

Environment — Marine environment — Alleged radioactive contamination arising from French underground nuclear weapons tests in South Pacific — Request to International Court of Justice by New Zealand to resume proceedings begun in 1973 challenging legality of France's nuclear tests — Court's ruling in 1974 that object of dispute had disappeared because of France's undertaking in 1974 to cease atmospheric tests — Assumption in 1974 that no risk of contamination from underground testing — Whether earlier proceedings and judgment limited to atmospheric nuclear testing or concerning all radioactive contamination caused by whatever means of testing — Developments in scientific knowledge and international environmental law since 1974 — Precautionary principle — Environmental impact assessment — Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 1986 — Whether relevant considerations for Court in determining whether New Zealand has established continuity of proceedings

International Court of Justice — Procedure — Application by State to reopen earlier proceedings — Paragraph 63 of 1974 Judgment in *Nuclear Tests (New Zealand v. France) Case* — Paragraph 63 permitting New Zealand to request examination of situation if “basis” of 1974 Judgment “affected” — Conduct of underground nuclear weapons tests by France — Whether procedure for access to the Court independent from Articles 60 and 61 of Statute of the Court — Whether within Court's inherent power to regulate own procedure — Whether basis of 1974 Judgment affected or limited to atmospheric testing — Standard of proof applicable — Request for indication of provisional measures

International Court of Justice — Jurisdiction — Terminated jurisdiction — Application by New Zealand to resume proceedings in *Nuclear Tests Case* commenced against France in 1973 — Provision in Court's Judgment of 1974 permitting return to Court where “basis” of Judgment “affected” — Denunciation by France of General Act for the Pacific Settlement of Disputes following commencement of proceedings in 1973—Scope of Court's jurisdiction — Whether Court's examination of application limited to scope of earlier proceedings and dispute

Cambridge University Press

978-0-521-58068-7 - International Law Reports, Volume 106

Edited by E. Lauterpacht, C. J. Greenwood and A. G. Oppenheimer

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INTERNATIONAL COURT OF JUSTICE

REQUEST FOR AN EXAMINATION OF THE SITUATION IN ACCORDANCE
WITH PARAGRAPH 63 OF THE COURT'S JUDGMENT OF 20 DECEMBER 1974
IN THE *NUCLEAR TESTS (NEW ZEALAND v. FRANCE) CASE*

ORDER

International Court of Justice. 22 September 1995

(Bedjaoui, *President*; Schwebel, *Vice-President*; Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, *Judges*; Sir Geoffrey Palmer,¹ *Judge ad hoc*)

SUMMARY: *The facts.*—In 1973 New Zealand had made an application to the Court challenging the legality of French nuclear tests then taking place in the South Pacific. At that time France was conducting atmospheric nuclear tests.² In 1974, France announced that it would cease conducting atmospheric nuclear tests and, on the basis of these undertakings by France, the Court ruled that it was no longer required to give a decision on the claim because the claim no longer had any object (the 1974 Judgment). In paragraph 63 of the 1974 Judgment the Court stated that:

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 upon as a basis of jurisdiction in the present case cannot constitute by itself an obstacle to the presentation of such a request.³

Between 1974 and 1992 France conducted a number of underground nuclear tests at Mururoa and Fangataufa atolls in the South Pacific. Testing was halted by the French Government in 1992 but in June 1995 the French Government announced that it intended to conduct what it described as a

¹ Judge *ad hoc* designated by New Zealand. France declined to designate a judge *ad hoc*.

² The decision of the International Court of Justice in the *Nuclear Tests Case (New Zealand v. France)* is not reproduced in the *ILR*, but is noted at 57 *ILR* 605, following the report of the judgment in the *Nuclear Tests Case (Australia v. France)*. The judgments delivered by the Court in the Australian case and the New Zealand case were, in most respects, identical. The Australian application had, however, referred specifically to atmospheric nuclear testing, whereas the New Zealand application had referred only to nuclear testing in general. The relevant paragraphs of the New Zealand application are set out at 57 *ILR* 605.

