NEW ZEALAND AND THE INTERNATIONAL COURT OF JUSTICE

KENNETH KEITH*

New Zealand's encounters with the International Court of Justice ('ICJ') show the Court to be a central means for the resolution of international disputes, although by no means the only one. This article draws partly on the author's career as a judge (including on the bench of the ICJ) as well as earlier professional experience as counsel for New Zealand. Rather than comment on the reasoning of decisions to which the author has contributed, the article discusses certain general features of international dispute resolution. The article highlights New Zealand's cautious approach to the Permanent Court of International Justice, the Court's predecessor. It describes New Zealand's encounters with the ICJ during its claim against France's nuclear tests, in the requests for advisory opinions in the nuclear weapons cases and in its intervention in the Whaling in the Antarctic dispute against Japan, alongside other international situations and disputes.

CONTENTS

I INTRODUCTION

This article surveys New Zealand's encounters with the International Court of Justice ('ICJ'). While being a strong supporter of the Court, New Zealand has always regarded recourse to it as just one aspect of international dispute settlement. The record also indicates that New Zealand has forged a distinct path to Australia in litigation before the Court.

Recourse to the ICJ is one of many ways of dealing with international disputes and situations. Article 2(3) of the *Charter of the United Nations* records the obligation of all members to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. In turn, art 33 lists the means available to parties to any dispute 'likely to endanger the maintenance of international peace and security' — 'negotiation,

* Thanks to the participants in the Melbourne Law School workshop and to Dr Rod Alley, Hilary Charlesworth, Emma Dunlop, Amelia Keene, Don Mackay, Bill Mansfield, Sir Geoffrey Palmer, Judge Peter Tomka and Margaret Young for corrections and comments.

enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other methods of their own choice'.

New Zealand's attitude to the ICJ was made clear in 1971, when it responded to a General Assembly review of the role of the Court by stating:

> The question of the attitude of States towards the Court should … be considered against the wider perspective of States' attitudes to third party settlement in general … [T]he Secretary-General['s] … introduction to his annual report last year [had] noted that the very limited use made of the Court seemed to reflect a general aversion to settlement by means of a binding legal decision rather than a specific aversion to the Court, since arbitration has also been little used.[1]

New Zealand, the statement continued, 'attaches considerable importance to third party settlement as a means of resolving disputes and in particular has always strongly supported the Court and the role of judicial settlement'. Referring to the recent *North Sea Continental Shelf* cases,[2] it noted the value in some situations of combining litigation with other methods of overall dispute resolution — in that case, the negotiation of treaties between the three parties to delimit their overlapping claims, on the basis of the law stated in rather broad terms by the Court.[3]

New Zealand's participation in the *Nuclear Tests* cases,[4] undertaken just a short time later, can also be seen in that light, although in relation to a much wider range of methods. The New Zealand government, in particular Prime Minister Norman Kirk, regarded the Court proceedings as just one of many ways in which pressure was to be placed on the nuclear powers, especially France, to cease the development, including the testing, and the proliferation of nuclear weapons. Indeed, the Prime Minister was not particularly confident about recourse to the Court, telling the leader of the New Zealand team, Professor RQ Quentin-Baxter, as he headed off to The Hague, that he had no great faith in lawyers — 'they lose half their cases'!

The following account shows New Zealand moving from an essentially negative attitude in the earliest days of the Permanent Court of International Justice ('PCIJ'), as part of its lack of enthusiasm for the League of Nations, to lukewarm acceptance of the jurisdiction of the PCIJ in 1929 and 1931, with careful qualifications, to much more positive support in 1944 to 1945 as the PCIJ was being replaced by the ICJ. Since that time, it has given the Court strong support and, when appropriate, has used it, along with other means of resolving disputes or handling matters. In some situations, New Zealand has determined that other means are to be preferred.

---

1 *Review of the Role of the International Court of Justice: Report of the Secretary-General: Addendum*, UN GAOR, 26th sess, Agenda Item 90, UN Doc A/8382/Add.4 (12 November 1971) 2 ('*Review of the Role of the International Court of Justice*').

2 *North Sea Continental Shelf (Federal Republic of Germany/Denmark) (Judgment)* [1969] ICJ Rep 3; *North Sea Continental Shelf (Federal Republic of Germany/Netherlands) (Judgment)* [1969] ICJ Rep 3.

3 *Review of the Role of the International Court of Justice*, UN Doc A/8382/Add.4 (n 1) 2. See 'Work of the Court in 1970–1971' (1970–71) 25 *International Court of Justice Yearbook* 100, 117–26 for the resulting treaties.

4 *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457 ('*Nuclear Tests (NZ v France)*'); *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253 ('*Nuclear Tests (Australia v France)*').

II NEW ZEALAND'S CAUTIOUS APPROACH TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

A *Late 19th and Early 20th Century: Towards an Empire of Law and International Justice*

The 1899 and 1907 *Hague Conventions* for the peaceful settlement of international disputes begin with the agreement of the parties to ensure the peaceful settlement of disputes, with a view to avoiding as far as possible recourse to war in the relations between states.[5] The preamble to the 1899 text expresses the desire of the parties to extend the 'empire of the law' and strengthen the 'appreciation of international justice'.[6] The parties recommend that states, not parties to the dispute, should on their own initiative offer their good offices or mediation to the disputant states, even in the course of hostilities. The exercise of that right was not to be regarded as an unfriendly act. Processes of mediation were spelled out as were the provisions for commissions of inquiry and arbitration and the Permanent Court of Arbitration. The 1907 Convention further developed the articles in the light of early experience.

The *New Zealand Consolidated Treaty List*, published in 1997, includes arbitration agreements concluded by the United Kingdom between the late 19th and early 20th centuries with 16 countries, some of them being considered to be still in force then or earlier by succession.[7] A 1910 United States agreement was the basis for the *Successors of William Webster* case concerning land claims by an American in New Zealand and the *Treaty of Waitangi*, decided in 1925.[8] The List also records that New Zealand, in 1959, acknowledged that it was a party to the 1899 *Hague Convention*.[9] That action followed an initiative by the Administrative Council of the Permanent Court of Arbitration in 1955–57.[10]

John Salmond's inaugural lecture as Professor of Law at Victoria College in Wellington in 1906 spoke in very positive terms of recent international declarations and treaties. Under the heading 'The Advance of Humanity', he argued that, transcending all were the documents signed at The Hague.[11] They might justly be regarded as the opening of a new era in international relations. At the end of the lecture, he spoke of the hundred or more arbitral awards, all of which, with one exception, had been complied with. Of those awards, one party

---

5 *International Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899, 187 ConTS 410 (entered into force 4 September 1900) art 1 ('*Hague I*'); *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, 205 ConTS 223 (entered into force 26 January 1910) art 1 ('*Hague II*').

6 *Hague I* (n 5) Preamble para 3.

7 New Zealand Ministry of Foreign Affairs and Trade, *New Zealand Consolidated Treaty List as at 31 December 1996: Part 2 (Bilateral Treaties)* (1997) ('*New Zealand Consolidated Treaty List*').

8 *Successors of William Webster (United States v Great Britain) (Awards)* (1925) 6 RIAA 166, 166–70.

9 *New Zealand Consolidated Treaty List* (n 7).

