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Nuclear Testing: New Zealand and France in the International Court of Justice

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Don MacKay

Abstract

This article discusses the action taken by New Zealand following Jacques Chirac's announcement that France would conduct a series of eight nuclear weapons tests in the South Pacific. New Zealand eventually took its complaints to the ICJ and requested that their case from 1973-1974 regarding weapons testing be reopened.

NUCLEAR TESTING: NEW ZEALAND AND FRANCE IN THE INTERNATIONAL COURT OF JUSTICE

*Don MacKay**

INTRODUCTION

On June 13, 1995, the recently elected President of France, President Jacques Chirac, announced that France would conduct a final series of eight nuclear weapons tests in the South Pacific starting in September. President Chirac's announcement broke the moratorium on nuclear testing observed by France and most other nuclear weapon states ("nuclear powers") for the past three years. It came just a month after the decision of the parties to the Nuclear Non-Proliferation Treaty¹ ("NPT") to extend the treaty indefinitely. As part of that outcome, the nuclear powers had agreed to exercise the "utmost restraint" in nuclear testing pending the entry into force of a Comprehensive Nuclear Test Ban Treaty.

Non-nuclear powers already felt a sense of betrayal over China's nuclear testing within a month of the NPT compact being reached. France's announcement that it would soon follow suit, fuelled that anger further, and sparked world-wide criticism. Even in France itself, polling suggested that there was widespread anxiety and opposition over its Government's decision.

In New Zealand, the Government had already reacted strongly to the Chinese test. Its reaction to the French announcement was both strong and immediate, with the Prime Minister making a public statement in the New Zealand Parliament deploring the decision and urging the French Government to reconsider it. The New Zealand Parliament unanimously passed a resolution condemning any resumption of French nuclear testing in the South Pacific. A few days later, the New Zealand Permanent Representative at the U.N. Conference

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1. Treaty for the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

on Disarmament² took a similar stance, drawing attention to the inconsistency between the French announcement and the undertaking given by the nuclear powers upon the extension of the Nuclear Non-Proliferation Treaty. A delegation from the South Pacific region, at senior political level, including the New Zealand Minister for Disarmament and Arms Control, quickly flew to Paris to convey the region's deep concern to the French Foreign Minister.

New Zealand also initiated a series of intensive bilateral representations to the French Government urging it to reconsider. The New Zealand Prime Minister wrote to the French President calling attention to the strong public reaction in New Zealand, and indicating that the French decision had cast a cloud over the relationship between the two countries that would last as long as the nuclear tests continued. He also expressed concern about possible environmental consequences from the testing, and pointed to the unanimous opposition of countries in the South Pacific region to its resumption. In a unique adaptation of new technology, the Prime Minister also addressed an open letter to the President on the Internet, which invited those "surfing the net" to take up the issue. The New Zealand Ambassador in Paris began extensive representations in the French capital, and the French Ambassador in Wellington started out on what was to become a well-trodden path to New Zealand Government Ministers' offices to receive representations and protests. On August 17, 1995, the New Zealand Prime Minister wrote to the French President formally notifying him that New Zealand would be taking France to the International Court of Justice. This followed the decision, a week earlier, that New Zealand would go to the Court in an endeavor to re-open the earlier "nuclear tests" case of 1973 and 1974.³ Five other South Pacific States would subsequently intervene in the case.

I. *BACKGROUND ON NUCLEAR TESTING*

It is necessary to place New Zealand's reaction and that of

2. See generally, 1995 U.N. CONFERENCE ON DISARMAMENT Y.B., U.N. Sales No. E.95.IX.1. The achievements and findings in the area of disarmament at the Conference are published annually in the yearbook. *Id.*

3. Nuclear Tests (N.Z. v. Fr.) 1974 I.C.J. 457 (Dec. 20) [hereinafter *New Zealand Case*]; (Aust. v. Fr.) 1974 I.C.J. 253 (Dec. 20) [hereinafter *Australian Case*].

other South Pacific countries in context. The Pacific region has been used for nuclear testing since shortly after World War II. The consequences can be seen to this day, with ongoing radioactive contamination in some areas and some islands still uninhabitable. The United States initiated testing in the Marshall Islands in 1946, and continued there until 1962. The United Kingdom followed, testing in Australia from 1952 until 1957, and at Malden and Christmas Islands (now part of Kiribati) in 1957 and 1958. France took the decision to develop nuclear weapons in the early 1950's and conducted its first test in the French Sahara in 1960. Following Algeria's independence in 1963, France decided to shift its testing site to Mururoa Atoll in French Polynesia. Although only four of the nineteen tests conducted in Algeria had been atmospheric, the French Government decided that for engineering and economic reasons, testing in the South Pacific would be conducted in the atmosphere. The first French test at Mururoa was conducted on July 2, 1966.

New Zealand protested vigorously over the commencement of French tests in the South Pacific, and continued to do so, as did other South Pacific countries. It has sometimes been suggested by French commentators that such protests were anti-French or discriminatory, in that New Zealand did not protest the earlier U.S. and British tests in the region. Indeed, even recently, it was suggested publicly by French sources that the protests of New Zealand and others to the current series of tests were motivated by a desire to drive France from the South Pacific. That is not, and has never been, New Zealand policy. Time has moved on from the early 1950's when New Zealand and Australia acquiesced in the U.S. and British atmospheric tests in the region and with time has come knowledge of the consequences of such testing. In earlier tests, the testing countries even exposed their own personnel to fallout, because the risks were not known. There was, however, emerging public disquiet, leading New Zealand to establish a monitoring system in the Pacific Islands in the early 1960's to keep track of fallout. In the United Nations, in 1958, New Zealand was associated with a number of countries in sponsoring a resolution in the General Assembly designed to promote conditions in which a comprehensive nuclear test ban could be realized. In 1959, New Zealand joined the appeal of African countries to France not to carry out its announced intention of beginning nuclear weapon

tests in the Sahara. In 1961, New Zealand publicly deplored the Soviet Union's breach of the moratorium observed since 1958 by three nuclear powers, which led to the resumption of nuclear testing soon after by the United States and the United Kingdom. A year later New Zealand voted in the General Assembly, along with an overwhelming majority of governments, to condemn all nuclear weapon tests and to demand their cessation. Indeed, since 1972, New Zealand had taken the lead in tabling a resolution each year at the U.N. General Assembly calling for a Comprehensive Test Ban Treaty to be negotiated. Following the adoption of the 1962 Partial Nuclear Test Ban Treaty,⁴ New Zealand was the fourth nation to sign, preceded by only the three sponsors of the Treaty. New Zealand's strong opposition to nuclear testing, and nuclear weapons, has also been expressed in domestic legislation⁵ which among other things prohibits the entry of nuclear armed vessels into New Zealand ports. This led to the suspension of the ANZUS⁶ alliance by the United States and a lengthy freeze in a long-standing political and security relationship with the U.S. that was highly valued by New Zealand.

