The nuclear tests cases after ten years

K. J. Keith*

The author was counsel for New Zealand in the Nuclear Tests cases in the International Court of Justice, 1973-74. This paper is based on an address given in August 1983 to the International Law Society of Victoria University. To some extent its form still reflects that fact although some references have been added. The views expressed are those of the author and should not be attributed to any other person.

I. INTRODUCTION

In May 1973 the New Zealand and Australian governments initiated proceedings against France in the International Court of Justice in The Hague seeking the cessation of the atmospheric testing by France of nuclear weapons. In June the Court gave interim relief. It indicated that pending the further stages of the cases France should cease testing. It also ordered that the next phase of the cases be directed to its jurisdiction to deal with the applications and to their admissibility. Following written and oral proceedings (concluding in July 1974) on those matters, the Court in December 1974 held that since France had promised not to test nuclear weapons in the atmosphere and was bound by that promise, the proceedings no longer had any object and the Court was not called upon to give decisions on them.[1]

* Professor of Law, Victoria University of Wellington.

1 The orders and judgments of the Court in the two cases are as follows: *Nuclear Tests* case (*Australia* v. *France*) Interim Protection Order of 22 June 1973, [1973] I.C.J. Rep. 99; (*New Zealand* v. *France*) 135; Application to Intervene, Orders of 12 July 1973; 320 and 324; Judgments of 20 December 1974, [1974] I.C.J. Rep. 253, 457; and Application to Intervene, Orders of 20 December 1974, 530 and 535.
The Court has published the pleadings in two volumes. See in addition the volumes of the proceedings and judgments published by the New Zealand and Australian governments.
The formal majority of the Court was nine, but four of those who voted for the dispositif wrote separate opinions the reasoning in which departs substantially from that in the Court's judgments.
It is important to note that the Court's judgments do not bring the cases to a definite end (if I may be allowed a possible tautology). Near the end of the judgments at 272 and 477 the following paragraph occurs:

> Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment

It is about 10 years since the cases began — time enough to reflect on them. For this purpose it is useful to go back to some of the French commentary on the cases. That commentary helps to provide different perspectives on events and proceedings which caused much controversy in France as well as elsewhere.

Guy Lacharriere,[2] after setting out the position which, as he saw it, the International Court had adopted, concluded that after 1973 the French government could no longer have confidence in the present day Court. The Court had not declared itself incompetent in a situation excluded from its jurisdiction by the 1966 declaration made by France accepting the jurisdiction of the Court. The 1973 action of the Court in granting interim relief and refusing to declare itself incompetent had been taken contrary to all law. "The Government of France has then finally resolved to modify its relations with the Court; but it is the Court that had already changed."[3]

To be contrasted with that very censorious, official view (or at least the view of an official) is that of Jean-Pierre Cot who was then a socialist member of Parliament and mayor (as well as a professor of law at the Sorbonne):[4]

> Ignoring the order of 22 June 1973, France took up again its nuclear tests at Mururoa. The contempt shown by the French Government for international justice throughout this process, culminating in the abrogation of the declaration accepting the compulsory jurisdiction, leaves a feeling of bitterness. Is this the image of France?

What are we to make of such a clash — occurring within France? Aspects of these differences will be considered by reference to the jurisdictional issues; the pressures on the Court; and the 1973 and 1974 proceedings. Some conclusions will be suggested. The emphasis will be principally on questions of process, and on the Court as an institution for the settlement of disputes. That is to say the concern of this paper will not be with the substance of the arguments. It is true that it is the Court's function to clarify and develop the law as well as to settle disputes. But because of time, of the actual course of events, and of the great importance of process, the focus will be on the process issues rather than the substance,[5] bearing in mind such questions as:

> were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request.

The Rt. Hon. Mr Rowling, the New Zealand Prime Minister, called attention to this passage in his press statement of 21 December 1974, N.Z. Foreign Affairs Rev. Vol. 24, No. 12 (December 1974), 38.

2 (1973) 19 Annuaire Français du Droit International 235. At the time he wrote the commentary, de Lacharriere was Directeur des Affaires Juridiques de l'Administration du Ministère des Affaires Etrangères. He is now a judge of the International Court.