10 See a UN Secretariat study prepared for the International Law Commission: 'Documents of the Twentieth Session including the Report of the Commission to the General Assembly' [1968] II(2) *Yearbook of the International Law Commission* 1, 29–30 [115]–[117].

11 John Salmond, 'If Germany Came to New Zealand' (1999) 30(2) *Victoria University of Wellington Law Review* 489, 490.

had argued that the tribunal had gone beyond its jurisdiction.[12] Salmond was later to be involved in the preparation of the *William Webster* case.[13]

B *The League of Nations and the Permanent Court of International Justice*

The New Zealand Prime Minister William Ferguson Massey made it clear from 1919 that the Royal Navy was the guarantor of New Zealand's security and prosperity, rather than the League of Nations. In March 1924, for instance, in expressing regret to Ramsay MacDonald about the British government's decision not to develop a base at Singapore, he said that if the defence of the British Empire is to depend on the League of Nations only, then it may turn out to have been a pity that the League was ever brought into being.[14]

In December 1924, the Dominions were consulted at short notice about the British government's proposal that they should consider accepting the 1924 *Geneva Protocol for the Pacific Settlement of International Disputes*, designed to close the gaps in the *Covenant of the League of Nations*.[15] The proposal would, among other things, have extended the jurisdiction of the PCIJ over the question whether a matter was essentially within a state's domestic jurisdiction. The text raised two New Zealand fears, one of which it had raised at the Paris peace negotiations — the possible review of its immigration policies (an issue raised by the Japanese proposal for a racial equality clause to be included in the Covenant, a proposal vigorously opposed by Billy Hughes as well as by Massey and which failed although it had majority support), and British maritime rights in the event of war. New Zealand was opposed to a Court, 'consisting mainly of foreigners', deciding those matters.[16] Following the fall of the MacDonald government in London, the proposal did not proceed.

Along with the other members of the British Empire, New Zealand in 1929 accepted, although with reluctance, the compulsory jurisdiction of the PCIJ with a number of reservations. The major reservations were the exclusion of matters which by international law were within its domestic jurisdiction and matters which were before the Council of the League.[17] Hersch Lauterpacht sharply described the insistence by New Zealand on the domestic jurisdiction reservation as a

---

12 Ibid 492. Perhaps he was referring to a 1900 unreasoned award made by the President of France in a boundary dispute between Colombia and Costa Rica: see *Award Relating to the Boundary Dispute (Colombia v Costa Rica) (Awards)* (1900) 28 RIAA 341. For a later reasoned award by the Chief Justice of the United States, see *The Boundary Case between Costa-Rica and Panama (Costa Rica v Panama)* (1914) 11 RIAA 519.

13 See Alex Frame, *Salmond: Southern Jurist* (Victoria University Press, 1995) ch 10.

14 FLW Wood, *Political and External Affairs* (Historical Publications Branch, 1958) 15.

15 Kenneth Keith, '100 Years of International Arbitration and Adjudication' (2014) 15(1) *Melbourne Journal of International Law* 1, 6–9.

16 'Protocol for the Pacific Settlement of International Disputes: Correspondence Relating to the Position of the Dominions' [1925] 1(A–05c) *Appendices to the Journals of House of Representatives* 1, 6 <https://atojs.natlib.govt.nz/cgi-bin/atojs>.

17 See *Protocol of Signature Relating to the Statute of the Permanent Court of International Justice Provided for by Article 14 of the Covenant of the League of Nations*, opened for signature 16 December 1920, 88 LNTS 272 (entered into force 19 September 1929) annex XXII, 277–8.

concession to an obviously provincial and uninstructed view on the character of the Permanent Court and the nature of international law administered by it.[18]

In 1931, New Zealand, along with Australia, the UK, France and others became bound by accession to the 1928 *General Act for the Pacific Settlement of Disputes* ('*General Act*').[19] In 1939, at the outset of the Second World War, New Zealand, along with other members of the British Empire, added reservations to its acceptances of the jurisdiction of the PCIJ under the optional clause and the *General Act*.[20] They excluded claims arising during the war. Some states reacted and protested. Could those reservations be justified by *rebus sic stantibus* or in some other way?[21]

New Zealand's action in 1931, of becoming bound by accession to the 1928 *General Act*, would be of critical importance for establishing the jurisdiction of the Court when in 1973 Australia and New Zealand brought the *Nuclear Tests* cases. When France was preparing its testing program it amended, in 1959 and 1966, its acceptance of jurisdiction under art 36(2) of the *Statute of the International Court of Justice* to exclude matters relating to its national security or national defence.[22] The commonly held view was that those reservations denied the Court jurisdiction in respect of French nuclear testing. France appears, however, at that time, not to have focused on the need to take similar action in relation to the *General Act*. Blushes in the Quai d'Orsay? The *General Act* had been listed in the 1948 New Zealand treaty list, and France had in several ways recognised it as continuing in force after the dissolution of the League of Nations in 1946.

---

18 H Lauterpacht, 'The British Reservations to the Optional Clause' (1930) (29) *Economica* 137, 150–1. See also Lorna Lloyd, *Peace through Law: Britain and the International Court in the 1920s* (Boydell Press, 1997).

19 *General Act of Arbitration (Pacific Settlement of International Disputes)*, opened for signature 26 September 1928, 93 LNTS 343 (entered into force 16 August 1929) ('*General Act*').

20 I note, too, that earlier, in 1936, New Zealand's Prime Minister, Michael Joseph Savage, responded to a questionnaire from the League about the system of collective security included in the Covenant and other matters. The Prime Minister affirmed the country's support for that system and said that, in principle, New Zealand was prepared to accept the proposals in the 1924 Geneva protocol: 'Reform of the League of Nations: Copies of Communications between the Secretary-General of the League of Nations and His Majesty's Government in New Zealand' [1936] 1(A–05a) *Appendices to the Journals of House of Representatives* 1, 2 <https://atojs.natlib.govt.nz/cgi-bin/atojs>. See also Keith, '100 Years of International Arbitration and Adjudication' (n 15) 9.

21 See, eg, Manley O Hudson, 'The Eighteenth Year of the Permanent Court of International Justice' (1940) 34(1) *American Journal of International Law* 1, 15–18; Manley O Hudson, 'The Nineteenth Year of the Permanent Court of International Justice' (1941) 35(1) *American Journal of International Law* 1, 8–11; Oliver J Lissitzyn, 'Treaties and Changed Circumstances (*Rebus Sic Stantibus*)' (1967) 61(4) *American Journal of International Law* 895, 905–8. Oliver Lissitzyn also discusses the US action in August 1940 relating to the load line convention: at 908–11. On the latter, see also Herbert W Briggs, 'The Attorney General Invokes Rebus Sic Stantibus' (1942) 36(1) *American Journal of International Law* 89.

22 *Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 562 UNTS 71 (registered on 20 May 1966); *Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 337 UNTS 65 (registered on 10 July 1959).