Opposition to nuclear testing has long been shared by other countries in the South Pacific region as well. As long ago as 1954, the people of the Marshall Islands petitioned the United Nations Trusteeship Council about fallout from U.S. testing, which harmed the inhabitants of Rongelap and Utirik Atolls. Countries in the region have strenuously opposed testing for many years, and the South Pacific Forum⁷ has long adopted resolutions opposing nuclear testing. The region has also strongly opposed proposals by other countries to dump radioactive and toxic waste in the waters of the South Pacific, the importation into the region of chemical and toxic waste including that for destruction at the Johnson Island plant operated by the United States, and the shipments of plutonium through the region by Japan. All these activities are regarded with deep apprehension.

4. Treaty Banning Nuclear Weapons Tests, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43. The ban prohibited all nuclear tests in any environment but underground. *Id.*

5. The New Zealand Nuclear Free Zone, Disarmament and Arms Control Act (1987) (N.Z.).

6. See ANZUS, Sept. 1, 1995, 3 U.S.T. 3420, 131 U.N.T.S. 83. ANZUS is the Mutual Defense Treaty between the United States, New Zealand and Australia. *Id.*

7. An annual meeting of the Heads of Government of the independent countries of the region.

They are viewed by small and potentially vulnerable island states as exposing the region's environment to risks from hazardous activities from which they derive no commensurate benefit, and which those conducting the activities are often doing a long way away from their own main centers of population. Nuclear testing in the South Pacific by France has been viewed no differently. Assurances by France that the tests are safe have inevitably invited the response that, if so, why were they not being conducted closer to Paris. It has been well-known, of course, that this would not be acceptable to most of the French population. In these circumstances, the debate has often become passionate. Although testing by China, the United States, and the Soviet Union has also engendered strong opposition in the region on disarmament grounds, the fact that it has been conducted in those countries' metropolitan areas means that it has never stirred up quite the same level of emotion as the testing by France.

The South Pacific region's strong opposition to nuclear testing there has also found expression in several legal instruments. A Conference on the Human Environment in the South Pacific held in Rarotonga in 1982⁸ ("Raratonga Conference"), urged that a treaty be negotiated to protect the South Pacific environment including from nuclear contamination. These negotiations eventually resulted in the adoption of the Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region⁹ ("the Noumea Convention") on November 25, 1986. This Convention, which entered into force on August 22, 1990, has some similarities to other regional seas conventions. In other respects it is quite different. Among its obligations is one contained in Article 12, entitled "Testing of nuclear devices," which requires that the parties take appropriate measures to limit environmental damage caused by nuclear testing.¹⁰ This Article had its genesis in the desire of South Pa-

8. See SPREP, Report of the Conference on the Human Environment in the South Pacific, Rarotonga, Cook Islands, Mar. 8-11, 1982, *reprinted in* UNEP Regional Seas Reports and Studies, No. 31.

9. Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 26 I.L.M. 38 (1987) [hereinafter *Noumea Convention*].

10. *Id.* art. 12, 26 I.L.M. at 47. "The parties shall take all appropriate measures to prevent, reduce and control pollution in the convention area which might result from the testing of nuclear devices." *Id.*

cific Countries that the Regional Environment Convention should prohibit the testing of nuclear weapons. It became abundantly clear during the extensive negotiations leading up to the Convention that France would not become party to any instrument with such an express prohibition. Eventually, as a compromise to ensure that the region obtained as much protection as possible from a Convention, which was widely supported within the region, it was agreed that Article 12 would take its present form. It was carefully drafted to ensure that it did not condone the continuing conduct of nuclear testing in the region. The Noumea Convention also contains a number of other highly pertinent obligations including an express obligation in Article 16 to undertake an environmental impact assessment ("EIA") before embarking on any major project that would affect the marine environment.¹¹

Nuclear testing was also a major factor in the adoption of the South Pacific Nuclear Free Zone Treaty 1985¹² ("Treaty of Rarotonga"), which entered into force in 1986. This Treaty reflects the collective will of South Pacific nations to renounce the possession of nuclear weapons, to ensure that nuclear weapons are neither tested nor stationed on national territory in the region, and to gain assurances of non-use of nuclear weapons from nuclear powers.

In order to be fully effective, such nuclear free zones require the support of all nuclear powers, and the Treaty of Rarotonga has several protocols under which nuclear powers can undertake not to use or threaten to use nuclear weapons against South Pacific states and not to test nuclear weapons in the region.¹³ Although the Soviet Union and China became party to these protocols in 1988, France, the United States, and the United Kingdom steadfastly refused to do so. The reason for France's refusal to become party to the protocols was that it wished to continue to test its nuclear weapons within the region,

11. *Id.* art. 16, 26 I.L.M. at 48. An environment impact assessment ("EIA") is required before embarking upon any undertaking "which might affect the marine environment". *Id.*

12. South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 24 I.L.M. 1440 (entered into force Dec. 11, 1986) [hereinafter Treaty of Rarotonga]; Status of South Pacific Nuclear Free Zone Treaty and Final Text of the Three Protocols to the South Pacific Nuclear Free Zone Treaty, *opened for signature* Aug. 6, 1985, 28 I.L.M. 1599 (1989) (entered into force Dec. 11, 1986) [hereinafter Rarotonga Protocols].

13. See Rarotonga Protocols, *supra* note 12, 28 I.L.M. 1599.

or at least to maintain the option to do so. While the United States and the United Kingdom had no intention of testing nuclear weapons in the region themselves, and specifically stated so, their refusal to sign was undoubtedly to maintain solidarity with the one nuclear power, France, which did wish to continue testing there.

II. NEW ZEALAND'S PREVIOUS LEGAL ACTION AGAINST FRANCE

A. *The Nuclear Tests Cases of 1973-74*

After fruitlessly protesting to France over many years regarding its atmospheric testing of nuclear weapons in the South Pacific, in late 1972, New Zealand and Australia began looking into the possibility of bringing cases in the International Court of Justice. On May 4, 1973, the Prime Minister wrote to the French President telling him that New Zealand was submitting the dispute to the International Court, and this was followed on May 9, 1973, by the lodging of a New Zealand Application instituting proceedings. Subsequently, on May 14th, a Request by New Zealand for Interim Measures of Protection was lodged with the Court. Australia filed a parallel but not identical case.

The New Zealand Application asked the Court to declare that the conduct by the French Government of nuclear tests in the South Pacific region that gave rise to radioactive fallout constituted a violation of New Zealand's rights under international law, and that these rights would be violated by any further such tests. The rights for which New Zealand sought protection included rights owed *erga omnes*¹⁴ and rights owed specifically to New Zealand. They were the right that no nuclear tests that gave rise to radioactive fallout be conducted; the right to preservation from unjustified artificial radioactive contamination of the terrestrial, maritime, and aerial environment; the right that no radioactive material enter the territory of New Zealand, the Cook Islands, Niue, or the Tokelau Islands, including their airspace and territorial waters (collectively "the Territory"), as a result of nuclear testing; the right that no radioactive material, having entered the Territory cause harm including apprehension, anxiety

14. *Erga omnes* rights are those rights that have such import that all states have a legal interest in their protection. *Barcelona Traction, Lights and Power Co. (Belg. v. Sp.)* 1970 I.C.J. 3, 32 (Feb. 5).

and concern to their people and Government; and the right to freedom of the high seas, without interference or detriment resulting from nuclear testing. These rights had their genesis in principles of, respectively, the Partial Test Ban Treaty, the Stockholm Declaration,¹⁵ territorial sovereignty, the *Trail Smelter*¹⁶ and like cases, and the law of the sea.