³ France had, after New Zealand filed its application in 1973 but before the Court had delivered its judgment in 1974, denounced the General Act for the Pacific Settlement of Disputes ("the General Act"), which had formed the basis for jurisdiction in the proceedings.

final series of tests. New Zealand filed with the Court a Request for an Examination of the Situation pursuant to paragraph 63 of the 1974 Judgment. Australia submitted an application for permission to intervene in the case under Article 62 of the Statute of the Court. Application for permission to intervene under Article 62 and declarations of intervention under Article 63 were submitted by Samoa, the Solomon Islands, the Marshall Islands and the Federated States of Micronesia.

New Zealand claimed that circumstances were such that the basis of the 1974 Judgment had been affected and that, under paragraph 63, it was entitled to request the resumption of the case begun in 1973. New Zealand argued (i) that the conduct of the proposed nuclear tests would violate New Zealand's rights under international law; and, further or in the alternative, (ii) that it was unlawful for France to conduct such tests before it had undertaken an environmental impact assessment ("EIA"). Unless an EIA established that the tests would not give rise to radioactive contamination, New Zealand maintained, its rights under international law would be violated. New Zealand also filed requests for the indication of provisional measures of protection requiring France to refrain from conducting underground nuclear tests and requiring it to conduct an EIA.

New Zealand maintained that paragraph 63 was activated because the concern of the 1973 application was with radioactive contamination arising from nuclear testing of whatever nature and the scope of the 1974 Judgment was not limited to atmospheric nuclear tests. New Zealand submitted that the Court had held that the dispute had become moot in 1974 by reason of France's undertakings, because atmospheric tests were the sole mode of testing used by France in the South Pacific at that time and because it was not then known that underground nuclear testing also involved risks of contamination. New Zealand submitted evidence indicating that underground nuclear tests in the South Pacific had already led to some contamination and that there was a risk of future contamination. New Zealand claimed, therefore, that the basis of the 1974 Judgment had been affected. New Zealand also submitted that France had failed to comply with the obligation to conduct an EIA under customary international law and under the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 1986 ("the Noumea Convention"), to which France was a party.⁴ New Zealand maintained that the Court had jurisdiction on the basis of France's adherence to the General Act for the Pacific Settlement of Disputes, 1928, at the time of the original application in 1973.

France contended that no basis existed which might found the Court's jurisdiction even *prima facie* and that the action by New Zealand was not within the framework of the earlier case, because that case related only to atmospheric tests, so that New Zealand's present request could not be linked to it. France asserted that, as the Court lacked jurisdiction in the absence of consent by France, neither the question of the designation of a judge *ad hoc*

⁴ Article 12 of the Noumea Convention required Parties to the treaty to "take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices". Article 16 of the Noumea Convention required the carrying out of an EIA before any major project "which might affect the marine environment" was embarked upon.

nor the indication of provisional measures arose, and that the action of New Zealand could not properly be entered in the Court's General List.

In view of the differences between France and New Zealand regarding the legal nature of the Request by New Zealand and its effect, both were invited to present to the Court informal *aide-mémoires* stating their positions on various issues which arose. In its *aide-mémoire*, New Zealand argued that the question of whether the present proceedings were the continuation of the 1973-4 proceedings was itself a question of jurisdiction, or analogous to one. Accordingly, on an application for provisional measures of protection, New Zealand had only to establish a prima facie case for continuity of the proceedings commenced in 1973. New Zealand maintained that paragraph 63 of the 1974 Judgment demonstrated the Court's intention not to close the case and that the "basis" of the 1974 Judgment which would permit resumption of the case extended to "any developments that might reactivate New Zealand's concern that French testing could produce contamination of the Pacific marine environment by any artificial radioactive material". New Zealand claimed that it had established a prima facie case for the continuity of proceedings and that it was, therefore, entitled to designate a Judge *ad hoc*.