III NEW ZEALAND'S COMMITMENT TO, AND EARLY ENGAGEMENT WITH, THE INTERNATIONAL COURT OF JUSTICE

New Zealand was represented on the 1944 Informal Interallied Committee on the future of the PCIJ.[23] The Committee's conclusions were fed into the 1945 Washington Conference, which preceded the major United Nations Conference held in San Francisco. New Zealand was represented at the 1945 meetings relating to the ICJ by the Chief Justice of New Zealand, Sir Michael Myers, and a legal adviser, Colin Aikman. At the former, Sir Michael responded to the speech of welcome by the US Secretary of State: one of the steps necessary to lead to permanent peace and security, he declared, was to establish the ICJ to decide in a peaceful manner all disputes, at all events justiciable disputes, arising between nations. To fail to do that would be a 'world tragedy'.[24]

New Zealand's independence of action in international affairs was growing during this period. Professor FLW Wood, in his volume in the *Official History of New Zealand in the Second World War*, in a chapter headed 'Small Power Rampant' concerned with the San Francisco Conference, writes that Prime Minister Peter Fraser and his principal advisers 'thought in terms of a supra-national organisation which would exercise judicial powers and command physical force and, moreover, could mobilise the loyalty of men and women all over the world'.[25] Along with Australia, New Zealand pushed for the new Court to possess some compulsory jurisdiction. The two countries had earlier formally agreed to call for 'the maximum employment of the International Court of Justice for the ascertainment of facts which may be in dispute'.[26] The US and the Soviet Union, however, were opposed to compulsory jurisdiction. Although at one stage the proposal had majority support (as had also been the case in 1920), pursuing it might have jeopardised the adoption of the Statute and indeed the Charter itself.[27]

In the late 1940s, New Zealand representatives, along with the Australians and others, struggled with the question whether the General Assembly was competent to deal with the issue of the rights of Indians in South Africa. The record shows that there were differences of opinion between politically appointed permanent representatives ('PRs') and their advisers. One PR claimed that the General Assembly could not determine its competence — a 'heresy' said the Department's legal adviser, and another declared that it was the lawyer's job to stop laymen

---

23 United Nations, 'Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice' (1945) 39(1) *Supplement to the American Journal of International Law* 1, 1.

24 United Nations Committee of Jurists, *Minutes of First Plenary Session* (Documents of the United Nations Conference on International Organization, San Francisco, 1945) vol 14, 34, 39.

25 Wood (n 14) 371.

26 United Nations Conference on International Organization, 'Report on the Conference Held at San Francisco 25 April – 26 June 1945 by the Rt Hon Peter Fraser Chairman of the New Zealand Delegation' [1945] 1(A-02) *Appendix to the Journals of the House of Representatives* 1, 115 <https://atojs.natlib.govt.nz/cgi-bin/atojs> ('Report of the Conference Held at San Francisco'). See also AR Shearer, 'Text of Conclusions Reached at the Australia–New Zealand Conference, Wellington, November 1944' in New Zealand, Ministry of Foreign Affairs (ed), *New Zealand Foreign Policy: Statements and Documents 1943–1957* (New Zealand Government Printer, 1972) 80. For a discussion of the conclusions reached at the Wellington Conference, see Paul Hasluck, *Diplomatic Witness: Australian Foreign Affairs 1941–1947* (Melbourne University Press, 1980) 149–50.

27 For background, see 'Report of the Conference Held at San Francisco' (n 26) 70–2.

being legalistic. The proposals for the reference of the matter to the ICJ for an advisory opinion received very little support and were not pressed.[28]

In the 1950s, controversies arose about the dismissal of staff members of American nationality of the UN Secretariat. The United Nations Administrative Tribunal had been set up, in succession to that for members of the Secretariat of the League of Nations, to decide disputes between UN staff members and the Administration. It upheld the claims made by the staff members and awarded them compensation. In the course of a debate that led to the Court being asked about the binding force of the Tribunal's awards, JV Wilson, a long term member of the League Secretariat and a very early member of the New Zealand Department of External Affairs, who had made a major and successful contribution at San Francisco to have included in the Charter provisions about the independence of the Secretariat (see arts 100 and 101), argued that 'any interference with awards that have already been made is, it appears to us, save in the most exceptional cases, a denial of justice and a departure from principle'.[29] For Australia, Sir Percy Spender QC, then its Ambassador to the United States, rejected the proposition that the General Assembly had no option but to make the necessary appropriations to meet the awards. In their pleadings, the US quoted the Spender position, the Netherlands the Wilson one. The Court went with the latter, which was also the position held by Dag Hammarsjkold, the Secretary-General.[30]

In 1965, the New Zealand Parliament extended its fisheries zone to 12 nautical miles. That action followed the failure of the 1960 UN conference to agree on any proposal about such limits. Japan protested and proposed that the matter be taken to the ICJ. No, said New Zealand. Rather, an agreement was reached providing for the phasing out of the take by Japanese vessels.[31] By contrast, when New Zealand in 1977 declared its 200-mile exclusive economic zone, Japan, South Korea and Russia in fisheries agreements with it recognised the declaration (based on proposals gaining widespread support at the law of the sea conference) as being in conformity with international law. In neither situation could a court or tribunal have produced such outcomes. Consider the Court's unsuccessful attempt to

---

28 See Malcolm Templeton, *Human Rights and Sporting Contacts: New Zealand Attitudes to Race Relations in South Africa, 1921–94* (Auckland University Press, 1998) 17, 21; Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966* (The Federation Press, 2005) 211–14.

29 'Written Statement of the Netherlands Government', *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* [1954] ICJ Pleadings 94, 106, citing UN GAOR, 5th Comm, 7th sess, 423rd mtg, UN Doc A/C.5/SR.423 (5 December 1953) 305 [28].

30 *Effect of Awards of Compensation Made by the UN Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47, 48, 50. See also Kenneth Keith, 'Effect of Awards of Compensation Made by the United Nations Administrative Tribunal Advisory Opinion [1954] ICJ Rep 47' in Cedric Ryngaert et al (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press, 2016) 80; Brian Urquhart, *Hammarsjkold* (Bodley Head, 1972) 57–70.

31 EB Slack (ed), *Fisheries and New Zealand: Proceedings of a Seminar on Fisheries Development in New Zealand, Held at Victoria University of Wellington, May 21-23, 1968* (Department of University Extension, Victoria University of Wellington, 1969) 18–19, citing (1967) 17(2) *External Affairs Review* 22; (1967) 17(3) *External Affairs Review* 44, the latter referring to a State dinner for the Prime Minister of Japan given by his New Zealand counterpart lauding the settlement. New Zealand had firm legal advice, both internally and externally, that its case was a strong one. Further, a Court proceeding would take about three years, the length of time in fact agreed to for the phase out of Japanese fishing.

square the circle in the *Icelandic Fisheries* cases in 1974.[32] New Zealand in 1977 made a new declaration accepting the jurisdiction of the Court, replacing that of 1940. It includes a reservation excluding disputes about the living resources of the sea out to 200 miles.[33] It also reserved the possibility of making a reservation depending on the results of the *United Nations Convention on the Law of the Sea* ('*UNCLOS*') negotiations about dispute resolution,[34] a possibility that it did not invoke.

New Zealand in addressing law of the sea issues in the 1960s, the 1990s and later has used a range of methods, partly in recognition of the uncertain and rapidly developing law (recognised in its 1977 declaration), to resolve disputes and handle ongoing situations. These methods include unilateral national legislation, bilateral negotiations against the background of the *UNCLOS* negotiations (negotiations which moreover could lead to results not available in a Court process), proceedings under *UNCLOS* and the establishment of a regional fisheries management commission which has regulatory, allocation and dispute settlement powers.

