

DISSENTING OPINION OF JUDGE SIR GARFIELD BARWICK

I have already expressed my reasons for being unable to join in the Judgment of the Court in the case of *Australia v. France*. All those reasons apply with equal force in this case and need not be repeated.

The analysis of the exchanges between New Zealand and France prior to the lodgment of the Application results, in my opinion, in the emergence of a dispute between them as to their respective legal rights. It is apparent from the letter written on 19 February 1973 by the Ambassador of France to the Prime Minister of New Zealand that France early recognized that legal rights were involved in the matters which had been in discussion. The reply of the Prime Minister, written on 9 March 1973, made it quite clear in my opinion that New Zealand was asserting the existence of rights under international law and that France's acts in connection with the detonation of nuclear devices at Mururoa infringed those rights of New Zealand. As the letter of the Prime Minister of New Zealand to the President of France, written on 4 May 1973, points out, France disputed the existence of and the alleged breach of those rights. Thus in my opinion there was a legal dispute between the Parties prior to the lodging of the Application.

The various bases of claim made by the Applicant are subsumed under five headings in the Application (see para. 28) and in the Applicant's Memorial (see para. 190). They are not expressly spelled out individually in the pre-Application exchanges to the same extent but they are clearly all embraced in the formulae there employed. The basis of claim enumerated in these paragraphs of the Application and Memorial are all comprehended in the four bases of claim which are set out in my opinion in the case of *Australia v. France*. Thus, what I have said there as to those four bases of claim, is wholly applicable to the five bases of claim which the Applicant has enumerated in these proceedings. I need not specially differentiate between the four bases in the one case and the five bases of claim in the other.

Perhaps the emphasis respectively placed upon the unlawfulness of the testing of nuclear weapons and upon the infringement of sovereignty by the fall-out in New Zealand resulting from the detonation of nuclear devices, differs slightly in the two cases. This, in my opinion, does not require any special treatment in these reasons as the difference is not of any substantial importance.

The Applicant however, unlike Australia, did not seek an order of

injunction. Its only claim was for a declaration. Its claim is expressed in its Application as follows:

“Accordingly, New Zealand asks 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 radio-active fall-out constitutes a violation of New Zealand’s rights under international law, and that these rights will be violated by any further such tests.”

It is thus even more difficult in this case to support the view that the Applicant’s request for a declaration was but as a reason or foundation for an order of injunction or, as it is put, was merely a means to an end and not an end in itself. Any suggestion that the claim must be regarded as either a claim for a declaration or a claim for an injunction would be a false dichotomy. In truth the claim could seek both, as in the case of Australia but the claim of the Applicant does not.

In any case, as I pointed out in my opinion in the case of *Australia v. France*, it is only by a fallacious identification of the purpose being pursued by the initiation of the litigation with the substance of the claim actually made in the proceedings, is it concluded in the Judgment that the Applicant by its claim did not seek a declaration of right as a means of resolving its dispute with France as to the unlawfulness of the French nuclear activity at Mururoa and of its consequences.

Whatever may be said as to its motivation, the Application is in respect of a dispute as to the legality of the Respondent’s actions in exploding nuclear devices: so much is expressly conceded in the Judgment (see paras. 1 and 16). The Application in terms sought an adjudication upon questions of legal right as *the* method of resolving that dispute. Such an adjudication would result in *res judicata* binding both parties and, if the Applicant were successful, forming the basis for further action either of a litigious or diplomatic nature. A voluntary promise, even if binding, not to exercise what the Respondent still maintained was its right cannot be the equivalent or substitute for such an adjudication in these proceedings. It cannot properly be said, in my opinion, that because France has voluntarily “assumed an obligation as to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required . . . that any further finding would have no *raison d’être*” (para. 59) or that:

“ . . . since the Court now finds that a commitment in this respect has been entered into by France, there is no occasion for a pronouncement in respect of rights and obligations of the Parties concerning the past—which in other circumstances the Court would be entitled and

even obliged to make—whatever the date by reference to which such pronouncement might be made” (para. 54).

Such statements in the Judgment are in my opinion on their face erroneous and indicative of a failure on the part of the Court to perform its judicial duty of decision (Art. 38 of the Statute).

Of course, such a promise by France *if accepted by the Applicant* might well result in a compromise of the litigation. Despite, and with due respect to the assertion to the contrary in the Judgment (para. 57), it is, in my opinion, with the compromise of the litigation rather than with the settlement of the dispute between the Parties that the Court in this case as in the case of *Australia v. France* has, erroneously as I think, concerned itself.

The terms of the Applicant’s request seem wide enough to embrace tests which had occurred before the Application was lodged. The claim then proceeds that any further tests will violate French rights under international law. But this circumstance does not call in my opinion for any different reasoning from that which I have used nor any qualifications of the opinion I have expressed in the case of *Australia v. France*.

It should be mentioned however that throughout the pre-Application exchanges, the Applicant expressly and consistently reserved its “right to hold the French Government responsible for any damage or losses incurred by New Zealand or the Pacific Islands for which New Zealand has special responsibility or concern, as a result of the weapons tests”, which France intended to conduct. As consistently and as expressly, France denied that the Applicant had any such right. The fact of this reservation may be added to the other considerations to which I adverted in my opinion in the case of *Australia v. France*, for concluding that the Applicant is not debarred from seeking compensation from France for the results of the atomic detonations at Mururoa. It could clearly have done so in my opinion in these proceedings as to the results of the 1973 and 1974 series of tests, in the latter of which the Applicant has asserted that the “fall-out levels recorded for the 1974 test series have been significantly higher than those measured in 1972 and 1973”. Whether the Applicant in its final submission could have sought compensation in respect of these pre-Application detonations need not be decided but it is to my mind clear that if a declaration of unlawfulness had been made the Applicant would have been able to make it the basis for claims upon France for compensation in respect of such explosions.

My comments made in the case of *Australia v. France* as to the use sought to be made in the Judgment of the introduction and of a comment made upon the communiqué of 8 June 1974 by the Applicant, apply equally to this case. Such introduction and comment were in no sense related to the question the Court has decided. Further, nothing in the statement of the Prime Minister of New Zealand made on 1 November 1974 was directed to that question. Neither the observations of the

Applicant on the communiqué of 8 June 1974 nor the said statement of the Prime Minister afford in my opinion any justification for not notifying and hearing the Applicant upon the question the Court has now decided.

Here, as in the case of *Australia v. France*, the Court in my opinion has failed in a basic respect to comply with the requirements of its judicial process. It has decided a question of which the Applicant has had no notice and by the use of material which the Applicant was unaware had been introduced into evidence in the proceedings. The injustice of this course is obvious. Further, unaided by analysis and argument which undoubtedly could have contributed in my opinion to a right conclusion of fact and a proper understanding of the substance of the Applicant's claims, the Court has reached what in my opinion is an insupportable conclusion. It has failed to decide the questions of jurisdiction and of admissibility, isolated by its Order of 22 June 1973 in order that there should be an early decision upon them.

As in the case of *Australia v. France*, I am unable to join in the Judgment which follows from an unjust procedure and which produces a result which I cannot accept as right and proper in the circumstances.

(Signed) G. E. BARWICK.