France submitted an *aide-mémoire* but indicated that this was not an acceptance by France of the Court's jurisdiction and formed no part of proceedings governed by the Statute and Rules of the Court. In its *aide-mémoire*, France reiterated its assertion that the case of 1973-4 had been definitively closed by the 1974 Judgment. France maintained that it was the undertakings given in 1974 to cease atmospheric nuclear testing which constituted the basis for the Court's decision and that, therefore, underground tests were outside the scope of the 1974 Judgment and could not activate the mechanism under paragraph 63. France claimed that New Zealand's Request did not fall within any of the categories in the Statute under which an application could be brought, because it was neither a request for interpretation of an earlier judgment (Article 60 of the Statute) nor an application for revision (Article 61 of the Statute) and that, as the Court lacked jurisdiction in the matter, no procedural action could be taken, which also meant that New Zealand's request for provisional measures could not be examined.

In September 1995, the Court held a public sitting at which New Zealand and France were requested to address the Court on the question of whether the requests submitted by New Zealand fell within the provisions of paragraph 63. In these proceedings, New Zealand claimed, *inter alia*, that the basis of the 1974 Judgment had been affected by changes in the factual situation because the assumption in the 1974 Judgment that the abandonment of atmospheric testing would end risks of contamination had since been shown to be incorrect. New Zealand also argued that changes in the law were capable of affecting the basis of the 1974 Judgment and sought to rely on changes in standards and procedures in international environmental law. New Zealand maintained that, in the 1974 Judgment, the Court was exercising its inherent right to determine its own procedure and that paragraph 63 was a mechanism enabling the resumption of the 1973-4 proceedings which had not been fully determined. It maintained that the reference in paragraph 63 to the provisions of the Statute referred only to provisions regulating the procedure applicable to the examination once the Request was made. France

contended that the use of the phrase “in accordance with the provisions of the Statute” in paragraph 63 meant that a request could be made only under the specific procedures in Articles 60 and 61 of the Statute. France maintained that New Zealand’s Request was most closely related to Article 61 because New Zealand sought to rely on the existence of new facts but, because France’s decision in 1995 to carry out underground tests had not existed at the time of the 1974 Judgment and the ten-year time-limit had expired, the criteria under Article 61 were not satisfied. New Zealand, France submitted, had not invoked any provision of the Statute to justify its procedure in law.

Held (by twelve votes to three, Judges Weeramantry and Koroma and Judge *ad hoc* Sir Geoffrey Palmer dissenting):—The Request was outside the scope of paragraph 63 of the 1974 Judgment and was dismissed. The request for interim measures and the applications to intervene were also dismissed.

(1) The matter had to be entered in the General List even if for the sole purpose of the Court determining whether New Zealand’s Request fulfilled the conditions under paragraph 63 (p. 24).

(2) In expressly laying down, in paragraph 63 of the 1974 Judgment, that New Zealand could request an examination of the situation, the Court could not have intended to limit New Zealand’s access to the Court to those procedures provided under Articles 60 and 61 of the Statute or the filing of a new application under Article 40(1). The Court had thus not excluded a special procedure in the event of circumstances arising which affected the basis of the 1974 Judgment. That special procedure was inextricably linked with the existence of such circumstances and was not available in the absence of those circumstances (pp. 24-6).

(3) Australia’s application in the 1973-4 *Nuclear Tests (Australia v. France) Case* had related exclusively to atmospheric tests. In paragraph 63 of its Judgment in the New Zealand case, the Court had adopted the identical form of words used in paragraph 60 of the Judgment in the Australian case. In 1974, therefore, the Court had considered the two cases to be identical as to their subject-matter, relating exclusively to atmospheric tests. The Court’s present examination was limited to an analysis of the 1974 Judgment and could not reopen the question of whether New Zealand had broader objectives in its 1973 application than the cessation of atmospheric tests. In addition, France’s undertakings, upon which the 1974 Judgment was based, were specifically limited to the cessation of atmospheric testing. The 1974 Judgment dealt exclusively with atmospheric testing and it was not possible for the Court now to consider underground tests, developments in international environmental law and the conclusion of the Noumea Convention, all of which had occurred since 1974. The Request by New Zealand was not, therefore, within the scope of paragraph 63 and had to be dismissed. The Request was removed from the General List (pp. 26-8).

