SEPARATE OPINION OF JUDGE IGNACIO-PINTO

[Translation]

I concur in the Judgment delivered by the Court in the second phase of this case, but without entirely sharing the grounds on which it has relied to reach the conclusion that the Australian claim "no longer has any object".

Before explaining on what points my reasoning differs from that of the Court, I must refer to the Order of 22 June 1973, by which the Court, after having acceded to Australia's request for the indication of interim measures of protection, decided that the proceedings would next be concerned with the questions of jurisdiction and admissibility. The Court having thus defined the character which the present phase of the proceedings was to possess, I find myself, much to my regret, impelled not to criticize the Court's Judgment, but to present the following observations in order unequivocally to substantiate my separate opinion in the matter.

First I wish to confirm my view, already set forth in the dissenting opinion which I appended to the above-mentioned Order of 22 June 1973, that, considering the all too markedly political character of this case, Australia's request for the indication of interim measures of protection ought to have been rejected as ill founded. Now that we have come to the end of these proceedings and before going any further, I think it useful to recall certain statements emanating from the competent authorities of the Australian Government which give the plainest possible illustration of the political character of this case.

I would first draw attention to the statement made by the Prime Minister and Minister for Foreign Affairs of Australia in a Note of 13 February 1973 to the Minister for Foreign Affairs of the French Government (Application, Ann. 11, p. 62):

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

Secondly I wish to recall what the Solicitor-General of Australia said at the hearing which the Court held on 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." (Emphasis added.)

It appears therefore, taking into account my appreciation of the political character of the claim, that it was from the beginning that, basing myself on this point, I had considered the claim of Australia to be without object.

That said, I now pass to the observations for which my appraisal of the Court's Judgment calls, together with the explanation of my affirmative vote.

First of all, I consider that the Court, having called upon the Applicant to continue the proceedings and return before it so that it might rule upon its jurisdiction to entertain the case and on the admissibility of the Application, ought to treat these two questions clearly, especially as certain erroneous interpretations appear to have lent credence among the lay public to the idea that Australia "had won its case against France", since in the final analysis it had obtained the object of its claim, which was to have France forbidden to continue atmospheric nuclear testing.

As I see the matter, it is extremely regrettable that the Court should have thought it ought to omit doing this, so that unresolved problems remain with regard to the validity of the 1928 General Act, relied on by Australia, as also to the declaration filed under Article 36, paragraph 2, of the Statute and the express reservations made by France in 1966 so far as everything connected with its national defence was concerned. It would likewise have been more judicious to give an unequivocal ruling on the question of admissibility, having regard to what I consider to be the definitely political character revealed by the Australian claim, as I have recalled above.

These, I find, are so many important elements which deserved to be taken into consideration in order to enable the Court to give a clear pronouncement on the admissibility of Australia's claim, more particularly as the objective of this claim is to have the act of a sovereign State declared unlawful even though it is not possible to point to any positive international law.

I must say in these circumstances that I personally remain unsatisfied as to the procedure followed and certain of the grounds relied on by the Court for reaching the conclusion that the claim no longer has any object.

I nevertheless adhere to that conclusion, which is consistent with the position which I have maintained from the outset of the proceedings in the first phase; I shall content myself with the Court's recognition that the Australian Application "no longer" has any object, on the understanding, nevertheless, that for me it never had any object, and ought to have

been declared inadmissible *in limine litis* and, therefore, removed from the list for the reasons which I gave in the dissenting opinion to which I have referred above.

The fact remains that, to my mind, the Court was right to take the decision it has taken today. I gladly subscribe—at least in part—to the considerations which have led to its doing so, for, failing the adoption by the Court of my position on the issues of jurisdiction and the admissibility of the Australian claim, I would in any case have been of the view that it should take into consideration, at least *in the alternative*, the new facts which supervened in the course of the present proceedings and after the closure of the oral proceedings, to wit various statements by interested States, with a view to ascertaining whether circumstances might not have rendered the object of the Application nugatory. Since, in the event, it emerges that the statements *urbi et orbi* of the competent French authorities constitute an undertaking on the part of France to carry out no more nuclear tests in the atmosphere, I can only vote in favour of the Judgment.

