CASE CONCERNING THE 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*

30 APRIL 1990

Eduardo Jiménez de Aréchaga, Chairman
Sir Kenneth Keith,
Prof. Jean-Denis Bredin, Members
Registrar: Michael F. Hoellering
Assistant Registrar: Philippe P. Chalandon

* The Award was rendered in English and French.

I. AGREEMENT TO ARBITRATE

1. On 9 July 1986 the Governments of France and of New Zealand concluded in Paris by an Exchange of Letters* an Agreement submitting to arbitration any dispute concerning the interpretation or application of two other Agreements concluded on the same date, which related to the problems arising from the *Rainbow Warrior* affair.

The text of the letter sent by the Prime Minister of France and accepted by the New Zealand Government runs as follows:

> I have the honour to refer to the two Agreements concluded today in the light of the ruling of the Secretary-General of the United Nations.
>
> On the basis of that ruling, I have the honour further to propose that any dispute concerning the interpretation or application of either of these two Agreements which it has not been possible to resolve through the diplomatic channel shall, at the request of either of our two Governments, be submitted to an Arbitral Tribunal under the following conditions:
>
> (*a*) each Government shall designate a member of the Tribunal within 30 days of the date of the delivery by either Government to the other of a written request for arbitration of the dispute, and the two Governments shall, within 60 days of that date, appoint a third member of the Tribunal who shall be its Chairman;
>
> (*b*) if, within the times prescribed, either Government fails to designate a member of the Tribunal or the third member is not agreed the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultations with the two Governments by choosing the member or members of the Tribunal;
>
> (*c*) a majority of the members of the Tribunal shall constitute a quorum and all decisions shall be made by a majority vote;
>
> (*d*) the decisions of the Tribunal, including all rulings concerning its constitution, procedure and jurisdiction, shall be binding on the two Governments.
>
> If the foregoing is acceptable to the Government of New Zealand, I would propose that the present letter and your response to it to that effect should constitute an agreement between our two Governments with effect from today's date.

2. On 14 February 1989 the Parties concluded in New York the following Supplementary Agreement relating to the present Arbitral Tribunal:

> The Government of New Zealand and the Government of the French Republic
>
> RECALLING the three Agreements concluded by Exchanges of Letters of 9 July 1986 following the ruling of the Secretary-General of the United Nations relating to the Rainbow Warrior affair;
>
> RECALLING FURTHER that the third Agreement establishes an arbitral procedure for the settlement of any dispute concerning the interpretation or application of either of the first two Agreements which it has not been possible to settle through the diplomatic channel;
>
> NOTING that the Government of New Zealand by diplomatic Note of 22 September 1988 requested that this procedure be used to settle such a dispute;
>
> NOTING ALSO that in accordance with the third Agreement an Arbitral Tribunal has been constituted comprising:
>
> Dr. Eduardo Jiménez de Aréchaga, Chairman of the Tribunal, appointed by the two Governments,

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* For the exchange of letters see United Nations, *Reports of International Arbitral Awards*, vol. XIX, pp. 216-221.

Sir Kenneth Keith, designated by the Government of New Zealand,

Mr. Jean-Denis Bredin, designated by the Government of the French Republic;

BEARING IN MIND the provisions of the third Agreement;

BELIEVING it desirable to supplement those provisions of the third Agreement relating to the functioning and procedures of the Tribunal;

HAVE AGREED AS FOLLOWS:

Article 1

1. Subject to paragraphs 2, 3, and 4 of this Article, the composition of the Tribunal shall remain unchanged throughout the period in which it is exercising its functions.

2. In the event that either the arbitrator designated by the Government of New Zealand or the arbitrator designated by the Government of the French Republic is, for any reason, unable or unwilling to act as such, the vacancy may be filled by the Government which designated that arbitrator.

3. The proceedings of the Tribunal shall be suspended during a period of twenty days from the date on which the Tribunal has acknowledged such a vacancy. If at the end of that period the arbitrator has not been replaced by the Government which designated him the proceedings of the Tribunal shall nonetheless resume.

4. In the event that the Chairman of the Tribunal is, for any reason, unable or unwilling to act as such, he shall be replaced by agreement between the two Governments. If the two Governments are unable to agree within a period of forty days from the date on which the Tribunal has acknowledged such a vacancy, the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultation with the two Governments. The proceedings of the Tribunal shall be suspended until such time as the vacancy has been filled.

Article 2

The decisions of the Tribunal shall be made on the basis of the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchanges of Letters on 9 July 1986, this Agreement and the applicable rules and principles of international law.

Article 3

1. Each Government shall, within fourteen days of the entry into force of this Agreement, appoint an Agent for the purposes of the arbitration and shall communicate the name and address of its Agent to the other Government and to the Chairman of the Tribunal.

2. Each Agent may appoint a deputy or deputies. The names and addresses of such deputies shall also be communicated to the other Government and to the Chairman of the Tribunal.

Article 4

1. The Tribunal shall meet at New York at such days and times as it may determine after consultation with the Agents.

2. The Tribunal after consultation with the Agents shall designate a Registrar and may engage such staff and secure such services and equipment as it deems necessary.

Article 5

1. The procedure shall consist of two parts: written and oral.

2. The written pleadings shall consist of:

(*a*) A Memorial, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and to the French Agent within eight weeks after entry into force of this Agreement;

(*b*) A Counter-Memorial, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within eight weeks after the date of receipt by the French Agent of the New Zealand Memorial;

(*c*) A Reply, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and the French Agent within four weeks after the date of receipt by the New Zealand Agent of the French Counter-Memorial;

(*d*) A Rejoinder, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within four weeks after the date of receipt by the French Agent of the New Zealand Reply;

(*e*) Such other written material as the Tribunal may determine to be necessary.

3. The Registrar shall notify the two Agents of the address for deposit of written pleadings and other written material.

4. Each document shall be communicated in six copies.

5. The Tribunal may extend the above time limits at the request of either Government.

6. The oral hearings shall follow the written proceedings after an interval of not less than two weeks.

7. Each Government shall be represented at the oral hearings by its Agent or deputy Agent and such counsel and experts as it deems necessary for this purpose.

Article 6

Each Government shall present its written pleadings and oral submissions to the Tribunal in English or in French. All decisions of the Tribunal shall be delivered in both languages. Verbatim records of the oral proceedings shall be produced each day in the language in which each statement was delivered. The Tribunal shall arrange for such translation and interpretation services as may be necessary and shall keep a verbatim record of all oral proceedings in English and French.

Article 7

1. On completion of the proceedings, the Tribunal shall render its Award as soon as possible and shall forward a copy of the Award, signed by the Chairman and the Registrar of the Tribunal, to the two Agents.

2. The Award shall state in full the reasons for the conclusions reached.

Article 8

The identity of the Agents and counsel of the two Governments, as well as the whole of the Tribunal's Award, may be made public. The Tribunal may also decide, after consultation with the two Agents and giving full weight to the views of each, to make public the written pleadings and the records of the oral hearings.

Article 9

Any dispute between the two Governments as to the interpretation of the Award may, at the request of either Government, be referred to the Tribunal for clarification within three months after the date of receipt of the Award by its Agent.

Article 10

The present Agreement shall enter into force on the date of signature.

II. SUMMARY OF THE PROCEEDINGS

3. In accordance with Article 3 of the Supplementary Agreement, each Government communicated to the Chairman of the Tribunal the name and address of its Agent.

The Agent appointed by New Zealand is Mr. Christopher David Beeby, Deputy Secretary, Ministry of External Relations and Trade, New Zealand.

The Agent appointed by France is Mr. Jean-Pierre Puissochet, Counselor of State, Director of Legal Affairs, Ministry of Foreign Affairs, France.

4. On 8 May 1989, the Tribunal met in New York and appointed Michael F. Hoellering as Registrar, and Philippe P. Chalandon as Assistant Registrar.

5. The two Governments filed their written pleadings within the agreed time limits.

On 5 April 1989 the Government of New Zealand submitted a Memorial with Annexes.

On 1 June 1989 the Government of France submitted a Counter-Memorial with Annexes.

On 30 June 1989 and on 27 July 1989 respectively, the parties submitted their Reply with further Annexes and a Rejoinder.

6. With the written stage of the proceedings concluded the Tribunal, following consultations with the Agents of both Parties, fixed the date of the opening of oral proceedings for 31 October 1989. Oral proceedings were held in New York from 31 October to 3 November 1989. The following persons attended:

For New Zealand:

Rt. Hon. D. R. Lange, Attorney General, as Leader of the Delegation,

Mr. C. D. Beeby, Deputy Secretary, Ministry of External Relations and Trade, as Agent and Counsel,

Professor D. W. Bowett, Q.C., Whewell Professor of International Law, University of Cambridge, as Counsel,

Mr. C. R. Keating, Assistant Secretary, Ministry of External Relations and Trade, as Counsel,

Mr. D. J. McKay, Counsellor, Ministry of External Relations and Trade, as Counsel,

Ms. J. A. Lake, Legal Consultant, Ministry of External Relations and Trade, as Counsel;

For France:

Mr. Jean-Pierre Puissochet, Counselor of State, Director of Legal Affairs, Ministry of Foreign Affairs, as Agent and Counsel,

Mr. Prosper Weil, Professor of the Paris University of Law, Economics and Social Sciences, as Counsel,

Mrs. Brigitte Stern, Professor of the University of Paris X at Nanterre, as Counsel,

Mr. Vincent Coussirat-Coustère, Professor of the University of Lille II, as Counsel,

Mrs. Marie-Reine d'Haussy, Assistant Director, Legal Department, Ministry of Foreign Affairs, as Counsel,

Mr. François Alabrune, Secretary, Legal Department, Ministry of Foreign Affairs, as Counsel,

Mr. Jean-Paul Esquirol, Controller-General of the Army, as Expert,

Mr. Jean-Paul Algret, Lieutenant Colonel, as Expert,

Professor Charles Laverdant, Member of the Academy of Medicine, as Expert.

The oral proceedings were recorded in conformity with Article 6 of the Supplementary Agreement.

III. Final submissions of the parties

7. The final submissions of the parties are as follows:

For New Zealand, in the Memorial:

144. In conclusion, New Zealand respectfully requests the Tribunal to grant the following relief:

(*a*) A declaration that the French Republic:

(i) breached its obligations to New Zealand by failing to seek in good faith the consent of New Zealand to the removal of Major Mafart and Captain Prieur from the island of Hao;

(ii) breached its obligations to New Zealand by the removal of Major Mafart and Captain Prieur from the island of Hao;

(iii) is in breach of its obligations to New Zealand by the continuous absence of Major Mafart and Captain Prieur from the island of Hao;

(iv) is under an obligation to return Major Mafart and Captain Prieur promptly to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement;

(*b*) An order that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement.

For France, in the Counter-Memorial:

Conclusion

For all the reasons set out in the foregoing chapters, the Government of the French Republic respectfully requests that the Arbitral Tribunal reject the requests of New Zealand.

For New Zealand, in the Reply:

Conclusion

In its Counter-Memorial France has failed to establish any reason, whether by reference to law or fact, why New Zealand should not be granted the relief it seeks.

Accordingly, New Zealand respectfully maintains its request for a declaration and an order for specific performance, as set out in paragraph 144 of its Memorial.

For France, in the Rejoinder:

Conclusion

For all the reasons set out in the foregoing chapters, the Government of the French Republic once again respectfully requests that the Arbitral Tribunal reject the requests of New Zealand.

Oral conclusions:

For New Zealand:

Mr. President, I have made it clear that New Zealand sees no reason to make any modification of its request to this Tribunal for a declaration and order as set out in paragraph 144 of the New Zealand Memorial.

For France:

Its Agent reaffirmed its earlier ". . . conclusions whose main thrust is to encourage you to reject the entire New Zealand request".

IV. THE FACTS

The 1986 Ruling and Agreements

8. On 10 July 1985, a civilian vessel, the *Rainbow Warrior*, not flying the New Zealand flag, was sunk at its moorings in Auckland Harbour, New Zealand, as a result of extensive damage caused by two high-explosive devices. One person, a Netherlands citizen, Mr. Fernando Pereira, was killed as a result of this action: he drowned when the ship sank.

9. On 12 July 1985, two agents of the French Directorate General of External Security (D.G.S.E.) were interviewed by the New Zealand Police and subsequently arrested and prosecuted. On 4 November 1985, they pleaded guilty in the District Court in Auckland, New Zealand, to charges of manslaughter and wilful damage to a ship by means of an explosive. On 22 November 1985, the two agents, Alain Mafart and Dominique Prieur, were sentenced by the Chief Justice of New Zealand to a term of 10 years imprisonment.

10. On 22 September 1985, the Prime Minister of France issued a communiqué confirming that the *Rainbow Warrior* had been sunk by agents of the D.G.S.E. under orders. On the same day, the French Minister for External Affairs indicated to the Prime Minister of New Zealand that France was ready to undertake reparations for the consequences of that action.

11. Bilateral efforts to resolve the differences that had arisen subsequently between New Zealand and France were undertaken over a period of several months. In June 1986, following an appeal by Prime Minister Lubbers of the Netherlands, the two Governments formally approached the Secretary-General of the United Nations and referred to him all the problems between them arising from the *Rainbow Warrior* affair for a binding Ruling.

12. On 6 July 1986, the Secretary-General of the United Nations issued the following:

Ruling

The issues that I need to consider are limited in number. I set out below my ruling on them, which takes account of all the information available to me. My ruling is as follows:

1. *Apology*

New Zealand seeks an apology. France is prepared to give one. My ruling is that the Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the "Rainbow Warrior" by French service agents which took place on 10 July 1985.

2. *Compensation*

New Zealand seeks compensation for the wrong done to it, and France is ready to pay some compensation. The two sides, however, are some distance apart on quantum. New Zealand has said that the figure should not be less than US Dollars 9 million, France that it should not be more than US Dollars 4 million. My ruling is that the French Government should pay the sum of US Dollars 7 million to the Government of New Zealand as compensation for all the damage it has suffered.

3. *The two French service agents*

It is on this issue that the two Governments plainly had the greatest difficulty in their attempts to negotiate a solution to the whole issue on a bilateral basis before they took the decision to refer the matter to me.

The French Government seeks the immediate return of the two officers. It underlines that their imprisonment in New Zealand is not justified, taking into account in particular the fact that they acted under military orders and that France is ready to give an apology and to pay compensation to New Zealand for the damage suffered.

The New Zealand position is that the sinking of the "Rainbow Warrior" involved not only a breach of international law, but also the commission of a serious crime in New Zealand for which the two officers received a lengthy sentence from a New Zealand court. The New Zealand side states that their release to freedom would undermine the integrity of the New Zealand judicial system. In the course of bilateral negotiations with France, New Zealand was ready to explore possibilities for the prisoners serving their sentences outside New Zealand.

But it has been, and remains, essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that.

The French response to that is that there is no basis either in international law or in French law on which the two could serve out any portion of their New Zealand sentence in France, and that they could not be subjected to new criminal proceedings after a transfer into French hands.

On this point, if I am to fulfil my mandate adequately, I must find a solution in respect of the two officers which both respects and reconciles these conflicting positions.

My ruling is as follows:

(*a*) The Government of New Zealand should transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur should be transferred to a French military facility on an isolated island outside of Europe for a period of three years.

(*b*) They should be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They should be isolated during

their assignment on the island from persons other than military or associated personnel and immediate family and friends. They should be prohibited from any contact with the press or other media whether in person or in writing or in any other manner. These conditions should be strictly complied with and appropriate action should be taken under the rules governing military discipline to enforce them.

(*c*) The French Government should every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that they are being implemented.

(*d*) If the New Zealand Government so requests, a visit to the French military facility in question may be made, by mutual agreement between the two Governments, by an agreed third party.

(*e*) I have sought information on French military facilities outside Europe. On the basis of that information, I believe that the transfer of Major Mafart and Captain Prieur to the French military facility on the isolated island of Hao in French Polynesia would best facilitate the enforcement of the conditions which I have laid down in paragraphs (*a*) to (*d*) above. My ruling is that this should be their destination immediately after their transfer.

4. *Trade issues*

The New Zealand Government has taken the position that trade issues have been imported into the affair as a result of French action, either taken or in prospect. The French Government denies that, but it has indicated that it is willing to give some undertakings relating to trade, as sought by the New Zealand Government. I therefore rule that France should:

(*a*) Not oppose continuing imports of New Zealand butter into the United Kingdom in 1987 and 1988 at levels proposed by the Commission of the European Communities insofar as these do not exceed those mentioned in document COM (83) 574 of 6 October 1983, that is to say, 77.000 tonnes in 1987 and 75.000 tonnes in 1988; and

(*b*) Not take measures that might impair the implementation of the Agreement between New Zealand and the European Economic Community on Trade in Mutton, Lamb and Goatmeat which entered into force on 20 October 1980 (as complemented by the Exchange of Letters of 12 July 1984).

5. *Arbitration*

The New Zealand Government has argued that a mechanism should exist to ensure that any differences that may arise about the implementation of the agreements concluded as a result of my ruling can be referred for binding decision to an arbitral tribunal. The Government of France is not averse to that. My ruling is that an agreement to that effect should be concluded and provide that any dispute concerning the interpretation or application of the other agreements, which it has not been possible to resolve through the diplomatic channel, shall, at the request of either of the two Governments, be submitted to an arbitral tribunal. (The ruling then made the specific proposals for arbitration which were later incorporated in the Agreement set out in para. 1 of this Award.)

6. The two Governments should conclude and bring into force as soon as possible binding agreements incorporating all of the above rulings. These agreements should provide that the undertaking relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur should be implemented at the latest on 25 July 1986.

7. On one matter I find no need to make a ruling. New Zealand, in its written statement of position, has expressed concern regarding compensation for the family of the individual whose life was lost in the incident and for Greenpeace. The French statement of position contains an account of the compensation arrangements that

have been made; I understand that those assurances constitute the response that New Zealand was seeking".

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* *

13. In accordance with paragraph 6 of the Ruling, the French and New Zealand Governments concluded in Paris, on 9 July 1986, by Exchanges of Letters, three Agreements which incorporated the provisions of the Ruling. The first of these Agreements, which relates to the situation of the two French officers, runs as follows:

On 19 June 1986, wishing to maintain the close and friendly relations which have traditionally existed between New Zealand and France, our two Governments agreed to refer all of the problems between them arising from the Rainbow Warrior affair to the Secretary-General of the United Nations for a binding Ruling. In the light of that Ruling, made available on 7 July 1986, I have the honour to propose the following:

The Prime Minister of France will convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the Rainbow Warrior by French service agents which took place in Auckland on 10 July 1985. Furthermore, the French Government will pay the sum of US$ 7 million to the Government of New Zealand as compensation for all the damage which it has suffered.

The Government of New Zealand will transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur will be transferred to a French military facility on the island of Hao for a period of not less than three years.

They will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They will be isolated, during their assignment in Hao, from persons other than military or associated personnel and immediate family and friends. They will be prohibited from any contact with the press or other media, whether in person, in writing or in any other manner. These conditions will be strictly complied with and appropriate action will be taken under the rules governing military discipline to enforce them.