(4) The order was made without prejudice to the obligations on States to respect and protect the natural environment (p. 28).

(5) The request for the indication of provisional measures and the applications to intervene were also dismissed (pp. 28-9).

Declaration of Vice-President Schwebel: France’s claims in response to New

Cambridge University Press

978-0-521-58068-7 - International Law Reports, Volume 106

Edited by E. Lauterpacht, C. J. Greenwood and A. G. Oppenheimer

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Zealand's action were tantamount to an objection to the admissibility of New Zealand's Request and should have been so treated. In practice, that was what the Court had done (p. 31).

Declaration of Judge Oda: While supporting the order of the Court dismissing the Request, it was to be hoped that no further tests of any kind of nuclear weapons would be carried out in the future (p. 32).

Declaration of Judge Ranjeva: The Court should have dealt with the question of whether the "basis" of the 1974 Judgment was "affected" before considering whether procedural requirements were met. The approach adopted by the Court led to unnecessary consideration of procedural questions and emphasized procedural formalism over legal substance contrary to the spirit of paragraph 63 (p. 33).

Separate opinion of Judge Shahabuddeen: (1) New Zealand claimed that the 1974 Judgment was based on the Court's assumption that underground tests were safe. It was not, however, certain whether the Court did, in fact, assume that underground tests were safe or whether it acted on the understanding that New Zealand was satisfied that such tests were safe (p. 34).

(2) New Zealand maintained that its action was a continuation of its 1973 application, and thus its Request hinged on the dispute presented in 1973 and could not expand on it. In the proceedings in 1973-4, however, the dispute was referred to by New Zealand and the Court as being a dispute "as to the legality of atmospheric nuclear tests". The question of the legality of underground tests was, therefore, outside the limits of the dispute giving rise to the proceedings and as placed before the Court in 1973 (pp. 34-6).

(3) Where the Court had jurisdiction at the time an application was made, it could continue to exercise that jurisdiction in relation to the dispute presented in the application notwithstanding the termination of that jurisdiction in the course of the proceedings. The Court was not, however, entitled to exercise a terminated jurisdiction over new acts occurring after the termination of jurisdiction. The request for a declaration as to the legality of underground tests and for measures restraining France from conducting such tests were new acts (pp. 36-7).

(4) The Court's function was to determine disputes on the basis of international law. It could, especially where there was doubt, develop and advance the law on the basis of broad notions of justice. Where the law was clear, however, it had to prevail. The law was clear that the Court could not act unless there was a dispute before it and it could then act only within the limits of that dispute (pp. 37-8).

Dissenting opinion of Judge Weeramantry: (1) The Court had intended, by the inclusion of paragraph 63, to preserve its 1974 Judgment in its full integrity in case some event occurred which undermined the basis of that Judgment although, at that time, it had believed that the threats to New Zealand's rights had been overcome by France's undertakings. The 1973-4 case was not *res judicata*. The Court had formulated a special procedure under paragraph 63 without any time limitation for New Zealand to reopen the proceedings in the case of certain eventualities. The phrase "in accordance with the provisions of

the Statute” merely indicated that New Zealand had to follow the usual procedural formalities required of any application made by any party to the Court but did not require New Zealand to satisfy the criteria under Article 60 or 61 of the Statute (pp. 42-7).

