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 of 22 September 1995

The Court handed down its decision that New Zealand's 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, made on 21 August 1995, "does not fall within the provisions of the said paragraph 63 and must consequently be dismissed".

Consequently, New Zealand's request for provisional measures and the applications for permission to intervene submitted by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia, as well as the declarations of intervention made by the last four States, all of which are proceedings incidental to New Zealand's main Request, likewise had to be dismissed.

The Court limited the present proceedings to the examination of the following 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 in the case concerning *Nuclear Tests (New Zealand* v. *France)*?". In the Court's view, that question has two elements. The first element concerns the courses of procedure envisaged by the Court in paragraph 63 of its 1974 Judgment, when it stated that "the Applicant could request an examination of the situation *in accordance with the provisions of the Statute*"; the other concerns the question whether the "basis" of that Judgment has been "affected" within the meaning of paragraph 63 thereof.

In its examination of that question, the Court found in the first place that by inserting in paragraph 63 the abovementioned phrase the Court did not exclude a special procedure for access to it (unlike those mentioned in the Court's Statute, like the filing of a new application, or a request for interpretation or revision, which would have been open to the Applicant in any event). Secondly, however, the Court found that that special procedure would only be available to the Applicant if circumstances were to arise which affected the basis of the 1974 Judgment. And that, it found, was not the case, as the basis of that Judgment was France's undertaking not to conduct any further atmospheric nuclear tests and only a resumption of nuclear tests in the atmosphere would therefore have affected it.

The decision was taken by 12 votes to 3. Three declarations, one separate opinion and three dissenting opinions were appended to the Order.

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In its Order, the Court recalls that on 21 August 1995 New Zealand filed a "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; it is indicated in the Request that it "aris[es] out of a proposed action announced by France which will, if carried out, affect the basis of the Judgment rendered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case"; and that "the immediate circumstance giving rise to the present phase of the Case is a decision announced by France in a media statement of 13 June 1995" by the President of the French Republic, according to which "France would conduct a final series of eight nuclear weapons tests in the South Pacific starting in September 1995". New Zealand expressly founds its "Request for an Examination of the Situation" on paragraph 63 of the Judgment of 20 December 1974 (cited below). At the end of its Request, New Zealand states that the rights for which it seeks protection all fall within the scope of the rights invoked in paragraph 28 of its Application of 1973, but that, at the present time, it seeks recognition only of those rights that would be adversely affected by entry into the marine environment of radioactive material as a result of the further tests to be carried out at Mururoa or Fangataufa Atolls, and of its entitlement to protection and to the benefit of a properly conducted Environmental Impact Assessment; within these limits, New Zealand asks the Court to adjudge and declare:

"(i) that the conduct of the proposed nuclear tests will constitute a violation of the rights under international law of New Zealand, as well as of other States;

further or in the alternative,

(ii) that it is unlawful for France to conduct such nuclear tests before it has undertaken an Environmental Impact Assessment according to accepted international standards. Unless such an assessment establishes that the tests will not give rise, directly or indirectly, to radioactive contamination of the marine environment the rights under international law of New Zealand, as well as the rights of other States, will be violated."

The Court further recalls that on the same day New Zealand filed a request for the following provisional measures:

"(1) that France refrain from conducting any further nuclear tests at Mururoa and Fangataufa Atolls;

(2) that France undertake an environmental impact assessment of the proposed nuclear tests according to accepted international standards and that, unless the assessment establishes that the tests will not give rise to radioactive contamination of the marine environment, France refrain from conducting the tests;

(3) that France and New Zealand ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decisions the Court may give in this case".

The Court also refers to the submission of applications for permission to intervene by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia, as well as to the declarations on intervention made by the last four States. It then refers to the presentation, at the invitation of the President of the Court, of informal aides-mémoire by New Zealand and France and to the public sittings held on 11 and 12 September 1995.

The Court then summarizes the views expressed by the two States in the course of the proceedings.

The Court finally observes that New Zealand's "Request for an Examination of the Situation" submitted under paragraph 63 of the 1974 Judgment, even if it is disputed *in limine* whether it fulfils the conditions set in that paragraph, must none the less be the object of entry in the General List of the Court for the sole purpose of enabling the latter to determine whether those conditions are fulfilled; and that it has accordingly instructed the Registrar.

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The Court begins by citing paragraph 63 of the Judgment of 20 December 1974, which provides: "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."

It then indicates that the following question has to be answered *in limine*: "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 in the case concerning *Nuclear Tests (New Zealand* v. *France)*?"; and that the present proceedings have consequently been limited to that question. The question has two elements: one concerns the courses of procedure envisaged by the Court in paragraph 63 of its 1974 Judgment, when it stated that "the Applicant could request an examination of the situation *in accordance with the provisions of the Statute*"; the other concerns the question whether the "basis" of that Judgment has been "affected" within the meaning of paragraph 63 thereof.

