

NUCLEAR TESTS CASE (NEW ZEALAND v. FRANCE)

Judgment of 20 December 1974

In its judgment in the case concerning Nuclear Tests (New Zealand v. France), the Court, by 9 votes to 6, has found that the claim of New Zealand no longer had any object and that the Court was therefore not called upon to give a decision thereon.

In the reasoning of its Judgment, the Court adduces *inter alia* the following considerations: Even before turning to the questions of jurisdiction and admissibility, the Court has first to consider the essentially preliminary question as to whether a dispute exists and to analyse the claim submitted to it (paras. 22–24 of Judgment); the proceedings instituted before the Court on 9 May 1973 concerned the legality of atmospheric nuclear tests conducted by France in the South Pacific (para. 16 of Judgment); the original and ultimate objective of New Zealand is to obtain a termination of those tests (paras. 25–31 of Judgment); France, by various public statements made in 1974, has announced its intention, following the completion of the 1974 series of atmospheric tests, to cease the conduct of such tests (paras. 33–44 of Judgment); the Court finds that the objective of New Zealand

has in effect been accomplished, inasmuch as France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific (paras. 50–55 of Judgment); the dispute having thus disappeared, the claim no longer has any object and there is nothing on which to give judgment (paras. 58–62 of Judgment).

Upon the delivery of the Judgment, the Order of 22 June 1973 indicating interim measures of protection ceases to be operative and the measures in question lapse (para. 64 of Judgment).

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For the purposes of the Judgment the Court was composed as follows: President Lachs; Judges Forster, Gros, Bengzon, Petré, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda; Judge *ad hoc* Sir Garfield Barwick.

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Of the nine Members of the Court who voted for the decision, Judges Forster, Gros, Petrén and Ignacio-Pinto appended separate opinions.

Of the six judges who voted against the decision, Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock appended a joint dissenting opinion, and Judges de Castro and Sir Garfield Barwick dissenting opinions.

These opinions make known and substantiate the positions adopted by the judges in question.

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Also on 20 December 1974, the Court made two Orders regarding applications submitted by the Government of Fiji for permission to intervene in the two cases concerning Nuclear Tests (*Australia v. France*; *New Zealand v. France*). In these Orders, which were not read in public, the Court found, following the above-mentioned Judgments, that these applications lapsed and that no further action thereon was called for. These Orders were voted unanimously by the Court in the same composition as for the Judgments. Judges Gros, Onyeama, Jiménez de Aréchaga and Sir Garfield Barwick appended declarations to them, and Judges Dillard and Sir Humphrey Waldock a joint declaration.

Although the Court delivered a separate Judgment for each of the two Nuclear Tests cases referred to above, they are analysed together in the summary which follows.

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Procedure (paras. 1–20 of each Judgment)

In its Judgment, the Court recalls that on 9 May 1973 the Applicant instituted proceedings against France in respect of French atmospheric nuclear tests in the South Pacific. To found the jurisdiction of the Court, the Application relied on the General Act for the Pacific Settlement of International Disputes concluded at Geneva in 1928 and Articles 36 and 37 of the Statute of the Court. By a letter of 16 May 1973 France stated that it considered that the Court was manifestly not competent in the case, that it could not accept its jurisdiction and that it requested the removal of the case from the Court's list.

The Applicant having requested the Court to indicate interim measures of protection, the Court, by an Order of 22 June 1973, indicated *inter alia* that, pending its final decision, France should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of the Applicant. By various communications the Applicant has informed the Court that further series of atmospheric tests took place in July–August 1973 and June–September 1974.

By the same Order of 22 June 1973, the Court, considering that it was necessary to begin by resolving the questions of the Court's jurisdiction and of the admissibility of the Application, decided that the proceedings should first be addressed to these questions. The Applicant filed a Memorial and presented argument at public hearings. It submitted that the Court had jurisdiction and that the Application was admissible. France did not file any Counter-Memorial and was not represented at the hearings; its attitude was defined in the above-mentioned letter of 16 May 1973.

With regard to the French request that the case be removed from the list—a request which the Court, in its Order of 22 June 1973, had duly noted while feeling unable to accede to it at that stage—the Court observes that it has had the opportunity of examining the request in the light of the subsequent proceedings. It finds that the present case is not one in which the procedure of summary removal from the list would be appropriate. It is to be regretted that France has failed to appear in order to put forward its arguments, but the Court nevertheless has to proceed and reach a conclusion, having regard to the evidence brought before it and the arguments addressed to it by the Applicant, and also to any documentary or other evidence which might be relevant.