The French Government will every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that these paragraphs are being implemented as agreed.

If the New Zealand Government so requests, a visit to the facility on Hao may be made, by mutual agreement between the two Governments, by an agreed third party.

The undertakings relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur will be implemented not later than 25 July 1986.

14. In accordance with the Ruling and the First Agreement, officers Mafart and Prieur were transferred from New Zealand to a French military facility on the island of Hao on 23 July 1986, and the other obligations undertaken in para. 2 of the Agreement were implemented.

The Case of Major Mafart

15. On 7 December 1987 the French Ministry of Defence was advised by the commander of the Hao military base that the condition

of Major Mafart's health required examinations and immediate care, which could not be carried out locally. The Minister of Defence then decided to send a medical team to the site. This team was led by a principal Army doctor, Dr. Maurel, from the Val-de-Grace Hospital in Paris.

16. On 10 December 1987 (Hao date), Dr. Maurel sent the Ministry of Defence a message, received in Paris on Friday 11 December, stating that Major Mafart "poses the etiological and therapeutic problem of stabbing abdominal pains in a patient with a history of similar, and still unlabeled, problems. The results of today's examination indicate the need for explorations in a highly specialized environment. His condition justifies an emergency return to a hospital in mainland France. Absent any formal notice from you to the contrary, I propose that this evacuation take place by the Sunday 13 December 1987 aircraft".

17. On 11 December 1987, a Friday, the Minister of Defence conveyed Dr. Maurel's message to the Minister of Foreign Affairs, adding that he planned to proceed with officer Mafart's health-related repatriation. He also asked the Minister of Foreign Affairs to "contact the New Zealand Government through the procedures stipulated in the agreement signed with that Government".

18. On 11 December 1987, at 6.59 p.m. (Paris time; it was 6.59 a.m. on Saturday 12 December in Wellington) the Minister of Foreign Affairs sent the French Ambassador in Wellington a telegram asking him to immediately give the New Zealand authorities a verbal note containing all the information that the French Government had just received (Dr. Maurel's medical opinion was attached to this note). The French Government, referring to the 1986 Agreement, asked "the New Zealand Government to consent to Major Mafart's urgent health-related transfer to a hospital in mainland France".

The French Ambassador was instructed to stress the fact that the only means of transport immediately available between Hao and Paris was the military aircraft leaving Hao Sunday morning. The Ambassador was asked to add that "the state of Major Mafart's health absolutely required that he be examined without delay in a highly specialized medical facility which exists neither in Hao nor in Papeete".

19. On 12 December 1987, between 10 a.m. and 11 a.m. (Wellington time) the French Ambassador contacted a senior official of the New Zealand Ministry of Foreign Affairs, communicating the above message.

20. About 4 hours later, between 2.00 and 3.00 on the afternoon of Saturday, 12 December 1987, the New Zealand Government answered the preceding communication by note verbale which stated that "in order to enable the request to be examined with the care it deserves, the New Zealand Government will require a New Zealand assessment to be made of Major Mafart's medical condition. Accordingly, urgent arrangements are now being made for a suitably qualified New Zealand military doctor to fly on a New Zealand military aircraft to Hao for this purpose". The note added that "the Ministry seeks urgent confirmation that the French authorities will give the necessary clearance for a

military flight to Hao for this purpose. Details of the proposed flight will be given to the Embassy as soon as possible".

In transmitting the preceding note verbale to his Government the French Ambassador added that the New Zealand Senior official who handed him the note inquired whether the departure date scheduled for Major Mafart's evacuation, that is, 13 December at 4.00 a.m., was in fact the Hao date. If so, this would correspond to the New Zealand date of Monday 14 December.

21. On 12 December 1987 the French Ambassador in Wellington advised the French Ministry of Foreign Affairs that he was given the following information relating to the projected visit to Hao of a New Zealand military doctor arriving by Air Force plane:

Type of aircraft	P3 ORION
Registration	New Zealand 6204
Flight number	N.P. 0999
Pilot	Lieutenant B. R. Clark
Crew	12 members
Passengers	1 doctor and 1 interpreter
Depart Auckland	Sunday 13 December 7.00 a.m. (New Zealand date and time)
Arrive Hao	Saturday 12 December 4.00 p.m. (French Polynesia date and time)
Call sign	Kiwi 999
Facilities requested	Fuel 35,000 pounds Avtur.

22. On 12 December 1987 at 5.11 p.m. (Paris time), equivalent to 5.11 a.m. on 13 December 1987 (Wellington time), the Ministry of Foreign Affairs sent by telegram to the French Ambassador in Wellington the response to be delivered to the New Zealand authorities. Due to the time shift, this response was received in Wellington early on Sunday morning 13 December 1987, some sixteen hours after the New Zealand proposal in para. 20 above.

The French authorities indicated that, to their great regret, they were unable to

> authorize a New Zealand aircraft to make a stop on the Hao military base. Indeed, for imperative reasons of national security, access to this base is strictly regulated and is prohibited to foreign aircraft. This is the reason why Major Mafart and Major Prieur were transported to the Hao base in July 1986 by a French military aircraft, which had come to pick them up at the Wallis airport, to which they had been transported from New Zealand by a New Zealand military plane.

The French authorities added that "the French Government agrees to allow Major Mafart to be examined, as soon he arrives in mainland France, by a physician designated by New Zealand. If applicable, it would be willing to consider covering the cost of sending a New Zealand physician to France, if this solution was preferred by the New Zealand Government".

23. On 13 December, the French Ambassador advised that the New Zealand Prime Minister could not accept the French proposal

but advanced new proposals, taking into account the impossibility of landing at Hao. According to the New Zealand Memorial, the New Zealand Government put forward two alternatives: that a New Zealand medical doctor be flown to Papeete, Tahiti, by a New Zealand military aircraft, and then onward to Hao by French military aircraft; or, if France preferred, that the New Zealand medical doctor be flown to Papeete by a commercial flight and then onward to Hao by French military aircraft.

The French Ambassador in Wellington advised his Government somewhat differently: "Mr. Lange proposes the following: New Zealand dispatches a military doctor to Papeete as soon as possible by commercial airline. The French party undertakes to transport him to Hao so that he can perform his medical assignment there. After being brought back to Papeete, he returns to New Zealand to submit his conclusions to the New Zealand authorities".

24. On 14 December (Wellington time), the French Ambassador sent the following note to the New Zealand Ministry of Foreign Affairs:

> A—The New Zealand request to have Major Mafart examined by a New Zealand physician who would go to Hao, via Papeete, then return to Auckland to report to his Government, who would then make their decision known, would delay the French officer's health-related transfer to mainland France by an excessive period of time that could be as long as several days, given the available transport opportunities. The French authorities feel that this additional delay is absolutely incompatible with the urgency, stressed by the doctor who examined Major Mafart, of transporting the Major to a highly specialized medical facility in mainland France.
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> B—In carrying out their duty to protect the health of their agents, the French authorities, in this case of *force majeure*, are forced to proceed, without any further delay, with the French officer's health-related repatriation. Major Mafart will leave Hao on Sunday 13 December at 2.00 (local time) on board a military plane that will arrive in Paris on Monday 14 December at about 10.00 (local time) after a technical stop in Pointe-à-Pitre.
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> C—The French authorities reiterate that they are willing to allow Major Mafart to be examined by a physician chosen by New Zealand, as soon as he arrives in Paris, and that they are even willing to cover the cost of sending a physician from New Zealand for this purpose, if this solution is preferred by the New Zealand Government.
>
> D—All measures have been taken to insure the confidentiality of the entire operation and to see to it that it remains secret, in any event until Major Mafart can be examined in mainland France by the physician designated by the New Zealand authorities".

25. On 14 December 1987 at 9.30 (Paris time), Officer Mafart arrived in Paris. He was taken to the Val-de-Grace Hospital where he was examined and treated by Professor Daly, head of the Val-de-Grace medical clinic, a professor of medicine and a specialist in gastroenterology.

26. A note delivered on 14 December 1987 from the New Zealand Embassy to the French Ministry of Foreign Affairs stated:

> New Zealand views with considerable concern, and wishes to record its serious objection to the unilateral action taken, in the absence of New Zealand consent, to transfer Major Alain Mafart to France on Sunday 13 December 1987.

New Zealand regards this action as a serious breach of both the letter and the spirit of the obligations undertaken pursuant to the Ruling of 6 July 1986 by the Secretary-General of the United Nations.

The first approach to the New Zealand Government about a possible medical evacuation of Mafart was made by the Ambassador of France in New Zealand at approximately 10.00 a.m. New Zealand time on Saturday 12 December. From that moment the New Zealand side has acted with great sensitivity to the humanitarian considerations involved and has worked hard, in a sympathetic and pragmatic way, to ensure that both medical requirements and requirements of principle were left in balance.

Within four hours of the receipt of the French request a proposal had been approved by the New Zealand Prime Minister and conveyed to the Ambassador of France which would have enabled examination in Hao of Mafart by a New Zealand doctor the following afternoon.

That proposal was rejected by the French side after 16 hours delay on the basis that it was undesirable that a New Zealand aircraft should land at Hao. New Zealand then immediately offered to transport its doctor to Tahiti, with France providing onward transportation to Hao. That proposal could also have been accomplished in a similar time frame had it not been for the delay on the part of the French authorities.

New Zealand reserves its right to submit the question of Mafart's transfer from Hao to arbitration in accordance with the agreed procedures set out in the Exchange of Letters of 9 July 1986. Nevertheless the New Zealand Government is willing to work constructively with the French Government to reach a resolution of the matter and, to this end, New Zealand awaits the French response to the proposals made today in a separate communication to the Prime Minister of France from the Prime Minister of New Zealand.

27. The letter from the Prime Minister of New Zealand to the Prime Minister of France, dated 14 December 1987, read as follows:

I have been advised that, without the consent of the New Zealand Government, Major Mafart was taken some hours ago by French military aircraft from Hao for medical examination in metropolitan France.

My purpose in writing to you is not to deal with the legality of the action which has been taken—that is clear and will be the subject of a note from the New Zealand Embassy to the Quai d'Orsay—but to explore with you the best means of dealing with the situation which this unilateral action has created.

Your authorities have advised us that a New Zealand doctor may examine Mafart on his arrival in Paris; and arrangements are now being made to enable this to be done. I would of course expect that our doctor's examination of Major Mafart will confirm a medical condition requiring urgent specialist examination. Should our doctor's examination of Major Mafart confirm the need for urgent specialist attention then I suggest that we might proceed on the basis of an agreement as follows:

(*a*) compliance with the Exchange of Letters of 9 July 1986, by the return of Major Mafart to Hao, will be restored as soon as his medical condition permits and he will be so returned even if further maintenance treatment is required which could be continued on Hao;

(*b*) the conditions contained in the Exchange of Letters of July 1986 relating to Major Mafart's isolation, including the prohibition of any contact with the press or other media whether in person, in writing or in any other manner will continue to apply during such time as Major Mafart is in metropolitan France;

(*c*) the French authorities will transmit regularly to the New Zealand Government medical reports on Major Mafart's condition and, if requested, will undertake consultations with a designated New Zealand doctor and permit subsequent examinations;

(*d*) in the event of disagreement between our two Governments that Major Mafart's medical condition is such as to permit his return to Hao, the issue will be referred to the Secretary-General of the United Nations for his decision;

In the event that our doctor's examination does not confirm a medical condition requiring urgent specialist attention then he shall be returned forthwith to Hao and in the event that there is disagreement as to that then the provisions of (*d*) shall apply.

I should be grateful for your urgent confirmation that this proposal is acceptable to you.

I think I should add that when Major Mafart is returned to Hao I intend, pursuant to the Exchange of Letters of 9 July 1986, to request the agreement of your Government to a visit to Hao by a representative of the Secretary-General of the United Nations. I should also note, in this regard, that in view of the essential role played by the Secretary-General in this matter, I have thought it proper to advise him of these developments.

I hope that Major Mafart's health will improve.

28. On 14 December 1987 New Zealand sent a doctor to examine Alain Mafart. At 4.00 p.m. (Paris time) officer Mafart was examined by Dr. R. S. Croxson, a national of New Zealand, residing in London. Dr. Croxson, with the cooperation of French authorities and medical doctors, was able to conduct a substantial physical examination of officer Mafart, becoming acquainted with all his health records, in consultation with the French doctors.

Dr. Croxson's report to the New Zealand authorities of 14 December 1987 concerning his examination of Major Mafart read as follows:

Questions Dr. Croxson was asked to address:

(*a*) whether Mafart has a condition which, in your opinion, required specialist investigation not likely to be available in the presumably limited military facilities on Hao;

(*b*) whether in your opinion the symptoms and conditions were such as to justify an emergency evacuation;

(*c*) an account of the nature of the specialist investigations to be undertaken, including the likely length of time for the investigation;

(*d*) your opinion, if any, on whether or when he would be fit to be returned to Hao;

(*e*) whether in your opinion the patient may be simply a malingerer.

Conclusions from Dr. Croxson's report on Major Mafart, 14 December 1987:

(*a*) I believe Mafart needed detailed investigations which were not available on Hao;

(*b*) Although Dr. Maurel appeared impressed by the severity of his pain and symptoms, when I asked if he thought Mafart might need an emergency operation he hesitated and I had the feeling he did not really feel at this stage that immediate surgery was going to be required but was more impressed by the recurring nature of the symptoms. I think it is therefore highly arguable whether an emergency evacuation as opposed to a planned urgent evacuation was necessary;

(*c*) 2-3 weeks;

(*d*) when investigations and observations are completed (possibly 3-4 weeks), as the doctors may wish to keep him under observation to witness a further attack should their investigations not disclose any other significant abnormalities;

(*e*) all the medical facts are very consistent and I do not think he is a malingerer.

29. On 18 December 1987 Dr. Croxson submitted a second report, which read as follows:

Opinion

The further sequencing and investigations would sound appropriate for somebody with such a longstanding story of recurrent abdominal pain and distension from probable adhesions. The investigations would normally take a further one to two weeks. I do not think that they are being excessively slow on their investigations, but are pursuing them in a fairly logical manner. Perhaps the investigations could be compressed over five or six days rather than the planned two weeks, although I did not take this point up with Professor Daly. Professor Daly offered to discuss by telephone with me the further results on Monday 4 January at the same time.

I did not tape record my conversation with Professor Daly, and I think I was a little limited in not having French interpretation. Nonetheless the results of the investigations and the planned sequencing really do sound quite appropriate. Given the long history, I suspect most clinicians would like to witness an episode of severe pain and abdominal distension. I did not raise the question again of exploratory surgery, nor did Professor Daly indicate to me that there was any question of this at the present time.

Professor Daly indicated that he had read my full medical report and agreed that it was a totally accurate picture of his (Professor Daly's) medical facts as outlined to me. We did not discuss the acute management of Mafart as it appeared to Dr. Maurel when he arrived at Hao on 10 December.

30. On 19 December 1987 the Ministry of Foreign Affairs of the French Republic addressed a formal note to the New Zealand Embassy, answering the 14 December formal note in the following terms:

The French Government thinks that Major MAFART's transfer to Paris on December 13 to undergo emergency medical examinations and the care necessitated by his condition cannot be analyzed as a failure to meet the obligations under the agreement resulting from the Exchanges of Letters on 9 July 1986 between France and New Zealand, following the intervention of the Secretary-General of the United Nations.

On 11 December, when it appeared imperative to have Major MAFART undergo medical examinations as soon as possible in a highly specialized environment, the New Zealand Ministry of Foreign Affairs was contacted in order to secure the New Zealand authorities' consent to the French officer's transfer to Paris by military flight departing Hao on 14 December. The New Zealand authorities then made their consent contingent upon a doctor's examination of Major MAFART on Hao and, for this purpose, proposed that the required physician be transported to the French military base by a New Zealand military plane. But, as the New Zealand authorities were moreover aware, given the nature of the Hao base, foreign aircraft were excluded from landing there. In this connection, the French Ministry of Foreign Affairs recalls that, when Major MAFART and Captain PRIEUR were transported from New Zealand to Hao, this impossibility was made known and resulted in their being forced to change planes at the Wallis airport.

The solution of having a New Zealand physician come to the Papeete airport and be transferred from that city to Hao by a French plane was also examined. But it was immediately ascertained that, given the technical possibilities and the fact that the doctor would have to return via the same arrangements, so that he could report to his Government, the result of this procedure would have been that no decision could be made for several days.

Under these conditions, the only solution, in the spirit of the Agreement of 9 July 1986 and of the conversations that led up to it, was to evacuate Major MAFART and permit the physician designated by New Zealand to ascertain his state of health as soon as he arrived in Paris. The French Government is happy to point out, in this

regard, that the New Zealand authorities accepted this solution and dispatched Dr. CROXSON to Paris for this purpose.

It noted with satisfaction the very positive appraisal that the New Zealand Government gave of the frankness, candor and full cooperation that Dr. CROXSON enjoyed while carrying out his assignment.

It observes that the conclusions of the report written by this doctor, which were conveyed to it on 16 December by the New Zealand Embassy in Paris, concur with those of the French physicians and show that there were perfect grounds for the decision to transport Major MAFART to a highly specialized facility existing only in mainland France.

The French Government shares the desire expressed by the New Zealand Government, in its note, to participate constructively in the examination of this matter, about which the Prime Minister will send a message to the Prime Minister of New Zealand under separate cover.

31. On 23 December 1987 the Prime Minister of France addressed the following letter to the Prime Minister of New Zealand:

The emergency conditions under which Major MAFART had to be returned to France to undergo medical examinations, which you asked about in your letter of 14 December, must, as you yourself indicate, be examined between us in order to analyze the main elements of the situation.

It is certainly not necessary to recall the details of the circumstances of this transfer, which, I am sure, you are perfectly familiar with. It was following the dispatch of a French military doctor, alerted by the Ministry of Defence, that the necessity became apparent on 11 December of having Major MAFART examined as soon as possible in a highly specialized environment, which could not be found on French territory except in Paris. Through our Ministries of Foreign Affairs, contacts were immediately made for the purpose of obtaining your country's consent, in accordance with the Agreement concluded on 9 July 1986 by the Exchanges of Letters following the intervention of the Secretary-General of the United Nations, which themselves resulted from secret conversations between our two Governments. Your representatives then indicated their desire to be permitted to have Major MAFART examined by a New Zealand physician. However, it was quickly ascertained that this was not possible by direct landing of a New Zealand airplane on the island of Hao, which is a military base closed to foreign aircraft. You will also recall that the transfer of Major MAFART and Captain PRIEUR from New Zealand to Hao had required a change of planes in Wallis, for the same reason.

It also became clear that the solution that your representatives immediately proposed, which consisted of flying a doctor from New Zealand to Papeete, then from Papeete to Hao, by French military plane, and returning this doctor via the same route so that he could report to his Government, would have required a delay of several days, which seemed contrary to the imperative interests of Major MAFART's health.

