NUCLEAR TESTS CASE (NEW ZEALAND v. FRANCE)

(Application of 9 May 1973)

SUPPLEMENTARY AIDE-MEMOIRE OF NEW ZEALAND

1. New Zealand, having received the French Aide-Memoire dated 6 September 1995, believes that the Court may be assisted if it has before it, when considering the matter on 8 September, two brief comments on that document. The present Aide-Memoire is not intended, and in the time available could not be, a full reply to the French document, the detailed treatment of which is reserved.

I

2. It will be clear to the Court, from the detail into which the French Aide-Memoire has found it necessary to enter in order to make its points, particularly in Sections A and B relating to the present status of the proceedings begun in 1973 and the contention that the main Request by New Zealand does not relate to a "case", that there are in respect of these matters significant differences of view between the Parties which must be resolved by the Court. Such consideration by the Court cannot properly take place on the basis of the Aides-Memoire which the Parties have submitted at the request of the President. These have no formal standing nor are they fully responsive to each other. New Zealand did not contemplate when it filed its main Request that this document could be treated as anything other than the document initiating the resumption by the Court of its consideration of the case begun in 1973. On the basis of the unvarying practice of the Court in relation to matters that can, at the very

least, be *prima facie* related to some existing basis of jurisdiction, New Zealand expected that it would have the opportunity to develop its request in oral proceedings.

II

3. These present proceedings are not comparable to the cases which France has invoked in support of its contention that New Zealand's main Request is not an act introductive of proceedings capable of being related to any provision of the Statute or any existing case.

4. The attempt by France to invoke the Orders of the Court which it mentions at p.15 of its Aide-Memoire can only, by virtue of the failure to refer to certain dominating features of those cases, be described as positively misleading. Those Orders are ones made by the Court in three cases in each of which the Applicant State not only did not identify any possible jurisdictional link between it and the named Respondent State but even expressly acknowledged in its Application that no such link existed.

5. Thus, in the first case cited by France, that of the Treatment in Hungary of Aircraft and Crew of United States of America (*USA v Hungary; USA v USSR*), the Application said in paragraph 2:

> "The United States Government, in filing this application with the Court, submits to the Court's jurisdiction for the purposes of this case. The Hungarian Government appears not to have filed any declaration with the Court thus far, and although it was invited to do so by the United States Government in the Note annexed hereto it has not made any responsive reply to the invitation. The Hungarian Government is, however, qualified to submit to the jurisdiction of the Court in this matter and may upon notification of this application by the Registrar, in accordance with the Rules of the Court, take the

necessary steps to enable the Court's jurisdiction over both parties to the dispute to be confirmed.

Thus the United States Government founds the jurisdiction of this Court on the foregoing considerations and on Article 36(1) of the Statute." (See the *Pleadings* in that case, p.9.)

6. Identical words were used in the Application in both the other cases cited by France, the *Aerial Incident of 4 September 1954 (USA v USSR)* (see *ICJ Pleadings* in that case, p.9) and the *Aerial Incident of 7* [not 4, as the French document states] *November 1954 (USA v USSR)* (see *ICJ Pleadings* in that case, p.9).

7. The French Aide Memoire says that:

"In all these cases, the Court, using its administrative power, decided, by orders made without holding hearings and without the Parties having been invited to participate in any procedural act, to strike them from the list, after having taken note that its lack of jurisdiction was manifest."

This is quite correct. What is totally incorrect and unsustainable is the sentence which next follows: "It should not be handled differently to-day" (*"Il ne saurait en aller différement aujourd'hui"*).

8. The difference between these cases and the present one is manifest. As stated, in each of these cases (and there are several others of the same kind not cited in the French document) the United States conceded from the outset that at the moment of the Application it could not identify any jurisdictional link between itself and the respondent State. In the present case, New Zealand points to a perfectly valid link - the terms of paragraph 63 of the 1974 Judgment. The only question is whether the conditions of operation of that link are satisfied, as contended by New

Zealand, or are not, as contended by France. That is a substantial legal issue which cannot be resolved peremptorily.

9. It follows that the French contention in paragraph 34 of its Aide-Memoire, namely, that the Court's decision in the matter can be taken *proprio motu* without a public hearing, is equally misplaced. So likewise is the pretence in the next paragraph that there is no "objective fact" to which may be related such matters as the application for interim measures of protection, the applications for intervention and the resumed participation of the *ad hoc* Judge chosen by New Zealand.

10. It is interesting to note that Professor Rosenne, in his *Law and Procedure of the International Court*, Vol. II, p.540, treats these cases as instances of "unilateral arraignment under the doctrine of *forum prorogatum*" where the seisin is not even *prima facie* effective. The present proceedings do not fall into that category. New Zealand does not invoke *forum prorogatum*. It points quite specifically to paragraph 63 of the 1974 Judgment as the basis of the Court's competence to proceed.