3 Ibid. 251 (author's translation).

4 Ibid. 252, 271 (author's translation). Mr Cot subsequently became a minister in a Mitterand government.

5 The annual bibliographies of the Court list the extensive commentary on the case; most of it is about the substantive issues and some about interim relief; see vol. 28, 99, 26-47; vol. 29, 10225-43; vol. 30, 10480-82 and 10518-39; vol. 31, 10810-19; vol. 32, 11067-70; vol. 33, 11286-88, 11336; and vol. 34, 11461, 11556.

What does the International Court do?
What can it do in dealing with a very difficult problem?
What are its relations with the parties before it?
How do its processes relate to other methods of handling international problems?

The Court was faced in these cases with the prospect of making decisions on (i) the granting of interim relief protecting the parties' rights pending the later stages of the proceedings, (ii) its jurisdiction to deal with the merits of the cases and (iii) the merits, that is in broad terms the lawfulness of the action of France in undertaking tests of nuclear weapons which gave rise to radioactive fallout.

II. JURISDICTION

Central to all those matters and a recurring theme is the sovereignty of states. States are sovereign, the broad argument runs, they are independent, they are equal, especially in the area of protecting national jurisdiction and developing their defence forces. The principles apply as well to the creation and development of the law and to the peaceful settlement of disputes. To take the last, all agree that the Court's jurisdiction depends on the consent of the states appearing before it. It was only if France had consented to jurisdiction that the Court could proceed to a final judgment on the merits of the matter brought before it.

The Statute of the Court indicates three ways in which that consent might be given.[6] The first is by a particular agreement between the states involved for the purposes of the specific case. Australia put that possibility to France. It rejected it.

Second, the Court's statute enables states to file declarations in which they accept jurisdiction in relation to other states which do likewise. This is sometimes referred to as the "optional" clause. States can opt to accept jurisdiction. Practice has long accepted that these declarations can be qualified, especially by the inclusion of reservations which exclude particular categories of disputes from their scope. So, states have excluded disputes arising before the date of acceptance, or disputes with particular categories of states, or disputes about specified subject matters. France appeared to have made its position very clear in respect of this method of accepting jurisdiction, for in 1966, the year in which it moved its test site from the Sahara to the South Pacific, it deposited a new acceptance which excluded "disputes concerning activities connected with national defence." Moreover, the acceptance itself was terminable on notice, that is without any period of notice at all.[7]

That appeared to many to be a clear manifestation of France's intention in relation to the Court and its testing of nuclear weapons. The French government appears to have thought so too for it took no action in early 1973 when the possibility of Court proceedings was widely and publicly discussed to use that power of immediate termination of the whole acceptance. That action came

6 Statute of the International Court of Justice, art. 36.
7 1966-1967 I.C.J. Yearbook 52.

in the course of the next year, 1974.[8] Here I make only two comments on the arguments based on the declaration accepting jurisdiction. The first is to emphasise the width of sovereign discretion to modify the declarations to meet worries about national defence. The second, related point is to stress the fragility of this system of jurisdiction, sometimes called the "compulsory" jurisdiction of the court: it is for the most part subject to rapid and drastic alteration, usually in the direction of shrinkage.[9]

I wish rather to move to the third possible source of jurisdiction — jurisdiction agreed to under a treaty to which the states in question are parties. There was in fact such a treaty which appeared to be applicable, the General Act for the Pacific Settlement of Disputes of 1928 to which Australia, New Zealand and France had all become parties on the same day in 1931. It provided in general terms for the jurisdiction of the International Court: "[a]ll disputes with regard to which the parties are in conflict as to their respective rights shall . . . be submitted for decision to the Permanent Court of International Justice . . .".[10] That treaty also allowed for the making of reservations, but there were none that were relevant. France had not for instance made a reservation to it parallelling that which it made in 1966 to the optional system.