As to the first element of the question before it, the Court recalls that New Zealand expresses the following view: "paragraph 63 is a mechanism enabling the continuation or the resumption of the proceedings of 1973 and 1974. They were not fully determined. The Court foresaw that the course of future events might in justice require that New Zealand should have that opportunity to continue its case, the progress of which was stopped in 1974. And to this end in paragraph 63 the Court authorized these derivative proceedings. . . . the presentation of a Request for such an examination is to be part of the same case and not of a new one." New Zealand adds that paragraph 63 could only refer to the procedure applicable to the examination of the situation once the Request was admitted; it furthermore explicitly states that it is not seeking an interpretation of the 1974 Judgment under Article 60 of the Statute, nor a revision of that Judgment under Article 61.

France, for its part, stated as follows: "As the Court itself has expressly stated, the possible steps to which it alludes are subject to compliance with the 'provisions of the Statute' . . . The French Government incidentally further observes that, even had the Court not so specified, the principle would nevertheless apply: any activity of the Court is governed by the Statute, which circumscribes the powers of the Court and prescribes the conduct that States must observe without it being possible for them to depart therefrom, even by agreement . . . ; as a result and *a fortiori*, a State cannot act unilaterally before the Court in the absence of any basis in the Statute. Now New Zealand does not invoke any provision of the Statute and could not invoke any that would be capable of justifying its procedure in law. It is not a request for interpretation or revision (*a*), nor a new Application, whose entry in the General List would, for that matter, be quite out of the question (*b*)".

The Court observes that in expressly laying down, in paragraph 63 of its Judgment of 20 December 1974, that, in the circumstances set out therein, "the Applicant could request an examination of the situation *in accordance with the provisions of the Statute*", the Court cannot have intended to limit the Applicant's access to legal procedures such as the filing of a new application (Statute, Art. 40, para. 1), a request for interpretation (Statute, Art. 60) or a request for revision (Statute, Art. 61), which would have been open to it in any event; by inserting the above-mentioned words in paragraph 63 of its Judgment, the Court did not exclude a special procedure, in the event that the circumstances defined in that paragraph were to arise, in other words, circumstances which "affected" the "basis" of the Judgment. The Court goes on to point out that such a procedure appears to be indissociably linked, under that paragraph, to the existence of those circumstances; and that if the circumstances in question do not arise, that special procedure is not available.

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The Court then considers that it must determine the second element of the question raised, namely, whether the basis of its Judgment of 20 December 1974 has been affected by the facts to which New Zealand refers and whether the Court may consequently proceed to examine the situation as contemplated by paragraph 63 of that Judgment; to that end, it must first define the basis of that Judgment by an analysis of its text. The Court observes that in 1974 it took as the point of departure of its reasoning the Application filed by New Zealand in 1973; and that in its Judgment of 20 December 1974 it affirmed that "in the circumstances of the present case, as already mentioned, the Court must ascertain the true subject of the dispute, the object and purpose of the claim . . . In doing so it must take into account not only the submission, but the Application as a whole, the arguments of the Applicant before the Court, and other documents referred to . . ." (*I.C.J. Reports 1974*, p. 467, para. 31). Referring, among other things, to a statement made by the Prime Minister of New Zealand, the Court found that "for 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 radio-active fall-out on New Zealand territory" (*I.C.J. Reports 1974*, p. 466, para. 29). In making, in 1974, this finding and the one in the *Nuclear Tests (Australia* v. *France)* case (for the Court, the two cases appeared identical as to their subject-matter, which concerned exclusively atmospheric tests), the Court had addressed the question whether New Zealand, when filing its 1973 Application, might have had broader objectives than the cessation of

atmospheric nuclear tests—the "primary concern" of the Government of New Zealand, as it now puts it. The Court concludes that it cannot now reopen this question since its current task is limited to an analysis of the Judgment of 1974.

The Court recalls that, moreover, it took note, at that time, of the communiqué issued by the Office of the President of the French Republic on 8 June 1974, stating that "in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed" (*I.C.J. Reports 1974*, p. 469, para. 35) and of other official declarations of the French authorities on the same subject, made publicly outside the Court and *erga omnes*, and expressing the French Government's intention to put an end to its atmospheric tests; and that, comparing the undertaking entered into by France with the claim asserted by New Zealand, it found that it faced "a situation in which the objective of the Applicant [had] in effect been accomplished" (*I.C.J. Reports 1974*, p. 475, para. 55) and accordingly indicated that "the object of the claim having clearly disappeared, there is nothing on which to give judgment" (*I.C.J. Reports 1974*, p. 477, para. 62). The Court concludes that the basis of the 1974 Judgment was consequently France's undertaking not to conduct any further atmospheric nuclear tests; that it was only, therefore, in the event of a resumption of nuclear tests in the atmosphere that that basis of the Judgment would have been affected; and that that hypothesis has not materialized.