Under these conditions, the only remaining solution was to defer, until his arrival in Paris, Major MAFART's examination by a doctor of your choosing, which was done. In this regard, I noted the very positive appraisal that you and your staff gave to the quality of the cooperation that Dr. CROXSON enjoyed from the French doctors. The reception given to your compatriot, his access to all the necessary documents, and the in-depth examination of Major MAFART, which he was able to do, showed the spirit of openness that we bring to this matter.

Moreover, as you undoubtedly recall, the eventuality of illness, and, in the case of Captain PRIEUR, of pregnancy, were precisely the conditions that led to the stipulation, in the July 1986 Agreement, of the possibility of leaving the island. This emerges from the secret negotiations of our two Governments, conducted, on respective sides, by Mr. BEEBY and Mr. GUILLAUME, which prepared the way for the intervention of the United Nations Secretary-General, and of which we have kept a very accurate transcript. Dr. CROXSON, at your request, drew up a medical report,

the conclusions of which, not being covered by medical confidentiality, were conveyed to the Ministry of Foreign Affairs by your Embassy in Paris. This report shows that Major MAFART was in need of substantial medical examinations which could not be done in Hao and which were to last several weeks. In response to a question that you asked him, Dr. CROXSON added that Major MAFART was by no means a malingerer and that he was indeed ill.

Thus, all the circumstances of this affair confirm my feeling that we have acted with moderation and discretion and that we should now await the results of the examinations underway in order to be able to appraise the state of Major MAFART's health with better knowledge of the facts.

Such are the indisputable facts, verified by individuals that you designated. You will understand that, under these conditions, I was surprised by the public accusations that you immediately made against this officer and against the French authorities, whereas I had proposed that this operation be kept confidential and that the fact themselves showed the correctness of the decision that I made.

However, I have just learned that you feel, after a new examination of all of the elements of this affair, that there was no longer any point to the intervention of the Secretary-General of the United Nations, to which you alluded to in your letter. This way of seeing things corresponds to the attitude that I personally adopted by refusing to engage in a polemic. Indeed, I am convinced that our two countries today should endeavor to turn the page and resume a constructive relationship, in keeping with the long tradition of friendship between our two nations.

32. On 23 December 1987 the Embassy of New Zealand answered the two communications in paragraphs 30 and 31 above by the following note:

The New Zealand Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour to convey, on instruction, the following response to certain of the assertions contained in the Ministry's Note of 19 December 1987 and the letter to the Prime Minister of New Zealand from the Prime Minister of France delivered in Wellington on 23 December.

New Zealand rejects the view advanced by the French side that the transfer of Major Mafart from Hao was in accordance with the ruling of the United Nations Secretary-General and the Exchanges of Letters of 9 July 1986 between New Zealand and France.

On a point of fact, the sequence of dates set out in the Ministry's Note is inaccurate. New Zealand was advised of Mafart's condition late in the morning of 12 December (New Zealand time). About midnight on 13 December (New Zealand time)—about 39 hours later—advice was given by the French Ambassador in Wellington (and also by the Quai d'Orsay to the New Zealand Embassy) that he had already been removed from Hao.

The request for consent was presented as a humanitarian emergency. New Zealand responded promptly and sympathetically offering to send a New Zealand doctor for an on the spot examination so that, if the medical condition of Mafart justified it, consent could be given within the time frame requested by the French authorities. The quickest option involved a flight direct to Hao. It was a matter for the French authorities to judge whether their position about clearances for foreign aircraft at Hao was of greater importance to them than what was said to be a serious medical emergency. The long delay in responding and the terms of that response called in question the veracity of the so-called emergency.

It is manifestly incorrect to state that the New Zealand side, when confronted with this response from France, suggested an option that would have prevented a decision for several days. The French Ambassador in Wellington was told that the doctor could be transported immediately to Papeete by New Zealand military aircraft (or alternatively, if the French side preferred, civilian aircraft options could be explored) for onward transport to Hao by French military aircraft.

There is no basis in fact for the extraordinary statement that the New Zealand doctor would have had to return to New Zealand to make a report before a decision could be made.

New Zealand formally disputes the suggestion that the decision to evacuate Major Mafart was in accord with the spirit of the Agreement or the Secretary-General's Ruling or any preliminary discussions. It was, on its face, a clear breach of both the letter and the spirit of the Ruling and the Exchanges of Letters—a breach which called in question the credibility of France's commitment to honor undertakings in this matter. There is not and was never at any stage of the discussions between France and New Zealand, an agreement or understanding that New Zealand would automatically agree to a request for medical evacuation. The relevant clause in the Agreement means precisely what it says.

New Zealand also rejects the suggestion that its decision to accept the offer to send a New Zealand doctor to Paris to examine Major Mafart can or could be construed as acceptance by the New Zealand authorities of the evacuation of Mafart without New Zealand consent. That suggestion has no basis in fact and is wholly at variance with the terms of the Embassy's Note 1987/103 of 14 December 1987 which recorded New Zealand's serious objection to the unilateral action taken by France.

New Zealand reiterates that its proposals put forward on 12 and 13 December were made in good faith. New Zealand was not refusing consent but seeking clarification. That could have been accommodated in a number of ways and very quickly. The objective evidence now available confirms that there was in fact no emergency and no justification for the French authorities setting a deadline of the kind that they did. Furthermore, New Zealand could have been advised of the situation considerably earlier. It is also clear beyond any doubt that had there in fact been a genuine emergency, New Zealand's requests for clarification (which were entirely reasonable and appropriate) could have been met within the time frame proposed had France been willing to work positively and constructively to that end. Responsibility for the delay in obtaining New Zealand consent lies at France's door.

33. On the same day, 23 December 1987, the Prime Minister of New Zealand answered the Prime Minister of France in the following terms:

Thank you for your letter which I have received today. I appreciate the sentiments you have expressed about the need to restore and maintain the cordial relations between New Zealand and France. I must say, however, that the fact that you have not in your response addressed the substantive issues that were contained in my letter of 14 December, is a matter of grave concern to me and my Government.

If we are to turn a page as you suggest, then what we need is a satisfactory assurance that as soon as the medical investigations of Major Mafart have been completed and he has undergone any treatment which can only be given in Paris, he will be returned to Hao.

Our medical advice is that these investigations will be completed shortly. I must say to you that, in the absence of a satisfactory response by 30 December to the proposals set out in my earlier letter, we will have no choice but to conclude that France is unwilling to comply with its legal obligations. In that event we will feel compelled to invoke the arbitration provisions of the Secretary-General's Ruling and the Agreement of 9 July 1986.

Let me also say that at no stage have we indicated that there was no role for the United Nations Secretary-General in seeking to resolve this matter. To the contrary, I specifically mentioned this role in my letter and in various public statements. I have discussed the situation with him and we have kept him fully informed and will continue to do so. He has also, as you know, taken various initiatives of his own.

Finally, there are a number of points in your letter (which are also mentioned in recent discussion between our officials) which I do not accept. I have asked the New Zealand Embassy in Paris to convey our views on these matters to the Quai d'Orsay.

I have also asked our Embassy to set in motion a request for a visit to Hao by a third party in accordance with the Ruling and the Agreement of 9 July 1986.

34. On 30 December 1987 the French Ministry of Foreign Affairs sent a note to the New Zealand Embassy answering the New Zealand communications in paras. 32 and 33 above, in the following terms:

The Ministry of Foreign Affairs was surprised by the sharp tone of the referenced documents and therefore feels it is a good idea to respond so as to enable a better understanding of the French Government's point of view.

The Ministry of Foreign Affairs recalls that Major Mafart is currently still undergoing medical examinations, the necessity of which has been acknowledged by both the French doctors and Dr. Croxson. These examinations will not be completed until early January; Dr. Croxson has also indicated that he was on vacation until 4 January. So, today, no one can say what the doctors' conclusions will be.

The Ministry of Foreign Affairs is surprised that, under these conditions of fact, the New Zealand authorities could have doubted the French intentions in connection with respecting the July 1986 Agreement; it goes without saying that Major Mafart will return to Hao when the state of his health permits.

It emphasizes that, on the second and third points brought up in Mr. Lange's letter of 14 December (isolation of Major Mafart, specifically from the press and the media, plus disclosure of medical reports, as well as examinations by a New Zealand doctor), New Zealand has received from the beginning, and will continue to receive, full satisfaction.

A discussion of possible recourse to the Secretary-General of the United Nations in the event of a disagreement between the two Governments over the possibility of returning Major Mafart to Hao, given the state of his health, seems pointless, for the reasons indicated above. However, if the question did arise, the French Government would have the greatest apprehensions about appealing to the Secretary-General of the UN to resolve any dispute over the evaluation of the officer's health. Firstly, this is not the procedure stipulated in the Agreement of 9 July 1986, which in this case expressly provides for settlement by arbitration; secondly, just as the intervention of the high authority represented by the Secretary-General was necessary to solve all the problems born of the Rainbow Warrior incident, so it may seem out of proportion with the limited issue here involved, should it arise.

As for the conditions under which the decision to return Major Mafart to France was made because of the state of his health, the Ministry of Foreign Affairs rejects the New Zealand assertion that the refusal to let a New Zealand airplane land on Hao in itself gives rise to doubt as to the emergency nature of Major Mafart's evacuation. As it has already had occasion to point out, the impossibility of allowing a foreign aircraft to land on Hao is absolute and was well known to New Zealand.

The Ministry of Foreign Affairs notes that New Zealand maintains that there is no factual basis for the statement that the New Zealand doctor who would have been taken to Hao on a French means of transportation after a connection in Papeete would have had to return by the same route to New Zealand in order to report to his Government before a decision could be made. However, it points out that this information was conveyed to it from Wellington by the French Ambassador immediately following the telephone conversation which took place on Sunday 13 December at about 1.00 p.m. between the Ambassador and Mr. Beeby.

It does not share the opinion expressed in note No. 1987/107 as to the spirit of the Agreement resulting from the Exchange of Letters on 9 July 1986. Although leaving the island requires the consent of both Governments, and although this consent should, insofar as circumstances permit, be prior, it remains that the provision in question here was inserted with precisely the possibility of an illness in mind and that, in this case, approval could not be reasonably refused.

The Ministry of Foreign Affairs does not see any need to quibble, at this stage, over the meaning of New Zealand's agreement to send a doctor to Paris and, on this point, refers purely and simply to this doctor's findings, which, in its eyes, corroborate the French doctors' appraisals of the nature of the ailments that Major Mafart is suffering from.

The New Zealand Government has requested the application of the provision of the Agreement of 9 July 1986 which stipulates that "If the New Zealand Government so requests, a visit to the Hao military installation may, by common agreement between the two Governments, be made by an approved third party." Referring to the remarks made by the New Zealand Charge d'Affaires when the note of 24 December was submitted, it is the understanding of the Ministry of Foreign Affairs that the purpose of the request would be to verify the presence of Captain Prieur on Hao. In this regard, it gives the Government of New Zealand the most formal assurance. However, if the New Zealand Government intends to persist in its request, the French Government will agree to it in principle in order to avoid any erroneous interpretation. However, the Ministry of Foreign Affairs does feel that, in this case, there would be no grounds for asking the Secretary-General of the United Nations to designate a representative to make this visit. Indeed, it points out that, as is confirmed by the secret conversations that led up to it, the Exchange of Letters of 9 July 1986 provides that the visit must be made by a third party approved by common agreement between the two Governments. If a visit must take place, France proposes that it be entrusted to Dr. T. Maoate, Vice Prime Minister and Minister of Health of the Cook Islands, given the geographical proximity and the historical ties between the Cook Islands and New Zealand. Dr. Maoate could be transported by a French military airplane either from Papeete or directly from the Cook Islands. In the absence of specific clauses in the Agreement of 9 July 1986, the cost of this mission should be paid by the requesting Government.

35. On 4 January 1988 a third report from Dr. Croxson transcribed what Professor Daly, the doctor in charge of Mafart, proposed to do as follows:

1. To supervise Major Mafart closely and in particular to witness if possible a major crisis at which time he would have a surgical consultation available.

2. To this end Major Mafart must remain close to his department near the hospital. Professor Daly would wish to review him should any new crisis appear and would be seeing him regularly at least once weekly for the next three to four weeks, and in his opinion Mafart should not return to Hao until the diagnosis and plan of treatment is more certain.

3. He feels that Mafart is very tired after the many investigations and explorations and is anxious in view of the diagnosis still not being settled, and he feels that some degree of "convalescence" for about three to four weeks is necessary.

4. He feels that perhaps exploratory surgery might be necessary, but again emphasized that he is not keen on blind laparotomy in view of the danger of new adhesions. I understand that he is proposing to discharge Mafart later this week and to review him once weekly.

Professor Daly and I agreed that this was a difficult clinical problem. Professor Daly also indicated that he would contact me in the event of any major crisis appearing in the next few days, and unless something further developed I would communicate with him next Monday, 11 January.

Professor Croxson concluded:

Professor Daly's point about observing him for a longer period, particularly to try and witness a major episode when one would have a surgical opinion, is a very orthodox and appropriate clinical management.

36. On 5 January 1988 the Embassy of New Zealand conveyed to the French Ministry of Foreign Affairs the following response to the Ministry's note of 30 December 1987:

> Without addressing all of the points contained in the Ministry's note and while reserving New Zealand's legal position and, in particular, its right to commence arbitration proceedings, the explicit assurance that Major Mafart will return to Hao when his health permits is very welcome. Furthermore the assurance given with respect to Captain Prieur is also welcomed, and it is hoped that these two assurances, together with the ongoing cooperation at the medical level, will provide a basis for resolving the remaining issues between France and New Zealand.

37. On 11 January 1988 a fourth report from Dr. Croxson was produced. In this report, Dr. Croxson advised that "no clear abnormality has been demonstrated on the previous investigations", adding that "the plan is to examine him again in one week's time or earlier should crisis develop".

38. On 18 January 1988 Dr. Croxson advised that in a telephone conversation with Professor Daly the French Professor told him that "the situation had not altered clinically since last week", that "he has no final firm diagnosis" and that the final report would be available on 27 January 1988.

39. On 21 January 1988 the New Zealand Embassy, being advised that Professor Daly would be preparing a final report on 27 January, expressed the wish to have Major Mafart re-examined by their medical advisor, Dr. Croxson, assisted by a specialist, Dr. Christopher Mallinson, a gastroenterologist practicing in the United Kingdom. This request was agreed to by the French authorities and their examination took place on 25 January 1988.

40. On 28 January 1988 Professor Daly advised that:

> Major Alain MAFART was hospitalized on 14 December 1987 at the VAL-de-GRACE hospital where he underwent in-depth radiological, biological and clinical tests. Given the need for close, specialized medical observation and on the basis of the standards of fitness governing military personnel, he must be considered as unfit to serve overseas for an indefinite period.
>
> *Prospects—Medical Decision*:
>
> 1. Given the current uncertainties of the diagnosis, it does not seem warranted to propose an exploratory laparotomy right away for this abdominal ailment.
>
> 2. Depending on the subsequent clinical development, various additional tests can be considered:
>
> —barium enema
>
> —Wirsungography and pancreas function
>
> —Mesenteric arteriography
>
> These points have been discussed with Professor MALLINSON and Dr. CROXSON.
>
> 3. So, close observation is called for in order to forestall a more acute crisis, which is liable to entail a surgical procedure, or to schedule the aforementioned explorations.
>
> 4. So, Major MAFART must be kept in mainland France insofar as this observation can be done only in a modern, well-equipped hospital center.
>
> Because of these exigencies, and pursuant to the standards of fitness governing French military personnel, he is declared unfit to serve overseas for an indefinite period.

41. On 5 February 1988 the Ministry of Foreign Affairs conveyed Professor Daly's report to the New Zealand Embassy, adding that the Ministry "feels that, given the medical conclusions that it has been given, it is not possible at present for Major Mafart to return to the island of Hao. Hence, it is planned that Major Mafart will receive a military assignment in mainland France in which he will continue to be subject to the clauses resulting from the Exchange of Letters of 6 July 1986, specifically as regards contact with the press and other communication media".

42. On 12 February 1988 Dr. Croxson submitted his fifth report, stating, *inter alia*, that:

> Dr. Mallinson, consultant gastroenterologist, and myself examined Major Mafart in the Val-de-Grace hospital on Monday 25 January in the presence of and with the assistance of Professor Daly and Dr. Laverdant . . . we reviewed all the investigations, x-rays, laboratory studies which had been carried out . . .
>
> Major Mafart has remained well, since his last report on 18 January, with no major episodes of pain or abdominal distension. He has been eating a light and varied diet and living in a house within the hospital confines . . . He did not appear depressed; his pulse, blood pressure and temperature were normal . . .

The report concluded as follows:

> I believe the investigations have proceeded at a very slow pace and could well have been compressed within one to two weeks. There was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly if he had, he should have been airlifted to the nearest general surgical center, which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris.
>
> We do not believe that he needs to remain in the confines of a major hospital center for the indefinite future but that he could be returned to Hao now, continue life as normal, rest during minor attacks and obtain treatment from the military medical facilities in Hao if the attacks were of a more severe nature comparable to the satisfactory management of the two previous attacks in July and December which were carried out at Hao.
>
> In the unlikely event that a major crisis with acute irreversible obstruction did occur, and we emphasize that none have appeared in the last 22 years, surgical treatment in Tahiti would be the logical appropriate and safest management. We do not feel that mesenteric angiography nor an ERCP are essential investigations in his management; if they were they could have been carried out by now.

43. On 18 February 1988, the New Zealand Embassy addressed a note to the French Ministry of Foreign Affairs recalling the position of the New Zealand Government:

> the unilateral removal of Major Mafart from Hao without the consent of the New Zealand Government constituted a violation of France's obligations to New Zealand under the Ruling of July 1986 by the United Nations Secretary-General and the Agreement of 9 July 1986 between New Zealand and France.

The note added:

> The medical reports available to both parties fully support the New Zealand position, which is corroborated by other evidence. There was no medical situation requiring emergency evacuation and the alternative proposals suggested by New Zealand for medical examination prior to giving consent to his departure were reasonable.
>
> Despite the existence of this dispute regarding France's application of the Ruling and the Agreement, and while fully reserving its legal position at every

step, New Zealand has, because of the humanitarian characteristics of the situation, cooperated fully with the French programme of medical examination of Major Mafart.

However, the extended nature of these medical examinations has been a matter of concern to the New Zealand Government and, according to the medical reports, also to Major Mafart himself. Dr. Croxson's reports indicate that they have been unnecessarily extended . . . Dr. Croxson's advice, supported by Dr. Mallinson, is that there is no medical reason for Major Mafart's return to Hao to be any further delayed. The position of the Ministry . . . that Major Mafart is unfit for military service overseas is noted. But in New Zealand's view that is not relevant to the question of compliance with France's obligations to New Zealand under the Agreement. The issue is whether compliance should now be restored. Dr. Croxson's advice is unequivocal. Major Mafart is medically fit to return to Hao. The nature of the assignment, if any, given to him in that place is not an issue.