Many had forgotten about the General Act. It was possibly associated in many persons' minds with the largely unsuccessful attempts made in the 1920's to fill the "gaps" in the system of the League of Nations for the peaceful settlement of disputes. That possible link provided a very frail basis for an argument that the Act fell with the League of Nations. That argument has never been put in a sustained way in any of the four cases[11] in which the Act has now been pleaded — probably because it cannot be. On the contrary, the argument that the Act continues to exist is an extremely strong one. It has been argued in a sustained way, by among others six members of the Court.[12] The great strength of this jurisdictional argument presented a cruel dilemma for the Court.

III. RELEVANT LEGAL AND POLITICAL FACTORS

A range of factors, legal and political, were present in early 1973 when the cases were ready for the first, interim proceedings. First on the side of the Court taking positive action, was the growing concern (to use a mild word) about the development, spread, and testing of nuclear weapons, especially their testing in the atmosphere. That concern, particularly the last part of it, had taken legal form in the Partial Test Ban Treaty, then less than 10 years old, but

8 1973-1974 I.C.J. Yearbook 49.

9 E.g. Waldock, "The Decline of the Optional Clause" (1955-6) 32 Brit. Year Book Int. L., 244; Merrills, "The Optional Clause Today" (1979) 50 Brit. Year Book Int. L., 87.

10 Art. 17. In terms of Statute of the International Court art. 37, treaties conferring jurisdiction on the Permanent Court are to be read as applying to the International Court.

11 The *Prisoners of War* (*Pakistan* v. *India*) case and the *Aegean Sea* (*Turkey* v. *Greece*) case as well as the two *Nuclear Tests* cases.

12 [1974] I.C.J. Rep. 253, 312, 372, 391; and 457, 494, 524, 525.

accepted by a very large number of states, including the two super powers. It was seen as well in a mounting series of United Nations General Assembly resolutions. How was the International Court, as the principal judicial organ of the United Nations, to respond to these felt necessities of the time?

A second factor was the rapidly growing concern for the environment. The Stockholm Conference, a major focus for the general movement and a body which had condemned atmospheric nuclear testing and emphasised the responsibility of states for environmental damage, had met just a few months earlier. Attitudes to nuclear radiation had drastically changed. Was the law changing too?

A third matter was stability in the law of treaties. The argument based on the General Act is, as indicated, an extremely strong one. The Court could not be seen as casting doubt on the basic principle that treaties are binding on the parties to them.

But the Court had as well to be aware of factors suggesting caution. One was that the defendant, France, was a major client of the Court. It could fairly he said that France had been for the 50 years of its existence the principal supporter and user of the Court.

The second factor strengthens the first. It is the enormous importance in the politics and the defence planning of the Republic of the *force de frappe*. France was insistent on the establishment of its independent force. It needed it to prevent invasion, speaking of invasion "three times" in recent history. This is to be seen in its exchanges with New Zealand throughout the 1960's and into the 1970's.[13] France would not accept that that policy — or the testing part of it — could be directly put in issue in court proceedings. That was a violation of its sovereign independence. Accordingly Lacharriere in writing in early 1974 put first in his criticism of the Court the fact that the Court had lent itself to legal processes under the cover of so called pollution when in reality they were directed at "notre force de dissuasion nucleaire".[14] The French Government also argued that behind the campaign was a willingness to obstruct the defence policy of France and to oppose its will for independence. It would not allow the fundamental objective of the country's security and independence to be called in question.[15] The comment might perhaps be made that much of the argument against France was directly aimed at atmospheric testing: it was not hidden behind environmental arguments.

Third were difficulties which stood in the way of the substantive arguments against nuclear testing. Ten years earlier atmospheric testing was plainly lawful. Two of the five states which were known to be able to test weapons had stayed outside the Test Ban Treaty and had continued to test in the atmosphere. And each of the three that were bound by the Treaty had, under its terms, the power

13 See e.g. the diplomatic correspondence annexed to the New Zealand Application instituting the proceedings.

14 Supra n. 2.

15 *Livre Blanc Sur Les Essais Nucléaires* (Comité interministeriel pour l'information, Paris, 1973), 21.

to withdraw from it, in exercising its national sovereignty if it decided that extraordinary events relating to the subject matter of the Treaty had jeopardised the supreme interests of the country.