The Court observes further that in analysing its Judgment of 1974, it reached the conclusion that that Judgment dealt exclusively with atmospheric nuclear tests; that consequently it is not possible for the Court now to take into consideration questions relating to underground nuclear tests; and that the Court cannot, therefore, take account of the arguments derived by New Zealand, on the one hand from the conditions in which France has conducted underground nuclear tests since 1974, and on the other from the development of international law in recent decades—and particularly the conclusion, on 25 November 1986, of the Noumea Convention—any more than of the arguments derived by France from the conduct of the New Zealand Government since 1974. It finally observes that its Order is 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.

The Court therefore finds that the basis of the 1974 Judgment has not been affected; that New Zealand's Request does not therefore fall within the provisions of paragraph 63 of that Judgment; and that that Request must consequently be dismissed. It also points out that following its Order, the Court has instructed the Registrar to remove that Request from the General List as of 22 September 1995.

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Finally, the Court indicates that it must likewise dismiss New Zealand's "Further Request for the Indication of Provisional Measures", as well as the applications for permission to intervene submitted by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia and the declarations of intervention made by the last four States—all of which are proceedings incidental to New Zealand's main Request.

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The full text of the operative paragraph reads as follows:

"68. Accordingly,

THE COURT,

(1) By twelve votes to three,

Finds that the 'Request for an Examination of the Situation' in accordance with paragraph 63 of the Judgment of the Court of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case, submitted by New Zealand on 21 August 1995, does not fall within the provisions of the said paragraph 63 and must consequently be dismissed;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Weeramantry, Koroma; Judge *ad hoc* Sir Geoffrey Palmer;

(2) By twelve votes to three,

Finds that the 'Further Request for the Indication of Provisional Measures' submitted by New Zealand on the same date must be dismissed;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Weeramantry, Koroma; Judge *ad hoc* Sir Geoffrey Palmer;

(3) By twelve votes to three,

Finds that the 'Application for Permission to Intervene' submitted by Australia on 23 August 1995, and the 'Applications for Permission to Intervene' and 'Declarations of Intervention' submitted by Samoa and Solomon Islands on 24 August 1995, and by the Marshall Islands and the Federated States of Micronesia on 25 August 1995, must likewise be dismissed.

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Weeramantry, Koroma; Judge *ad hoc* Sir Geoffrey Palmer."

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Vice-President Schwebel and Judges Oda and Ranjeva appended declarations to the Order of the Court. Judge Shahabuddeen appended a separate opinion; and Judges Weeramantry and Koroma and Judge *ad hoc* Sir Geoffrey Palmer appended dissenting opinions to the Order.

Declaration of Vice-President Schwebel

Vice-President Schwebel, in a declaration, maintained that France's objections to the maintenance by New Zealand of its Requests were tantamount to an objection to admissibility, and should have been treated accordingly pursuant to the Rules of Court.

Declaration of Judge Oda

In his declaration, Judge Oda fully supported the Order, which dismisses New Zealand's Request to reopen the *Nuclear Tests (New Zealand* v. *France)* case of 1973/1974, as he shared the reasoning with regard to the matters of procedure leading to the refusal of that Request. But, as the Member of the Court from the only country which has suffered the devastating effects of nuclear weapons, he felt bound to express his personal hope that no further tests of any kind of nuclear weapons would be carried out under any circumstances in future.

Declaration of Judge Ranjeva

In his declaration, Judge Ranjeva expressed regret that the Court had overemphasized procedural formalism while not adhering to the structure of the reasoning adopted in paragraph 63 of the 1974 Judgment. As he saw it, dealing first with the question of the basis of that Judgment and the conclusions reached in the Order rendered the developments devoted to procedural questions without object.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen said that the growing recognition of the need to protect the natural environment was striking. He understood New Zealand's concerns and agreed with its case on several points. He agreed that New Zealand was entitled to come to the Court, entitled to a hearing and entitled to a Judge *ad hoc*, and that it was not shut out by the words in paragraph 63 of the 1974 Judgment, "in accordance with the provisions of the Statute".

Judge Shahabuddeen also accepted that New Zealand was opposed to nuclear contamination arising from nuclear testing of any kind. The question was how far was this general opposition to contamination from nuclear testing of any kind made the subject of the specific dispute presented in the particular case which New Zealand brought against France in 1973.