44. On 21 July 1988 Dr. Croxson presented a final report on Major Mafart that states:

No change in Major Mafart's condition since last examination, 25 January 1988. No major episodes of severe abdominal pain, abdominal distension and none requiring hospitalization or special investigation. My conclusions of my report of 12 February 1988 remain and indeed are strengthened by this further period of five months of observations.

45. According to the French Counter-Memorial Alain Mafart, who was evacuated in December 1987 for health reasons, was declared "repatriated for health reasons" on 11 March 1988. After a temporary assignment at the Head Office of the Nuclear Experimentation Center, he was assigned on 1 September 1988 to the War College in Paris, after passing the entrance examination, for which he had taken the written part in Hao and the oral part in Paris. On 1 October 1988, he was promoted to the rank of Lieutenant Colonel.

Mr. Bos' Visit to Hao

46. On 28 March 1988 an agreed third party, a Netherlands official, designated by the two Governments for the purpose, visited Hao. Mr. Adriaan Bos submitted on 5 April 1988 a report indicating that he had had an interview with Captain Dominique Prieur, and that her military function on Hao is that of officier conseil and officier adjoint. In the former capacity she performs certain social functions, while in the latter she deputizes for the Commander of the base in carrying out certain duties. A few months after arrival on Hao, on 22 July 1986, she was joined by her husband, who is also an officer.

Mr. Bos advised that "there are approximately 17 officers on Hao. Tours of duty on Hao are normally limited to one year". Mr. Bos added that "Dominique Prieur and her husband have access to the normal recreational facilities at the base. As regards contact with her family, Dominique Prieur said that her mother had visited her twice and her parents-in-law once".

The Case of Captain Prieur

47. The French Counter-Memorial states that on 3 May 1988, the French Ministry of Foreign Affairs received a medical report indicating

that Dominique Prieur was 6 weeks pregnant. The report stated that this pregnancy should be treated with special care for several reasons: Mrs. Prieur was almost 39 years old; her gynecological history; the fact that this would be her first child. It also indicated that the medical facilities existing on Hao were unable to provide the necessary medical examinations and the care required by Mrs. Prieur's condition.

48. On the same day, 3 May 1988, the New Zealand Ambassador in Paris was advised of the above information and answered that she would inform her Government. The New Zealand Ambassador noted that she "agrees that the medical facilities existing on Hao are clearly inappropriate, but it was her understanding that Papeete did have all the relevant necessary equipment".

49. The next day, 4 May 1988, the New Zealand Government answered the French Ministry of Foreign Affairs, stating:

> While New Zealand's consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld.
>
> The New Zealand Government would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and on-going treatment could be carried out if the facilities at Hao are not adequate.
>
> As a first step to coming to an agreement on this basis, the New Zealand authorities are making arrangements for a New Zealand military doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao.

The answer added that Dr. Brenner, a civilian consultant to the Royal New Zealand Navy, qualified in obstetrics and gynecology, was standing by to travel to Papeete on that day, 4 May.

50. The French Ministry of Foreign Affairs, on the same day, 4 May, "agreed to the dispatching of Dr. Bernard Brenner to Hao as soon as possible", adding that "this solution was suitable to us and that all the arrangements would be made for the New Zealand doctor's trip to Papeete and his transfer to Hao, definitely on the morning of 5 May".

51. On 5 May 1988, the New Zealand Ministry of Foreign Affairs informed the French Ambassador to New Zealand "that, due to the continuing UTA strike, Dr. Brenner and his interpreter are forced to delay their arrival in Papeete, which they will reach by Air New Zealand. Leaving Auckland on Friday, 6 May at 8.40 p.m., they will arrive in Papeete the same day at 3.25 a.m. (Papeete time). If extreme urgency so requires, a connection to Papeete by military plane could be envisaged".

52. On 5 May 1988 at 11.00 a.m. (French time), the New Zealand Ambassador in Paris was told that the French Government had been informed of a "new development", namely, that Dominique Prieur's father, hospitalized for treatment of a cancer, was dying. The French Government informed the Ambassador that "for obvious humanitarian reasons" Dominique Prieur had to see her father before his death. It was proposed "bearing in mind the previous conversations regarding Mrs. Prieur's pregnancy" that either Dr. Brenner, the New Zealand doctor, leave Auckland within three or four hours on a special flight

for Papeete, whence a military aircraft would take him to Hao, or that Mrs. Prieur leave Hao immediately for Paris, where she would be examined by the New Zealand doctor.

In response to questions communicated via telephone by the New Zealand Ambassador, it was then stated that the Minister of Defence was ready to agree that Dr. Brenner be transported directly from Auckland to Hao by a New Zealand aircraft.

53. According to Annex 47 of the French Counter-Memorial, the New Zealand Ambassador replied on 5 May 1988 that the New Zealand Prime Minister could not be reached but that "while waiting for the Prime Minister's decision, the solution of sending a New Zealand military aircraft to Hao was under study. It was, however, clear that the aircraft could not leave Auckland within the 3 or 4 hour time limit requested by the French Government. A departure would have to be planned instead for Friday morning (New Zealand time)". French authorities then noted that "inasmuch as the New Zealand aircraft would head directly for Hao, its departure from Auckland could be delayed until Friday morning at 7.30 a.m. (New Zealand time). This was the latest possible deadline beyond which Dominique Prieur would run the risk of arriving in Paris too late to see her father alive".

54. On 5 May 1988 at 9.30 p.m. (Paris time), the New Zealand Ambassador in France informed the French Minister of Foreign Affairs of the following:

A. It was not possible to ready a New Zealand military aircraft to leave for Hao "within the time limit set by France".

B. Mr. Lange was not willing to agree to the departure of Mrs. Prieur from Hao for the reason invoked the same morning by the French Government (the state of health of the interested party's father).

C. The response and offer that New Zealand had made regarding Mrs. Prieur's pregnancy were still valid.

D. New Zealand would not give any guarantee of confidentiality regarding the state of health of Mrs. Prieur's father.

E. New Zealand agreed to send a doctor on Friday morning to verify the state of health of Mrs. Prieur's father.

55. On 5 May 1988 at 10.30 p.m. (French time), the following response was given to the New Zealand Ambassador:

A. The French Government considers it impossible, for obvious humanitarian reasons, to keep Mrs. Prieur on Hao while her father is dying in Paris. The French officer will therefore depart immediately for Paris.

B. We agree that a New Zealand doctor may contact the doctors treating Dominique Prieur's father and, if those doctors agree to it, may examine the patient.

C. Our offer of a medical examination of Mrs. Prieur, upon her return to metropolitan France, by a doctor chosen by New Zealand, remains valid.

56. On 6 May 1988 a telegram sent by the French Minister of Foreign Affairs to the French Ambassador at Wellington confirmed that Mrs. Prieur had left on board the special flight on Thursday, 5 May at 11.30 p.m. (Paris time), and that she was expected in Paris on 6 May in the evening.

57. On 10 May 1988 the New Zealand Embassy presented the following note to the French Ministry of Foreign Affairs referring to the discussions which took place on 3, 4 and 5 May 1988 between the Cabinet of the Minister of Foreign Affairs and the Embassy concerning Captain Dominique Prieur:

> The Government of New Zealand feels obliged to place on record at this time its concern about the actions of the former French Government with respect to France's obligations to New Zealand under international law in connection with the Agreement following from the Ruling of 6 July 1986 by the Secretary-General of the United Nations and incorporated in the Exchange of Letters between France and New Zealand of 9 July 1986. New Zealand must protest these actions in the strongest possible terms.
>
> In this connection New Zealand must also recall the previous violations of those solemn undertakings when Major Mafart was removed from Hao in December 1987 without New Zealand's consent and when, contrary to the clear medical indications of adequate fitness, French authorities refused to restore compliance. New Zealand has sought to retain a cooperative relationship with France, including the activation of a medical team to visit Hao last week to examine Captain Prieur. Last week's unilateral acts by the former French Government constitute a further serious violation of legal obligations under the Agreement concluded under the auspices of the United Nations Secretary-General and give rise to a further legal dispute between France and New Zealand.
>
> Prior to the events of last week New Zealand had publicly committed itself to seeking to resolve these problems through the diplomatic channel. It remains New Zealand's very strong wish to restore a climate of mutual confidence in its relations with France, and, accordingly, New Zealand continues to be willing to seek a settlement under which France would voluntarily return Major Mafart and Captain Prieur to Hao. An agreement whereby both officers could undergo specialist medical treatment in Tahiti, if that became necessary, and subject to appropriate conditions, could be envisaged.
>
> The alternative approach is that the actions of the former French Government in this matter should be subject to independent review in accordance with the arbitration agreement between France and New Zealand. New Zealand awaits the response of the new French administration.

58. On 16 May 1988 the father of Captain Prieur died.

59. On 21 July 1988 Dr. Croxson examined both Major Mafart and Captain Prieur and advised as to the latter as follows:

> The investigations and examinations by the French medical attendants and my clinical examination would all be consistent with an approximately 18-week pregnancy which is proceeding uneventfully. Results of the amniocentesis to exclude important chromosome abnormalities are awaited. No special arrangements for later pregnancy or delivery are planned, and I formed the opinion that management would be conducted on usual clinical criteria for a 39-year-old, fit, healthy woman in her first pregnancy.

60. According to the French Counter-Memorial, Dominique Prieur was assigned to the Head Office of the Nuclear Experimentation Center in Villacoublay. She was on leave until 7 November 1988, corresponding to military furlough that she had not taken previously. She then received twenty-two weeks maternity leave, pursuant to French labor law. She gave birth to her child on 15 December 1988.

61. On 22 September 1988 the New Zealand Government presented a note to the French Ministry of Foreign Affairs and referring to its notes of 18 February and 10 May 1988 (paras. 43 and 57) stated:

Extensive efforts have been made in the intervening months to resolve this dispute through the diplomatic channel. The Government of New Zealand greatly regrets the fact that constructive proposals to this end which it advanced on 10 August 1988 met no satisfactory response from the French Government. The New Zealand Government is therefore forced to the conclusion that all reasonable efforts to resolve this dispute have been exhausted. The Embassy is therefore instructed to advise that the Government of New Zealand hereby requests, in accordance with the Ruling of the Secretary-General of the United Nations and the Agreement of 9 July 1986 between New Zealand and France, that the dispute be submitted to an arbitral tribunal.

V. DISCUSSION

The Contentions of the Parties

62. New Zealand contends that France has committed six separate breaches of the international obligations it assumed under Clauses 3 to 7 of the First Agreement of 9 July 1986, three in respect of each agent. New Zealand submits that, taken chronologically, these breaches of obligations were: first, France's failure to seek in good faith its consent to the removal of the two agents from Hao; second, the removal of the two agents without New Zealand's consent; and, third, the continued failure to return the two agents to Hao.

63. With respect to the first breach, New Zealand maintains that the mutual consent provision carried with it three subsidiary obligations to act in good faith, namely, to give full information in a timely manner about circumstances in which consent was to be sought; not to impede New Zealand's efforts to verify this information; and, finally, to give its Government a reasonable opportunity to reach an informed decision.

New Zealand alleges that when Major Mafart was hospitalized in Hao in July 1987 its Government was not informed that a medical problem had arisen, nor was it advised in December that a medical doctor had been sent from France. The information furnished had no detailed description of the medical history and no explanation of the necessity for an air journey in excess of 20 hours to Paris, as against a flight of a little more than an hour to the excellent facilities in Papeete.

New Zealand further states that its proposal for an immediate medical examination in Hao by a New Zealand doctor encountered difficulties and obstructions such as the invoked absolute impossibility for a foreign military aircraft to land at Hao. It lays stress on the fact that the alleged impossibility was not absolute, as shown by the fact that a United States military aircraft had landed there previously, and, six months later, in the case of Captain Prieur, permission for landing in Hao was granted.

New Zealand also submits that in the case of Major Mafart reasonable time was not given, in fact less than 48 hours, to reach an informed decision and in the case of Captain Prieur France failed to seek New Zealand's consent in good faith, for consent was never, in fact, sought on either the grounds of her pregnancy or on the grounds of her father's illness. It states that while it was preparing to examine the alleged need for special treatment of the pregnancy and where it might be carried out,

just three days before Presidential elections in France, the New Zealand Government was told that the terminal illness of Captain Prieur's father required her immediate removal.

64. The second set of breaches which New Zealand asserts is the removal of the two agents from Hao without New Zealand consent. New Zealand points out that France has acknowledged in these proceedings that it removed the two agents without New Zealand's consent; thus, the French Republic has admitted a *prima facie* breach and the only question is whether it can legally justify that breach.

New Zealand contends that the mutual consent provision allows the departure from Hao when and only when both Governments were agreed that circumstances justified that departure. It also considers that in making such decisions both Governments are obliged to act in good faith. The provision reads that the two agents "will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments". The words "for any reason" and the words "except with mutual consent", in New Zealand's view, cannot be dismissed as superfluous but have a function and a meaning, expressly excluding any unilateral right to remove either agent. Any removal, for any reason, it argues, required the consent of New Zealand; moreover, the word "prohibited" emphasized the strictness of the regime established and the complete unacceptability of any exceptions to it.

65. The third set of breaches, according to New Zealand, consists in France's failure to return the agents: in the case of Major Mafart, France invokes, *inter alia*, French military law to excuse the continuous breach of the obligation to return him to Hao, alleging that he is not fit for military service overseas. However, New Zealand observes that Major Mafart is fit enough to attend the War College, and points out that it is not asking that he go overseas in active service or fight a war: a certificate by a French medical doctor that in terms of French military law Major Mafart is unfit for service overseas has no bearing on the question whether he should be in Hao. Anyway, it adds, Major Mafart can be placed under any necessary medical supervision in Hao and good medical support facilities exist nearby in Tahiti.

Recalling Article 27 of the Vienna Convention on the Law of Treaties, New Zealand asserts that it is not open to France nor to any other State to invoke the provisions of its own internal law as a justification for non-performance of its treaty obligations.

As to Captain Prieur, removed from Hao because of the illness of her father, France has stated that after his death, she was placed on maternity leave pursuant to the French military code and therefore could not be sent back to Hao as long as her pregnancy continued; subsequent to the birth, France has asserted that she can not be sent back with a baby.

New Zealand finds that these reasons fail to justify the continuous breach resulting from the fact that Captain Prieur has not been sent back to Hao.

It points out that whether Captain Prieur wishes to take the child to Hao is irrelevant; there are many children on the island, which has a

civilian population of some 1,100 people. Just as the First Agreement allowed Captain Prieur's husband to live with her in Hao, it will allow her husband and child to accompany her or not, as she chooses.

New Zealand adds that there are countless examples in the South Pacific involving teachers, missionaries, administrators and others, where European families with small children have lived in small atoll communities less civilized than those on Hao.

66. For its part, the French Republic maintains that the clause prohibiting the two agents from leaving the island except with the consent of the two Governments is intended for one of the two following possibilities: either a special situation, particularly illness, or, as in the case of Captain Prieur, pregnancy, which would render their remaining on the island inconceivable, or a joint desire by the two Governments to shorten the total length of their stay. It stresses that, both in December 1987, for Major Mafart, and in May 1988, for Captain Prieur, the first possibility was involved.

France acknowledges that it did not obtain New Zealand's prior consent, but it nevertheless seems to France that, bearing in mind the reason that made the transfer to Paris necessary, and the very special circumstances under which that transfer was made, its action bore no stain of illegality under the 1986 Agreement and the rules and principles of international law.

It believes, moreover, that legitimate reasons have prevented the return of the officers in question to their island, and that in any case, the obligation to return can have no existence after 22 July 1989, the expiration date of the 1986 Agreement.

67. In the case of Major Mafart, the French Republic recalls that on 7 December 1987, the Ministry of Defence received from the commander of the base at Hao a message indicating that Major Mafart's state of health required immediate examinations and care that could not be provided on the atoll.

A principal Army physician, Dr. Maurel, was dispatched to the site and his report indicated that Major Mafart's condition necessitated "explorations in a highly specialized environment" and therefore "emergency repatriation to a hospital in mainland France". The French Republic adds that its authorities made every possible effort, during that weekend, bearing in mind the difficulties in communication between the two capitals, to obtain New Zealand's consent within the time available to the repatriation of Major Mafart for health reasons; to that end, the *note verbale* presented by the French Ambassador in Wellington on Saturday morning contained all the information that Paris had, and Dr. Maurel's message was attached.

As for the denial of access to the base of a New Zealand aircraft, the French Republic asserts that New Zealand knew about the prohibition because the transfer of officers in July 1986 was organized according to this rule; moreover, the description of the flight in question, with a crew of 12 members, seemed like a provocation. But at the same time, in order to respond to New Zealand's concerns, it was proposed that a doctor

designated by the latter should examine Major Mafart upon his arrival in Paris. In addition, there was a misunderstanding regarding the place from which the doctor sent by New Zealand to Hao should make his report: the information that French authorities had was that this doctor was to return to New Zealand to present his conclusions. This would have had the effect of delaying Major Mafart's departure by several days. Under these conditions, the French Republic adds, the French authorities made the decision for an immediate repatriation for reasons of health, notwithstanding the terms of the Agreement.

68. As for Major Mafart's stay in mainland France, he arrived in Paris on 14 December and was immediately hospitalized. He remained in the hospital until 6 January 1988, being subject to medical supervision within the hospital confines.

The French Republic stresses that the New Zealand doctor sent to verify the agent's state of health, Dr. Croxson, examined him on the day of his arrival in Paris and submitted a report in the form of responses to a series of questions, concluding that the condition of the party in question necessitated specialized examinations which could not be carried out in Hao and that the officer was not a malingerer. As for the emergency evacuation, Dr. Croxson's response reflects doubt about the degree of emergency and not about the existence of an emergency.

The French Republic also points out that Dr. Croxson was kept regularly informed about the officer's state of health, and that he examined him again on several occasions, being accompanied, on 25 January, by a British gastroenterologist, Dr. Mallinson. On 27 January, Professor Daly issued his final report on Major Mafart, in which, in accordance with the rules of fitness governing French military personnel, "Major Mafart was declared unfit to serve overseas for an indeterminate period".

Dr. Croxson's report of 16 February, written with Dr. Mallinson's assistance, reaches a contrary conclusion, asserting that Major Mafart could return to Hao. But in the face of this difference of opinion, France maintains that the military status of the two officers, with all the consequences that entails, particularly as regards the exclusive competence of the French military physicians and the conclusiveness of their opinion, is one of the essential elements of the 1986 Agreement. France states that the French authorities consequently were not in a position to return Mafart to Hao.