Object of the Claim (paras. 21–41 of the Judgment in the Australian case, and 21–44 in the New Zealand case)

The present phase of the proceedings concerns the jurisdiction of the Court and admissibility of the Application. In examining such questions, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters. By virtue of an inherent jurisdiction which the Court possesses *qua* judicial organ, it 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. It is therefore necessary for it to make a detailed analysis of the claim submitted in the Application, which is required by Article 40 of the Statute to indicate the subject of the dispute.

In its Application, Australia asks the Court:

—to adjudge and declare that “the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law” and to order “that the French Republic shall not carry out any further such tests”.

New Zealand, in its Application, 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 essential to consider whether the Applicant requests a judgment which would only state the legal relationship between the Parties or a judgment requiring one of the Parties to take, or refrain from taking, some action. The Court has the power to interpret the submissions of the Parties and to exclude, when necessary, certain elements which are to be viewed, not as indications of what the Party is asking the Court to decide, but as reasons advanced why it should decide in the sense contended for. In the present case, if account is taken of the Application as a whole, the diplomatic exchanges between the Parties in recent years, the arguments of the Applicant before the Court and the public statements made on its behalf during and after the oral proceedings, it becomes evident that the Applicant's original and ultimate objective was and has remained to obtain a termination of French atmospheric nuclear tests in the South Pacific.

In these circumstances, the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings, namely certain public statements by French authorities, of which some were mentioned before the Court at public hearings and others were made

subsequently. It would have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course, however, would have been justified only if the matter dealt with in those statements had been completely new or had not been raised during the proceedings, which is manifestly not the case. The Court is in possession not only of the statements made by the French authorities in question but also of the views of the Applicant on them.

The first of these statements is contained in a communiqué which was issued by the Office of the President of the French Republic on 8 June 1974 and transmitted in particular to the Applicant: ". . . in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed". Further statements are contained in a Note from the French Embassy in Wellington (10 June), a letter from the President of France to the Prime Minister of New Zealand (1 July), a press conference given by the President of the Republic (25 July), a speech made by the Minister for Foreign Affairs in the United Nations General Assembly (25 September) and a television interview and press conference by the Minister for Defence (16 August and 11 October). The Court considers that these statements convey an announcement by France of its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series.

Status and Scope of the French Statements

(paras. 42-60 of the Judgment in the Australian case, and 45-63 of the Judgment in the New Zealand case)

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Nothing in the nature of a *quid pro quo*, nor any subsequent acceptance, nor even any reaction from other States is required for such declaration to take effect. Neither is the question of form decisive. The intention of being bound is to be ascertained by an interpretation of the act. The binding character of the undertaking results from the terms of the act and is based on good faith; interested States are entitled to require that the obligation be respected.

In the present case, the Applicant, while recognizing the possibility of the dispute being resolved by a unilateral declaration on the part of France, has stated that, in its view, the

possibility of further atmospheric tests has been left open, even after the French statements mentioned above. The Court must, however, form its own view of the meaning and scope intended to be given to these unilateral declarations. Having regard to their intention and to the circumstances in which they were made, they must be held to constitute an engagement of the French State. France has conveyed to the world at large, including the Applicant, its intention effectively to terminate its atmospheric tests. It was bound to assume that other States might take note of these statements and rely on their being effective. It is true that France has not recognized that it is bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements in question; the unilateral undertaking resulting from them cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration.

Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific. The Applicant has sought an assurance from France that the tests would cease and France, on its own initiative, has made a series of statements to the effect that they will cease. The Court concludes that France has assumed an obligation as to conduct, concerning the effective cessation of the tests, and the fact that the Applicant has not exercised its right to discontinue the proceedings does not prevent the Court from making its own independent finding on the subject. As a court of law, it is called upon to resolve existing disputes between States: these disputes must continue to exist at the time when the Court makes its decision. In the present case, the dispute having disappeared, the claim no longer has any object and there is nothing on which to give judgment.

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, if the basis of the Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute.

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For these reasons, the Court finds that the claim no longer has any object and that it is therefore not called upon to give a decision thereon (para. 62 of the Judgment in the Australian case, and para. 65 of the Judgment in the New Zealand case).