(2) New Zealand had the right to ask the Court to examine the situation under paragraph 63 because the basis of the 1974 Judgment had been affected, the dispute had not disappeared, and New Zealand’s claim in 1995 related to the same type of damage as that giving rise to the application in 1973. Although the Court’s consideration in 1974 was limited to atmospheric tests because these were the only type of nuclear tests taking place at that time in the Pacific, the *ratio decidendi* of the 1974 Judgment was that New Zealand was entitled to protection against damage caused by radioactive contamination from the explosion of nuclear weapons in general. The means by which damage was brought about was subsidiary to the main fact of damage and the prohibition of a specific means of testing formed part of the 1974 Judgment but was not the basis of the Judgment. Underground testing of nuclear weapons was regarded as safe in 1974 but it had since been shown to produce the type of damage complained of by New Zealand in its 1973 application. In considering the 1995 Request, the Court had a responsibility to have regard to the changes in scientific knowledge which underlay the assumptions behind its 1974 Judgment. Furthermore, to construe the 1974 Judgment as prohibiting radioactive fall-out from atmospheric testing while permitting underground testing which might produce the same damage would go against the fundamental rule of interpretation that a legal document was not to be construed so as to lead to unreasonable or absurd results (pp. 47-60).

(3) New Zealand was entitled to a consideration by the Court of its request for provisional measures. It had established a *prima facie* case that it was suffering or likely to suffer damage of the same nature of which it had complained in 1973 (p. 61).

(4) (a) The inter-temporal principle required the Court to consider the Request in the light of the scientific knowledge now available. If the basis of the 1974 Judgment was undermined by knowledge in 1995 and if the terms of that Judgment permitted reconsideration where its basis was undermined, the Court should apply the knowledge that it had today (pp. 61-3).

(b) Under the principle of intergenerational equity, the Court was a trustee of the rights of the people of New Zealand in the future as well as today and it should thus have taken account of current scientific knowledge relating to the long-term effects of radioactive contamination (pp. 63-4).

(c) The Court should have had regard to the precautionary principle, under which “where there [were] threats of serious or irreversible damage, lack of full scientific certainty [c]ould not be used as a reason for postponing measures to prevent environmental degradation” (Bergen Economic Commission for Europe Ministerial Declaration on Sustainable Development, 1990). The precautionary principle had received widespread international acceptance and provided a basis for the Court to consider the Request and to prevent, on a provisional basis, the threatened environmental degradation, until such time as New Zealand’s claims were proved unfounded by full scientific evidence (pp. 64-6).

(d) An issue of such importance as that before the Court was one in which

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978-0-521-58068-7 - International Law Reports, Volume 106

Edited by E. Lauterpacht, C. J. Greenwood and A. G. Oppenheimer

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the principle of environmental impact assessment *prima facie* applied under contemporary international environmental law. The Court had a special place at the apex of international tribunals, enjoyed a special position of trust in relation to the principles of environmental law and was entitled to take into account the EIA principle when considering the present Request (pp. 66-7).

(e) The illegality of introducing radioactive waste into the marine environment was well established and, as such, the Court was entitled to act upon the *prima facie* case made out by New Zealand (pp. 67-8).

(f) The principle that no State was entitled to cause damage to other States was a long-established principle of international law and applied equally in modern environmental law and, specifically, in relation to damage caused to the environments of other States (pp. 68-9).

(5) New Zealand had made out a *prima facie* case that the dangers which gave rise to its application in 1973 were present again as a consequence of the underground tests that France was conducting in the Pacific, thereby activating paragraph 63 and establishing a jurisdictional basis for the Request. The Court should have proceeded to consider whether a case had been made out for the grant of interim measures of protection and whether the intervenors should be allowed to intervene under Article 62 to protect their legal interests. It was inappropriate that matters of critical importance were not subjected to a preliminary examination simply by reason of a strict, inflexible, construction of paragraph 63 (pp. 69-84).

Dissenting opinion of Judge Koroma: The Court had applied the wrong standard of proof. Given the seriousness of the matter and the weight of legal and factual evidence presented, New Zealand had shown *prima facie* that the Request had a legal basis and that it fell within the provisions of paragraph 63. Whether the basis of the 1974 Judgment had been affected was a question of fact and any doubts arising in respect of this should have been resolved in the favour of New Zealand given the gravity of the issues and the nature of the Request. New Zealand complained in 1973 about the radioactive effects of nuclear weapons testing. In 1973 there was an assumption that underground testing produced no radioactive effect. That assumption was no longer valid and this affected the basis of the 1974 Judgment, thus activating paragraph 63.