69. As for Captain Prieur, France explains that on 3 May 1988 the Ministry of Foreign Affairs received a report indicating that Mrs. Prieur was six weeks pregnant, that it was a risky pregnancy, and that the facilities on Hao would not permit the carrying out of the necessary examinations and care. The New Zealand response said that this was not a case in which, if the medical situation justified it, the consent of New Zealand would be unreasonably refused and proposed that a New Zealand doctor take the first available flight to Papeete and be transported from there by a French aircraft, making his report from Hao. But since the airline was on strike Dr. Brenner's voyage would be delayed 30 hours. Then, on 5 May, it was learned in Paris, the French

Republic adds, that Mrs. Prieur's father was dying, which gave the situation a dramatic urgency because it was necessary, for obvious humanitarian reasons, that Mrs. Prieur see her father again before he died. To bring about this last meeting, the French authorities proposed certain solutions, one of which was that Dr. Brenner be transported directly to Hao by a New Zealand military aircraft. But information was received from New Zealand to the effect that a New Zealand military aircraft could not take off until the morning of 6 May. The French authorities replied that, inasmuch as this aircraft would go directly to Hao, its departure from Auckland could be delayed until Thursday morning at 7.30, Wellington time. After that deadline, Dominique Prieur would risk arriving too late to see her father alive. The New Zealand authorities then indicated that it was impossible to get a New Zealand military aircraft ready within the stated time.

On 5 May, one hour after the response from the New Zealand Government was received, the French Government informed New Zealand that it considered it impossible to keep Mrs. Prieur on Hao while her father was dying in Paris and that she was departing immediately for France.

70. As regards Captain Prieur's stay in mainland France, the French Republic maintains that, having returned to France to be present for her father's last moments, she was obliged to remain there throughout her pregnancy, and after the birth of her child on 15 December 1988, obvious humanitarian considerations prevented her being returned either with or without her child.

71. In summary, it results from the foregoing that New Zealand contends that the removal of the two agents from the island of Hao without its consent, the circumstances of those removals and the continued failure of France to return them to Hao are breaches of the international obligations contained in the First Agreement.

The French Government, on its part, does not contest the fact that the provisions of the Agreement have not been literally honored, since the two officers' return to mainland France was not preceded by New Zealand's formal agreement, and they did not remain on the island of Hao for the three-year period that had been agreed. It believes nevertheless that because circumstances of extreme urgency were involved, its actions do not constitute internationally wrongful acts.

The Applicable Law

72. The first question that the Tribunal must determine is the law applicable to the conduct of the Parties.

According to Article 2 of the Supplementary Agreement of 14 February 1989:

> The decisions of the Tribunal shall be taken on the basis of the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchange of Letters of 9 July 1986, this Agreement and the applicable rules and principles of international law.

This provision refers to two sources of international law: the conventional source, represented by certain bilateral agreements concluded between the Parties, and the customary source, constituted by the "applicable rules and principles of international law".

The customary source, in turn, comprises two important branches of general international law: the Law of Treaties, codified in the 1969 Vienna Convention, and the Law of State Responsibility, in process of codification by the International Law Commission.

The Parties disagree on the question of which of these two branches should be given primacy or emphasis in the determination of the primary obligations of France.

While New Zealand emphasizes the terms of the 1986 Agreement and related aspects of the Law of Treaties, France relies much more on the Law of State Responsibility. So far as remedies are concerned both are in broad agreement that the main law applicable is the Law of State Responsibility.

73. In this respect, New Zealand contests three French legal propositions which it describes as bad law. The first one is that the Treaty of 9 July 1986 must be read subject to the customary Law of State Responsibility; thus France is trying to shift the question at issue out of the Law of Treaties, as codified in the Vienna Convention of 1969.

New Zealand contends that the question at issue must be decided in accordance with the Law of Treaties, because the treaty governs and the reference to customary international law may be made only if there were a need (1) to clarify some ambiguity in the treaty, (2) to fill an evident gap, or (3) to invalidate a treaty provision by reference to a rule of *jus cogens* in customary international law. But, it adds, there is otherwise no basis upon which a clear treaty obligation can be altered by reference to customary international law.

A second French proposition contested by New Zealand is that Article 2 of the Supplementary Agreement of 14 February 1989 refers to the rules and principles of international law and thus, France argues, requires the Tribunal to refer to the Law of International Responsibility. New Zealand contends that Article 2 makes clear that the Tribunal is to decide in accordance with the Agreements, so the Treaty of 9 July 1986 governs and, consequently, customary international law applies only to the extent it is applicable as a source supplementary to the Treaty; not to change the treaty obligation but only to resolve an ambiguity in the treaty language or to fill some gap, which does not exist since the text is crystal clear. Thus, New Zealand takes the position that the Law of Treaties is the law relevant to this case.

Finally, New Zealand contests a third French proposition by which France relies upon the general concept of circumstances excluding illegality, as derived from the work of the International Law Commission on State Responsibility, contending that those circumstances arise in this case because there were determining factors beyond France's control, such as humanitarian reasons of extreme urgency making the action necessary. New Zealand asserts that a State party to a treaty, and

seeking to excuse its own non-performance, is not entitled to set aside the specific grounds for termination or suspension of a treaty, enumerated in the 1969 Vienna Convention, and rely instead on grounds relevant to general State responsibility. New Zealand adduces that it is not a credible proposition to admit that the Vienna Convention identifies and defines a number of lawful excuses for non-performance—such as supervening impossibility of performance; a fundamental change of circumstances; the emergence of a new rule of *jus cogens*—and yet contend that there may be other excuses, such as *force majeure* or distress, derived from the customary Law of State Responsibility. Consequently, New Zealand asserts that the excuse of *force majeure*, invoked by France, does not conform to the grounds for termination or suspension recognized by the Law of Treaties in Article 61 of the Vienna Convention, which requires absolute impossibility of performing the treaty as the grounds for terminating or withdrawing from it.

74. France, for its part, points out that New Zealand's request calls into question France's international responsibility towards New Zealand and that everything in this request is characteristic of a suit for responsibility; therefore, it is entirely natural to apply the Law of Responsibility. The French Republic maintains that the Law of Treaties does not govern the breach of treaty obligations and that the rules concerning the consequences of a "breach of treaty" should be sought not in the Law of Treaties, but exclusively in the Law of Responsibility. France further states that within the Law of International Responsibility, "breach of treaty" does not enjoy any special status and that the breach of a treaty obligation falls under exactly the same legal regime as the violation of any other international obligation. In this connection, France points out that the Vienna Convention on the Law of Treaties is constantly at pains to exclude or reserve questions of responsibility, and that the sole provision concerning the consequences of the breach of a treaty is that of Article 60, entitled "Termination of a treaty or suspension of its application as a result of breach", but the provisions of this Article are not applicable in this instance. But even in this case, the French Republic adds, the State that is the victim of the breach is not deprived of its right to claim reparation under the general Law of Responsibility. France points out, furthermore, that the origin of an obligation in breach has no impact either on the international wrongfulness of an act nor on the regime of international responsibility applicable to such an act; this approach is explained in Article 17 of the draft of the International Law Commission on State Responsibility.

In particular, the French Republic adds, citing the report of the International Law Commission, the reasons which may be invoked to justify the non-execution of a treaty are a part of the general subject matter of the international responsibility of States.

The French Republic does admit, in this connection, that it is the Law of Treaties that makes it possible to determine the content and scope of the obligations assumed by France, but, even supposing that France had breached certain of these obligations, this breach would not entail any repercussion stemming from the Law of Treaties. On the

contrary, it is exclusively within the framework of the Law on International Responsibility that the effects of a possible breach by France of its treaty obligations must be determined and it is within the context of the Law of Responsibility that the reasons and justificatory facts adduced by France must be assessed. Consequently, the French Republic further states, it is up to the Tribunal to decide whether the circumstances under which France was led to take the contested decisions are of such a nature as to exonerate it of responsibility, and this assessment must be made within the context of the Law of Responsibility and not solely in the light of Article 61 of the 1969 Vienna Convention.

75. The answer to the issue discussed in the two preceding paragraphs is that, for the decision of the present case, both the customary Law of Treaties and the customary Law of State Responsibility are relevant and applicable.

The customary Law of Treaties, as codified in the Vienna Convention, proclaimed in Article 26, under the title "*Pacta sunt servanda*" that

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This fundamental provision is applicable to the determination whether there have been violations of that principle, and in particular, whether material breaches of treaty obligations have been committed.

Moreover, certain specific provisions of customary law in the Vienna Convention are relevant in this case, such as Article 60, which gives a precise definition of the concept of a material breach of a treaty, and Article 70, which deals with the legal consequences of the expiry of a treaty.

On the other hand, the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility.

The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general Law of State Responsibility, for instance by establishing a system of remedies for it.

The Permanent Court proclaimed this fundamental principle in the Chorzow Factory (Jurisdiction) case, stating:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention (P.C.I.J., Series A, Nos. 9, 21 (1927)).

And the present Court has said:

> It is clear that refusal to fulfill a treaty obligation involves international responsibility (Peace Treaties (second phase) 1950, *ICJ Reports*, 221, 228).

The conclusion to be reached on this issue is that, without prejudice to the terms of the agreement which the Parties signed and the applicability of certain important provisions of the Vienna Convention on the Law of Treaties, the existence in this case of circumstances excluding wrongfulness as well as the questions of appropriate remedies, should be answered in the context and in the light of the customary Law of State Responsibility.

Circumstances Precluding Wrongfulness

76. Under the title "Circumstances Precluding Wrongfulness" the International Law Commission proposed in Articles 29 to 35 a set of rules which include three provisions, on *force majeure* and fortuitous event (Article 31), distress (Article 32), and state of necessity (Article 33), which may be relevant to the decision on this case.

As to *force majeure*, it was invoked in the French note of 14 December 1987, where, referring to the removal of Major Mafart, the French authorities stated that "*in this case of force majeure*" (emphasis added), they "are compelled to proceed without further delay with the repatriation of the French officer for health reasons".

In the oral proceedings, counsel for France declared that France "did not invoke *force majeure* as far as the Law of Responsibility is concerned". However, the Agent for France was not so categorical in excluding *force majeure*, because he stated: "It is substantively incorrect to claim that France has invoked *force majeure* exclusively. Our written submissions indisputably show that we have referred to the whole theory of special circumstances that exclude or 'attenuate' illegality".

Consequently, the invocation of "*force majeure*" has not been totally excluded. It is therefore necessary to consider whether it is applicable to the present case.

77. Article 31 (1) of the ILC draft reads:

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

In the light of this provision, there are several reasons for excluding the applicability of the excuse of *force majeure* in this case. As pointed out in the report of the International Law Commission, Article 31 refers to "a situation facing the subject taking the action, which leads it, as it were, *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it" (Ybk.ILC, 1979, vol. II, para. 2, p. 122, emphasis in the original). *Force majeure* is "generally invoked to justify *involuntary*, or at least unintentional conduct", it refers "to an irresistible force or an unforeseen external event

against which it has no remedy and which makes it 'materially impossible' for it to act in conformity with the obligation", since "no person is required to do the impossible" (*Ibid.*, p. 123, para. 4).

The report of the International Law Commission insists on the strict meaning of Article 31, in the following terms:

> the wording of paragraph 1 emphasizes, by the use of the adjective "irresistible" qualifying the word "force", that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means . . . The event must be an act which occurs and produces its effect without the State being able to do anything which might rectify the event or might avert its consequences. The adverb "materially" preceding the word "impossible" is intended to show that, for the purposes of the article, it would not suffice for the "irresistible force" or the "unforeseen external event" to have made it *very difficult* for the State to act in conformity with the obligation . . . the Commission has sought to emphasize that the State must not have had any option in that regard (Ybk. cit., p. 133, para. 40, emphasis in the original).

In conclusion, New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*. Consequently, this excuse is of no relevance in the present case.

78. Article 32 of the Articles drafted by the International Law Commission deals with another circumstance which may preclude wrongfulness in international law, namely, that of the "distress" of the author of the conduct which constitutes the act of State whose wrongfulness is in question.

Article 32 (1) reads as follows:

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

The commentary of the International Law Commission explains that " 'distress' means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question" (Ybk. cit., 1979, p. 133, para. 1).

The report adds that in international practice distress, as a circumstance capable of precluding the wrongfulness of an otherwise wrongful act of the State, "has been invoked and recognized primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea—for example, when the captain of a State vessel in distress seeks refuge from storm in a foreign port without authorization, or when the pilot of a State aircraft lands without authorization on foreign soil to avoid an otherwise inevitable disaster" (*Ibid.*, p. 134, para. 4). Yet the Commission found that "the ratio of the actual principle suggests that it is applicable, if only by analogy, to other comparable cases" (*Ibid.*, p. 135, para. 8).

The report points out the difference between this ground for precluding wrongfulness and that of *force majeure*: "in these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand" (Ybk. cit., p. 122, para. 3). But "this choice is not a 'real choice' or 'free choice' as to the decision to be taken, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the 'possibility' of acting in conformity with the international obligation is therefore only apparent. In practice it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress" (Ybk. cit., p. 133, para. 2).

The report adds that the situation of distress "may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved, may admittedly represent an interest that is capable of severely restricting an individual's freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State" (*Ibid.*, p. 135, para. 10). Thus, this circumstance may also apply to safeguard other essential rights of human beings such as the physical integrity of a person.

The report also distinguishes with precision the ground of justification of Article 32 from the controversial doctrine of the state of necessity dealt with in Article 33. Under Article 32, on distress, what is "involved is situations of necessity" with respect to the actual person of the State organs or of persons entrusted to his care, "and not any real 'necessity' of the State".

On the other hand, Article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

This distinction between the two grounds justifies the general acceptance of Article 32 and at the same time the controversial character of the proposal in Article 33 on state of necessity.

It has been stated in this connection that there is

> no general principle allowing the defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed . . .; in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated . . . In these cases—in which adequate compensation must be paid—it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress. (*Manual of Public International Law*, ed. Soerensen, p. 543.)

The question therefore is to determine whether the circumstances of distress in a case of extreme urgency involving elementary human-

itarian considerations affecting the acting organs of the State may exclude wrongfulness in this case.

79. In accordance with the previous legal considerations, three conditions would be required to justify the conduct followed by France in respect to Major Mafart and Captain Prieur:

1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.

The Case of Major Mafart

80. The New Zealand reaction to the French initiative for the removal of Major Mafart appears to have been conducted in conformity with the above considerations.

The decision to send urgently a medical doctor to Hao in order to verify the existence of the invoked ground of serious risk to life clearly implied that if the alleged conditions were confirmed, then the requested consent would be forthcoming.

Unfortunately, it proved impossible to proceed with that verification while Major Mafart was still on the island. The rule forbidding foreign aircraft from landing in Hao prevented the prompt arrival of a New Zealand medical doctor in a military airplane and accompanied by a large crew. In these circumstances, the maintenance of the pre-existing interdiction of foreign landing cannot be considered as unfounded nor as deliberately designed to impede the New Zealand authorities from verifying the facts or frustrate their efforts to that end. Likewise, difficulties of communication and interpretation of statements made in different languages may explain the misunderstanding as to how and from where the New Zealand doctor would report his conclusions. The parties blame each other for the failure to carry out the verification in Hao, but there were many factors, not the fault of any party, nor questioning their good faith, which prevented the carrying out of that verification in the short time available. The problem arose during a weekend; communications had to be exchanged between Paris and Wellington, with half a day "time difference" between the two cities; various departments were involved, etc. Consequently, the conclusion must be reached that none of the parties is to blame for the failure in carrying out the very difficult task of verifying *in situ* Major Mafart's health during that weekend.

81. The sending of Dr. Croxson to examine Major Mafart the same day of the arrival of the latter in Paris had the same implication indicated above, namely, that if the alleged conditions of urgency jus-

tifying the evacuation were verified, consent would very likely have been given to what was until then a unilateral removal. The reservation made by New Zealand in the formal diplomatic note of 23 December 1987 rejecting the suggestion that its decision to accept the offer to send a New Zealand doctor to Paris to examine Major Mafart could be construed as acceptance of the evacuation only applied to any implication resulting from the sending of Dr. Croxson; it is obvious that the acceptance of that French offer, by itself, could not imply consent to the removal.

But, on the other hand, having accepted the offer to verify whether Major Mafart had required an urgent sanitary evacuation, subsequent consent to that measure would necessarily be implied, unless there was an immediate and formal denial by New Zealand of the existence of the medical conditions which had determined Major Mafart's urgent removal, accompanied by a formal request by New Zealand authorities for his immediate return to Hao, or at least to Papeete. And this did not occur.

On the contrary, Dr. Croxson's first report, of 14 December 1987, accepts that Major Mafart needed "detailed investigations which were not available in Hao" and his answer to the crucial question of whether there was justification for the emergency evacuation is equivocal. He apparently assumes that the only reason for the repatriation was the need for immediate surgery, which was not the case, and he introduces a distinction between emergency evacuation and planned urgent evacuation, but in both alternatives justifying the sanitary evacuation which had been accomplished.

82. It was not until 12 February 1988 when Dr. Croxson, then accompanied by Professor Mallinson, stated: "there was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly, if he had, he should have been airlifted to the nearest surgical center which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris". But this was post-facto wisdom: too late to counteract the implications of his previous reports, and the tolerance of the continuation of the treatment for almost two months.

83. This sixth report, dated 12 February 1988, on the other hand, evidences that there was by that time a clear obligation of the French authorities to return Major Mafart to Hao, by reason of the disappearance of the urgent medical emergency which had determined his evacuation. This report, together with the absence of other medical reports showing the recurrence of the symptoms which determined the evacuation, demonstrates that Major Mafart should have been returned to Hao at least on 12 February 1988, and that failure to do so constituted a breach by the French Government of its obligations under the First Agreement. This breach is not justified by the decision of the French authorities to retain Major Mafart in metropolitan France on the ground that he was "unfit to serve overseas".

84. This decision was based on a medical report by Professor Daly. Taking into account the reliance that both parties give to medical

reports concerning the state of health of Major Mafart, both in respect of his removal from Hao and his permanence in France, it becomes necessary to analyze the points of agreement and disagreement of the various medical reports filed in the proceedings and pronounce on the differences which exist between them.

The various medical reports by Dr. Croxson and Professor Daly coincide in finding that after several weeks of investigation and exploration no firm diagnosis had been reached and no clear abnormalities had been demonstrated. It is also stated in Dr. Croxson's fifth report that in January 1988 Major Mafart had been discharged from the hospital and was living in a house within the hospital confines, being subject to weekly supervision by Professor Daly. Dr. Croxson also states in that same report that during his visit with Professor Mallinson on 25 January 1988 he verified that "Mafart has remained well since his last report of 18 January, with no major episodes of pain or abdominal distension". A final report by Dr. Croxson on 21 July 1988, after a 5-month period of observation, indicates "no change in Major Mafart's clinical condition since last examination. No major episodes of severe abdominal pain, abdominal distension and none requiring hospitalization or special investigations".

There are no medical reports of French origin questioning or contradicting these assertions of fact; this final report of Dr. Croxson, communicated to the French authorities, has also been presented as an Annex to the French Counter-Memorial.

85. It is against this background that Professor Daly's report declaring Major Mafart "unfit for overseas service" must be examined. In support of his conclusion Professor Daly states that in the case of Major Mafart "close supervision is necessary" and consequently "he must remain in mainland France inasmuch as this follow up can be carried out only in a modern and well-equipped Hospital Center". Professor Daly invokes two grounds in support of his assertion that "close supervision is necessary": this must be done, according to him, with the object of 1) "intercepting an even more acute crisis, which may require surgery" or 2) "planning the above-mentioned explorations".