On May 23 and 24, after it had considered the parallel Australian case, the International Court of Justice heard New Zealand's oral argument in support of its Request for Interim Measures of Protection. On June 22, 1973, the Court, by 8 votes to 6, indicated measures of protection, ordering *inter alia* that the French Government should avoid nuclear tests causing the deposit of radioactive fallout on the Territory. A similar Order was made in the Australian case. The Court also decided that the next phase of the cases should be concerned with the questions of jurisdiction and admissibility. Following the filing of Memorials by New Zealand and Australia, the Court held oral hearings on both cases on July 10 and 11, 1974.

The Court delivered its Judgment in December 1974, after an unusually long delay. By a vote of 9 to 6 the Court found that New Zealand's claim no longer had any object and that it was therefore not called upon to give a decision on it. This conclusion was based on a number of official statements made publicly by France in the course of 1974, which the Court decided evidenced an intention to cease conducting nuclear tests in the atmosphere following the completion of the 1974 series. On this basis, the Court found that the objective of New Zealand had, in effect been accomplished "in as much as the Court finds that France has undertaken the obligation to hold no further tests in the atmosphere in the South Pacific."¹⁷ The dispute between New Zealand and France having disappeared in the Court's view, the New Zealand claim no longer had any object and there was nothing on which to give judgment.¹⁸ A similar Judgment was delivered in the Australian case.¹⁹

France did not participate in any of the proceedings in 1973

15. *Report of the U.N. Conference on Human Environment*, U.N. Doc. A/CONF. 48/14 and Corr. 1, § 1 at 1 (1972).

16. *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1906 (1949).

17. *New Zealand Case*, 1974 I.C.J. at 475.

18. *Id.* at 476-79.

19. *Australian Case*, 1974 I.C.J. at 272.

and 1974, nor did it appoint an Agent or file any pleadings. France maintained the view that the Court was manifestly incompetent to hear the case, and that it could not accept the Court's jurisdiction. In defiance of the Court's Order indicating Interim Measures of Protection that it not do so, France continued to test in the atmosphere.

Various observers have suggested that the Court's reading of the New Zealand Application was strained in some respects. Unlike the Australian Application, New Zealand's Application was not cast solely in terms of atmospheric testing. Furthermore, the Court matched the New Zealand Application and the French atmospheric undertaking without giving New Zealand the opportunity to be heard on that approach. On the other hand, the Court did give New Zealand the satisfaction of a ruling that France was now legally bound not to test in the atmosphere, and it made that ruling without having first determined that it had jurisdiction to deal with the merits of the case.

Although, in 1974, the Court found that the dispute was at an end, the door was left slightly ajar for New Zealand to return to it. In paragraph 63 of its Judgment the Court said:

63. 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, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request.²⁰

There were in fact two bases on which New Zealand invoked the Court's jurisdiction in its 1973 Application. First, New Zealand relied on the General Act for the Specific Settlement of International Disputes, 1928,²¹ to which New Zealand and France had acceded on the same day, and which neither had ever denounced. Second, New Zealand argued that a reserva-

20. *New Zealand Case*, 1974 I.C.J. at 477.

21. General Act for the Specific Settlement of International Disputes, Sept. 26, 1928, 93 L.N.T.S. 343, 1931 Gr. Brit. T.S. No. 32 (Cmd. 3930).

tion lodged by France excluding from its acceptance of the Court's compulsory jurisdiction under the optional clause, *inter alia* disputes concerning questions of national defense,²² did not apply *ratione materiae* to the dispute. France subsequently moved to denounce the General Act, and also to remove itself entirely from the compulsory jurisdiction of the Court, in January 1974, some months after Australia and New Zealand initiated their proceedings.

B. *French Testing in the South Pacific 1974-92*

Following the Judgment handed down by the Court on December 20, 1974, France moved its nuclear testing program underground. From then until its moratorium on testing in 1992, France exploded some 134 nuclear devices in the South Pacific. During this period it also extended its testing program beyond the Mururoa site to include nearby Fangataufa Atoll. From 1988, Fangataufa was the site for all major nuclear explosions of over seventy kilotons. The French tests continued to draw protests from New Zealand and other South Pacific states, bilaterally and in multilateral fora. The South Pacific Forum, in its annual communiques, also continued to condemn the tests. This period was also marked by further international litigation between New Zealand and France linked to its nuclear testing, following the sinking of the Greenpeace vessel "Rainbow Warrior" by French Government agents in Auckland on July 10, 1985.²³

C. *The "Rainbow Warrior" Arbitration*

The "Rainbow Warrior" was sunk at its moorings in Auckland Harbour, as a result of extensive damage caused by two high explosive devices. A Greenpeace photographer on board was killed. The attack against the Rainbow Warrior was carried out by a team of French agents acting under official orders from the Directorate General of External Security. The Greenpeace vessel had been scheduled to proceed to Mururoa to protest

22. France Accession to General Act for the Specific Settlement of International Disputes, May 21, 1931, 1931 Gr. Brit. T.S. No. 32, at 15-16 (Cmd. 3930). France reserved its acceptance of the Court's compulsory jurisdiction for "disputes concerning activities connected with national defence." *Id.*

23. *What's News World-Wide*, WALL ST. J., Dec. 24, 1985, at 1. "France has agreed to pay damages to the environmentalist group Greenpeace for the July 10 sinking of its ship Rainbow Warrior in Auckland Harbor . . ." *Id.*

against France's underground nuclear testing, and the sabotage was carried out to stop this protest action. Although most members of the French team of agents quickly fled New Zealand by yacht, two were arrested. They were Major Alain Mafart and Captain Dominique Prieur of the French Armed Forces. France refused New Zealand's request to extradite or prosecute the three other known members of the team. Subsequently, in a communique issued on September 22, 1985, the Prime Minister of France confirmed France's responsibility for the attack.²⁴ The French Minister of Foreign Affairs also accepted responsibility for reparations for any losses resulting from the incident. In November, Major Mafart and Captain Prieur pled guilty in the New Zealand Courts to charges of manslaughter (culpable homicide) and wilful damage to a ship by means of an explosive. They were each sentenced to a term of ten years imprisonment.

The sinking of the "Rainbow Warrior" caused a major political scandal in France. The French Government was highly embarrassed, and the Minister of Defense resigned. In New Zealand, there was a deep sense of public outrage. It was the first time in New Zealand history that such an act of international violence had been carried out by the armed forces of a foreign state in New Zealand territory. The sense of outrage was magnified by the fact that the State responsible was a traditionally close friend and ally. There was a widespread public view that the two French agents should serve out the lengthy sentences imposed on them by the New Zealand judicial system, and should not be released early. France, however, placed considerable pressure on New Zealand, including trade and economic pressure, to try and get it to release the two agents. It was made clear by France that a settlement of the affair could only be achieved if the agents were released. Bilateral efforts to resolve the differences between the two countries were undertaken over several months and in June 1986, following an appeal by Prime Minister Lubbers of the Netherlands, the two governments formally approached the Secretary-General of the United Nations and referred to him all the problems between them arising from the Rainbow Warrior affair, for a binding ruling.

