

## SEPARATE OPINION OF JUDGE GROS

[*Translation*]

As is shown by the texts of the two Judgments, one in the Australian and the other in the New Zealand case, one is modelled on the other, the cases were examined, pleaded and deliberated upon together; the Applications instituting proceedings were filed on the same day and the steps preparatory to the judicial proceedings had been exactly parallel. Having been of the opinion that the two cases ought to have been joined (Order of 22 June 1973, *I.C.J. Reports 1973*, p. 149) I would refer to my opinion on the Judgment concerning the Government of the Commonwealth.

However, part of that opinion deals with the conduct of the Applicant in relation to the nuclear tests and some brief indication should be given to show how the attitude of the New Zealand Government was analogous to that of the Australian Government.

1. It is sufficient to read the series of diplomatic Notes addressed by the Government of New Zealand to the French Government between 14 March 1963 and the end of 1972 (Application, Ann. III, pp. 22-62) in which the argument that the French tests were unlawful was at no time put forward by New Zealand as justifying a request that the French tests be halted. The form of words used for the protests is always based on anxieties, never on a right. Thus, as late as 29 March 1972, a Note of the New Zealand Embassy in Paris stated:

“If such testing of nuclear weapons is carried out during 1972, the New Zealand Government will expect the French Government once again to make every effort to minimize potential risks and to ensure that all explosions take place only in meteorological conditions which afford the greatest possibility of eliminating the risk of dangerous fallout in inhabited areas. The New Zealand Government reaffirms that it formally reserves the 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 a responsibility, as a result of any nuclear weapons tests conducted by the Government of France.” (*Ibid.*, pp. 58 and 60.)

Exactly the same form of words, “if such testing of nuclear weapons is carried out” is to be found in the other New Zealand Notes (Note of 27 May 1966, Application, p. 42; Note of 5 June 1968, Application, p. 52; Note of 6 April 1970, Application, p. 54; Note of 14 May 1971, Application, p. 56).

After elections at the end of 1972 in which, as in Australia, the Labour

Party obtained a majority, the policy was modified and the conflict of political interests with France was brought before the Court.

2. As for the differentiation of New Zealand's attitude as between its direct allies and France or China, a few quotations will suffice.

The Prime Minister of New Zealand said in 1956:

“In the absence of any agreement among the major powers on the question of the control and supervision of conventional armaments, the development of this branch of the nuclear sciences must continue. Periodic tests are essential to this work<sup>1</sup>.”

Then a little before the first British thermonuclear bomb, in 1957, the Prime Minister stated:

“If Britain were to call a halt now it would leave her uncertain in her knowledge as to whether she did in fact possess adequate means of retaliation should nuclear weapons be used against her or should she be threatened with attack by this means. The United Kingdom understandably wishes to have that knowledge.”

At the same period the Government's policy on the subject was thus defined:

“First, this is one of the most serious problems that has ever faced the world.

Second, the course being followed by Britain is the right course, and we must continue to support her. Her aim is the security of the Commonwealth and the free world and our safety lies in that security.

Third, we should and will press for assurances that nuclear tests will be kept to a minimum, consistent with the defence of the free world.

Fourth, we are ready to support and to work for the complete banning of nuclear tests when the other nations will do the same and conditionally on their agreeing to an adequate system of international inspection. Surely nothing could be fairer than that. The very safety of the free world is at stake and we cannot afford to take risks.”

After 1966 the emphasis was placed on the desirability of securing the observance by all States of the restrictions provided for in the 1963 Treaty. The Prime Minister declared:

“I think it important that we get our priorities straight. The New Zealand Government's primary objection to the continuation

<sup>1</sup> All the quotations are from the review published by the New Zealand Ministry for Foreign Affairs, as reproduced in Nigel Roberts, *New Zealand and Nuclear Testing in the Pacific*, 1972.

of the French testing programme—as it is to the development of nuclear weapons by Communist China—is that it flies in the face of the clear international trend in the last few years towards limiting the spread of weapons of mass destruction. I have in mind such encouraging steps as the Partial Test Ban Treaty of 1963, and this year's Non-Proliferation Treaty, and the prospects that further specific measures such as a comprehensive ban on all testing will again be taken up for serious study by the great powers. It is in this context that the French determination to press ahead with their weapon development programme seems to me mostly to be regretted.”

3. For the rest, the principles to be applied to the so-called legal dispute submitted by New Zealand to the Court are those which I have set forth in connection with the Australian Application. There is nothing for the Court to judge in this clash of political interests.

4. Paragraphs 29-35 of my opinion in the case brought by Australia, which I had to devote to the premature disclosure by the Australian Prime Minister of the Court's decision of 22 June 1973 and of the voting-figures, do not concern the New Zealand case.

*(Signed) A. GROS.*