IV NEW ZEALAND OPPOSITION TO NUCLEAR TESTS AND NUCLEAR WEAPONS

A *Nuclear Tests 1973, 1974*

The New Zealand government and public took an increasingly strong view against nuclear tests from the 1950s and against nuclear weapons development and proliferation more generally. Malcolm Templeton tells the story superbly, drawing on extensive sources, including the New Zealand archives and interviews.[35] From April 1954, there was a dramatic increase in the correspondence received by the Prime Minister from organisations and individuals calling for a ban on testing and on the H-bomb itself — from churches, trade unions and Labour party branches. In May 1955, the UK government asked the New Zealand government about testing on the Kermadec Islands, about 600 miles north east of New Zealand. No, said New Zealand. Allowing the tests would cause uproar, the Prime Minister told the UK High Commissioner, and he would be forced to withdraw his agreement. The tests were to be in 1957, an election year, and the opposition Labour Party would take it up at once. Prime Minister Eden expressed himself 'much disappointed'. (The UK, at that stage, amended its acceptance of the ICJ's jurisdiction to avoid litigation about the testing.) In 1957, shortly before the election which led to a change of government, the Deputy Prime Minister said to a senior British Minister that New Zealand would never have nuclear weapons on its territory. In 1959, with Canada, New Zealand voted in favour of a General Assembly resolution introduced by a group of African and Asian states (including Morocco and Tunisia) expressing grave concerns at France's intention to test

---

32 *Fisheries Jurisdiction (United Kingdom v Iceland) (Judgment)* [1973] ICJ Rep 3 ('*Icelandic Fisheries I*'); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Judgment)* [1974] ICJ 175 ('*Icelandic Fisheries II*').

33 *Declaration by New Zealand Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 1055 UNTS 323 (signed and entered into force 22 September 1977) para (II)(3).

34 Ibid para (III)(1).

35 Malcolm Templeton, *Standing Upright Here: New Zealand in the Nuclear Age 1945–1990* (Victoria University Press, 2006) chs 3–6 ('*Standing Upright Here*').

nuclear weapons in the Sahara and urging that it refrain from conducting the tests.[36] The UK and the US voted against while Australia abstained.[37]

In February 1963, when the French intention to test in the Pacific was confirmed, the New Zealand Prime Minister, Keith Holyoake, wrote to the Australian Minister of External Affairs, Garfield Barwick, referring to 'the strength of public opinion in New Zealand, the anxiety likely to be caused in Western Samoa and the Cook Islands and [the] inability to justify the French course in terms of essential Western interests'.[38] Holyoake said that the New Zealand government would have to go ahead and protest. Further, 'the New Zealand branch of the Campaign for Nuclear Disarmament (CND) proposed to circulate a petition in support of the initiative of the Australian Labor Party to have the South Pacific declared a nuclear-free zone', an idea already promoted by Indonesia.[39] A series of 21 New Zealand diplomatic notes to France began on 14 March 1963 and ended on 4 May 1973.[40] (The *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water* — commonly known as the *Partial Test-Ban Treaty* — was concluded on 5 August 1963.)[41] The Application Instituting Proceedings Submitted by the Government of New Zealand ('New Zealand Application') includes diplomatic correspondence between 1966 and 1971 concerning clearances for French aircraft and ships having a possible connection with the French testing programme.[42] That extensive and unbroken diplomatic record, the closer proximity of New Zealand and territories under its administration to the testing ground, the British testing that had occurred in Australia, the public positions New Zealand had taken in 1961 in respect of Soviet and American tests, and the possibility that Pacific countries might be more likely to be involved were New Zealand to take proceedings, provided a contrast to the position of Australia. As Templeton records, Professor Roberto Ago, who was advising Australia, thought that if New Zealand were to stand aside and not file its own case, Australia's case would be weakened. (New Zealand's soon-to-be agent, Professor RQ Quentin-Baxter, was at the time a member of the UN International Law Commission along with Ago.)[43]

In August 1963, the New Zealand Parliament had received the report from its Petitions Committee relating to a petition signed by over 80,000 asking the government 'to take all necessary steps to bring about a pact between all states having territory in the southern hemisphere to keep the hemisphere free from nuclear weapons', a petition which plainly created difficulties for an ANZUS

---

36 *Question of French Nuclear Tests in the Sahara*, GA Res 1379 (XIV), 14th sess, 840th plen mtg, Agenda Item 68, UN Doc A/RES/1379(XIV) (20 November 1959).

37 UN GAOR, 14th sess, 840th plen mtg, Agenda Item 68, UN Doc A/PV.840 (20 November 1959) [108].

38 Templeton, *Standing Upright Here* (n 35) 109–11.

39 Ibid.

40 Those notes and the five French replies may be read in the application filed by New Zealand in the ICJ in 1973: 'Application Instituting Proceedings Submitted by the Government of New Zealand', *Nuclear Tests (New Zealand v France)* [1973] II ICJ Pleadings 3, 13–42 ('New Zealand Application').

41 *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water*, signed 5 August 1963, 480 UNTS 43 (entered into force 10 October 1963).

42 'New Zealand Application' (n 40) 40–3.

43 Templeton, *Standing Upright Here* (n 35) 200–5.

member.[44] The New Zealand position was also complicated by its wider relationships with France (including the prospect of the UK entering the European Economic Community ('EEC') and the consequent impact on its exports of primary produce) and proposals for a trade boycott being raised by the Federation of Labour.[45]

All those matters are relevant to the proposal, rejected by the Court, that the two cases should have been joined. Also significant are the sharp differences between the substance of the cases presented by the two countries and the relief they sought. I consider the relief sought under the later heading relating to the 1995 attempt to reopen the case.

On the substance, Australia's Application Instituting Proceedings in its single paragraph statement of the law emphasises invasion of its sovereignty,[46] as does its Request for Provisional Measures.[47] The Australian Application gives major attention to the consequences of nuclear explosions, referring to commonly accepted scientific opinion and the principles laid down by the International Commission on Radiological Protection ('ICRP').[48] Its Request similarly places the deposit of radioactive material onto Australian territory and the related reports of the UN Scientific Committee on the Effects of Atomic Radiation at the centre of the proceedings,[49] as did the oral argument at that stage.[50]

The New Zealand Application emphasises, under the heading, 'The Law', the progressive realisation of the dangers which nuclear tests present to life, health and the security of peoples and nations everywhere.[51] It argued that that change in attitude stemmed in part from a growing appreciation that world peace and security depend on the checking and eventual elimination of nuclear weapons and that their continued proliferation and refinement exacerbates international tensions and compounds the risks of nuclear war. The attitude has also sprung from the dispersal of radioactive fallout. Next, the maturing of national and international attitudes towards nuclear weapons and in particular to testing that gives rise to radioactive fallout is evidenced by a series of treaties and resolutions, including the Stockholm *Declaration of the United Nations Conference on the Human Environment*, listed in the New Zealand Application. Over that period, and as a corollary to intensified governmental and popular action relating to nuclear weapons, 'there has been a growing juridical perception of the nature and quality of this activity and a rapid development of law concerning it'.[52] The New Zealand Attorney-General in 1974 was also able to recall the statement made in 1971,

---

44 Ibid 115.

45 Ibid 117, 138.

46 'Application Instituting Proceedings', *Nuclear Tests (Australia v France)* (International Court of Justice, General List No 58, 9 May 1973) 28 [49(ii)] ('Australian Application').