24. *Id.*

The Secretary-General issued his Ruling on July 6, 1986.²⁵ At the heart of the dispute was the fate of the two French agents. Major Mafart and Captain Prieur were to be transferred to a French military facility on an isolated island outside of Europe for a period of three years. The island of Hao in French Polynesia was selected as the appropriate location. They were to be prohibited from leaving the island for any reason, except with the mutual consent of the two governments. The Secretary-General also ruled that the Prime Minister of France should convey to the Prime Minister of New Zealand "a formal and unqualified apology for the attack, contrary to international law, on the 'Rainbow Warrior' by French service agents which took place on 10 July 1985." He also ruled that the French Government should pay US\$7 million to the New Zealand Government as compensation for all the damage it suffered.

As events transpired, neither Major Mafart or Captain Prieur were to serve out their full terms on Hao Atoll. Major Mafart was transferred to France on December 13, 1987, by the French authorities for medical reasons, without New Zealand consent. At this stage, he had served less than seventeen months of his three year term on Hao. The French Government refused to return him to Hao, despite the New Zealand Government's requests that it do so. Subsequently, on May 5, 1988, three days before French Presidential elections, Captain Prieur was also unilaterally removed from Hao Atoll by the French authorities, without New Zealand's consent, on the grounds that she was six weeks pregnant and that her father was dying. She had served just over twenty-one months of her three year term on Hao. Once again, despite requests from New Zealand, the French Government refused to return her to Hao.

Again, bilateral discussions between the two countries failed to resolve the dispute between them, regarding the premature removal of Major Mafart and Captain Prieur from Hao. Accordingly, in late 1988, New Zealand decided that it would resort to a provision in the Secretary-General's Ruling — which was also included in a bilateral agreement between the two countries which incorporated the Ruling — which provided an arbitral procedure for the settlement of any dispute concerning its interpreta-

25. *U.N. Secretary General: Ruling on the Rainbow Warrior Affair Between France and New Zealand*, 26 I.L.M. 1346 (1987).

tion or application. Both sides appointed Agents and during the course of 1989 filed Memorials and Counter Memorials. Oral proceedings were held in New York from October 31, 1989 to November 3, 1989.

On April 30, 1990, the three person Arbitral Tribunal, which was chaired by Eduardo Jiménez de Aréchaga, a former President of the International Court of Justice and coincidentally, a Member of the Court in the 1973-74 Nuclear Tests Case, issued its Award. In the case of Major Mafart, it unanimously declared that France had committed a breach of its obligations to New Zealand by failing to order his return to Hao, although the majority held that his initial removal was not in breach. In the case of Captain Prieur, the Tribunal unanimously held that France had committed a breach by not endeavoring in good faith to obtain New Zealand's consent to her removal from Hao, by subsequently removing her from Hao, and by failing to order her return to Hao. The majority held, however, that as the three year period which Mafart and Prieur were to serve on Hao had now passed, France's obligations were at an end, and accordingly it would not now order their return. The Tribunal unanimously declared, however, "that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand."²⁶ The Tribunal also recommended that the two Governments set up a fund to promote close and friendly relations between the citizens of the two countries, and that the French Government make an initial contribution of US\$2 million to the fund. This recommendation was subsequently implemented by the two Governments, and the fund continues to operate, to good effect, to this day.

III. *THE 1995 CASE*

As already indicated, France's announcement in June 1995 that it would abandon the moratorium on nuclear testing and recommence testing in the South Pacific led to a variety of actions by New Zealand. These included the New Zealand Government despatching a naval hydrographic vessel to accompany a

26. *Rainbow Warrior Arbitration (N.Z. v. Fr.)* (award of Apr. 30, 1990), *reprinted in* INT'L ARB. REP., May 1990, at A-1, A-8.

peace flotilla of private yachts which went to Mururoa. Consideration was also given to whether there was scope for further legal action against France.

It was no longer possible to bring new proceedings against France in the International Court of Justice. France's denunciation of the General Act and its withdrawal from the compulsory jurisdiction of the Court, in January 1974, meant that the door had been closed on those jurisdictional bases for bringing a case before the Court. Attention, therefore, focussed on the possibility of reopening the earlier proceedings, exploiting the opportunity left by the Court in paragraph 63 of its Judgment of December 20, 1974.

It was clear that there would be considerable legal difficulty in taking such a step. The Prime Minister of New Zealand, Rt. Hon. Jim Bolger, was quite frank about the advice that he had received from the New Zealand Government's lawyers in this respect. Most legal commentators agreed with this assessment. There was, however, a strong view in the New Zealand Parliament, and in the wider community, that all possible means should be attempted in an endeavor to prevent the resumption of French testing. On August 8, 1995, a meeting of the leaders of all seven political parties represented in the New Zealand Parliament, including the Government, agreed unanimously that New Zealand should return to the International Court. The Court was advised informally on August 9, 1995 that New Zealand would be bringing a case before it. The written proceedings would be filed just thirteen days later.

A. *The Difficulties in Attempting to Reopen the Case*

The legal team ("team") that assembled to handle New Zealand's case faced formidable legal obstacles. The major hurdle was in linking the case back into the Court's 1974 Judgment. New Zealand needed to seek a reopening of the earlier case on the basis of the limited opportunity left open by the Court in paragraph 63. There was no jurisdictional basis on which to ask the Court to entertain a fresh case and any attempt by New Zealand to do so would surely fail *in limine* and would not even reach a hearing.

There was no precedent for reopening a case in the way that New Zealand was now attempting. Procedurally this raised some

novel issues. It was even unclear as to by what procedure New Zealand could move to reopen the case. The rules of Court set out clear procedures for initiating cases by way of Application. New Zealand avoided such a procedure, however, to quash any suggestion that New Zealand was seeking to initiate proceedings *de novo*. The team found it also necessary to avoid any procedure which might suggest that New Zealand was seeking an interpretation or a revision of the earlier Judgment, since this would now be time barred. The team therefore decided that the most appropriate action would be to lodge with the Court a document entitled "Request for an Examination of the Situation," since this followed precisely the opening left by the Court in paragraph 63. A "Further Request for the Indication of Provisional Measures" would be filed soon afterwards.

New Zealand's strategy of seeking to resume the earlier case, rather than begin a new one, led to other procedural idiosyncrasies. Resurrection of the earlier case required that the applicable Rules of Court be those in force at the time of the institution of the proceedings in 1973, although they had been significantly revised since that time. The team therefore dusted off the old 1972 Rules and consistently proceeded on the basis that they, rather than the current Rules, were the ones which applied to the case.

The appointment of the Judge *ad hoc* was another idiosyncrasy. In 1973, the Australian Chief Justice, Sir Garfield Barwick, had been appointed as Judge *ad hoc* by both the New Zealand and Australian Governments in their respective cases. It followed that if the earlier case was still alive, Sir Garfield Barwick was still the Judge *ad hoc*. It was felt, however, that in the current circumstances it would be more appropriate to have a New Zealander as Judge *ad hoc*. Sir Garfield Barwick, who was by now quite elderly, was located in Australia, and he agreed to address a letter to the President of the Court resigning the position.

Finally, the team also gave thought to an attempt at having the matter dealt with in the Court's new Chamber for Environmental Matters, which it had established in 1993. It was considered that the composition of the Chamber might favor a more sympathetic consideration of the New Zealand case than the full Court. In the end, however, it appeared that such a course of action would not be clear cut, and it was not pursued.

