INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
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NUCLEAR TESTS CASE

(AUSTRALIA *v.* FRANCE)

APPLICATION BY FIJI FOR PERMISSION TO INTERVENE

ORDER OF 20 DECEMBER 1974

1974

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ESSAIS NUCLÉAIRES

(AUSTRALIE c. FRANCE)

REQUÊTE DE FIDJI À FIN D'INTERVENTION

ORDONNANCE DU 20 DÉCEMBRE 1974

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APPLICATION BY FIJI FOR PERMISSION TO INTERVENE

ORDER

Present: *President* LACHS; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Judge* ad hoc Sir Garfield BARWICK; *Registrar* AQUARONE.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 48 and 62 of the Statute of the Court,

Having regard to the application of the Government of Fiji dated 16 May 1973 for permission to intervene in these proceedings,

Having regard to the Order of the Court in this case dated 12 July 1973,

Makes the following Order:

1. Whereas by a Judgment of 20 December 1974 in this case the Court finds that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon,

2. Whereas in consequence there will no longer be any proceedings before the Court to which the Application for permission to intervene could relate,

THE COURT,

Unanimously,

Finds that the Application of the Government of Fiji for permission to intervene in the proceedings instituted by Australia against France lapses, and that no further action thereon is called for on the part of the Court.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and seventy-four, in four copies, one of which will be deposited in the archives of the Court, and the others transmitted to the Government of Fiji, the Government of Australia, and the French Government, respectively.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

Judge GROS makes the following declaration:

Je vote la présente ordonnance pour des motifs différents de ceux qu'elle indique. Le document présenté par le Gouvernement fidjien le 16 mai 1973 ne pouvait à aucun titre être considéré comme une demande d'intervention au sens de l'article 62 du Statut et cette demande aurait dû être rejetée dès l'origine.

Judge ONYEAMA makes the following declaration:

I have voted in favour of the Order, although, in my view, the reason given for it, namely that the claim of the applicant State no longer has any object and in consequence there will no longer be any proceedings before the Court in which intervention would be possible, carries an implication with which I am unable to agree. The implication is that if the claim had had an object and the Court had been called upon to give a decision thereon, there would have been a possibility of intervention in this case.

Fiji was not, at any time material to these proceedings, a party to the General Act of 1928 nor to the optional clause of the Statute of the Court on which the applicant State sought to base the Court's jurisdiction, nor

has she invoked any basis of jurisdiction vis-à-vis France in her request to intervene.

The Court should have decided upon this request itself as required by Article 62 of the Statute of the Court and should, in my view, have rejected it on the ground that the condition of reciprocity of an obligation to accept the Court's jurisdiction was wholly absent between Fiji and France.

Judges DILLARD and Sir Humphrey WALDOCK make the following joint declaration:

The Order states that, the Court having found that the claim of Australia no longer has any object, the Court is not called upon to give a decision thereon and consequently there will no longer be any proceedings to which intervention can relate. The Application of the Government of Fiji has, according to the Order, therefore lapsed.

The conclusion flows logically from the premise. As Members of the Court, bound by its decision in the *Nuclear Tests* case, we are therefore impelled to vote in favour of the Order. It is clearly not possible for the Government of Fiji to intervene in proceedings, when, by the Judgment of the Court, no proceedings exist.

Having said this we feel it incumbent on us to state that we do not agree with the premise which furnishes the ground on which the Court's conclusion rests. As indicated in detail in the dissenting opinion of ourselves and some of our colleagues, we do not agree that the Court should have decided that no further action is called for on the claim of Australia against France.

If, in the case of *Australia* v. *France*, the views of the minority had prevailed, the issue of Fiji's intervention would have required examination in order to determine whether or not there existed a sufficient jurisdictional link between Fiji and France to justify the former's intervention under Article 62 of the Court's Statute. Furthermore, in our view an opportunity should have been given to Fiji to be heard on the issue before this determination was made.

It follows from what we have said above that, while we feel impelled to vote for the Order of the Court, our reasons for doing so differ in certain respects from those advanced by the Court.

Judge JIMÉNEZ DE ARÉCHAGA makes the following declaration:

I have concurred in voting for the dismissal of Fiji's application to intervene under Article 62 of the Statute for a reason other than that

on which the Order is based: because Fiji, which is not a party to the 1928 Act and to the optional clause system, has failed to invoke in its application any title of jurisdiction in relation to France.

In my view, in order to be entitled to intervene under Article 62 of the Statute for the purpose of asserting a right as against the respondent a State must be in a position in which it could itself bring the respondent before the Court.

When Article 62 of the Statute was drafted, its authors were proceeding on the assumption that the intervening State would have its own title of jurisdiction in relation to the respondent, since the draft Statute then provided for general compulsory jurisdiction. When that system was replaced by the optional clause, Article 62 remained untouched, but it must be interpreted and applied as still subject to that condition. Otherwise, unreasonable consequences would result, in conflict with basic principles such as those of the equality of parties before the Court and the strict reciprocity of rights and obligations among the States which accept its jurisdiction. A State which cannot be brought before the Court as a respondent by another State can neither become an applicant vis-à-vis that State nor an intervener against that same State, entitled to make independent submissions in support of an interest of its own. In my view the provision in Article 69, paragraph 2, of the Rules of Court requiring "a statement of law and of fact justifying intervention" must in circumstances like those in the present case be interpreted as including the requirement of establishing an independent jurisdictional link between intervener and respondent.

Judge *ad hoc* Sir Garfield BARWICK makes the following declaration:

I have voted in favour of the Order made in respect of the Application by Fiji to intervene in these proceedings not because of the Order made by the Court in the cases *Australia* v. *France* and *New Zealand* v. *France* but solely for the reasons expressed by Judge Jiménez de Aréchaga and Judge Onyeama in their declarations concerning the Fiji Order, with which I entirely agree.

(Initialled) M.L.

(Initialled) S.A.