86. The first ground, the need for surgery, had been discarded by all medical experts as an inappropriate answer to the two crises experienced by Major Mafart, both in Hao, in July 1987 and again in December 1987. Dr. Croxson and Professor Mallinson concurred in the view that the only indication for "surgery would be an acute and irreversible obstruction", adding that "there have been no signs to suggest complete obstruction".

This assertion was not questioned or contradicted by other medical reports.

Since such an intervention may be performed in any normally equipped surgical center, there is no medical justification to retain Major Mafart in metropolitan France for the remote and unlikely event that he would suffer, for the first time in his life, an acute and irreversible obstruction.

87. The second medical reason invoked in Professor Daly's report was the need to "plan the above-mentioned explorations". This sentence refers to the fact that he indicates in his final report that "a number of additional investigations could be contemplated", adding that "these points have been discussed with Professor Mallinson and Dr. Croxson". But the latter pointed out in their report that while they agreed with a "barium-enema X-ray" (which obviously may be performed in any hospital), they had observed that "we do not feel that mesenteric angiography nor an ERCP are essential investigations in (Mafart's) management; if they were they could have been carried out by now". This observation, not contested in any other medical report, is the conclusive answer to the second ground invoked by Professor Daly.

In consequence, there was no medical justification to retain Major Mafart in metropolitan France instead of returning him to Hao in compliance with the First Agreement.

88. The other ground leading Professor Daly to declare Major Mafart "unfit to serve overseas for an undetermined period" was of a legal and not of a medical character: the need to apply the "rules of fitness governing French military personnel".

There is no reason to doubt that Professor Daly in his report and the French authorities in refusing on this ground the return of Major Mafart to Hao were applying the French norms on the subject of physical aptitude for service overseas and in general the French military regulations and statutes.

But compliance with the First Agreement was not dependent on the fact that Major Mafart should have been able to render active service in the military base at the island of Hao. Under the special obligations which the First Agreement imposed on him he was not required to render any military service at all. All that was required from him was to be re-transferred to Hao and remain there until the expiration of the term established in the First Agreement, without any contact with the press and other media. His transfer to Hao was not of a regular military character; it was not an assignment subject to the normal conditions or requirements of a French military posting. Lack of aptitude to serve actively in military service beyond the confines of metropolitan France does not imply lack of aptitude to be re-transferred to Hao and remain there for the required term. It has not been contended, nor even suggested, that the climate or the environment in Hao could affect adversely Major Mafart's health nor that the food available in the island could be the cause of the troubles to his health.

Both parties recognized that the return of Major Mafart to Hao depended mainly on his state of health. Thus, the French Ministry of Foreign Affairs in its note of 30 December 1987 to the New Zealand Embassy referring to France's respect for the 1986 Agreement had said that Major Mafart will return to Hao when his state of health allowed.

Consequently, there was no valid ground for Major Mafart continuing to remain in metropolitan France and the conclusion is unavoidable that this omission constitutes a material breach by the French Government of the First Agreement.

For the foregoing reasons the Tribunal:

— by a majority declares that the French Republic did not breach its obligations to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;

— declares that the French Republic committed a material and continuing breach of its obligation to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988.

The Case of Captain Prieur

89. As to the situation of Captain Prieur, the French authorities advised the New Zealand Government, on 3 May 1988, that she was pregnant, adding that a medical report indicated that "this pregnancy should be treated with special care . . ." The advice added that "the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition".

90. The New Zealand authorities answered this communication on 4 May 1988, stating that "while New Zealand's consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld". This communication added that the New Zealand Government "would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and ongoing treatment could be carried out if the facilities at Hao are not adequate". For this purpose "as a first step to coming to an agreement on this basis", the New Zealand authorities advised that they were "making arrangements for a New Zealand doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao by French military transport". The nominated doctor was Dr. Bernard Brenner, qualified in obstetrics and gynecology.

91. On 4 May 1988 the French authorities gave their "agreement for sending to Hao, as soon as possible, Doctor Bernard Brenner. The latter would first be taken to Papeete by airliner or by a New Zealand military aircraft, and from there he would be transported to Hao by a French military aircraft" (see para. 50).

However, industrial action by French airline pilots caused the postponement of these plans by one day, until 6 May 1988.

In the interim, on 5 May 1988, the New Zealand Ambassador in Paris was informed "by the Office of the Minister of Foreign Affairs" of a "new element", namely, that "Dominique Prieur's father, who is at the Begin Hospital for treatment of a cancer, is dying", and "his condition is considered critical by the doctors". The French authorities added that: "we believed that, for obvious reasons of a humanitarian nature, it was essential that Dominique Prieur be able to see her father before his death". They advised of several solutions that were conceivable (see para. 52).

92. It has been stated in paras. 53 to 56 above that:

The New Zealand Ambassador responded on 5 May that while awaiting the Prime Minister's decision, the solution of sending a New Zealand military aircraft was being studied;

The French authorities had indicated that the departure from Auckland could not be delayed beyond 7.30 a.m. Friday (New Zealand time), "the final deadline" after which France would be running the risk that Dominique Prieur would arrive in Paris too late to see her father alive;

The New Zealand authorities informed the French Government on 5 May 1988 at 9.30 p.m. that they were not ready to give their consent for the reason invoked but that the offer made because of Mrs. Prieur's pregnancy remained valid;

In their response on 5 May at 10.30 p.m., the French authorities stated that the French Government considered it impossible "for obvious humanitarian reasons" to keep Mrs. Prieur on Hao, and that the officer was therefore leaving immediately for Paris;

The French authorities confirmed on 6 May that Mrs. Prieur had left Hao by a special flight on Thursday at 11.30 p.m. (Paris time) and was expected in Paris at the end of the evening on that day (6 May).

93. The facts above, which are not disputed, show that New Zealand would not oppose Captain Prieur's departure, if that became necessary because of special care which might be required by her pregnancy. They also indicate that France and New Zealand agreed that Captain Prieur would be examined by Dr. Brenner, a New Zealand physician, before returning to Paris. Only because of the strike by the U.T.A. airline, the examination that was to take place in Hao on Thursday 5 May had to be postponed until Friday 6 May, since Dr. Brenner would be arriving in Papeete at 3.25 p.m. local time, via Air New Zealand. As the French Republic acknowledges in its Counter-Memorial, "It seemed that we were moving towards a satisfactory solution; New Zealand's approval of Mrs. Prieur's departure seemed probable". Reconciliation of respect for the Agreement of 9 July 1986 and the humanitarian concerns due to the particular circumstances of Mrs. Prieur's pregnancy thus seemed to have been achieved.

94. On the other hand, it appears that during the day of 5 May the French Government suddenly decided to present the New Zealand Government with the *fait accompli* of Captain Prieur's hasty return for a new reason, the health of Mrs. Prieur's father, who was seriously ill, hospitalized for cancer. Indisputably the health of Mrs. Prieur's father, who unfortunately would die on 16 May, and the concern for allowing Mrs. Prieur to visit her dying father constitute humanitarian reasons worthy of consideration by both Governments under the 1986 Agreement. But the events of 5 May (French date) prove that the French Republic did not make efforts in good faith to obtain New Zealand's consent. First of all, it must be remembered that France and New Zealand agreed that Captain Prieur would be examined in Hao on 6 May, which would allow her to return to France immediately. For France, in this case, it was only a question of gaining 24 or 36 hours. Of course, the

health of Mrs Prieur's father, who had been hospitalized for several months, could serve as grounds for such acute and sudden urgency; but, in this case, New Zealand would have had to be informed very precisely and completely, and not be presented with a decision that had already been made.

However, when the French Republic notified the Ambassador of New Zealand on 5 May at 11.00 a.m. (French time), the latter was merely told that Mrs. Dominique Prieur's father, hospitalized for cancer treatment, was dying. Of course, it was explained that the New Zealand Government could verify "the validity of this information" using a physician of its choice, but the telegram the French Minister of Foreign Affairs sent to the Embassy of France in Wellington on 5 May 1988 clearly stated that the decision to repatriate was final. And this singular announcement was addressed to New Zealand: "After all, New Zealand should understand that it would be incomprehensible for both French and New Zealand opinion for the New Zealand Government to stand in the way of allowing Mrs. Prieur to see her father on his death bed . . ." Thus, New Zealand was really not asked for its approval, as compliance with France's obligations required, even under extremely urgent circumstances; it was indeed demanded so firmly that it was bound to provoke a strong reaction from New Zealand.

95. The events that followed confirm that the French Government's decision had already been made and that it produced a foreseeable reaction. Indeed, at 9.30 p.m. (French time) on 5 May, the Ambassador of New Zealand in Paris announced that the New Zealand Government was not prepared to approve Mrs. Prieur's departure from Hao, for the reason given that very morning by the French Government. But the New Zealand Government explained that the "response and New Zealand's offer concerning the consequences of Mrs. Prieur's pregnancy were still valid". France, therefore, could have expected the procedure agreed upon by reason of Mrs. Prieur's pregnancy to be respected. Quite on the contrary, the French Government informed the New Zealand Ambassador at 10.30 p.m. that "the French officer is thus leaving immediately for Paris", and Mrs. Prieur actually left Hao on board a special flight at 11.30 p.m. (Paris time). It would be very unlikely that the special flight leaving Hao at 11.30 p.m. had not been planned and organized before 10.30 p.m., when the French decision was intimated, and even before 9.30 p.m., the time of New Zealand's response. Indeed, the totality of facts prove that, as of the morning of Thursday, 5 May, France had decided that Captain Prieur would leave Hao during the day, with or without New Zealand's approval.

96. Pondering the reasons for the haste of France, New Zealand contended that Captain Prieur's "removal took place against the backdrop of French presidential elections in which the Prime Minister was a candidate" and New Zealand pointed out that Captain Prieur's departure and arrival in Paris had been widely publicized in France. During the oral proceedings, New Zealand produced the text of an interview given on 27 September 1989 by the Prime Minister at the relevant time, explaining the following on the subject of the "Turenge couple": "I take

responsibility for the decision that was made, and could not imagine how these two officers could be abandoned after having obeyed the highest authorities of the State. Because it was the last days of my Government, I decided to bring Mrs. Prieur, who was pregnant, back from the Pacific atoll where she was stationed. Had I failed to do so, she would surely still be there today". New Zealand alleges that the French Government acted in this way for reasons quite different from the motive or pretext invoked. The Tribunal need not search for the French Government's motives, nor examine the hypotheses alleged by New Zealand. It only observes that, during the day of 5 May 1988, France did not seek New Zealand's approval in good faith for Captain Prieur's sudden departure; and accordingly, that the return of Captain Prieur, who left Hao on Thursday, 5 May at 11.30 p.m. (French time) and arrived in Paris on Friday, 6 May, thus constituted a violation of the obligations under the 1986 Agreement.

This violation seems even more regrettable because, as of 12 February 1988, France had been in a state of continuing violation of its obligations concerning Major Mafart, as stated above, which normally should have resulted in special care concerning compliance with the Agreement in Captain Prieur's case.

97. Moreover, France continued to fall short of its obligations by keeping Captain Prieur in Paris after the unfortunate death of her father on 16 May 1988. No medical report supports or demonstrates the original claim by French authorities to the effect that Captain Prieur's pregnancy required "particular care" and demonstrating that "the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition". There is no evidence either which demonstrates that the facilities in Papeete, originally suggested by the New Zealand Ambassador in Paris, were also inadequate: on the contrary, positive evidence has been presented by New Zealand as to their adequacy and sophistication.

The only medical report in the files concerning Captain Prieur's health is one from Dr. Croxson, dated 21 July 1988, which appears to discard the necessity of "particular care" for a pregnancy which is "proceeding uneventfully". This medical report adds that "no special arrangements for later pregnancy or delivery are planned, and I formed the opinion that management would be conducted on usual clinical criteria for a 39-year-old, fit, healthy woman in her first pregnancy".

So, the record provides no justification for the failure to return Captain Prieur to Hao some time after the death of her father.

98. The fact that "pregnancy in itself normally constitutes a contra-indication for overseas appointment" is not a valid explanation, because the return to Hao was not an assignment to service, or "an assignment" or military posting, for the reasons already indicated in the case of Major Mafart.

Likewise, the fact that Captain Prieur benefited, under French regulations, from "military leave which she had not taken previously", as well as "the maternity and nursing leaves established by French law" may be measures provided by French military laws or regulations.

But in this case, as in that of Major Mafart, French military laws or regulations do not constitute the limit of the obligations of France or of the consequential rights deriving for New Zealand from those obligations. The French rules "governing military discipline" are referred to in the fourth paragraph of the First Agreement not as the limit of New Zealand rights, but as the means of enforcing the stipulated conditions and ensuring that they "will be strictly complied with". Moreover, French military laws or regulations can never be invoked to justify the breach of a treaty. As the French Counter-Memorial properly stated: "the principle according to which the existence of a domestic regulation can never be an excuse for not complying with an international obligation is well established, and France subscribes to it completely".

99. In summary, the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart without obtaining New Zealand's consent, but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations and a breach of a material character.

100. According to Articles 60 (3) (*b*) of the Vienna Convention on the Law of Treaties, a material breach of a treaty consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

The main object or purpose of the obligations assumed by France in Clauses 3 to 7 of the First Agreement was to ensure that the two agents, Major Mafart and Captain Prieur, were transferred to the island of Hao and remained there for a period of not less than three years, being subject to the special regime stipulated in the Exchange of Letters.

To achieve this object or purpose, the third and fourth paragraphs of the First Agreement provide that New Zealand will transfer the two agents to the French military authorities and these authorities will immediately transfer them to a French military facility in Hao. The prohibition "from leaving the island for any reason without the mutual consent of the two Governments" was the means to guarantee the fulfilment of the fundamental obligation assumed by France: to keep the agents in Hao and submit them to the special regime of isolation and restriction of contacts described in the fourth paragraph of the Exchange of Letters.

The facts show that the essential object or purpose of the First Agreement was not fulfilled, since the two agents left the island before the expiry of the three-year period.

This leads the Tribunal to conclude that there have been material breaches by France of its international obligations.

101. In its codification of the Law of State Responsibility, the International Law Commission has made another classification of the different types of breaches, taking into account the time factor as an

ingredient of the obligation. It is based on the determination of what is described as *tempus commissi delictu*, that is to say, the duration or continuation in time of the breach. Thus the Commission distinguishes the breach which does not extend in time, or instantaneous breach, defined in Article 24 of the draft, from the breach having a continuing character or extending in time. In the latter case, according to paragraph 1 of Article 25, "the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation".

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach.

And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.

For the foregoing reasons the Tribunal:

— declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;

— declares that as a consequence the French Republic committed a material breach of its obligations by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;

— declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao.

Duration of the Obligations

102. The Parties in this case are in complete disagreement with respect to the duration of the obligations assumed by France in paragraphs 3 to 7 of the First Agreement.

New Zealand contends that the obligation in the Exchange of Letters envisaged that in the normal course of events both agents would remain on Hao for a continuous period of three years. It points out that the First Agreement does not set an expiry date for the three-year term but rather describes the term as being for "a period of not less than three years". According to the New Zealand Government, this is clearly not a fixed period ending on a predetermined date. "The three-year period, in its context, clearly means the period of time to be spent by Major Mafart and Captain Prieur on Hao rather than a continuous or fixed time span. In the event of an interruption to the three-year period, the obligation assumed by France to ensure that either or both agents serve the balance of the three years would remain". Consequently, concludes the Government of New Zealand, "France is under an ongoing obligation to return Major Mafart and Captain Prieur to Hao to serve out the balance of their three-year confinement".

103. For its part, the French Government answers: "it is true that the 1986 Agreement does not fix the exact date of expiry of the specific regime that it sets up for the two agents. But neither does it fix the exact date that this regime will take effect". The reason, adds the French Government, is that in paragraph 7 of the First Agreement, it is provided that the undertakings relating to "the transfer of Major Mafart and Captain Prieur will be implemented not later than 25 July 1986". Consequently, adduces the French Government, "it is quite obviously the effective date of transfer to Hao which should constitute the *dies a quo* and thus determine the *dies ad quem* . . . The obligation assumed by France to post the two officers to Hao and to subject them there to a regime that restricts some of their freedoms was planned by the parties to last for three years beginning on the day the transfer to Hao became effective; this transfer having taken place on 22 July 1986, the three-year period allotted for the obligatory stay on Hao and its attendant obligations" expired three years after, that is to say, on 22 July 1989.

The French Government adds in the Reply that "a period is quite precisely a continuous and fixed interval of time" and "even if no exact expiry date was expressly stated in advance, this date necessarily follows from the determination of both a time period and the *dies a quo*". The French Government remarks, moreover, that there is no rule of international law extending the length of an obligation by reason of its breach.

104. It results from paragraph 7 of the Agreement of 9 July 1986 that both parties agreed that "the undertakings relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur" should be implemented as soon as possible. For that purpose, they fixed a completion date of not later than 25 July 1986. In respect of the two agents, the date of their delivery to French military authorities was 22 July 1986, thus bringing to an end their prison term in New Zealand. In order to avoid any gap or interval, paragraph 3 of the Agreement required that the two agents should be transferred to a French military base "immediately thereafter" their delivery. There is no question therefore that the special regimen stipulated and the undertakings assumed by the French Government began to operate uninterruptedly on 22 July 1986. It follows that such a special regime, intended to last for a minimum period of three years, expired on 22 July 1989. It would be contrary to the principles concerning treaty interpretation to reach a more extensive construction of the provisions which thus established a limited duration to the special undertakings assumed by France.

105. The characterization of the breach as one extending or continuing in time, in accordance with Article 25 of the draft on State Responsibility (see para. 101), confirms the previous conclusion concerning the duration of the relevant obligations by France under the First Agreement.

According to Article 25, "the time of commission of the breach" extends over the entire period during which the unlawful act continues to take place. France committed a continuous breach of its obligations,

without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.

If the breach was a continuous one, as established in paragraph 101 above, that means that the violated obligation also had to be running continuously and without interruption. The "time of commission of the breach" constituted an uninterrupted period, which was not and could not be intermittent, divided into fractions or subject to intervals. Since it had begun on 22 July 1986, it had to end on 22 July 1989, at the expiry of the three years stipulated.

Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is *now* in breach of its international obligations.

106. This does not mean that the French Government is exempt from responsibility on account of the previous breaches of its obligations, committed while these obligations were in force.

Article 70 (1) of the Vienna Convention on the Law of Treaties provides that:

> the termination of a treaty under its provisions . . .
>
> (*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its determination.

Referring to claims based on the previous infringement of a treaty which had since expired, Lord McNair stated:

> such claims acquire an existence independent of the treaty whose breach gave rise to them (*ICJ Reports*, 1952, p. 63).

In this case it is undisputed that the breaches of obligation incurred by the French Government discussed in paragraphs 88 and 101 of the Award—the failure to return Major Mafart and the removal of and failure to return Captain Prieur—were committed at a time when the obligations assumed in the First Agreement were still in force.