In addition to the procedural difficulties, New Zealand also faced major substantive difficulties in reopening the case. The most obvious of these was the Court's ruling in 1974 that the case dealt with atmospheric testing.²⁷ It was also clear that the French underground testing activities of which New Zealand now complained, had been entirely within the contemplation of both the Court and the Parties in 1974. New Zealand had not protested the Court's Judgment in these terms nor endeavored to return to the Court at the time to seek an interpretation or revision of its Judgment. An examination of the record shows that the New Zealand Government had, for the most part, been satisfied with the accomplishment of its immediate objective, namely the cessation of atmospheric testing in the South Pacific. While it had never specifically acquiesced in underground testing²⁸ — and in later years had vigorously protested this — New Zealand never suggested that it was illegal or that the Court's Judgment was too narrow.

The New Zealand case also faced real problems on the evidentiary side. While it was clear in 1973 and 1974 that there was radioactive fallout from France's atmospheric tests, and that this fallout was directly affecting New Zealand and the Pacific Island countries or territories for which it had international responsibility, that was not now the situation with regard to French underground testing. Although there were real, and entirely legitimate, concerns about the long-term effects that the underground testing might be having on Mururoa and Fangataufa Atolls, scientific opinion was that there would be negligible radiological impact beyond the territorial sea. A top nuclear physicist within the New Zealand Government system had made statements publicly to this effect. On the other hand, several non-governmental scientific sources in France had publicly expressed

27. *New Zealand Case*, 1974 I.C.J. at 466. "[F]or purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to atmospheric tests so conducted as to give rise to radioactive fallout on New Zealand territory." *Id.*

28. In a public statement the day after Judgment, the New Zealand Prime Minister recalled:

[T]hat New Zealand's concern about nuclear testing had never been confined to the particular case of tests conducted by France — or, indeed, to the question of testing in the atmosphere. It would continue to be the New Zealand Government's aim to bring about the ending of all forms of nuclear weapons testing, by any country.

fears about the consequences of testing on the physical integrity of the atolls. Moreover, the three scientific missions which had been allowed to visit Mururoa had been restricted in what they could do, and had raised questions and concerns which had never been satisfactorily answered by the French Government. No missions were ever even permitted to visit Fangataufa.

A further obstacle faced by the New Zealand team, was the elapse of time. Given that New Zealand was seeking to reopen a Judgment delivered twenty-one years earlier, the issue would inevitably arise as to why New Zealand was seeking to do so now, and what had changed from earlier. If the team did not satisfactorily deal with this question, New Zealand would inevitably be prejudiced by its failure to reopen the case earlier.

Finally, the New Zealand team faced very real time constraints. French sources had suggested publicly that the first test would be held in early September. New Zealand needed to file proceedings as quickly as possible, with a view to having the application for interim relief heard or at least filed before the first test. The team therefore set themselves the goal, which they were to meet, of filing the proceedings no later than August 21, giving them just thirteen days. The New Zealand team researched amassed and assessed a huge amount of legal, scientific, and historical material during this brief period as the New Zealand documents were put together.

B. New Zealand's Request to Reopen the Earlier Case

On August 21, New Zealand filed two documents with the International Court in The Hague. The main document, entitled "Request for an Examination of the Situation," set out the background to the case before the Court in 1973 and 1974, including the 1973 Order Indicating Interim Measures of Protection and the 1974 Judgment. The Request examined the significance of paragraph 63 of the 1974 Judgment, and the circumstances in which New Zealand could seek to have the case reopened. It also set out concerns regarding the impact of French underground testing on the atolls at Mururoa and Fangataufa and the surrounding environment. It argued that France was obliged to conduct a prior EIA before resuming underground testing in the region, pointing to the specific Treaty undertaking in the Noumea Convention referred to earlier and

to customary international law. It also argued that conduct that causes, or is likely to cause, the introduction into the marine environment of radioactive material is illegal, pointing both to pertinent treaties and to the precautionary principle.²⁹

The continuity argument advanced by New Zealand, in essence, was that the Court concluded in 1974 that New Zealand's concerns about radioactive contamination of the environment were "matched" by France's promise to cease atmospheric testing. The Court had at that time assumed that underground testing would not damage the environment or breach international law. By 1995, that assumption had become demonstrably wrong. In terms of paragraph 63, New Zealand had, therefore, shown the basis of the Judgment to be affected by new underground testing.³⁰ New Zealand could thus resume its 1974 case against France accordingly.

New Zealand concluded its written request by submitting that the Court should, in the words of paragraph 63 of the 1974 Judgment, "examine the situation" as it now existed. As a matter of priority and urgency, New Zealand asked the Court for provisional measures to protect its rights, which fell within the scope of those invoked in the 1973 application, pending further consideration of the case. At the present time, New Zealand sought recognition only of those rights that would be adversely affected by entry into the marine environment of radioactive material in consequence of the further tests to be carried out at the Mururoa or Fangataufa Atolls, and of its entitlement to the protection and benefit of a properly conducted EIA. Within these limits, therefore, New Zealand asked the Court to adjudge and declare: (1) that the conduct of the proposed nuclear tests would constitute a violation of the rights under international law of New Zealand, as well as of other States; and further or in the alternative, (2) that it was unlawful for France to conduct such tests before it had undertaken an EIA according to accepted international standards, which established that the tests would not give rise, directly or indirectly, to radioactive contamination of the marine environment.

29. The "precautionary principle" is the notion of an exhaustive examination as to the effects on the environment of a government activity prior to the continuance of such activity which poses a significant risk to nature.

30. *New Zealand Case*, 1974 I.J.C. at 477. "[T]he basis of the Judgement to be affected" *Id.*

The accompanying "Further Request for the Indication of Provisional Measures" sought an Order as a matter of urgency that France refrain from conducting any further tests and undertake an EIA, and that neither Party take action of any kind which might aggravate or extend the dispute or prejudice the rights of the other Party, pending the final decision of the Court in the proceedings. Also accompanying the Requests was a letter from the New Zealand Minister of Foreign Affairs requesting the President of the Court to exercise his powers under Article 66(3) of the 1972 Rules and ask the parties not to do anything that would change the status quo pending the hearing.³¹ This request that the President of the Court exercise his powers under the Rules was repeated on subsequent occasions. Although the request was repeated in a letter to the President from the New Zealand Prime Minister immediately following the first French test on September 6, 1995, and also in informal meetings, the President of the Court was never to exercise his powers under Article 66(3) of the 1972 Rules. The President of the Court explained, at the commencement of the oral hearings, that as those powers expressly applied to incidental proceedings for the indication of provisional measures, he had considered it difficult to accede to those requests without prejudicing the issues before the Court. Along with the requests, New Zealand lodged a nomination for the appointment of a Judge *ad hoc* in substitution for Sir Garfield Barwick. The nominee was Sir Geoffrey Palmer, a former Prime Minister, and Professor of Law at Victoria University of Wellington and at the University of Iowa.

Two days later Australia filed an "Application for Permission to Intervene" in the case. This was shortly followed by similar applications from four Pacific Island states: Western Samoa, Solomon Islands, Federated States of Micronesia, and Marshall Islands. Australia had considered applying to the Court to reopen its own case along the same lines as New Zealand, but had concluded that it would be unsuccessful. Unlike the New Zealand case in 1973 and 1974, the Australian case had specifically sought an end to "atmospheric" nuclear testing.

