declared inadmissible and could not have given rise to any consideration of the truth of the facts alleged by the applicant State. Such would have been the situation even in relations between States having accepted without reservation the optional clause of Article 36 of the Statute of the Permanent Court of International Justice. The mere discovery that the case concerned a matter not governed by international law would have been sufficient to prevent the Permanent Court from adjudicating upon the claim. To use the terminology of the present proceedings, that would have been a question concerning the admissibility of the application and not the jurisdiction of the Court. It is only an evolution subsequent to the Second World War which has made the duty of States to respect the human rights of all, including their own nationals, an obligation under international law towards all States members of the international community. The Court alluded to this in its Judgment in the case concerning the *Barcelona Traction, Light and Power Company, Limited* (*I.C.J. Reports 1970*, p. 32). It is certainly to be regretted that this universal recognition of human rights should not, up to now, have been accompanied by a corresponding evolution in the jurisdiction of international judicial organs. For want of a watertight system of appropriate jurisdictional clauses, too many international disputes involving the protection of human rights cannot be brought to international adjudication. This the Court also recalled in the above-mentioned Judgment (*ibid.*, p. 47), thus somewhat reducing the impact of its reference to human rights and thereby leaving the impression of a self-contradiction which has not escaped the attention of writers.

We can see a similar evolution taking place today in an allied field, that of the protection of the environment. Atmospheric nuclear tests, envisaged as the bearers of a particularly serious risk of environmental pollution, are a source of acute anxiety for present-day mankind, and it is only natural that efforts should be made on the international plane to erect legal barriers against that kind of test. In the present case, the ques-

tion is whether such barriers existed at the time of the filing of the Australian Application. That Application cannot be considered admissible if, at the moment when it was filed, international law had not reached the stage of applicability to the atmospheric testing of nuclear weapons. It has been argued that it is sufficient for two parties to be in dispute over a right for an application from one of them on that subject to be admissible. Such would be the situation in the present case, but to my mind the question of the admissibility of an application cannot be reduced to the observance of so simple a formula. It is still necessary that the right claimed by the applicant party should belong to a domain governed by international law. In the present case, the Application is based upon an allegation that France's nuclear tests in the Pacific have given rise to radio-active fall-out on the territory of Australia. The Australian Government considers that its sovereignty has thereby been infringed in a manner contrary to international law. As there is no treaty link between Australia and France in the matter of nuclear tests, the Application presupposes the existence of a rule of customary international law whereby States are prohibited from causing, through atmospheric nuclear tests, the deposit of radio-active fall-out on the territory of other States. It is therefore the existence or non-existence of such a customary rule which has to be determined.

It was suggested in the course of the proceedings that the question of the admissibility of the Application was not of an exclusively preliminary character and that consideration of it could be deferred until the examination of the merits. This raises a question regarding the application of Article 67 of the 1972 Rules of Court. The main motive for the revision of the provisions of the Rules which are now to be found in that Article was to avoid the situation in which the Court, having reserved its position with regard to a preliminary question, orders lengthy proceedings on the substantive aspects of a case only to find at the end that the answer to that preliminary question has rendered such proceedings superfluous. It is true that Article 67 refers only to preliminary objections put forward by the respondent, but it is obvious that the spirit of that Article ought also to apply to the consideration of any questions touching the admissibility of an application which the Court is to resolve ex officio. It is also plainly incumbent upon the Court, under Article 53 of the Statute, to take special care to see that the provisions of Article 67 of the Rules are observed when the respondent is absent from the proceedings.

In sum, the Court, for the first time, has had occasion to apply the provision of its revised Rules which replaced the former provisions enabling preliminary objections to be joined to the merits. One may ask where the real difference between the new rule and the old lies. For my part, I consider that the new rule, like the old, bestows upon the Court a discretionary power to decide whether, in the initial stage of a case, such and such a preliminary question ought to be settled before anything else. In exercising this discretionary power the Court ought, in my view, to assess the degree of complexity of the preliminary question in relation to

the whole of the questions going to the merits. If the preliminary question is relatively simple, whereas consideration of the merits would give rise to lengthy and complicated proceedings, the Court should settle the preliminary question at once. That is what the spirit in which the new Article 67 of the Rules was drafted requires. These considerations appear to me to be applicable to the present case.

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. It should be recalled that, in the preliminary stage from which they have not emerged, the proceedings had already been subjected to considerable delays, which left the Australian Government ample time to prepare its written pleadings and oral arguments on all aspects of admissibility. How, in those circumstances, could the consideration of the question have been postponed to some later date?