Consequently, the claims advanced by New Zealand have an existence independent of the expiration of the First Agreement and entitle New Zealand to obtain adequate relief for these breaches.

For the foregoing reasons the Tribunal:

— by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989.

Existence of Damage

107. Before examining the question of adequate relief for the aggrieved State, it is necessary to deal with a fundamental objection which has been raised by the French Government. The French Government opposes the New Zealand claim for relief on the ground that such a claim "completely ignores a central element, the damage", since it does not indicate that "the slightest damage has been suffered, even moral damage".

And, the French Republic adds, in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation.

108. New Zealand gives a two-fold answer to the French objection: first, it contends that it has been confirmed by the International Law Commission draft on State Responsibility that damage is not a precondition of liability or responsibility and second, that in any event, New Zealand has suffered in this case legal and moral damage. New Zealand asserts that it is not claiming material damage in the sense of physical or direct injury to persons or property resulting in an identifiable economic loss, but it is claiming legal damage by reason of having been victim of a violation of its treaty rights, even if there is no question of a material or pecuniary loss. Moreover, New Zealand claims moral damage since in this case there is not a purely technical breach of a treaty, but a breach causing deep offence to the honour, dignity and prestige of the State. New Zealand points out that the affront it suffered by the premature release of the two agents in breach of the treaty revived all the feelings of outrage which had resulted from the *Rainbow Warrior* incident.

109. In the oral proceedings, France made it clear that it had never said, as New Zealand had once maintained, that only material or economic damage is taken into consideration by international law. It added that there exist other damages, including moral and even legal damage. In light of this statement, New Zealand remarked in the hearings that France recognized in principle that there can be legal or moral damage, and that material loss is not the only form of damage in this case. Consequently, the doctrinal controversy between the parties over whether damage is or is not a precondition to responsibility became moot, so long as there was legal or moral damage in this case. Accordingly, both parties agree that

> in inter-State relations, the concept of damage does not possess an exclusive material or patrimonial character. Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State (cf. Soerensen, *Manual* cit., p. 534).

110. In the present case the Tribunal must find that the infringement of the special regime designed by the Secretary-General to reconcile the conflicting views of the Parties has provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage. This damage is of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well.

The Appropriate Remedies

On the Request for an "Order" to the French Republic to Return its Agents to Hao

111. It follows from the foregoing findings that New Zealand is entitled to appropriate remedies. It claims certain declarations, to the effect that France has breached the First Agreement.

But New Zealand seeks as well an order for the return of the agents. It asserts in its Memorial, under the title "*Restitutio in integrum*" that "in the circumstances currently before the Tribunal, such a declaration is not, in itself, a true remedy. And the same is true for any order, or declaration of 'cessation' of the breach. For what is required to restore the position of full compliance with the First Agreement is *positive* action by France, i.e., positive steps to return Major Mafart and Captain Prieur to Hao and to keep them for the minimum of three years required by the First Agreement".

New Zealand therefore claims what it calls *restitutio*, in the form of an order for specific performance. In its formal request in its Memorial it seeks an order "that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three-year periods in accordance with the conditions of the First Agreement". It does not at that stage use the label or title of *restitutio* or specific performance.

New Zealand points out that any other remedy would be inappropriate in this case. While France suggests that the appropriate remedy for non-material damage is satisfaction in the form of a declaration, New Zealand states that a mere declaration that France was in breach would be simply a statement of the obvious, and would not be satisfactory at all for New Zealand. A declaration of the respective rights and duties of the parties, contends New Zealand, would be an appropriate remedy in those cases where it is clear that once the judicial declaration is made, the Parties will conform their conduct to it, but it is not an appropriate remedy in this case because it is clear that France will not return the two agents to Hao unless specifically ordered to do so.

As to cessation, New Zealand contends that an order to that effect will suffice in those cases where the breach consists not of active conduct which is unlawful but of failing to act in a lawful manner; if one wants a party to desist from certain action cessation would be appropriate, but not if one wants a party to act positively.

Finally, as to reparation in the form of an indemnity, New Zealand contends that, at least in cases of treaty breach, what a claimant State seeks is not pecuniary compensation but actual, specific compliance or performance of the treaty, adding that if the party in breach were not expected to comply with the treaty, but need only pay monetary compensation for the breach, States would in effect be able to buy the privilege of breaching a treaty and the norm *pacta sunt servanda* would cease to have any real meaning. It is for this reason, concludes New Zealand, that where responsibility arises from a fundamental breach of treaty, the remedy of restitution, in the sense of an order for specific performance, is the most appropriate remedy.

112. For its part, the French Republic maintains that adequate reparation for moral or legal damage can only take the form of satisfaction, generally considered as the remedy *par excellence* in cases of non-material damage. Invoking the decisions of the International Court of Justice, France maintains that whenever the damage suffered amounts

to no more than a breach of the law, a declaration by the judge of this breach constitutes appropriate satisfaction.

France points out, moreover, that, rather than *restitutio*, what New Zealand is demanding is the cessation of the denounced behavior, i.e., "a remedy aimed at stopping the illegal behavior and consisting of a demand for execution of the obligation which has still not been carried out", according to the definition of the Special Rapporteur for the International Law Commission on State Responsibility, Professor Arangio-Ruiz.

But, France adds, only illegal behavior that continues up to the day when the problem is posed can be subject to cessation. For cessation to take place, there must be illegal behavior of a continuous nature which persists up to the day when the remedy is applied. Consequently, France adds, this form of reparation presupposes that France's obligation to maintain the agents on Hao is in effect on the day the Tribunal rules. A State cannot be condemned to carry out an obligation by which it is no longer bound: if the obligation is no longer in effect on the day the judge rules, this judge can state that, in the past, when the obligation was in effect, an illegal act was committed. But the judge cannot give a ruling of *restitutio in integrum* or of *specific performance* of the obligation because once the obligation is no longer in effect, the judge does not have the power to revive it.

The French Republic concludes that it would be impossible to force France to put a stop to a situation that has already ceased to exist; the order for execution in kind cannot be granted since there is no longer anything that can be executed in the future.

113. Recent studies on State responsibility undertaken by the Special Rapporteurs of the International Law Commission have led to an analysis in depth of the distinction between an order for the cessation of the unlawful act and *restitutio in integrum*. Professor Riphagen observed that in numerous cases "stopping the breach was involved, rather than reparation or *restitutio in integrum stricto sensu*" (Ybk. I.L.C. 1981, vol. II, Part I, doc. A/CN.4/342, and Add.1-4, para. 76).

The present Special Rapporteur, Professor Arangio-Ruiz, has proposed a distinction between the two remedies (ILC Report to the General Assembly for 1988, para. 538).

In the field of doctrine, Professor Dominicé has rightly observed that "the obligation to bring an illegal situation to an end is not reparation, but a return to the initial obligation", adding that "if one speaks, regarding this type of circumstance, of an obligation to give (in the general sense) *restitutio in integrum*, it does not actually mean reparation. What is required is a return, to the situation demanded by law, the cessation of illegal behavior. The victim State is not claiming a new right, created by the illegal act. It is demanding respect for its rights, as they were before the illegal act, and as they remain" (Observations on the rights of a State that is the victim of an internationally wrongful act. Droit international 2, Institut des Hautes Etudes Internationales, Paris, 1982, p. 1, 27).

The International Law Commission has accepted the insertion of an article separate from the provisions on reparation and dealing with the subject of cessation, thus endorsing the view of the Special Rapporteur Arangio-Ruiz that cessation has inherent properties of its own which distinguish it from reparation (ILC Report to the General Assembly for 1989, para. 259).

Special Rapporteur Arangio-Ruiz has also pointed out that the provision on cessation comprises all unlawful acts extending in time, regardless of whether the conduct of a State is an action or an omission (ILC Report to the General Assembly for 1988, para. 537).

This is right, since there may be cessation consisting in abstaining from certain actions—such as supporting the "contras"—or consisting in positive conduct, such as releasing the U.S. hostages in Teheran.

There is no room, therefore, for the distinction made by New Zealand on this point (see para. 111).

Undoubtedly the order requested by the New Zealand Government for the return of the two agents would really be an order for the cessation of the wrongful omission rather than a *restitutio in integrum*. This characterization of the New Zealand request is relevant to the Tribunal's decision, since in those cases where material restitution of an object is possible, the expiry of a treaty obligation may not be, by itself, an obstacle for ordering restitution.

114. The question which arises is whether an order for the cessation or discontinuance of the wrongful omission may be issued in the present circumstances.

The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.

Obviously, a breach ceases to have a continuing character as soon as the violated rule ceases to be in force.

The recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued. (*The United States Diplomatic and Consular Staff in Teheran Case, I.C.J. Reports, 1979*, p. 21, para. 38 to 41, and 1980, para. 95, No. 1; *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua, I.C.J. Reports, 1984*, p. 187, and 1986, para. 292, p. 149.)

If, on the contrary, the violated primary obligation is no longer in force, naturally an order for the cessation or discontinuance of the wrongful conduct would serve no useful purpose and cannot be issued.

It would be not only unjustified, but above all illogical to issue the order requested by New Zealand, which is really an order for the cessation or discontinuance of a certain French conduct, rather than a *restitutio*. The reason is that this conduct, namely to keep the two agents in Paris, is no longer unlawful, since the international obligation expired on 22 July 1989. Today, France is no longer obliged to return the two agents to Hao and submit them to the special regime.

For the foregoing reasons the Tribunal:

— declares that it cannot accept the request of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao.

115. On the other hand, the French contention that satisfaction is the only appropriate remedy for non-material damage is also not justified in the circumstances of the present case.

The granting of a form of reparation other than satisfaction has been recognized and admitted in the relations between the parties by the Ruling of the Secretary-General of 9 July 1986, which has been accepted and implemented by both Parties to this case.

In the Memorandum presented to the Secretary-General, the New Zealand Government requested compensation for non-material damage, stating that it was "entitled to compensation for the violation of sovereignty and the affront and insult that that involved".

The French Government opposed this claim, contending that the compensation "could concern only the material damage suffered by New Zealand, the moral damage being compensated by the offer of apologies".

But the Secretary-General did not make any distinction, ruling instead that the French Government "should pay the sum of US dollars 7 million to the Government of New Zealand as *compensation for all the damage it has suffered*" (*Ibid.*, p. 32, emphasis added).

In the Rejoinder in this case, the French Government has admitted that "the Secretary-General granted New Zealand double reparation for moral wrong, i.e., both satisfaction, in the form of an official apology from France, and reparations in the form of damages and interest in the amount of 7 million dollars".

In compliance with the Ruling, both parties agreed in the second paragraph of the First Agreement that "the French Government will pay the sum of US 7 million to the Government of New Zealand as *compensation for all the damage which it has suffered*" (emphasis added).

It clearly results from these terms, as well as from the amount allowed, that the compensation constituted a reparation not just for material damage—such as the cost of the police investigation—but for non-material damage as well, regardless of material injury and independent therefrom. Both parties thus accepted the legitimacy of monetary compensation for non-material damages.

On Monetary Compensation

116. The Tribunal has found that France has committed serious breaches of its obligations to New Zealand. But it has also concluded that no order can be made to give effect to these obligations requiring the agents to return to the island of Hao, because these obligations have already expired. The Tribunal has accordingly considered whether it should add to the declarations it will be making an order for the payment by France of damages.

117. The Tribunal considers that it has power to make an award of monetary compensation for breach of the 1986 Agreement under its jurisdiction to decide "any dispute concerning the interpretation or the application" of the provisions of that Agreement (*Chorzow Factory Case (Jurisdiction)* PCIJ Pubs. Ser A. No. 9, p. 21).

118. The Tribunal next considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is no material damage. As already indicated, the breaches are serious ones, involving major departures from solemn treaty obligations entered into in accordance with a binding ruling of the United Nations Secretary-General. It is true that such orders are unusual but one explanation of that is that these requests are relatively rare, for instance by France in the *Carthage* and *Manouba* cases (1913) (11 UNRIAA 449, 463), and by New Zealand in the 1986 process before the Secretary-General, accepted by France in the First Agreement. Moreover, such orders have been made, for instance in the last case.

119. New Zealand has not however requested the award of monetary compensation—even as a last resort should the Tribunal not make the declarations and orders for the return of the agents. The Tribunal can understand that position in terms of an assessment made by a State of its dignity and its sovereign rights. The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so. Further, the Tribunal itself has not had the advantage of the argument of the two Parties on the issues mentioned in paragraphs 117 and 118, or on other relevant matters, such as the amount of damages.

120. For these reasons, and because of the issue mentioned in paragraphs 124 to 126 following, the Tribunal has decided not to make an order for monetary compensation.

On Declarations of Unlawfulness as Satisfaction

121. The Tribunal considers in turn satisfaction by way of declarations of breach. Furthermore, in light of the foregoing considerations, it will make a recommendation to the two Governments.

122. There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obliga-

tion. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities. The whole matter is valuably and extensively discussed by Professor Arangio-Ruiz in his second report (1989) for the International Law Commission on State Responsibility (A/CN.4/425, paras. 7-19, and Ch. 3, paras. 106-145; see also Ch. 4, paras. 146-161, "Guarantees of Non-Repetition in the Wrongful Act"). He demonstrates wide support in the writing as well as in judicial and State practice of satisfaction as "the special remedy for injury to the State's dignity, honour and prestige" (para. 106).

Satisfaction in this sense can take and has taken various forms. Arangio-Ruiz mentions regrets, punishment of the responsible individuals, safeguards against repetition, the payment of symbolic or nominal damages or of compensation on a broader basis, and a decision of an international tribunal declaring the unlawfulness of the State's conduct (para. 107; see also his draft article 10, A/CN.4/425/Add.1, p. 25).

123. It is to the last of these forms of satisfaction for an international wrong that the Tribunal now turns. The Parties in the present case are agreed that in principle such a declaration of breach could be made—although France denied that it was in breach of its obligations and New Zealand sought as well a declaration and order of return. There is no doubt both that this power exists and that it is seen as a significant sanction. In two related cases brought by France against Italy for unlawful interference with French ships, the Permanent Court of Arbitration, having made an order for the payment of compensation for material loss, stated that:

> in the case in which a Power has failed to meet its obligations . . . to another Power, the statement of that fact, especially in an arbitral award, constitutes in itself a serious sanction (*Carthage* and *Manouba* cases (1913) 11 UNRIAA 449, 463).

Most notable is the judgment of the International Court of Justice in the *Corfu Channel (Merits) Case* (1949 ICJ Reports 4). The Court, having found that the British Navy had acted unlawfully, in the operative part of its decision:

> gives judgment that . . . the United Kingdom Government violated the sovereignty of the People's Republic of Albania, and that this declaration of the Court constitutes in itself appropriate satisfaction.

The Tribunal accordingly decides to make four declarations of material breach of its obligations by France and further decides in compliance with Article 8 of the Agreement of 14 February 1989 to make public the text of its Award.

For the foregoing reasons the Tribunal:

— declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand.

Recommendation

124. New Zealand and France have had close and continuing relations since the early days of European exploration of the South Pacific. The relationship has grown more intense and friendly since the beginning of constitutional government in New Zealand exactly 150 years ago. It includes the friendship of many of the citizens of the two countries forged in peace and war, particularly in the two world wars; and, notwithstanding difficulties of great distance, it extends to the full range of cultural, social, economic and political matters.

125. From the time of the acknowledgement by the French Republic of its responsibility for the unlawful attack on the *Rainbow Warrior*, senior members of the Governments of both countries have stressed their wish to re-establish and strengthen those good relations. A critical element in that process is a fair and final settlement of the issues arising from that incident and the later events with which this Award is concerned. So the 1986 Agreements, giving effect to the Secretary-General's Ruling, stress the wish of the two Governments to maintain the close and friendly relations traditionally existing between them. In the hearing before the Tribunal, the Agents of the two Governments emphasized the warming of the relationship, referring for instance to a relevant statement made by Mr. Rocard, the French Prime Minister, during his visit in August 1989 to the South Pacific. Moreover, Mr. Lange, now Attorney-General of New Zealand and from July 1984 to August 1989 Prime Minister, spoke before the Tribunal of the dynamic of reconciliation now operating between the two countries.

126. That important relationship, the nature of the decisions made by the Tribunal, and the earlier discussion of monetary compensation lead the Tribunal to make a recommendation. The recommendation, addressed to the two Governments, is intended to assist them in putting an end to the present unhappy affair.

127. Consequently, the Tribunal recommends to the Government of France and the Government of New Zealand that they set up a fund to promote close and friendly relations between the citizens of the two countries and recommends that the Government of France make an initial contribution equivalent to US Dollars 2 million to that fund.

128. The power of an arbitral tribunal to address recommendations to the parties to a dispute, in addition to the formal finding and obligatory decisions contained in the award, has been recognized in previous arbitral decisions. During the hearings, the New Zealand Attorney-General proposed that the Tribunal make some recommendations. The Agent for France has not challenged in any way the power of the Tribunal to make such recommendations in aid of the resolution of the dispute.

For the foregoing reasons the Tribunal:

— in light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries,

and that the Government of the French Republic make an initial contribution equivalent to US Dollars 2 million to that fund.

VI. DECISION

For these reasons,

THE ARBITRAL TRIBUNAL

1) by a majority declares that the French Republic did not breach its obligation to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;

2) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988;

3) declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;

4) declares that as a consequence the French Republic committed a material breach of its obligations to New Zealand by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;

5) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao;

6) by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989;

7) as a consequence declares that it cannot accept the requests of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao;

8) declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand;

9) in the light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to $US 2 million to that fund.

DONE in English and in French in New York, on the 30 April, 1990.

Eduardo JIMÉNEZ DE ARÉCHAGA
President

Michael F. HOELLERING
Registrar

Arbitrator Sir Kenneth Keith appends a separate opinion to the Decision of the Arbitral Tribunal.

Separate opinion of Sir Kenneth Keith

1. As appears from paras. 2 to 5 and 7 to 9 of the Decision of the Tribunal, I agree with major parts of the Award. In particular I agree

— that France committed several serious breaches of the agreement it had entered into in 1986 in accordance with the binding ruling of the United Nations Secretary-General,

— that the Tribunal should declare its condemnation of those breaches in its Award which it also decides to make public, and

— that the parties should be recommended to establish a Fund, France making the first contribution equivalent to $US 2 million, to promote close and friendly relations between the citizens of the 2 countries.

2. To my regret and with great respect to my colleagues, I do however disagree with them on two matters—

— the lawfulness of the removal of Major Mafart from the island of Hao (paras. 80-88 of the Award), and

— the duration of the period the two agents were to stay on the island (paras. 102-106).

I have accordingly prepared this separate opinion giving my reasons for that disagreement.