France then responded to the New Zealand documents which had been forwarded to it by the Court. By letter of August

31. Rules of Procedure of the International Court of Justice, art. 66(3), 1946 I.C.J. Acts & Docs. 14-15, as amended 11 I.L.M. 899, 913-14 (1972).

28, 1995, the French Ambassador in The Hague informed the Court that, in the view of his Government, there was no basis upon which the Court might find, even *prima facie*, the jurisdiction to entertain New Zealand's Requests. The 1974 case had related exclusively to atmospheric tests, as the Court itself had found. As the Court manifestly lacked jurisdiction in the absence of the consent of France, neither the question of the choice of a Judge *ad hoc*, nor that of the indication of provisional measures arose, and the case should be removed from the General List.

France maintained this position at a preliminary meeting between its Representatives, the New Zealand Co-Agents and the President of the Court, which was held at the Peace Palace on August 30, 1995. At that meeting no assurance was given by the President that there would be a hearing. France continued strongly to argue that there was no case in existence, as it had expired in 1974. This was vigorously contested by New Zealand, which sought a hearing as early as possible. Faced with these differences, the President, in what he acknowledged was a procedural innovation, invited each Party to submit an *aide-mémoire* on the issues. After that the Judges would meet informally, on September 8, 1995, to discuss the matter and whether a hearing should be given. Although the New Zealand side argued that, as the case subsisted, the Judge *ad hoc* should be present and able to participate in the September 8 meeting, this was not accepted.

The President's decision to defer any appointment of a Judge *ad hoc* presented a dilemma for the New Zealand side illustrative of the tyranny of distance often faced by Southern Hemisphere countries. If Sir Geoffrey Palmer awaited a decision as to his appointment before he proceeded from New Zealand to The Hague, half the World away, the prospect was that he would not be there in time to participate in the opening stages of the oral hearings. It was therefore decided to ask Sir Geoffrey to go to The Hague in advance of the Court's decision, so that he would be available if he was required. Sir Geoffrey agreed to do this and was, in fact, in The Hague when the Judges decided, on September 8, to appoint him, at which stage he was immediately able to enter into the necessary arrangements with the Court.

New Zealand and France both submitted *aides-mémoires* in response to the President's invitation (and New Zealand subsequently, a supplementary *aide-mémoire*). These essentially reiter-

ated and elaborated upon the positions already taken by the respective Governments. Nevertheless, New Zealand regarded France's continuing participation in this process as an extremely welcome development, given its non-participation in 1973 and 1974, although the French *aide-mémoire* stated that in no sense did it constitute acceptance of the jurisdiction of the Court or prejudice France's future position.

The Judges, none of whom had been on the Court in 1973 or 1974, met to discuss the case informally for the first time on September 8, 1995. They agreed by a majority, at that time, not only to appoint Sir Geoffrey Palmer as Judge *ad hoc*, but also that a public hearing would be held the following Monday, September 11, on the question: "Do the Requests submitted to the Court by the Government of New Zealand on 21 August 1995 fall within the provisions of paragraph 63 of the Judgment of the Court of 20 December 1974?"³² France had, by this time, conducted its first nuclear weapon test of the series, at Mururoa, on September 5. In another, more welcome development, however, it was reported from Paris that France had decided to participate in the oral hearings of the case.

C. The Oral Hearings

Although France had decided to participate, it was to become apparent that the French perspective and the New Zealand perspective as to precisely what the oral hearings would comprise were quite different. This emerged when the Agent and Co-Agents of New Zealand and the Representatives of France next met with the President of the Court, to discuss procedure, on the morning of the hearing. France's objective was to have the hearing completed in the shortest possible time, that afternoon, enabling it to disengage quickly. France also sought to characterize the hearing as an "informal" one, although this was rejected by the Court. New Zealand, in contrast, sought two to three sessions to enable a full presentation of its argument on the question. The argument, the team said, would necessarily cover whether the 1974 case contemplated continuity, under what conditions, and whether those conditions had been satisfied. While New Zealand stated that it would very much prefer

32. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. (Sept. 11) (forthcoming) (ruling to hold hearing).

France to be present for the entire hearing, it did not want this at the expense of curtailing its case.

As no agreement was forthcoming at this time, the Parties were requested to reconvene with the President before the first formal Court session in the afternoon. This second meeting resolved matters only minutes before the Court was due to sit in formal session. The hearing would be spread over two days, with each party being accorded the same amount of time, as well as a brief response time. While this was a little shorter than New Zealand had initially aimed for, it had achieved its main objectives of having all counsel heard without interruption and of having France remain in the process.

In opening New Zealand's oral presentation, the Attorney General, Hon. Paul East, expressed New Zealand's deep sense of regret and frustration at France's decision to proceed with its first nuclear weapons test since 1991, despite the clearly expressed views of the international community that it should not do so. He said it was particularly regrettable that France had begun its nuclear tests before the Court had been able to consider the New Zealand Requests. Furthermore, France's actions in carrying out the first test on September 5, and its continuing determination to proceed with further tests, highlighted the urgency of the case and the need for immediate provisional measures. The Attorney General characterized the matter as one of "vital importance" for New Zealand and other South Pacific countries, and pointed to the rioting and destruction that had occurred in Tahiti following the recent French test.³³

As regards the proper interpretation of paragraph 63 of the Court's 1974 Judgment, the Attorney General and other New Zealand counsel argued that New Zealand's 1973 application was not limited to atmospheric testing and was in essence a dispute about nuclear contamination. The source of that contamination was incidental. New Zealand's prayer in 1973 had been that the Court adjudge and declare that the conduct of nuclear

33. Opening Statement of the Hon. Paul East (N.Z. v. Fr.), 1995 I.C.J. Pleadings (Nuclear Tests) (forthcoming) (Sept. 11, 1995).

New Zealand approaches this Court as an appropriate and responsible forum which can respond to the legal aspects of the concerns of our region. By having such matters heard in a considered and judicial manner, it is hoped that much of the tension and anger which has led to the rioting can be dissipated.

Id.

tests in the South Pacific constituted a violation of New Zealand rights under international law. Moreover, the operative part of the Court's 1973 Order referred to the need to avoid nuclear tests in general and was not restricted to atmospheric tests. New Zealand's 1973 Application also included concern regarding the living resources of the sea.

New Zealand also pointed out that underground testing at the time of the 1974 Judgment was not an issue, and the Court then had no evidence before it that such testing either could or could not lead to radioactive contamination of any part of the environment. In contemplating the idea that the basis of the Judgment might be affected in some way in the future, the Court was not solely thinking of a resumption by France of atmospheric nuclear testing. The Court specifically said it was not contemplating any breach by France of its undertaking not to continue with atmospheric nuclear testing. Accordingly, New Zealand argued, the Court had instead been concerned that nuclear testing by France at some future time could give rise to artificial radioactive contamination of the environment in a manner not foreseen in 1974.

New Zealand argued that paragraph 63 was a mechanism enabling the continuation or the resumption of the proceedings of 1973 and 1974. They were not fully determined. The Court had foreseen that the course of future events might, in justice, require that New Zealand have the opportunity to continue its case, the progress of which was stopped in 1974. And to this end, in paragraph 63 the Court had authorized the derivative proceedings now brought by New Zealand.