As is clear from the foregoing, the admissibility of the Application depends, in my view, on the existence of a rule of customary international law which prohibits States from carrying out atmospheric tests of nuclear weapons giving rise to radio-active fall-out on the territory of other States. Now it is common knowledge, and is admitted by the Australian Government itself, that any nuclear explosion in the atmosphere gives rise to radio-active fall-out over the whole of the hemisphere where it takes place. Australia, therefore, is only one of many States on whose territory France's atmospheric nuclear tests, and likewise those of other States, have given rise to the deposit of radio-active fall-out. Since the Second World War, certain States have conducted atmospheric nuclear tests for the purpose of enabling them to pass from the atomic to the thermonuclear stage in the field of armaments. The conduct of these States proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests. What is more, the Treaty of 1963 whereby the first three States to have acquired nuclear weapons mutually banned themselves from carrying out further atmospheric tests can be denounced. By the provision in that sense the signatories of the Treaty showed that they were still of the opinion that customary international law did not prohibit atmospheric nuclear tests.

To ascertain whether a customary rule to that effect might have come into being, it would appear more important to learn what attitude is taken up by States which have not yet carried out the tests necessary for reaching the nuclear stage. For such States the prohibition of atmospheric nuclear tests could signify the division of the international community into two groups: States possessing nuclear weapons and States not possessing them. If a State which does not possess nuclear arms refrains from carrying out the atmospheric tests which would enable it to acquire them and if that abstention is motivated not by political or economic considerations but by a conviction that such tests are prohibited by

customary international law, the attitude of that State would constitute an element in the formation of such a custom. But where can one find proof that a sufficient number of States, economically and technically capable of manufacturing nuclear weapons, refrain from carrying out atmospheric nuclear tests because they consider that customary international law forbids them to do so? The example recently given by China when it exploded a very powerful bomb in the atmosphere is sufficient to demolish the contention that there exists at present a rule of customary international law prohibiting atmospheric nuclear tests. It would be unrealistic to close one's eyes to the attitude, in that respect, of the State with the largest population in the world.

To complete this brief outline, one may ask what has been the attitude of the numerous States on whose territory radio-active fall-out from the atmospheric tests of the nuclear Powers has been deposited and continues to be desposited. Have they, generally speaking, protested to these Powers, pointing out that their tests were in breach of customary international law? I do not observe that such has been the case. The resolutions passed in the General Assembly of the United Nations cannot be regarded as equivalent to legal protests made by one State to another and concerning concrete instances. They indicate the existence of a strong current of opinion in favour of proscribing atmospheric nuclear tests. That is a political task of the highest urgency, but it is one which remains to be accomplished. Thus the claim submitted to the Court by Australia belongs to the political domain and is situated outside the framework of international law as it exists today.

I consider, consequently, that the Application of Australia was, from the very institution of proceedings, devoid of any object on which the Court could give a decision, whereas the Judgment finds only that such an object is lacking now. I concur with the Judgment so far as the outcome to be given the proceedings is concerned, i.e., that the Court is not called upon to give a decision, but that does not enable me to associate myself with the grounds on which the Judgment is based. The fact that I have nevertheless voted for it is explained by the following considerations.

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 indi-

cation 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 different.

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. It is precisely that kind of situation which Article 8 of the Resolution concerning the Internal Judicial Practice of the Court is designed to avoid.

I have still to explain my position with regard to the question of the Court's jurisdiction, in the sense given to that term by the Order of 22 June 1973. As the Judgment expressly states, this many-faceted question is not examined therein. That being so, and as I personally do not feel any need to examine it in order to conclude in favour of the disposition of the case for which I have voted, I think that there is no place in this separate opinion for any account of the ideas I have formed on the subject. A separate opinion, as I conceive it, ought not to broach any questions not dealt with by the judgment, unless it is absolutely necessary to do so in order to explain the author's vote. I have therefore resisted the temptation to engage in an exchange of views on jurisdiction with those of my colleagues who have gone into this question in their dissenting opinions. A debate between judges on matters not dealt with in the judgment is not likely to add up to anything more than a series of unrelated monologues—or choruses. For whatever purpose it may serve, however, I must stress that my silence on the subject does not signify consent to the proposition that the Court had jurisdiction.

(Signed) Sture PETRÉN.