The removal of Major Mafart

3. The Tribunal holds that France did not act in breach of its obligations in removing Major Mafart from Hao on 14 December 1987. Its reason in essence is that a serious risk to life justified the removal of Major Mafart although New Zealand had not consented. The argument is not based on the obligations established by the agreement itself. New Zealand has not breached its obligations under the agreement to consider in good faith the French request for consent. Indeed in para. 80 the majority say that neither government is to blame for the failure in respect of the verification of Major Mafart's health on Hao in the weekend in question. Rather the argument is founded on the law of state responsibility and in particular on distress as a reason precluding the apparent unlawfulness of the departure of Major Mafart without New Zealand's consent.

4. In the words of the test stated by the International Law Commission, the question is whether the relevant French authorities "had no other means, in a situation of extreme distress, of saving [Major Mafart's] life". The commentary to the draft article suggests that the test, while still very stringent, may be a more relaxed one: so it asks will those at risk "almost inevitably perish" unless the impugned action is taken? And it suggests the widening of the situation of distress beyond the protection of life to the protection of "the physical integrity of a person" (see para. 78 of the Award).

5. On my understanding, such an argument is available in law notwithstanding the apparently absolute language of the 1986 agreement on the basis that that agreement has not excluded the operation of the principle. So the apparently absolute rule found in treaty and customary

international law affirming sovereignty over national airspace is not seen as being breached by the entry of foreign aircraft in distress. Similarly I would agree with counsel for France on the lawfulness of the urgent removal of an agent to Papeete for necessary life-saving surgery there following a shark attack at Hao and allowing no time to get New Zealand's prior consent. All legal systems recognize such exceptions to the strict letter of the law.

6. The principle is established and broadly understood. How does it apply to the facts in this case? There are 2 elements—first the threat to the life or the physical integrity of Major Mafart, and second the action taken to deal with that threat. My disagreement with the majority relates to the second matter and specifically to the timing of that action. I agree that the state of Major Mafart's health as known to the French authorities (including Dr. Maurel) on 14 December 1987 required detailed medical investigations not available on Hao. This was confirmed on the very day of Major Mafart's return to Paris by Dr. Croxson, the physician nominated by the New Zealand Government. Indeed the indications are that had the relevant information been provided to the New Zealand authorities in a timely and adequate manner in advance of the departure they would very likely have consented to medical investigations outside Hao. Such consent would almost certainly have been accompanied by conditions, for instance about the course of the investigations and requiring return to Hao when the investigations were satisfactorily completed.

7. I need not however pursue those matters. As indicated, my particular concern is not with the medical situation and the need for medical tests, but with the timing of the French action taken in apparent breach of the 1986 agreement. The particular medical condition had its origins in surgery 22 years earlier. In July of 1987 Major Mafart was in hospital on Hao. On 7 December 1987 the commander of the base there advised the Minister of Defence in Paris that Major Mafart required tests and treatment which could not be provided there. On 9 December 1987 the Minister dispatched a medical team to Hao. The French authorities did not advise the New Zealand authorities of any of these events occurring in 1987—although each of course could have led in due time to a request for consent to Major Mafart's departure. The three-monthly reports provided by France to New Zealand and the United Nations as required by the agreement also gave no hint of the July hospitalization. Those of 21 July and 21 October 1987 simply said that the earlier situation, involving among other things the officers being in their military positions, continued without change.

8. On Thursday 10 December 1987, Dr. Maurel, the senior Army doctor sent from Paris, reported to the Minister of Defence that his examination indicated the need to examine Major Mafart in a highly specialized environment; his state of health required urgent repatriation to a metropolitan hospital. In the absence of formal advice to the contrary from the Minister, he proposed that the evacuation should be made by the aircraft leaving on Sunday 13 December. On Friday 11 December the Minister of Defence advised his colleague the Minister of

Foreign Affairs of these events and the planned removal and asked that the latter "prendre l'attache" of the New Zealand Government within the framework of the procedure included in the 1986 agreement. It was only at this very late stage, at about 7 p.m. on that Friday (Paris time), that steps were taken to seek New Zealand's consent to the removal. By the time the request was presented to the New Zealand authorities in Wellington between 10 and 11 a.m. on the Saturday morning (Wellington time) a further 3 or 4 hours had passed and the aircraft was due to depart from Hao less than 2 days later.

9. Only 4 hours after receiving the French request, that is between 2 and 3 p.m. on the afternoon of Saturday 12 December, the New Zealand Government responded. It stated that a New Zealand medical assessment had to be made and it proposed that a New Zealand military doctor fly on a New Zealand military aircraft to Hao for that purpose. Later on the Saturday it sought clearances for that flight and it provided the relevant flight information. After the 8-hour flight from Auckland the plane would have been in Hao less than 30 hours after the initial request and fully 12 hours before the proposed departure of the flight from Hao.

10. It was about 16 hours later, on the Sunday morning (Wellington time), that France rejected New Zealand's proposal—at about the time that the New Zealand aircraft would have left. New Zealand made further proposals in the course of that day, the exact content of which is disputed. Whatever their precise detail, the French authorities at no stage sought clarification (for instance of their surprising understanding of one proposal that the doctor would have to return to New Zealand to make his report). Nor did they make any counter-proposals to enable a timely medical assessment to be made by New Zealand as a basis for the decision whether to consent or not to the departure. Indeed, France's first written communication since its request made on the Saturday morning was the note delivered in Wellington on the Monday announcing that "in this case of *force majeure*" the French authorities were forced to act without delay, and that Major Mafart "will leave Hao" on Sunday at 2 a.m. (Hao time). The aircraft had presumably already left when the note was delivered.

11. The long delay of about 7 days between the initial request from Hao and the arrival in Paris and the long arduous flight from Hao to Paris of about 20 hours both indicate that this was not a situation of extreme distress. France did not face an immediate medical emergency. It was not a case comparable to the hypothetical shark attack requiring urgent action and treatment (para. 5 above).

12. New Zealand was obliged to consider in good faith any request for consent made by France. It could not however perform that duty without adequate information and time. No one questions the propriety of its request to undertake a medical assessment—and indeed that was facilitated by the French authorities so far as an assessment in Paris was concerned. But the French authorities did not provide to New Zealand an appropriate opportunity to perform the duty and to make a decision before the proposed departure. So there is no indication in the record of

— why France failed to propose alternative arrangements for a New Zealand medical assessment in Hao or Papeete

— why France could not have delayed the flight from Hao for a short time to facilitate the visit

— why France could not have provided fuller medical information earlier—on a basis of confidence, of course.

13. France, in my view, has not established the need to act in apparent breach of its treaty obligations in the way and especially in the time that it allowed. There was no sufficient urgency. The case was not one of extreme distress threatening Major Mafart's physical integrity. France was in a position to facilitate a proper medical assessment by New Zealand in the performance by New Zealand of its good faith obligations under the agreement. It did not meet its obligations in that respect.

14. In the result, this difference within the Tribunal is of limited consequence since we all agree that France was as from 12 February 1988 in breach of its obligation to order the return of Major Mafart to Hao. Moreover, as indicated, I think it highly likely that a properly supported and presented request for consent would have been acceded to—on terms, of course.

Duration of the obligations

15. As the Award says, the parties are in sharp disagreement about the duration of the obligations, undertaken by France, in respect of the stay by the two agents on the island of Hao. In France's view, the obligations came to an end on 22 July 1989, the third anniversary of the transfer of the two agents to the island. That is so even if their removal from the island and their remaining in metropolitan France were unlawful. According to New Zealand, the agents were to spend a total period of 3 years (at least) on the island—whether the period was continuous or, exceptionally, aggregated from shorter, separate stays.

16. The majority of the Tribunal agrees with the French position. The consequence of the expiry of the obligations in July 1989 is that there can now be no order for the return of the agents to the island. I agree that that is the consequence of that date of expiry. As the Tribunal indicates in para. 114 of the Award, that is a sufficient and compelling reason for refusing to make the order for the return of the agents. Accordingly, I do not find it necessary to come to a conclusion on the issues discussed in para. 113—the characterization of the request either as *restitutio* or as cessation, and the differences between them. Could I simply say that I am not sure, for instance, about the validity of the distinction in theory or in practice. It is notable that the International Court in deciding that the respondent States must take positive steps or refrain from unlawful actions in the *Teheran* and *Nicaraguan* cases did not attach such labels (nor did the applicant states in their formal requests). I now turn to my disagreement with the majority's interpretation of the duration of the obligations.

17. We must of course begin with the 1986 agreement. Under its terms the agents

> will be transferred to a French military facility on the island of Hao *for a period of not less than three years.*
> seront transférés sur une installation militaire française de l'île de Hao, *pour une période minimale de 3 ans.* (emphasis added)

The agents were prohibited from leaving the island for any reason, except with the mutual consent of the two Governments.

18. The Vienna Convention on the Law of Treaties, the parties agree, provides an authoritative statement of the principles of interpretation of treaties. Article 31(1) reads

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

What is the ordinary meaning of the relevant terms? What does the context indicate? And the object and purpose of the agreement? Those questions involve, in the words of Max Huber, a process of *encerclement progressif.*

19. I begin with the *terms* of the agreement. The transfer to the island and the prohibition on departure involve of course an obligation to stay on the island. During that assignment on the island various additional obligations were imposed to ensure the agents' isolation. To return to the critical phrase, these various obligations relating to the stay on the island were *for*, *pour* a period of not less than 3 years. The agreement does *not* say that the agents were to be on the island only *during* a 3-year period, and as a result *for* a shorter period in total than 3 years. Counsel for France put the matter very clearly: one of France's obligations under paragraph 3 of the agreement was to transfer and to maintain the two officers on Hao for 3 years (''l'obligation de transférer et de maintenir pendant trois ans les deux officiers sur l'île de Hao'').

20. While the words ''at least'' ''minimale'' may not make any difference to the ordinary meaning, they certainly give that meaning greater emphasis. That emphasis underlines the importance of this element of the ruling and of the settlement. Moreover, those words, included in the agreement, are an addition to the ruling of the Secretary-General. They are indeed the only such change from the ruling. That one change must have at least that emphatic significance.

21. The *immediate context* provided by other parts of the agreement supports that ordinary meaning of its terms. The agreement places a specific terminal time limit on the obligations imposed on France of apology, and payment, and on the two Governments of transfer. But by contrast it gives no express date for the completion of the obligations relating to being on the island. It is, of course, a date which can be easily calculated since the relevant facts are readily known—either a continuous period of 3 years from the date of transfer, had the two stayed on Hao continuously, or an aggregated period of 3 years if, exceptionally, there was a break in the stay.

22. The *wider context* of the agreement includes, as well, the character of the regime imposed by it. That character is seen in part in its

origins as found in the ruling of the Secretary-General. He was obliged to make a ruling which was equitable and principled (il sera équitable et conforme aux principes pertinents applicables). The parties made frequent references to that ruling in support of their understanding of the meaning of the agreement.

23. At the time of the ruling, agreement, and transfer, the two agents had served less than a year of a 10-year prison term imposed by the Chief Justice of New Zealand following due process of law and pleas of guilty to very serious crimes known to all legal systems. They did not appeal against the sentences, as they were entitled to. They were not eligible to be released on parole until they had served at least 5 years. The French position was that the agents should be immediately released (la libération immédiate); that was, said France, implied by an equitable and principled approach; the agents had acted under orders; and France was willing to apologize and pay compensation to New Zealand (as well as to the private individuals who had suffered from the attack). It was essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that. New Zealand could not countenance the release to freedom after a token sentence of persons convicted of serious crimes.

24. As the Governments agree, and the ruling and later agreement indicate, the Secretary-General could not and did not fully adopt the position of either of them—either in respect of the *character* or the *period* of the stay on the isolated island.

25. The *character* of the regime was special. It was neither the New Zealand penal system nor French military service. Rather it was an assignment to an isolated military installation, subject to significant limits on the freedom of the two agents, and especially on their freedom of movement from the island. It is indeed the substantial restrictions on movement which France invokes for its view that it would be impossible or excessively onerous for an order for return to be made, even if it was otherwise appropriate to make it. The weight of the restrictions is briefly reflected in the only comment made by either of the agents about the regime and available to the Tribunal. Captain Prieur told Mr. Adriaan Bos during his inspection visit to Hao on 28 March 1988 that she felt isolated (très isolée) on Hao and was not looking forward (elle appréhendait) to the remainder of her stay which was then due to continue until July 1989. This was so notwithstanding that her husband was living with her on the base and that, as she recalled, she had had visits from her mother and parents-in-law.

26. The *period* of that regime—the stay on the isolated island was to be lengthy, shorter than both the 10 years imposed by the High Court and the 5 year minimum parole period. The period of real constraint on freedom was still going to be significant—a 3-year period in addition to the year that had already been spent in custody in New Zealand before and after conviction. It was not going to be a release to freedom. And yet that is what in real terms the French interpretation of the period could involve since, following a short stay on Hao and an unlawful departure,

the process of attempting with diligence to reach a settlement through diplomatic channels and then, if that attempt were to fail, the setting up and operating of the arbitral process could exhaust all or most of a period expiring in July 1989. That indeed is what has happened in the event. Such an interpretation is not consistent with the *object* of placing a substantial limit on the liberty of the two agents.

27. The terms of the agreement, its context and its object all lead me to the view that the agreement required the agents to be on the island for the full period, whether continuous or aggregated, of 3 years. (It is perhaps unnecessary to make the point that that conclusion is subject to limits which could lawfully and properly be placed on that obligation in accordance with the law of treaties or the law of state responsibility as discussed in paras. 72-79 of the Award.)

28. There are several arguments to the contrary which require consideration. The first is that the extension of obligations beyond the initial 3-year period would result in heavier obligations being placed on the agents. They would be subject not only to isolation on the island for 3 years but also to the obligations relating to limited personal contacts and media silence for the additional period they have been in France. Those obligations would thereby extend to 4 1/2 and 5 years for the two agents.

29. There are two effective answers (at least) to that argument. The first is that, by their terms, the obligations of limited contact and media silence relate only to the time on the island. If France has undertaken or the two parties have agreed that those conditions also applies *off* the island that would be a *new* obligation, separate from the agreement.

30. This is clear from the references to the island in the relevant paragraphs. The third paragraph requires transfer *to the island* for 3 years. The fourth paragraph

(1) prohibits departure *from the island* without consent;

(2) requires isolation *during their assignment in Hao* from persons other than military or associated personnel and immediate family and friends; and

(3) prohibits contact with the press or other media.

It is true that the last prohibition is not expressly limited in a geographic way. But that limit clearly arises from the context.

31. And the limit appears as well from the ruling of the United Nations Secretary-General. That ruling can be used to confirm the meaning gathered from the ordinary meaning of the agreement in context and in the light of its purpose. The Secretary-General set out conditions relating to the two agents in 4 paragraphs—those which appear in paras. 3-6 of the agreement. The second paragraph set out the prohibition on departure, and on personal and media contact, and the first made only a general reference to transfer "to a French military facility on an isolated island outside of Europe". The Secretary-General continued:

> I have sought information on French military facilities outside Europe. On the basis of that information I believe that the transfer of Major Mafart and Captain Prieur *to the French military facility on the isolated island of Hao* in French Polynesia *would best facilitate the enforcement of the conditions* which I have laid down in [the four] paragraphs . . . (emphasis added).

In the Secretary-General's mind, the obligations were integrally tied to the isolated island. The conditions were to be met there. That also appears from the provision for a visit by an agreed third party *to the island*—to determine of course whether the agreement is being complied with *there*.

32. It is true that France, in response to New Zealand's proposal, undertook to apply the conditions relating to the isolation of Major Mafart when he was in Paris. But that undertaking was a special one to deal only with the period during which Major Mafart was in Paris —France in giving it stated that Major Mafart would return to Hao when his health allowed. And it included the conditions which expressly applied *only* on the island. That it was a special additional undertaking peculiar to the circumstances appears as well from the lack of any such arrangement between the two governments for Captain Prieur.

33. The second reason for rejecting the argument based on the "heaviness" of the obligations proceeds on the basis—which I reject—that the isolation obligations are capable of directly applying in metropolitan France. The reason for rejection is that those obligations of isolation which are additional to those arising from geography are in fact slight and are much lighter than the obligations of being on the island —obligations which at relevant times were being unlawfully evaded according to the ruling of the Tribunal. The slightness of the obligations, especially those concerning the press, is evidenced by a valuable note, *Les règles de la discipline militaire*, provided to the Tribunal by the Agent of France. The 1972 law on the statut général des militaires places restrictions on the members of the armed forces compared with other citizens. The exceptions concern

—the expression of philosophical, religious and political beliefs in the context of the service;

—the obligation of discretion (réserve) in all circumstances;

—the requirements of military secrets.

34. It was of course by reference to such law that the obligations under the 1986 agreement were to be enforced. In the light of those obligations and of the general position of senior military officers, the statement by the French Agent that Colonel Mafart *since* July 1989 "*still* leads a life of total discretion" comes as no surprise at all. The French argument gives quite disproportionate weight to the obligations additional to those arising directly from being on Hao (assuming, that is, that the obligations were capable of direct application off the island) as well as from the officers' military status.

35. France also argues that the New Zealand position produces a result which is "manifestly absurd or unreasonable" (using the words of article 32 of the Vienna Convention on the Law of Treaties—that provision of course not being directly applicable here since France does not

use it to invoke supplementary interpretative material which assists its view). That absurdity or unreasonableness, for France, consists of the prolongation of the obligation of being on Hao beyond 3 years. But in the normal case the obligation would not so extend; if it did so extend, it would be for special reasons based on the consent of the two Governments or on *force majeure* or distress. It would be exceptional, and the prolongation would in any event accord with the ordinary meaning of the provisions in context and in the light of their purpose of imposing a real and not merely a token restraint on the liberty of the two officers.

36. France next argues that a *tempus continuum* is inherent in a contractual obligation of a given time period and that the same holds true for an international treaty obligation. The one case which it cites, *Alsing Trading Company Ltd* v. *Greece* (1954) 23 Int. L. Reps 633, it is true, involved a contract for a period of 28 years, but the contract *expressly* stated both its beginning and its expiry dates; accordingly it is of no general assistance in the present case. Moreover, general words have to be given meaning in their particular contexts and by reference to their purpose. And the law, including treaty practice, knows many periods of residence which can each be made up of shorter periods where appropriate to the context and purpose—consider treaties and legislation relating to taxation, benefits, citizenship, and electoral rights.

37. The Tribunal perhaps suggests a further argument for the view that the obligations ended in July 1989 in its statement that "the principles of treaty interpretation" are opposed to a more extensive construction of special undertakings (para. 104). I have of course invoked "the general rule of interpretation" stated in the Vienna Convention. The International Law Commission in elaborating that general rule did not incorporate any "principles". So it thought that it was not necessary to include in the general rule a separate statement of the principle of effective interpretation. It recalled that the International Court had insisted that there are definite limits to the use which may be made of that principle. Rather the Commission, like the Court, emphasized the ordinary meaning of the words in their context and in the light of the agreement's purpose (para. 6 of the commentary to draft articles 27 and 28, *ILC Yearbook 1966*, Vol. II, p. 219).

38. I have already indicated that those matters lead me to the conclusion that the agreement placed on France an obligation to ensure that the two agents spend three years on Hao.

Kenneth KEITH