France's argument was that the case had been definitely closed by the Judgment of the Court on December 20, 1974. The whole case was about atmospheric tests and only atmospheric tests, and this was evident from the Court's judgment. In this respect, France drew support from the passage in the Judgment which said that the New Zealand Application should be interpreted as applying only to atmospheric tests. On this basis, French counsel argued that the 1995 Request by New Zealand was of a "wholly artificial and unacceptable nature," there was "quite simply no 'case', within the meaning of the Statute, and no 'proceedings' within the meaning of the Rules of which [the] Court is validly seised." France argued that paragraph 63 had been drafted "in order to reassure New Zealand in the event of

France being tempted to resume atmospheric tests." More colorfully, France asserted that "New Zealand, masquerading behind paragraph 63, is seeking to conceal what is in fact a new case, taking up a dispute that is quite dead but that it pretends to believe is merely asleep."

France also argued that the New Zealand Request failed because there was no provision within the Statute of the International Court of Justice³⁴ within which the request fell. The Request was, said French counsel, "an unidentified legal object." Paragraph 63 of the Judgment required that any application New Zealand might make pursuant to the paragraph had to be "in accordance with the provisions of the Statute."³⁵ The present Request could not be brought within the terms of the Statute, as New Zealand had specifically stated that it was neither an application for interpretation of a Judgment under Article 60³⁶ or a request for a revision of a judgment under Article 61³⁷ (which would, in any event, be time barred).

Consistent with France's position that there was no case before the Court and that it was simply engaged in what one counsel described as "hearings about hearings," at no stage did it appoint an Agent. Also, the French legal team appeared in court in regular business attire, not in the national court garb as is the practice before the International Court.³⁸ Moreover, the French side's written answer to a question asked by the Judge *ad hoc* was headed "*Réponse à M. Palmer*," while the other answers were "*à M. le juge Weeramantry*" and so on. This approach was in contrast to the New Zealand legal team, who wore national court dress. Indeed, the Members of the Court itself were formally garbed. The French approach led Vice-President Schwebel to later comment, in a declaration appended to the Court's Judgment, that "when fifteen judges gathered in their robes in the Great Hall of Justice of the Peace Palace, and when Judge *ad hoc* Sir Geoffrey Palmer took his oath of office, the Members of the Court did not meet, Pirandello style, in search of a courtroom or

34. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, 59 Stat. 1055, T.S. No. 993 at 25, 3 Bevens 1179 [hereinafter SICJ].

35. *New Zealand Case*, 1974 I.J.C. at 477, ¶ 63.

36. SICJ art. 60, 59 Stat. at 1063, T.S. No. 993 at 33, 3 Bevens at 1191.

37. *Id.* art. 61, 59 Stat. at 1063, T.S. No. 993 at 33, 3 Bevens at 1191.

38. The exception was Sir Arthur Watts, the former Legal Adviser in the British Foreign Office, who appeared for France dressed as an English Queen's Counsel.

a case, but conducted an oral hearing on a phase of a case.”³⁹

While much of the argument before the Court centered around the language of paragraph 63 itself, the New Zealand side also wished to place before the Court the environmental implications of French nuclear testing in the South Pacific and the relevant international law. The question posed by the Court, whether the Requests submitted to the Court by the Government of New Zealand on August 21, 1995, fell within the provisions of paragraph 63 of the Judgment of the Court of December 20, 1974, seemed to the New Zealand legal team to be sufficiently broad to permit this.⁴⁰ In addition to asserting that the case was still alive, New Zealand argued that there was a *prima facie* case for the Court to examine the Judgment because of the new developments which were outlined in its Request. The basis of the Judgment had been affected by: (1) changes in the factual situation which showed there was now a risk of nuclear contamination from France’s underground nuclear testing; and (2) changes in international law, which had progressed from the point it was in 1974, so clarifying the standards to be applied to the dispute.

For New Zealand, this approach had several attractions. As well as forming a key element in the New Zealand legal argumentation, it would ensure that the Court was properly apprised of the very real concerns of the South Pacific region, and of the broader issues involved, when they addressed the question before them. New Zealand also hoped that it would draw France into a debate about the environmental implications of its testing program in the region, something it had steadfastly declined to do previously in such an international forum. While the French side were to criticize New Zealand for the breadth of its response to the Court’s question, it should always have been apparent from the Request, the *aide-mémoire*, and the informal discussions before the Oral Hearings, that this was New Zealand’s approach.

As far as the environmental impacts were concerned, New Zealand faced a quite different situation from that in 1973 and 1974, when there were demonstrable effects from French atmospheric testing upon New Zealand and those territories for which

39. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. (Sept. 22) (forthcoming) (declaration of Vice President Schwebel).

40. See *supra* note 33 and accompanying text (stating question posed by Court).

it had international responsibility. New Zealand could make no such claim in 1995. Instead, it had to rely upon broader environmental concerns, such as the risk of contamination to the marine environment from the accumulation of some 126 nuclear waste "stockpiles" within Mururoa Atoll, and eight large stockpiles within Fangataufa Atoll. There appeared to be little doubt that, at least in the longer term, there would be leakages of radiation from the atolls into the marine environment, although as noted earlier, scientific opinion tended to minimize its impact. New Zealand was also able to point to serious concerns raised publicly by a French volcanologist, Professor Pierre Vincent, about the impact of testing on the physical structure of the atolls. Moreover France had never permitted a full scientific investigation of Mururoa; only three limited investigations had been allowed. No independent scientific mission had ever been permitted to visit Fangataufa, the site of the largest explosions. There was also evidence of accidents and leakage in connection with actual testing activities. New Zealand submitted that there were serious concerns which France needed to address. In this respect, it was successful. France took up the invitation to debate the environmental issues in front of the Court, and comprehensive coverage was given to them.

The second leg of this New Zealand argument was that international law now obliged France to ensure the safety of its testing program for the marine environment and to carry out an EIA beforehand, which it had not done. In this respect New Zealand relied upon the development of norms to protect the global environment, as well as specific treaty obligations. It pointed to the Stockholm and Rio Declarations, and the onus they placed on states to ensure that activities within their jurisdiction or control did not cause damage to the environment of other states or of areas beyond the limits of their jurisdiction. As well as this, New Zealand pointed out that particularly high international standards had developed regarding the introduction of radioactive material into the marine environment, and the international community no longer accepted that the testing of nuclear weapons justified marine contamination.

New Zealand also sought to apply emerging international law relating to EIA's and the application of the precautionary principle. In particular, New Zealand drew upon the Noumea Convention to which both New Zealand and France are parties.

As mentioned earlier, the Noumea Convention contains an explicit obligation, in Article 16, to conduct an EIA before embarking upon any major project "which might affect the marine environment."⁴¹ In addition, there is an explicit duty, in Article 12, "to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices."⁴² New Zealand argued that, with regard to this latter obligation as well, France clearly could not be satisfied that it had fulfilled it unless it had first conducted a comprehensive EIA on the impact of the tests. It was also pointed out that the "Convention Area" covered by these treaty obligations includes not only high seas areas but also the territorial sea around Mururoa and Fangataufa. Accordingly, New Zealand was not required to prove that French testing was damaging New Zealand or even areas beyond France's jurisdiction. It was sufficient for there to be an adverse environmental impact or potential impact on the territorial waters around the atolls, which appeared to be inevitable.