Related to that matter was the argument of discrimination. According to Lacharriere a court decision against France would consolidate the privileges of those who had nuclear weapons and the bipolar model of the world.[16] Again the arguments made were relatively direct on this matter: a *new* law had developed. In that sense those who developed the technology later *were* disadvantaged.[17] Moreover, France argued, Australia and New Zealand had been involved in some of that earlier testing: they had by their actions approved, encouraged and even initiated action relevant to testing.[18] Did the applicants have "clean hands"?

IV. THE PROCEEDINGS IN THE COURT

What could be expected of the Court in such a case? Before I briefly discuss aspects of the proceedings, I should say something about the earlier diplomatic record. It gives the lie to the dirty hands argument. It points to the danger — to which one eminent commentator succumbed[19] — of commenting on Court proceedings such as these without having full regard to the record. The diplomatic record, assembled in the documentation submitted to the Court, shows a consistent and developing New Zealand position dating from at least 1958 when it supported a resolution about testing in the Sahara. France, the United States and the United Kingdom voted against it while Australia abstained. From 1963, New Zealand Governments in notes delivered to the Quai d'Orsay in Paris or the French Ambassador in Wellington made their opposition clear. It was an opposition based on three matters

1) a concern for disarmament and in particular an opposition to the spread and testing of nuclear weapons,
2) a concern for the environment, and
3) opposition to testing in our part of the world.[20]

Could that position become law? That question was central to the proceedings in 1973 and 1974. For reasons which I will indicate, the Court did not ever directly answer it.

The first stage of the proceedings was the request for interim relief, a power which the Court has to preserve the position of the parties pending the final

16 Supra n. 2, 248-249.

17 See e.g. the New Zealand note of 12 September 1963: "the reactions of the present day are not those of ten years earlier, and fear, like the effects of radioactive fallout, is cumulative in the population."

18 *White Paper* supra n. 15, 11-14. See also e.g. the dissenting opinions of Judge Ignacio-Pinto in 1973 and the separate opinions of Judge Gros in 1974. Compare the 1974 statement to the Court by Dr Finlay, the New Zealand Attorney-General.

19 McWhinney, *The World Court and the Contemporary International Law Making Process* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1979).

20 See e.g. the New Zealand notes of 27 May 1966 and of 19 December 1972 annexed to the Application Instituting Proceedings.

disposition of the case. The Court was immediately in a difficult position. France called on it to strike the cases from its list since it was manifestly incompetent to deal with them.[21] France refused to participate in the proceedings that being, it said, the clearest and most honourable course to follow.[22] Could the Court, faced with this strong challenge to its jurisdiction to deal with the matter, proceed to make the interim order? The Court has long followed the practice that it can make such an order, in the face of disputes about its jurisdiction, if there is some strength in the jurisdictional basis which is pleaded.[23] And as I have already indicated that side of the case was very strong.

The Court within a month of the completion of the argument made interim orders by a vote of 8 — 6.[24] The principal part of the orders indicated, as a provisional measure, that the French Government should avoid nuclear tests causing the deposit of radioactive fallout on the territory of the applicant states. That part of the orders was narrower than the New Zealand request in its specification of the territory, but wider than the Australian one in that it could extend to an underground test which vented.

The orders' significance was restricted a little by uncertainty as to whether such orders are binding. A New Zealand attempt to deal with that matter in argument was undermined by an Australian concession.[25] There was too the fuss about the "leak" of its vote on the Australian order before it was publicly read by the Acting President of the Court.[26] And the orders were of course violated by France in 1973 and 1974. Obtaining the orders was nevertheless a major success. They provided a basis for an important round of letters to heads of state and heads of government, for much publicity, and especially for the visit of the frigate to the testing ground at the time of the 1973 testing. The pressure on the French government to change its policies was certainly mounting. The diplomatic action continued as the next stage of the proceedings — relating to jurisdiction — was prepared.