47 'Request for the Indication of Interim Measures of Protection Submitted by the Government of Australia', *Nuclear Tests (Australia v France)* [1973] I ICJ Pleadings 1, 56 [66] ('Australian Interim Measures Request').

48 'Australian Application' (n 46) 14–22 [22]–[39].

49 'Australian Interim Measures Request' (n 47) 45–50 [5]–[45], 54 [59]–[60].

50 'Oral Arguments on the Request for the Indication of Interim Measures of Protection', *Nuclear Tests (Australia v France)* [1973] I ICJ Pleadings 162, 169–78, 181, 187, 195.

51 'New Zealand Application' (n 40) 7–9 [23]–[28].

52 Ibid 8 [27].

referred to earlier. It was in the 'spirit' of that statement, he said, that New Zealand had initiated these proceedings.[53]

I note as well three procedural matters arising between the two applicants. The first is the choice of judges ad hoc. New Zealand recognised early that there would for practical reasons have to be one chosen by both Applicants; otherwise the Court would have to meet in two different compositions to resolve issues and to prepare its orders and judgments. New Zealand did not think that there was any jurist in the two countries with the weight of international experience to influence the deliberations of the Court, and it proposed names of judges from third states. Australia was, however, determined to nominate an Australian and specifically Sir Garfield Barwick, then Chief Justice of the High Court of Australia. The New Zealanders queried Sir Garfield's expertise in international law, but in the end both countries nominated Barwick because of the insistence of Prime Minister Gough Whitlam.[54]

The second matter concerns the provisional measures stage. In its oral argument, New Zealand referred on its first day to a recent judgment of the Court as supporting the proposition that the powers of the Court to grant provisional measures under the *General Act* were available even though France contended that it was no longer in force.[55] It accordingly sought on its second day the measures under art 33 of the *General Act* (which made it express that the measures were binding) or, alternatively, under art 41 of the Statute.[56] A little over an hour later, counsel for Australia, in answer to a question from a judge (a question which was not addressed to New Zealand) said that Australia relied exclusively on the Statute.[57] That answer was given without notice to, let alone consultation with the New Zealand team. In its order in the New Zealand case, the Court simply said that it should not exercise its power under the *General Act* until it reached a final conclusion that the *General Act* is still in force.[58] In its Australian order the Court takes account, although not completely accurately, of the answer and makes the order under the Statute alone.[59]

The third matter is the Australian request to the Court, again without notice to New Zealand, for the extension of the time for the filing of its memorial on jurisdiction and admissibility. New Zealand saw no need for an extension but agreed in the end to a shorter extension. It was concerned that one likely consequence would be that the hearings would follow those in other pending cases (the *Fisheries Jurisdiction* cases) and that any judgment would not be delivered until after the next testing season (both accurate predictions). There was also the worry that the request would be seen as a means of extending the effect of the

---

53 'Oral Arguments on Jurisdiction and Admissibility', *Nuclear Tests (New Zealand v France)* [1974] II ICJ Pleadings 250–5.

54 Templeton, *Standing Upright Here* (n 35) 210–11.

55 'Oral Arguments on the Request for the Indication of Interim Measures of Protection', *Nuclear Tests (New Zealand v France)* [1973] II ICJ Pleadings 97, 123–4 ('New Zealand Oral Arguments'), discussing the *ICAO Council* case.

56 'New Zealand Oral Arguments' (n 55) 140.

57 'Oral Arguments on the Request for the Indication of Interim Measures of Protection', *Nuclear Tests (Australia v France)* [1973] I ICJ Pleadings 163, 230–1.

58 *Nuclear Tests (New Zealand v France) (Order on 22 June 1973)* [1973] ICJ Rep 135, 139 [20] ('*Nuclear Tests (NZ v France) (Order)*').

59 *Nuclear Tests (Australia v France) (Order on 22 June 1973)* [1973] ICJ Rep 99, 102–3 [18]–[20].

provisional measures.[60] The shorter New Zealand time limit did not lead, as might have been expected, to it pleading its case first, a matter to which the New Zealand Attorney-General referred in his opening.[61]

From late 1972 through to 1974, the New Zealand team had been confident about jurisdiction on the basis of the *General Act* but worried about the merits. To our amazement at the end of 1974, we received what I would see as an almost complete win on the merits, without the ICJ ever ruling on jurisdiction and admissibility, without the merits ever being argued in a substantial way and without the parties having a fair hearing on the issues of fact and law on which the Court did decide — a point made by all but one of the common law judges on the Court who saw that as a breach of natural justice. One of those judges asked the New Zealand team the next morning, as he and the two of us were checking out from our hotel: 'Have you got over your shock yet?'. The New Zealand Prime Minister, in his press release issued immediately after the judgment was issued, declared that the Court's finding 'achieves in large measure the immediate object for which these proceedings were brought'.[62] A day or two before the judgment was given, on my way to The Hague, I called on the New Zealand Ambassador to France. He had just been to the Quai d'Orsay when his interlocutor had said, win, lose or draw, the relationship between the two countries would continue to improve. (By then, New Zealand as part of the deal under which Britain entered the EEC had secured access for its primary produce into Europe.) How, the Ambassador asked, could there be a draw in court proceedings? Did the Court provide an answer to Norman Kirk's quip? Sadly, he was dead by then.

Peter Kooijmans was, in 1974, a State Secretary in the Dutch government. He met often with Manfred Lachs, the President of the Court, about the site of the Court and the addition to the Peace Palace of the judges' wing, more often, he said, than was necessary for those purposes. 'There was another problem which troubled him deeply and again it was love for the Court which moved him.'[63] The *Nuclear Tests* cases were pending before the Court and he feared the devastating effect of a judgment allowing France to continue testing. It would be a repetition of 1966, the *South West Africa* cases, which had a devastating impact on the reputation of the Court. The President, accordingly, was looking for other avenues and tried them out on the future judge.[64] The avenue the Court finally settled on was that of mootness, based on what the Court saw as undertakings given by France not to test in the atmosphere.[65] These were exchanges, says Kooijmans, in which he 'not only found a friend but — even more important — a tutor, a guru'.[66]

---

60 Templeton, *Standing Upright Here* (n 35) 224–5.

61 'Oral Arguments on Jurisdiction and Admissibility' (n 53) 254.

