

## **The Rainbow Warrior-a game changer?**

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- 1 The sinking of the Rainbow Warrior in Auckland Harbour on 10 July 1985 was one of the most serious international incidents suffered by New Zealand in peacetime. It was a sensational and highly newsworthy event, attracting widespread international attention. It created a political furore for different reasons, both in New Zealand and in France. The resolution was difficult and protracted.
- 2 Covertly and without warning, officers of the French Directorate General of External Security (DGSE) attached explosive devices by night to the ship, detonated them and sank it. These actions constituted an unlawful violation of New Zealand sovereignty at international law and constituted serious offences under the Crimes Act 1961. A Dutch national was killed as a result of the action. The news broke in a dramatic fashion and inflamed New Zealand public opinion. It strained relations between France and New Zealand to breaking point. Wars have begun over less. Political management of the issue was extraordinarily difficult. Two of the French agents involved were arrested and charged with murder. This was reduced to manslaughter to which they pleaded guilty. Each was sentenced to 10 years imprisonment on 22 November 1985 by the New Zealand Chief Justice.
- 3 The dispute posed a series of stern challenges to the 4<sup>th</sup> Labour Government. The Ministers, especially the Prime Minister, Cabinet and Cabinet Committees worked hard on the issues. The levels of activity within the Government system were high: for the Police in detecting and prosecuting the offences; for Justice officials in managing the detention of the prisoners and the events surrounding the court proceedings; the intelligence community was involved throughout; the Crown Law Office and the Solicitor-General in deciding whether to reduce the charges from murder to manslaughter in return for a plea of guilty, in quashing private prosecutions and making submissions on sentencing; and the New Zealand Foreign Affairs officials in managing the diplomatic fallout and trying to arrive at a resolution of all the issues. The excellent performance of the New Zealand diplomats over a long and difficult period served New Zealand well. The issues continued for more than five years and were not fully resolved until after the arbitral tribunal decision in 1990.
- 4 Even after the two French agents were arrested and charged with murder the French Government did not admit its responsibility in the affair. Indeed, an internal inquiry in France concluded there was no French involvement in the matter. It was not until after the New Zealand Police file was forwarded to the French authorities in Paris that Prime Minister Fabius read a statement on 22 September 1985 admitting that the French secret service

agents had sunk the boat acting under orders. (Monsieur Fabius is currently the French Foreign Minister.) It is hard to fathom, even at this distance, what the French authorities in 1985 thought they could achieve by authorising the operation. It turned out to be a serious embarrassment for France as well as an ordeal for New Zealand.

- 5 The context for the dispute lay in the active anti-nuclear stance of New Zealand and many of its people towards the testing of French nuclear weapons in the Pacific, both atmospheric and later underground. The Greenpeace ship "Rainbow Warrior" was intending to set sail from Auckland to protest off Mururoa Atoll. The testing had had a profound effect on New Zealand public opinion over a period of years. That resulted in a New Zealand frigate with a minister on board being dispatched to Mururoa in 1973. It also prompted New Zealand and Australia to launch proceedings against France in the International Court of Justice. There was a judgment in 1974, although the issues were not decided on the merits, since the case was rendered moot the court said by France announcing that it was ceasing atmospheric testing. Later, underground tests resumed and a further visit to the court was made by New Zealand in 1995 to try to have the original case reopened. The tests also contributed to the dispute New Zealand had with the Americans over ANZUS and to the development of New Zealand's anti-nuclear stance. France still regards nuclear deterrence as "the ultimate safeguard of our sovereignty."<sup>1</sup>
- 6 The politics of this dispute were extremely challenging for both New Zealand and for France. The New Zealand public was truly outraged. David Lange's rhetorical gifts were on full display. The media naturally reported every little development and comment and there were many. The political management had to be constant and it was exceedingly difficult. Escalation of the dispute held hazards for New Zealand. The restrictions on certain exports instituted by France that began being applied in January 1986 were a cause for serious concern. And there were threats about future access of our exports to the EU.
- 7 New Zealand was not in an enviable position. New Zealand is a small country. France is a major political power, a permanent member of the United Nations Security Council, a militarily powerful state, and a nuclear weapons state. The legal options were few. France had renounced its acceptance of the compulsory jurisdiction of the International Court of Justice as a result of the Nuclear Test cases. We had to negotiate because we could not force France to adjudication. In any event, adjudication could not resolve all of the issues on both sides.
- 8 It fell to my lot to open bi-lateral negotiations in September 1985 with the French Foreign Minister, Dr Roland Dumas in New York on how to resolve the dispute. This was immediately after I had addressed the General Assembly in a speech that set out New Zealand's position on the issue. This was a day after the French Government admitted responsibility and said it