The hearings on jurisdiction did not in fact take place until July of 1974,[27] when France was already engaged in its next testing series, while giving signs that this was to be the last of the atmospheric series. Although the statements made to the Court made some reference to those signs, they were essentially

21 Although France refused to participate formally in the proceedings, it did in May 1973 send a memorandum to the Court arguing at some length that the Court was without jurisdiction and in June 1973 published the *White Paper,* supra n. 15, setting out its position on the range of issues. The comment by Lacharriere, supra n. 2, which was partly addressed to the pending jurisdictional issues was presumably also available to members of the Court.

22 Lacharriere, supra n. 2, 250.

23 E.g. *Fisheries Jurisdiction* cases [1972] I.C.J. Rep. 15-16, 33-34.

24 [1973] I.C.J. Rep. 99 and 135.

25 Ibid., 102-103.

26 E.g. [1974] I.C.J. Rep. 273, 293-296, 298 n. 1 and the Court proceedings referred to there.

27 The proceedings were delayed in the first place by the extension of the time limits for the filing of the written pleadings and secondly by a procedural decision of the Court, see e.g. ibid., 299-301 and 484-486.

focussed — as the Court had directed the previous year — on the questions whether the Court had jurisdiction and the claims were admissible.

There was then a long wait for judgment, a wait of more than five months (as compared with the usual one to three months) — a wait which was the more surprising given the fact that the Court by then must have been very familiar with the arguments about the General Act which had been the main feature of the proceedings. In the end the judgments were given just before Christmas of 1974.

In essence the majority of the Court[28] reasoned as follows:

1. The objective of the proceedings was to bring atmospheric tests to an end.
2. France by making various statements had given a unilateral undertaking by which it was bound to stop atmospheric testing.
3. Accordingly the proceedings no longer had any object and the Court therefore was not called upon to give decisions on the proceedings.

The judgments contain some breathtaking steps. Three aspects of the reasoning will be considered. The first relates to the Court's interpretation of the objective of the proceedings. The New Zealand Application — the formal document initiating the process — asked the Court to adjudge and declare that:

> the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests.

The Court, by reference to a series of statements made mainly outside the court proceedings and as late as 1 November, read this narrowly in at least three ways: the concern was with (1) atmospheric tests, (2) so conducted as to give rise to radioactive fallout on New Zealand territory, and (3) carried out in the future (i.e. after 1974).[29] It is not at all obvious that that reading can be legally justified. The Application seems to have a broader, declaratory force.

The second aspect of the reasoning is of much greater moment. It relates to the proposition that France is bound not to test. The first point about that is that suddenly New Zealand and Australia had in large part received the final ruling that they sought but would not have expected until the next round of proceedings — that is a ruling that France was not allowed to test. Next, that very important ruling was made without the Court ever deciding that France was subject to its jurisdiction. The ruling itself involved a wide statement of legal principle and a rather generous reading of the French statements. So far as the legal principle is concerned, the Court spoke as follows:[30]

> One of the basic principles governing tne creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an

28 Ibid., 253, 457. See supra n. 1 as to the division within the majority.
29 Ibid., 466 (para. 29), 472 (para. 45).
30 Ibid., 268 (para. 46), 473 (para. 49).

international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

The third aspect of the judgments relates to the process which the Court followed in preparing them. One commentator has said that this is an example of the common law method at work. Quite the contrary argument can be made. With just one exception *all* the common law judges complained about the process.[31] For them the Court had breached the principles of natural justice:

(1) It had given no notice to the parties that it was taking that issue up.

(2) It had given no notice to the parties of the facts that it was considering. (While the parties had mentioned and commented on some of the statements, others had occurred since the hearing had come to an end.)

(3) The parties had not been given an opportunity to appraise the statements in the light of legal principle.

The failure related not just to New Zealand and Australia but also to France.

This criticism relates to broader questions about the relationship of the parties to the Court. The parties in some ways are in a very exposed position since the Court is a court of first and last instance. There is no appeal stage at which arguments can be further and better developed. The Court and its members will give some indication of their positions at each phase — if the case proceeds through more than one. Some help may also be provided by questions — but few are asked — and by directions or suggestions from the Court[32] — but none were given here. And the clash of adversary argument should help define and illuminate the issues — but France maintained its absence, although it did assist by submitting a memorandum on jurisdiction.