62 Ministry of Foreign Affairs and Trade, *French Nuclear Testing in the Pacific* (1975) vol 2, 227–8.

63 PH Kooijmans, 'In Memoriam Manfred Lachs' (1993) 6(2) *Leiden Journal of International Law* x.

64 Ibid x–xi.

65 See generally *Nuclear Tests (NZ v France)* (n 4) 473–8 [50]–[64].

66 Kooijmans (n 63) xii.

B *Rainbow Warrior 1985*

I return to the point touched on at the outset of this article about the range of ways of settling (or not) international disputes or managing international situations. I mention, without elaborating, some of New Zealand's experiences relating to one matter. Negotiations, rather than formal dispute settlement, had a critical role for New Zealand after France's sinking of the Rainbow Warrior in 1985 by explosion in Auckland Harbour. The Greenpeace vessel was bombed by agents of the French secret service (the Directorate-General for External Security) ahead of its planned expedition to lead a peaceful anti-nuclear protest. The explosion killed one crew member, Fernando Pereira (of Dutch nationality). The negotiations between New Zealand and France were carried out over a lengthy period, at first by ministers and then principally by Christopher Beeby for New Zealand and Gilbert Guillaume for France. The Netherlands Prime Minister exercised his good offices at the right moment and suggested that the UN Secretary-General might play a role by way of binding mediation which was to be principled and equitable. Mr Perez de Cuellar agreed to that course and, within a short time, produced his ruling which was rapidly incorporated into three agreements between the two States. They provided for the removal of two agents, who had been prosecuted and jailed by a New Zealand court for 10 years, to an island in French Polynesia for three years, for the resolution of controversies about trade and for arbitration by a three member panel in the event of claims of breaches of the agreements.[67] (The ICJ was no longer available, given France's withdrawal of its acceptance under art 36(2) of the Statute and withdrawal from the *General Act*, without prejudice, of course, to its 1973 position that the *General Act* had disappeared with the ending of the League of Nations.) Later, there was also a private arbitration of the claim by Greenpeace, the owner of the ship, and France and the payment of compensation to the family of the Dutch crewmember who had been killed in the explosion.

After the return of the two agents from the island within the prescribed three year period, New Zealand initiated the arbitral procedure, which led to findings that France had breached several of its obligations under the agreement; while no order was made for the return of the agents to the island, the tribunal did recommend that a fund be set up, as it was, to mark the long friendship between New Zealand and France in peace and war.[68]

C *Nuclear Tests 1995*

The attempt to reopen the *Nuclear Tests* case at the ICJ in 1995 was prompted in part by Elihu Lauterpacht, who had been a member of the Australian team in 1973 and 1974, but much more by the continuing very broad opposition within

---

67 *Differences between New Zealand and France Arising from the Rainbow Warrior Affair (New Zealand v France) (Ruling)* (1986) 19 RIAA 199, 215–21.

68 *Difference between New Zealand and France concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 between the Two States and Which Related to the Problems Arising from the Rainbow Warrior Affair (New Zealand v France) (Decision)* (1990) 20 RIAA 215, 275. On the *Rainbow Warrior* affair, see Kenneth Keith, 'The Peaceful Settlement of International Disputes: The Rainbow Warrior Affair' in Charles Chernor Jalloh and Olufemi Elias (eds), *Shielding Humanity: Essays in International Law on Honour of Judge Abdul G Koroma* (Brill, 2015) 21.

New Zealand, in the South Pacific and beyond, to continued French testing in the region, even if it were now underground. The Rainbow Warrior outrage was still raw in many people's memories. In terms of the law, the attempt was possible because of two things — para 63 of the 1974 New Zealand judgment and the way New Zealand had formulated its case in its application in 1973.

In para 63, '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'.[69] The denunciation of the *General Act* by France in January 1974, said the Court, could not by itself constitute an obstacle to the presentation of such a request. (Did the omission of any reference to the declarations made under art 36(2) indicate that that ground of jurisdiction was hopeless and that France had succeeded, to that extent, to having the case removed from the List?) The press release issued by the Prime Minister, mentioned earlier, carefully recorded that opportunity to return to the Court.[70]

The relief sought in the 1973 New Zealand Application, to go to the second point, was drafted in the same terms as the *Partial Test-Ban Treaty* and was not restricted to atmospheric testing, as was the relief sought in the Australian Application. New Zealand sought a declaration that the conduct of French 'nuclear tests … that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law'.[71] The provisional measures adopted by the Court in the two cases used the wider language of the New Zealand application,[72] something that the Court did not recognise in the 1974 judgments, which ruled that in both cases the relief sought was limited to atmospheric testing and, accordingly, matched by the French declarations as the Court read them.[73]

The broader New Zealand political context was also critical in 1995. Following its election in 1984, the fourth Labour Government took the major step of refusing to allow nuclear armed and nuclear propelled naval vessels to enter New Zealand waters (with an exception for those in distress, as required by international law). That led to a major dispute with the US, as well as with Australia and the UK, and to the exclusion of New Zealand from ANZUS Council meetings.[74] The National Party, in opposition, at first opposed the nuclear free policy, but soon came to accept it. By 1995, the country as a whole appeared to be in full support — civil society was very active — and the National Prime Minister of the day was able to persuade the leaders of all the parliamentary parties to have their members endorse unanimously a motion supporting the taking of the matter back to The Hague.

---

69 *Nuclear Tests (NZ v France)* (n 4) 477 [63]. I note that the related para 60 in the Australian judgment is identical: *Nuclear Tests (Australia v France)* (n 4) 272 [60]. The extra paragraphs in the New Zealand judgment result from the different diplomatic histories and the different relief claimed in the two applications.

70 Ministry of Foreign Affairs and Trade (n 62) 227–8.

71 'New Zealand Application' (n 40) 4–5 [10]. Cf 'Australian Application (n 46) 12 [19], 26 [49(i)], 28 [49(ii)].

72 *Nuclear Tests (New Zealand v France) (Provisional Measures)* [1973] ICJ Rep 135, 142; *Nuclear Tests (Australia v France) (Provisional Measures)* [1973] ICJ Rep 99, 106.

73 The relief sought differed in another respect. The Australian one was limited to future atmospheric testing, while New Zealand also sought a judgment relating to the legality of past testing giving rise to radioactive fallout: 'New Zealand Application' (n 40) 4–5 [10]; 'Australian Application' (n 46) 28.

74 See generally Templeton, *Standing Upright Here* (n 35) chs 10–12.

The Attorney-General was able to emphasise that fact as he began New Zealand's presentation to the Court.[75]

As the record shows, there were rapid exchanges between the Court and the parties about whether a hearing would be held at all and, if so, about its subject matter. The Request, the Court ruled, was to be the subject of a narrow hearing (although it is interesting to match the Court's direction and the first part of the Attorney-General's opening),[76] with the French failing to name an agent and to dress in the standard way (with the exception of Sir Arthur Watts QC, until recently the Legal Adviser at the UK Foreign and Commonwealth Office, who properly wore his silk gown and wig) and with their counsel referring, in the hearing (and long after the event), to 'the non-case'.[77] They also produced a map of the Pacific which omitted the many small islands spread across that great Ocean, a matter emphasised by the New Zealand Solicitor-General in his reply.[78] But, by contrast to 1973 and 1974, they were, at least, in attendance and addressed the Court in a regular manner (and not by way of a white paper which came to the attention of the Judges in the earlier stages) and Sir Geoffrey Palmer made his solemn declaration as a judge ad hoc, replacing Sir Garfield Barwick. As he was resigning, Sir Garfield had referred to those cases about 'atmospheric' nuclear tests! At the outset, in 1973, the Registrar, as it happened also an Australian, mentioned that he had noticed the different formulations of the two applications which I read as explaining the broader titles assigned to both cases.