It is in effect evident that one could not rule otherwise than the Court has done, when one analyses objectively the various statements emanating whether from the Applicant or from France, which, confident in the reservations embodied in the declaration filed under Article 36, paragraph 2, of the Statute, contested the Court's jurisdiction even before the opening of oral proceedings.

As should be re-emphasized, it cannot be denied that the essential object of Australia's claim is to obtain from the Court the cessation by France of the atmospheric nuclear tests it has been conducting in the atoll of Mururoa which is situated in the South Pacific and is under French sovereignty. Consequently, if France had changed its attitude, at the outset of the proceedings, and had acquiesced in Australia's request that it should no longer carry out its tests, the goal striven for by the Applicant would have been attained and its claim would no longer have had any object. But now the Court has been led by the course of events to take note that the President of the French Republic and his competent ministers have made statements to the effect that the South Pacific test centre will not be carrying out any more atmospheric nuclear tests. It follows that the goal of the Application has been attained. That is a material finding which cannot properly be denied, for it is manifest that the object of the Australian claim no longer has any real existence. That being so, the Court is bound to accord this fact objective recognition and to conclude that the proceedings ought to be closed, inasmuch as it has acquired the conviction that, taking the circumstances in which they were made into account, the statements of the competent French authorities are sufficient to constitute an undertaking on the part of France which connotes a legal obligation *erga omnes*, despite the unilateral character of that undertaking.

One may regret—and I do regret—that the Court, particularly at this stage, did not devote more of its efforts to seeking a way of first settling

the questions of jurisdiction and admissibility. Some would doubtless go so far as strongly to criticize the grounds put forward by the Court to substantiate its decision. I could not take that attitude, for in a case so exceptionally characterized by politico-humanitarian considerations, and in the absence of any guiding light of positive international law, I do not think the Court can be blamed for having chosen, for the settlement of the dispute, the means which it considered to be the most appropriate in the circumstances, and to have relied upon the undertaking, made *urbi et orbi* in official statements by the President of the French Republic, that no more atmospheric nuclear tests will be carried out by the French Government. Thus the Judgment rightly puts an end to a case one of whose consequences would, in my opinion, be disastrous—I refer to the disregard of Article 36, paragraph 2, of the Statute of the Court—and would thereby be likely to precipitate a general flight from the jurisdiction of the Court, inasmuch as it would demonstrate that the Court no longer respects the expression of the will of a State which has subordinated its acceptance of the Court's compulsory jurisdiction to express reservations.

In spite of the criticisms which some of my colleagues have expressed in their opinions, and sharing as I do the opinion of Judge Forster, I will say, bearing in mind the old adage that "all roads lead to Rome", that I find the Judgment just and well founded and that there is, at all events, nothing in the French statements "which could be interpreted as an admission of any breach of positive international law".

In conclusion, I would like to emphasize once again that I am fully in agreement with Australia that all atmospheric nuclear tests whatever should be prohibited, in view of their untold implications for the survival of mankind. I am nevertheless convinced that in the present case the Court has given a proper Judgment, which meets the major anxieties which I expressed in the dissenting opinion to which I have referred, inasmuch as it must not appear to be flouting the principles expressed in Article 2, paragraph 7, of the United Nations Charter (Order of 22 June 1973, *I.C.J. Reports 1973*, p. 130), and indirectly inasmuch as it respects the principle of sovereign equality of the member States of the United Nations. France must not be given treatment inferior to that given to all other States possessing nuclear weapons, and the Court's competence would not be well founded if it related only to the French atmospheric tests.

(Signed) L. IGNACIO-PINTO.