Some of the commentary on the cases suggest that the Court was overly cautious, and took a narrow view of its role. Yet it decided that France was bound not to test weapons in the atmosphere, it propounded broad principles about the law relating to unilateral statements, and it did all that and more without giving the parties a hearing and without even deciding it had jurisdiction to deal with the case. All the matters, according to the Court, arose as part of a preliminary issue — was there still a dispute before the Court? That could, it said, be considered and resolved ahead of the matters that were argued.[33]

We come back to the basic role of the Court. The Statute gives it as follows: "to decide in accordance with international law such disputes as are given to it".

31 See the joint dissenting judgments (the authors included Judges Onyeama of Nigeria, Dillard of the United States, and Sir Humphrey Waldock) and the dissenting judgments of Sir Garfield Barwick, the judge *ad hoc* named by Australia and New Zealand. Ibid., 317, 322, 391-392, 439-443, 500 and 505. Cf. 265, 372 and 469. The exception was Judge Nagendra Singh from India.

32 See e.g. the emphasis in the 1967-72 review of the Court's rules on greater control over the oral proceedings, e.g. by indicating issues; see Judge Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice" (1973) 67 Am. J. Int. L. 1, 6-9.

33 E.g. [1974] I.C.J. Rep. 259-260, 271-272, 463, 476-477.

In refraining from further action, it was, in its view, merely acting in accordance with a proper interpretation of its judicial function:[34]

> 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.

How is that judicial means of contributing to international harmony to be related to other means of contributing to it? In 1971, the New Zealand government in commenting on the role of the International Court observed that the use of judicial settlement should not be seen as excluding other methods in arriving at an overall resolution of the dispute.[35] In the present case, the government was trying to achieve political ends. The Court proceedings were one means among several. The government continued its diplomatic efforts — regionally and universally in an effort to influence world and ultimately French opinion. The legal proceedings imposed some restraints on that. Thus the 1973 orders were as much directed to New Zealand and Australia as to France when they indicated that the three governments should ensure that no action of any kind be taken which might aggravate or extend the dispute. The government must still have found odd the comments of some judges that the proceedings were political, using that word pejoratively.[36] The proceedings *were* political — in the sense that the government was trying to achieve a result of political importance or a change in French policy. But the processes used, the discipline involved, and the principles developed were all law based.[37] The fact that the testing of nuclear weapons, like their development, deployment and use, gives rise to major political disputes does not mean that aspects of the dispute cannot be submitted to legal process.

V. AN ASSESSMENT

An assessment of the role and process of the International Court as seen in these *Nuclear Tests* cases can look first at the cases in the wider context of nuclear disarmament and arms control. The cases were brought at a high point of efforts within the decade after the Test Ban Treaty, a decade which had seen major movements to control nuclear weaponry. The governments in Wellington and Canberra, especially the former, were trying to pursue a range of policies at the regional and universal level. I do not take this matter further here except to note that French cessation of atmospheric nuclear testing was seen as an important step in that wider context.[38]

A second part of the assessment must look to the effect of the proceedings on the Court. The case in some ways was damaging for the Court. Its major supporter treated it with contempt and withdrew its acceptance of jurisdiction.[39] On the other side, many commentators strongly criticised the Court for avoiding

34 Ibid., 271, 477.
35 U.N. Doc. A/8382/Add. 4 of 12 November 1971 quoted by Dr Finlay, the New Zealand Attorney-General in the 1974 hearing.
36 See e.g. the opinions of Judge Ignacio-Pinto in 1973 and 1974 and Judge Gros in 1974.
37 See e.g. Dr Finlay's statement at the 1974 hearing.
38 See e.g. the statement of 21 December 1974 by the New Zealand Prime Minister, supra n. 1.
39 See e.g. supra n. 2 and n. 8.

the major issues presented to it, for its treatment of the law relating to unilateral statements, or for the process it followed.