There were divided views within the New Zealand team about our chances in 1995, but there was no doubt in our minds that we could make a respectable argument that would not damage New Zealand's diplomatic and professional reputation. And it would likely have some impact on opinion around the world about nuclear weapons and testing. (By that time, the World Health Assembly ('WHA') had adopted its resolution seeking an opinion about the legality of the use by states of nuclear weapons in armed conflict,[79] and the UN General Assembly had adopted a much broader request.[80] In the efforts leading to those requests, New Zealand civil society was heavily involved, as mentioned in the next section of this article.) As some of us had anticipated, the Court read the opportunity to return, stated in para 63, as limited to atmospheric testing, and our complaint was about the prospect of venting from underground tests into the

---

75 'Verbatim Record 1995/19', *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 (New Zealand v France)* (International Court of Justice, General List No 97, 11 September 1995) 17–18.

76 Ibid 15; *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 (New Zealand v France)* [1995] ICJ Rep 228, 295–6 [27].

77 'Verbatim Record 1995/21', *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 (New Zealand v France)* (International Court of Justice, General List No 97, 12 September 1995) 25.

78 Ibid 54–5.

79 World Health Assembly, *Health and Environmental Effects of Nuclear Weapons*, 46th sess, 13th plen mtg, Agenda Item 33, WHO Doc A46/VR/13 (14 May 1993).

80 *Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, GA Res 49/75, UN GAOR, 49th sess, 90th plen mtg, Agenda Item 62, UN Doc A/RES/49/75 (9 January 1995, adopted 15 December 1994) Preamble para 11 ('*GA Res 49/75*').

atmosphere of radioactive material, with a related request for an environmental impact assessment. Accordingly, the request failed,[81] but the French government did end its underground testing in January 1996. We need a Templeton to supplement his earlier book[82] and provide an account of the serious health consequences for those living in the Pacific and for those New Zealand servicemen who observed the tests and their families; the recent adoption of the *Treaty on the Prohibition of Nuclear* Weapons; and my next topic.[83] New Zealand was very active in promoting the drafting of that instrument and was the 13th to ratify; it came into force after it received 50 ratifications or accessions.

D *Nuclear Weapons Opinions 1993–1996*

The International Physicians for the Prevention of Nuclear War ('IPPNW') (founded in 1980) and the World Court Project (1986) succeeded in persuading enough member states to have the WHA (in May 1993) and the UN General Assembly (in 1994) ask the ICJ for advisory opinions relating to nuclear weapons. The WHA request was more focused, being limited to the legality of the use of nuclear weapons in war or armed conflict.[84] Two New Zealand physicians had a large hand in the WHA process, both in Wellington and Geneva, one having been Director-General of Health of the New Zealand Ministry of Health and experienced in the workings of the World Health Organization ('WHO'), and the other having been a postgraduate student in Edinburgh in August 1945, when Hiroshima and Nagasaki were bombed and when he understood that the world, including the world of science, had changed forever. He prepared a splendid book on the whole matter. It includes model laws, prepared by the New Zealand branch of the IPPNW, which anticipate the nuclear free statute enacted by the New Zealand Parliament in 1987.[85] New Zealand members of the World Court Project, with their Australian counterparts, were also very active in support of the General Assembly request.

During our reopening proceedings earlier in 1995, the point was made to me that there was a real contrast between the position New Zealand was taking then compared with the submission it had made the previous year in response to the WHA request. That brief document suggests, implicitly, that the Court should exercise its discretion to refuse to give the opinion.[86] By the time of the oral proceedings, the Attorney-General was able to say that because of the broader UN General Assembly request, any question about the competence of the WHO to

---

81 *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 (New Zealand v France) (Order)* [1995] ICJ Rep 288, 306 [63], 307 [68].

82 See Templeton, *Standing Upright Here* (n 35).

83 *Treaty on the Prohibition of Nuclear Weapons*, opened for signature 7 August 2017 (entered into force 22 January 2021).

84 World Health Assembly, *Health and Environmental Effects of Nuclear Weapons*, 46th sess, 13th plen mtg, Agenda Item 33, WHO Doc A46/VR/13 (14 May 1993) para 1; *GA Res 49/75*, UN Doc A/RES/49/75 (n **Error! Bookmark not defined.**) Preamble para 11.

85 See Erich Geiringer, *Malice in Blunderland: An Anti-Nuclear Primer* (Benton Ross, 1985).

86 'Written Statement of the Government of New Zealand', *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* (International Court of Justice, General List No 93, 13 September 1994).

make the request had become hypothetical.[87] (It is a shame, it seems to me, that the Court did not take that course rather than embarking on the argument about speciality.) Nor, he said, was there any compelling reason to justify the Court refusing to give the opinion requested by the General Assembly. On the merits, in the written as well as the oral argument, New Zealand took a direct position. According to the Attorney-General, New Zealand considered that the Court should rule that the threat or use of nuclear weapons was illegal.[88] The argument was based on the history of the increasing limits being placed on methods of warfare by rules in particular conventions and on principle, including the *Martens Clause* in its original form and, most recently, in the first 1977 *Additional Protocol* to the *Geneva Conventions* (an argument cited in the 1996 opinion),[89] as well as Montesquieu![90]

To return to the overall approach of the 1972 government of Prime Minister Norman Kirk, followed by subsequent Prime Ministers, New Zealand has taken initiatives and supported many others to control and to ban nuclear weapons for over 60 years. They include action at the UN, the engagement of governments, worldwide and regionally in the Pacific Islands Forum and in the negotiation of the South Pacific Nuclear Free Zone, the sending of frigates to the area of French testing and the enactment of a ban on nuclear armed and propelled ship visits. The Court is thus one of many means used by New Zealand to address problems and disputes in international affairs.

V NEW ZEALAND'S PARTICIPATION IN THE *WHALING CASE*

Australia brought this case against Japan, challenging its issuing of permits for the purpose of scientific research which allowed the killing of particular numbers of specified types of whales in the Antarctic.[91] New Zealand intervened under art 63 of the Statute of the Court.[92] It was able to do that as a party to the *International Convention for the Regulation of Whaling* of 1946, under which Japan had issued the permits.[93] Since I first became a judge almost 40 years ago, I have refused to comment on the reasoning of decisions to which I have contributed. The reasons given by the court or tribunal, read with the evidence and arguments on the law before it, must speak for themselves. I note, without comment, four features of this case.

The first is the joint press release of the Australian and New Zealand Foreign Ministers issued on 15 December 2010. Australia, it said, had indicated that they would prefer New Zealand not to file as a party. Because New Zealand has a judge on the ICJ, the joining of the two actions would result in Australia losing its

---

87 'Verbatim Record 1995/28', *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (International Court of Justice, General List No 95, 9 November 1995) 20–1.

88 Ibid 20.

89 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 259–60 [86]–[87].

90 'Verbatim Record 1995/28' (n 87) 49.

91 *Whaling in the Antarctic (Australia v Japan) (Judgment)* [2014] ICJ Rep 226.

92 'Declaration of Intervention of the Government of New Zealand', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 20 November 2012).

93 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) art 8(1).

entitlement to appoint a judge ad hoc for the case.[94] That release was read out by counsel for Japan in the second round of argument,[95] to the great discomfort of some in the Great Hall of Justice.