The question was important because New Zealand was seeking to link its present Request to the 1973 case. France contended that there could be no linkage because, in its view, the 1973 case concerned atmospheric nuclear tests, whereas New Zealand's present Request concerned a different question, of underground nuclear tests. New Zealand's view was that the 1973 case concerned the general subject of nuclear contamination by nuclear testing of any kind, and was therefore wide enough to include nuclear contamination by underground tests.

On this crucial issue, Judge Shahabuddeen noted that, after references in New Zealand's 1973 Application to discussions between New Zealand and France, paragraph 8 of that Application stated:

> "The French Government . . . made it plain that it did not accept the contention that its programme of atmospheric nuclear testing in the South Pacific involved a violation of international law. There is, accordingly, a dispute between the Government of New Zealand and the French Government as to the legality of atmospheric nuclear tests in the South Pacific region."

That passage fell under the heading "The Subject of the Dispute". Paragraph 10 of the Application, falling under the same heading, added:

> "Having failed to resolve through diplomatic means the dispute that exists between it and the French Government, the New Zealand Government is compelled to refer the dispute to the International Court of Justice."

Thus, the dispute which was referred by New Zealand to the Court in 1973 was one "as to the legality of atmospheric nuclear tests"; it was not one concerning the wider subject of nuclear contamination by nuclear testing of any kind. The subject of the 1973 case being different from the subject of New Zealand's present Request, it followed that the latter could not be linked to the former.

In the circumstances, although agreeing with New Zealand on several points, Judge Shahabuddeen felt prevented by substantial legal obstacles from agreeing with it on the remainder of its case.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his opinion, stated that the Court in 1974 had devised a special procedure, distinct from procedures for revision or interpretation of its Judgment, enabling New Zealand to approach the Court if the "basis" of the Judgment was "affected". The Court laid down no limits of time for this purpose.

A situation has now arisen, not contemplated then, of a continuance of the same sort of radioactive contamination as brought New Zealand to the Court in 1973.

The Court would not have considered the shift of venue to underground tests as having brought New Zealand's dispute to an end had the knowledge available today been available to the Court then. Had it possessed that knowledge, it would have been strange if the Court had been prepared to commit New Zealand to the dangers now complained of and, at the same time, had viewed New Zealand's grievances as having come to an end in consequence of the shifting of the venue of the explosions.

New Zealand's complaint in 1973 was that damage was caused by French nuclear explosions in the Pacific. New Zealand's complaint today is the same. The cause is the same, namely, French nuclear tests in the Pacific. The damage is the same, namely, radioactive contamination. The only difference is that the weapons are detonated underground.

Judge Weeramantry's opinion states that New Zealand has made out a prima facie case of danger from French nuclear tests, on the basis of which, in the absence of rebutting evidence by France, New Zealand has shown that the "basis" of the 1974 Judgment is now "affected". This gives New Zealand a right to request an examination of the situation, and places the Court under a duty to consider that Request and the interim measures following from it. It also places on the Court the duty to consider the applications for permission to intervene of Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia.

Judge Weeramantry also pointed out that important principles of environmental law are involved in this case, such as the precautionary principle, the principle that the burden of proving safety lies on the author of the act complained of, and the intergenerational principle relating to the rights of future generations. Judge Weeramantry regretted that the Court had not availed itself of the opportunity to consider these principles.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma stated that he was unable to support either the Order of the Court, or most of its reasoning.

Judge Koroma pointed out that New Zealand had established that its Requests fall under the provisions of paragraph 63 of the Court's Judgment rendered in 1974 in the *Nuclear Tests (New Zealand* v. *France)* case.

He recalled that that Judgment had dealt with the effects of radioactive fallout resulting from *atmospheric tests*, whereas New Zealand's Application then related to *nuclear tests* in the South Pacific region, and, to the extent that new scientific evidence now suggests that radioactive fallout could result from underground tests in the region, the basis of the Judgment has been affected.

He also stated that the Court should have taken cognizance of the legal trend prohibiting nuclear tests with radioactive effect on the environment, and should have proceeded to examine the Request submitted by New Zealand.

Dissenting opinion of Judge ad hoc *Sir Geoffrey Palmer*

Judge *ad hoc* Sir Geoffrey Palmer's dissenting opinion reaches a different conclusion from that of the Court. In his view, paragraph 63 of the 1974 Judgment is wide enough to provide grounds for the Court to entertain the present Application and in the circumstances it should do so. The fundamental issue in the case in the view of the majority turns on the distinction between atmospheric and underground testing. In Judge Palmer's opinion, both involve nuclear contamination and that is sufficient in the particular circumstances that have occurred to provide grounds for the Court to examine the situation and proceed to the next stage of the case.