The record needs to be balanced a little. The first point to be made is that the Court does not choose its cases. The parties initiate them and have an enormous capacity to influence the agenda of law declaration and development. The power of individual states to do that — with possible large consequences for the law applicable to all states — is to be contrasted with the much more complex and difficult process for initiating a multilateral law making conference.[40] The Court has few of the filtering devices available for instance to the Supreme Court of the United States.[41] It is perhaps not surprising that it has developed some avoidance devices of its own, nor that in the particular case it moved its potential focus from the very difficult substantive issues of general purport to the specific disputes between the parties — or at least the evolving disputes as the Court evaluated them. Should it however have done that without giving the parties, including France, the opportunity to be heard on that issue? The Court has, after all, often said that it must remain faithful to its judicial character.[42]

My whole instinct as a common lawyer says that the dissenters were right: a hearing should have been given. And yet, looking back, I hesitate. I wonder just what the parties would have done. Would their action have interfered with the subtle role which the Court, or some of its members, appear, in retrospect, to have been playing in nurturing the settlement, the fragile agreement, that was starting to appear? The December 1974 judgments suggest that the Court was watching the statements and reactions of the parties very closely. Moreover, the visits immediately following the judgments, of the New Zealand and Australian Prime Ministers to Paris helped consolidate the settlement which the Court, rather prematurely perhaps, had identified.[43]

40 See e.g. Daudet, *Les Conférences des Nations Unies pour la Codification du Droit International* (Pichon and Durand-Auzias, Paris, 1968).

41 See e.g. the fascinating discussions of the Court and Frankfurter J. (dissenting) in *Baker* v. *Carr* 369 U.S. 186 (1962).

42 See e.g. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Sijthoff, Leyden, 1971), ch. 5. The concern is perhaps rather more with the equality of the parties than with the absolute right to be kept fully informed by the court.

43 Mr Rowling on 21 December 1974 noted that the Court's finding achieved in large measure the immediate object for which the proceedings were brought: France was obliged not to test in the atmosphere. He recalled that the New Zealand Government had felt obliged in the past to take a more guarded view than that taken by the Court of the French statements, supra n. 1.
Two months later at his press conference in Paris he stated his delight at the good relations with France. "If we have had problems in the past it does seem that these are now essentially set aside. We are . . . in a new era in the relationship between us." The Foreign Affairs Review records that useful exchanges took place disposing of any coolness existing between the two countries over the issue of nuclear testing. The Prime Minister had expressed his satisfaction that atmospheric testing by the French had come to an end, N.Z. Foreign Affairs Rev. vol. 25, no. 3 (March 1975) 7. See similarly the statement by the Rt. Hon. Mr Whitlam, following his visit, to the Australian House of Representatives, Australian Foreign Affairs Record, vol. 46, no. 2 (February 1975), 67.

An assessment should also have regard to the position of the parties. The French reaction — a very strong censorious one — has already been indicated. Given the strength of the jurisdictional argument that reaction was in my view much too strong. A rational assessment should have suggested that the Court might well get to the merits and that participation in its process would be advantageous. The applicants were, of course, anticipating the Court ruling on the general law relating to atmospheric nuclear testing. They did not get that. They did however get — suddenly and essentially without warning — judgments that said that France was bound not to test nuclear weapons in the atmosphere. In the normal course they could not have expected judgments to that effect for another year or two and they could not have been confident that they would obtain such judgments even then. Can we say then that the Court showed considerable skill in contributing to (or it would say recognising) the settlement of the disputes (or at least the main lines of the disputes) and thereby, as a principal organ of the United Nations, adhering to and promoting a basic principle of the organisation: the settlement of international disputes by peaceful means? The particular situation strongly supports a positive answer. That answer must however contend with the more general expectation of governments that when they cede to the Court their power of decision the process and the law will, within broad limits, be predictable. And, as I have noted already, the judgments, as legal reasoning and as evaluations of the facts and the process followed, can be and have been with some reason strongly criticised. The Court is not, however, established just to provide satisfying and fully reasoned answers to nice legal questions.