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<sup>1</sup> Gareth Evans, Tanya Ogilvie-White Ramesh Takur *Nuclear Weapons: The State of Play 2015* (Australian National University, Centre for Non-Proliferation and Disarmament Canberra, 2015) 43.

was ready to make reparations for the consequences of the action. At that point the French prisoners had yet to be sentenced by the Chief Justice. Dr Dumas said in the negotiations that France wanted them back on the basis they had acted under military orders. That was not a defence at New Zealand law. As Attorney-General I made it clear the case would take its course in the courts and I would not intervene as a matter of constitutional principle. We made it clear that it was not open for the New Zealand Government to agree or even negotiate about the two prisoners while the case was before the courts. The New Zealand position was that there should be no release to freedom and that if the prisoners were transferred they should serve their sentence. France wanted the prisoners back but had no legal grounds for getting them back.

- 9 In the negotiations and the whole saga as it developed were a multi-dimensional mix of legal, political and trade issues:
  - an apology and compensation from France for violation of New Zealand's international law rights;
  - compensation for Greenpeace and the family of the dead crewman, claims New Zealand had no capacity to assert as a matter of international law;
  - the future trade relationship;
  - the fate of the two agents.
- 10 The negotiations proved to be horrendously difficult and eventually the Dutch Prime Minister suggested third party intervention. The parties finally agreed that all of the problems would be referred to the Secretary-General of the United Nations. This was announced on 19 June 1986. His ruling was delivered on 6 July 1986. This was a novel method of dispute settlement. In substance the bulk of the ruling had been negotiated between New Zealand and France in secret negotiations, conducted mainly in Switzerland and led by Chris Beeby. The Secretary-General himself settled the quantum of reparation and several other issues. This method of dealing with the problem was necessary because of the inflamed state of public opinion and politics in both countries over the issues and their proper resolution. It is just not possible to negotiate a fraught set of issues with public debate continuing on all sides.
- 11 The Secretary-General's authority and neutrality made it easier for the Government of both nations to save face in ways that were important to each of them. This is an example of political people using something akin to third-party adjudication or mediation to soften and ameliorate the political problems that they would otherwise experience.
- 12 Even so the prisoners were removed from Hao Atoll in breach of the Secretary-General's ruling. New Zealand invoked the arbitration clause in the binding agreement that followed from the Secretary-General's ruling. The arbitration concerned the legality of the French release of the two French prisoners in breach of the Secretary-General's Ruling of 1987 that the officers be transferred to the island of Hao in French Polynesia for a period of not less than three years. They were not permitted to leave the island except by the consent of the two governments. New Zealand was successful

in the arbitration. The Tribunal held France was in breach of its obligations in various ways by its removal of the prisoners and failure to return them to Hao. In light of its condemnation of France's action the Tribunal recommended that France and New Zealand set up a fund "to promote close and friendly relations between the citizens of the two countries" and that France make an initial contribution of \$US2 million. I hope the programmes will continue to be funded. The effluxion of time and financial stringency will bring pressure to bear on them.

- 13 I called at the New Zealand Embassy when I was in Paris last week to inquire whether there were any lasting effects from the Rainbow Warrior saga on the relationship between France and New Zealand. Ambassador James Kember reported that relations were in good heart. There were high levels of engagement between the countries-on the commemorations of the First World War and because of our current Security Council membership. France values cooperation with New Zealand on such issues as disaster relief in the Pacific.
- 14 I think it is fair to say that while the Rainbow Warrior chapter between France and New Zealand is closed, it has not been forgotten. Despite the unusual methods of settling the dispute that necessarily had to be adopted, the dispute has been successfully resolved and leaves now hardly a mark on the New Zealand body politic nor its diplomacy. From the point of view of New Zealand it can be said that principles important to the political health of small states were vindicated and the principles of international law upheld. If the case was a game changer it was in the innovative methods used to resolve it. Although it is hard to imagine another dispute for which the same methods could be used.
- 15 I conclude that New Zealand could not reasonably have expected to have achieved more than it did in this whole saga. International law was twice vindicated to uphold New Zealand's rights, once by negotiations and with the assistance of the United Nations Secretary-General and on the second occasion by arbitration. The matter is behind us now, but we should not forget what a heavy test it was for New Zealand and how wickedly difficult was the resolution.

Previous published writings on the subject: "Settlement of International Disputes: "The 'Rainbow Warrior' affair" Commonwealth Law Bulletin, April 1989, 587-598; "The Difficulties of Third-Party Adjudication for Political People" 2003 ASIL Proceedings 289-293; "Adjudication, Politics, and International Law" (2003) 17 Temple International and Comparative Law Journal 523-529; "Perspectives on International Dispute Settlement from a Participant" (2012) 43 VUWLR 39 at 59-62; *Reform-A Memoir* (Victoria University Press, Wellington, 2013) 487-493.