Duties were evolving under contemporary international law to refrain from causing serious damage which could reasonably be avoided and not to permit the escape of dangerous substances. Given such a trend, although nuclear testing *per se* was not prohibited, it could be considered illegal when it caused radioactive contamination. There was evidence before the Court to establish that there was a risk of contamination resulting from the proposed tests. The Court should have ruled that the Request was within paragraph 63 and indicated provisional measures. As the States which sought to intervene also faced the risk of radioactive contamination, they should have been granted an opportunity to present their views to the Court (pp. 85-102).

Dissenting opinion of Judge ad hoc Sir Geoffrey Palmer: (1) New Zealand had consistently opposed all nuclear weapons tests. The main contention of New Zealand in 1973 was that it was entitled to be free from the increased risk of nuclear contamination resulting from French testing in the South Pacific. In

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978-0-521-58068-7 - International Law Reports, Volume 106

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1974 the Court did not find it necessary to consider the issue of the legal effect of France's undertaking to halt atmospheric testing and did not, therefore, resolve the dispute between the two States as was evidenced by the other disputes which had arisen between France and New Zealand⁵ (pp. 107-10).

(2) The Court had, in 1974, established a mechanism by which New Zealand could return to the Court and the Court must have decided that this right provided an important and necessary safeguard. The Court did not decide the substantive issue before it but left open the opportunity to do so later. There was nothing in the language of paragraph 63 to restrict an examination by the Court to France's compliance with its undertaking not to resume atmospheric nuclear testing (pp. 111-20).

(3) The jurisdictional basis for the Request rested upon the 1974 Judgment itself, which was delivered in accordance with the Statute. The phrase "in accordance with the provisions of the Statute" simply meant that if paragraph 63 was activated, the Court would follow its usual procedures to deal with it. The Court was exercising its inherent power to regulate its own procedure (pp. 120-2).

(4) New Zealand had shown that there was a *prima facie* case for examination of the situation. New Zealand had established that the gravity of radiation damage, if it occurred, was likely to be serious for the marine environment. In addition, developments in international environmental law were sufficient to meet the *prima facie* test that the legal circumstances had altered sufficiently to favour an examination of the situation under paragraph 63. The law to be applied in such circumstances was the law applicable at the date on which the Court sought to apply it, i.e. the law as it stood in 1995 (pp. 122-38).

(5) The Request gave rise to questions as to the proper scope of the judicial role. Public international law was traditionally concerned with relations between States. There had, however, been developments which had eroded the concept of State sovereignty on which the traditional concepts of international law rested. The Court had a responsibility to declare, develop and uphold international law, while having regard to the limits of the law, particularly where political considerations arose. The Court had failed to take up the opportunity to develop environmental law and had failed to resolve the dispute before it (pp. 138-43).

The text of the Order of the Court commences on the following page.

⁵ *Rainbow Warrior (New Zealand/France)*, Ruling of the UN Secretary-General of 1987, 74 *ILR* 241 and Arbitration Award of 30 April 1990, 82 *ILR* 499.

Cambridge University Press

978-0-521-58068-7 - International Law Reports, Volume 106

Edited by E. Lauterpacht, C. J. Greenwood and A. G. Oppenheimer

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ORDER

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Present: President BEDJAOUÏ; *Vice-President* SCHWEBEL; *Judges* ODA, GUILLAUME, SHAHABUDDEEN, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEIŠCHHAUER, KOROMA, VERESHCHETIN, FERRARI BRAVO, HIGGINS; *Judge ad hoc* Sir Geoffrey PALMER; *Registrar* VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court,

Having regard to the Judgment delivered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand v. France)* case, and in particular its paragraph 63,

Makes the following Order:

1. Whereas on 21 August 1995 the New Zealand Government filed in the Registry a “Request for an Examination of the Situation”; whereas it is indicated therein that the Request concerned “aris[es] out of a pro-