New Zealand argued, in accordance with the precautionary principle which now applied at international law, it was for the state contemplating potentially harmful activities to carry out an EIA and to establish that there was no real risk; the onus was not on other states to demonstrate that there would be a risk. France, in response, acknowledged a general duty to prevent damage to the environment, although it questioned the status of the "precautionary principle," and argued that the EIA obligation left each state with a "considerable margin of discretion." It also disputed the reversal of the burden of proof. France also asserted that it actively endorsed the latest requirements of international law in the field of environmental protection. The Court was assured that the precautionary approach was precisely the approach that France had always adopted, and that it would do so again during the remaining tests.

The two day hearing concluded on September 12, and the Court retired to consider its decision. It presented its Order ten days later, on September 22. It said that the question to be answered comprised two elements. The first, in essence, was whether the 1974 Judgment provided a procedure *sui generis*, which enabled New Zealand to come back to the Court to seek

41. Noumea Convention, *supra* note 9, art. 16, 26 I.L.M. at 48 (1987).

42. *Id.* art. 12, 26 I.L.M. at 47 (1987).

to have the case reopened, or whether the provisions of the Statute now precluded it from doing so. The Court found for New Zealand on this issue.

The second issue was whether the basis of the 1974 Judgment had been "affected," within the meaning of paragraph 63, by the facts which New Zealand had referred to. In this respect the Court found by a majority of 12 to 3, that the basis of the Judgment was France's undertaking not to conduct any further atmospheric nuclear tests, and it was only in the event of a resumption of atmospheric tests that basis of the Judgment would have been affected. The Court said that, having taken the position that its 1974 Judgment dealt exclusively with atmospheric nuclear tests, it could not now take account of New Zealand's arguments relating to the conditions in which France conducted its underground nuclear tests since 1974 or the development of international law in recent decades. On the same basis, the Court held that it had to dismiss the "Application for Permission to Intervene" submitted by Australia and the similar applications submitted by Samoa, Solomon Islands, the Marshall Islands, and the Federated States of Micronesia, all of which were proceedings incidental to the New Zealand Request.

In giving its Order, the Court was not taking any position on the legality of France's nuclear tests or the conditions in which it conducted them. Indeed, the Court specifically said that its Order was "without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment."

In addition to the majority Judgment, one of the majority Judges issued a separate opinion, three others made separate declarations, and the three dissenting Judges issued quite lengthy separate opinions. The latter considered that New Zealand established strong grounds for reopening the earlier case. Their opinions contain some useful dicta on international environmental law. The opinions of Judge Weeramantry and Judge *ad hoc* Palmer canvass the relevant legal principles in some detail, and make comments supportive of, *inter alia*, the precautionary principle, EIA's, the illegality of introducing radioactive waste into the marine environment, and the principle that damage must not be caused to other states. Judge Weeramantry notes that the case presented the Court with a preeminent op-

portunity to make a pronouncement on the concept of intergenerational rights, among other things, and regretted that it had not done so. Judge Koroma comments that under contemporary international law, there is probably a duty not to cause gross or serious damage to the environment, together with a duty not to permit the escape of dangerous substances; given this trend, he says, it can be argued that nuclear testing would be considered illegal if it would cause radioactive fallout. Judge Shahabuddeen, in his separate opinion said that while he agreed with the Court's Order, he understood New Zealand's concerns and agreed with its case on several points. Judge Oda, in a declaration, said that as the Member of the Court from the only country that had suffered the devastating effects of nuclear weapons, he felt bound to express his personal hope that no further tests of nuclear weapons would be carried out under any circumstances in the future.

Less than two months later New Zealand was back before the International Court, again voicing its dismay over French nuclear testing. New Zealand was one of a number of states making oral submissions to the Court on the requests by the World Health Assembly and the U.N. General Assembly for Advisory Opinions regarding the threat or use of nuclear weapons. France had, by then, conducted two further nuclear tests in the South Pacific in the course of its current series. The New Zealand Attorney General told the Court that "South Pacific countries have had to put up with nuclear testing for far too long. These tests, and France's refusal to stop them forthwith, have only reinforced in our mind that the international community must turn up the pressure on nuclear weapons."⁴³ The Attorney General reiterated New Zealand's earlier position that French nuclear tests were "contrary to international law," and said that the Court "would be making a major contribution to the nuclear non-proliferation regime, and to nuclear security generally, were it now to find that any testing of nuclear weapons should be regarded as no longer permissible at international law." As of the date of writing this Essay, the Court has still to present its decision on the two requests for Advisory Opinions.

43. Statement of the Attorney General before the International Court of Justice (Nov. 1995).

CONCLUSION

On March 25, 1995, France, along with the United States and the United Kingdom, at Suva in Fiji, signed the Protocols to the South Pacific Nuclear Free Zone Treaty, including the undertaking not to test nuclear weapons in the region. This action brought to a close the chapter on nuclear testing in the South Pacific. The chapter on nuclear testing anywhere should shortly be closed with the conclusion of a Comprehensive Test Ban Treaty which New Zealand has sought for so many years. What will become of Mururoa and Fangataufa, and the legacy they bear from nuclear testing, only time will tell. The signing of the Protocols was viewed with relief in New Zealand, and many in France will have felt the same way. The two countries can now move forward as Pacific partners, without the longstanding irritant of nuclear testing between them.

International law, and the international legal process, has had its role to play in this development. In 1973, the proceedings brought by New Zealand and Australia in the International Court of Justice, and France's violation of the Court's Interim Measures of Protection, caused considerable discomfort within that Country. It is reasonable to assume that the proceedings, and France's apprehension of an adverse Judgment on the merits, was one of the factors which led it to stop testing atmospherically and move its tests underground. Later, France's acknowledged a breach of international law in sinking the "Rainbow Warrior" to try and stop protest against its nuclear tests, and the 1990 finding of the International Arbitral Tribunal that it had later acted illegally in removing the saboteurs Marfart and Prieur from Hao Atoll, were also significant embarrassments to the French Government. Those actions further undermined support for the undertaking — nuclear testing — which they were designed to protect.

The 1995 Court case was also part of this mosaic. It was part of a spontaneous worldwide protest against the resumption of nuclear testing in the South Pacific. It highlighted once again the strength of feeling of South Pacific countries. And it added to the pressure placed on the French Government, not least through the media attention which the case attracted in Europe. The results of the international protest of which it was a part, can probably be measured in several ways. First, in the South

Pacific, the French tests which were carried out eventually numbered six and not the eight initially indicated, and all nuclear powers have at last become signatories of the Protocols to the South Pacific Nuclear Free Zone Treaty. Second, the level of international opprobrium received by France served clear notice on the other democratic nuclear powers not to contemplate similar action, should they have been tempted to do so. Third, and perhaps most significant in the longer term, was agreement by key countries on a "zero" threshold in the Comprehensive Test Ban Treaty negotiations. Through this action, they have acknowledged the clearly expressed wish of the great majority of the international community that any nuclear testing is unacceptable.