The second relates to the point I made at the outset — the choice of method, in this case, for handling the issues. Over a number of years, those involved in the Future of the International Whaling Commission process, including Geoffrey Palmer, were working towards an agreed solution for a phasing out of Japanese whaling. That process ended, however, with Australia filing its application, shortly before what may have been the critical meeting of the members of the Commission. This point is to be related to my last one.[96]

The third is the contrast between the beginnings of the opening statements of the agents. The Australian opening followed a standard line: 'Australia maintains excellent relations with Japan. This dispute reflects a disagreement over one, albeit very important matter, in a relationship that is otherwise positive, deep and multi-dimensional.'[97] By contrast, the Japanese agent, in opening, asked 'to be a bit personal' and, referring to his father, an eminent international lawyer, said that he would have been terrified to see his son standing in front of the Court. He made no mention at all of the relationship between the two states.[98]

Last are the actions taken by Japan following the judgment, in particular its withdrawal from the International Whaling Commission and the 1946 Convention[99] and its amendment to its acceptance of the jurisdiction of the Court. The new reservation excludes 'any disputes arising out of, concerning, or relating to research on, or conservation, management or exploration of, living resources of the sea'.[100] The Ministry of Foreign Affairs of Japan website justifies this change on the basis that *UNCLOS* has provisions regarding such resources and methods of dispute settlement which allow the involvement of experts from the scientific

---

94 Kevin Rudd and Murray McCully, 'Australia and New Zealand Agree on Strategy for Whaling Legal Case' (Press Release, 15 December 2010).

95 'Verbatim Record 2013/21', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 15 July 2013) 27.

96 See Geoffrey Palmer, *Reform: A Memoir* (Victoria University Press, 2013) 655–60; Geoffrey Palmer, 'Whales and Humans: How Whaling Went from Being a Major Industry to a Leading Environmental Issue Then Landed Japan in the International Court of Justice for the First Time' (2015) 13 *New Zealand Yearbook of International Law* 107, 113–23. See also Bill Mansfield, 'Peaceful Settlement of International Disputes: Litigation or Negotiation — Some Practical Considerations' (2016) 14(2) *Otago Law Review* 329, 333–5.

97 'Verbatim Record 2013/7', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 26 June 2013) 18 [2].

98 'Verbatim Record 2013/12', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 2 July 2013) 14 [1].

99 Chief Cabinet Secretary, Ministry of Foreign Affairs of Japan, 'Statement by Chief Cabinet Secretary' (Media Release, 26 December 2018) <https://www.mofa.go.jp/ecm/fsh/page4e_000969.html>, archived at <https://perma.cc/5G8W-X9FA>; International Whaling Commission, 'Statement on Government of Japan Withdrawal from the IWC' (Media Release, 14 January 2019) <https://iwc.int/statement-on-government-of-japan-withdrawal-from-t>, archived at <https://perma.cc/N4PK-Z564>.

100 'Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court', *United Nations Treaty Collection* (Web Page) (Japan) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&clang=_en>, archived at <https://perma.cc/QD4H-WMWQ>.

or technical perspectives.[101] Those involved in the *Southern Bluefin Tuna* case brought by Australia and New Zealand against Japan, which succeeded in its plea that the tribunal did not have jurisdiction under *UNCLOS*,[102] may smile.

VI CONCLUSION

I conclude by turning to the 1971 position of New Zealand mentioned at the outset of this article, when New Zealand affirmed the 'considerable importance [it attaches] to third party settlement as a means of resolving disputes and, in particular, [how it] has always strongly supported the Court and the role of judicial settlement'.[103] At that time, the ICJ was facing circumstances that might be described as the most difficult in its institutional life. The decision in the *South West Africa* cases had led to very strong condemnation of the Court and, following the delivery of the *Barcelona Traction* judgment (which had been before the Court for eight years), the Court, in early 1970, had no cases on its docket. This matter was touched on delicately, even as an achievement, by President Sir Muhammad Zafrulla Khan, as the recently elected judges made their solemn declarations.[104] At the UN, 12 members from Africa, the Americas and Western Europe, referring to the current workload of the Court, stressed the need for an urgent review. The group proposed that a study be undertaken of 'obstacles to the satisfactory functioning of the Court, and ways and means of removing them', including an exploration of additional possibilities of its use. The members recommended the appointment of an ad hoc committee to undertake such a study[105] — a recommendation that did not gain support over the following four years of that process.

There followed a series of debates in the UN's sixth committee leading to three resolutions, the last of which noted, among other things, the Court's amendments to its rules to facilitate recourse to it by simplifying its procedure, reducing delays and costs and allowing the parties greater influence on the composition of panels. The General Assembly recognised the desirability of states accepting the jurisdiction of the Court; drew attention to the advantage of inserting in treaties, where appropriate, provisions for the jurisdiction of the Court to resolve disputes; called on states to consider the possibility of identifying cases to be taken to the Court and the possibility of using the chambers; and recommended that UN organs and specialised agencies review legal questions which they might refer to the Court for an advisory opinion. The Assembly, in addition, reaffirmed that recourse

---

101 'ICJ and Japan', *Ministry of Foreign Affairs of Japan* (Web Document) <https://www.mofa.go.jp/files/100028922.pdf>, archived at <https://perma.cc/CXF2-B5AN>.

102 *Southern Bluefin Tuna (New Zealand v Japan) (Judgment)* (2000) 23 RIAA 1. See also Mansfield (n 96) 333–5.

103 *Review of the Role of the International Court of Justice*, UN Doc A/8382/Add.4 (n 1) 2.

104 (1969–70) 24 *International Court of Justice Yearbook* 1, 115–17.

105 *Letter Dated 14 August 1970 from the Representatives of Argentina, Canada, Finland, Italy, Japan, Liberia, Mexico, the United States of America and Uruguay to the United Nations Addressed to the Secretary-General*, UN GAOR, 25th sess, UN Docs A/8042 and Add.1 and Add.2 (14 August 1970) attachment ('Explanatory Memorandum') [1]–[2].

to judicial settlement of legal disputes should not be considered an unfriendly act.[106]

By then, the Court had delivered provisional measures at the request of New Zealand and Australia in the *Nuclear Tests* cases and was deliberating on jurisdiction and admissibility. The Court was facing, or had faced, the major challenges presented by the *Icelandic Fisheries* cases (with the law of the sea plainly developing rapidly). There were also the cases brought by Pakistan against India following the Bangladesh War and by Greece against Turkey about the delimitation of their maritime boundaries in the Aegean Sea. In none of those six cases did the respondent state appear. Yet, arguably, the Court's rulings and presence was an important feature in the resolution of some of these incidents, and the Court has emerged from the difficult circumstances of the 1970s with countries continuing to engage with it.

While being a strong supporter of the Court, New Zealand has always regarded recourse to it as one means, among a number, of international dispute settlement. The cases and situations I have discussed indicate some of the range of approaches adopted in respect of nuclear weapons and the role of bilateral negotiation, against the background of multilateral negotiations, of fisheries matters. The Court is one means, a central one, but not the only one. The way New Zealand has forged a path to litigation before the ICJ, distinct from that of Australia, is also evident. This survey of New Zealand's encounters with the Court demonstrates a practical and pragmatic engagement with this ongoing and important forum for the peaceful resolution of international disputes.

106 *Review of the Role of the International Court of Justice*, GA Res 3232 (XXIX), UN GAOR, 26th sess, 2280th plen mtg, Agenda Item 93, Supp No 28, UN Doc A/RES/3232(XXIX) (29 November 1974) Preamble para 6, paras 1–6.