Denver Journal of International Law & Policy

Volume 4
Number 1 *Spring*
Symposium - Mexican-Foreign Investment Laws

Article 11

January 1974

French Nuclear Testing: A Crisis for International Law

William K. Ris Jr.

French Nuclear Testing: A Crisis for International Law

Keywords

International Law: History, Air and Space Law, International Court of Justice

COMMENTS

FRENCH NUCLEAR TESTING: A CRISIS FOR INTERNATIONAL LAW

PART I—THE LEGAL ARGUMENTS

On July 21, 1973, only one month after the International Court of Justice had prohibited it,[1] France began a new series of atmospheric nuclear tests in the South Pacific.[2] The tests pose a continuing threat of danger to the local population, their natural resourses, and to the various nations near the test site. This possible violation of international law, and the present inability of the world community to stop or even postpone it, raises serious questions about the value of available international mechanisms for solving conflict between nations and preventing serious global environmental damage.

At the outset, two issues must be distinguished. The first is the legality of the French extraterritorial atmospheric testing *per se* in light of modern principles of international law. The second is the specific French disegard of the World Court opinion which temporarily prohibited the tests pending a ruling on their legality. Both issues raise the possibility of serious, but separate, violations of international law.

PACIFIC TESTING AND INTERNATIONAL LAW

The question of the legality of nuclear testing in the Pacific is not a new one. It was first suggested in the mid 1950's that any nuclear testing on the high seas might be in violation of international law.[3] At that time legal attention was focused exclusively upon the United States testing in the Central Pacific. After the United States discontinued atmospheric testing, the focus shifted to the French Pacific tests begun in 1966.[4]

The French justification for its testing has always been fairly simple. France has repeatedly argued that the question is strictly a matter of security and self-defense: so long as other nations maintained a nuclear capability, France would continue to build hers.[5]

---

1. Nuclear Tests Case (Australia v. France) conveniently found in 12 INT'L LEGAL MATERIALS 749 (1973).

2. N.Y. Times, July 22, 1973, at 1, col. 5.

3. Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629 (1955).

4. FACTS ON FILE, DISARMAMENT AND NUCLEAR TESTS 1964-69, at 99 (V. Mastny ed. 1970) [hereinafter cited as FACTS ON FILE 1964-69].

5. UNITED NATIONS DEPARTMENT OF POLITICAL & SECURITY COUNCIL AFFAIRS, THE

The only alternative would be to continue to rely upon NATO defenses and the U.S. "nuclear umbrella." The unacceptable danger of that course is either being pulled into a nuclear confrontation not of her own making, or at the other extreme, failing to receive the NATO or U.S. nuclear support in a time of real crisis.[6] Thus a limited but independent "force de frappe" is seen as the most viable kind of nuclear defense. President de Gaulle consistently remarked on the unacceptability of "relying for her defense and thereby her existence and, finally, her policy, on a foreign protectorate and one that is uncertain anyway;" he would emphatically protest: "No! We are worth more than that!"[7]

But at the basis of all the French arguments supporting her position is the compelling rationale of equity. France has purported to be a proponent of complete and total disarmament, but, she reasons, so long as some nations continue to possess atomic weapons, it is hypocritical and unreasonable of them to expect that others will not exert the same right.[8]

What makes France unique, however, is that she has no vast open spaces of national territory available to conduct testing.[9] Testing any kind of weapons on national territory has never been considered illegal *per se*.[10] With a dense population it is an absolute necessity to go elsewhere. Thus the French development of nuclear weapons is bound to interfere with others' rights, at least to some degree. What those rights are and to what degree they are interfered with will determine the status of the testing in international law and its seriousness in terms of international peace and political stability.

France first began her testing in remote regions of the Sahara Desert in 1960[11] over the strong protests of the North Africans and in disregard of a U.N. General Assembly resolution, which requested her

---

UNITED NATIONS AND DISARMAMENT 1945-70, at 210 (1970) [hereinafter cited as UNITED NATIONS AND DISARMAMENT]; B.G. BECHHOEFER, POSTWAR NEGOTIATIONS FOR ARMS CONTROL 546-7 (1961); KESSING'S RESEARCH REPORT, DISARMAMENT: NEGOTIATIONS AND TREATIES 1946-71, at 322 (1972); B. RUSSET & C. COOPER, ARMS CONTROL IN EUROPE: PROPOSALS AND POLITICAL CONSTRAINTS 24-36 (1966-67).

6. D'Amato, *Legal Aspects of the French Nuclear Tests*, 61 AM. J. INT'L L. 66, 68-69 (1967); W.B. WENTZ, NUCLEAR PROLIFERATION 84 (1968).

7. FACTS ON FILE 1964-69, *supra* note 4.

8. WENTZ, *supra* note 6 at 93.

9. The Soviet Union, China and the United States each have sufficient territory for most of their testing. The United Kingdom has conducted most of its tests jointly with the United States.

10. Taubenfeld, *Nuclear Testing and International Law*, 16 Sw. L.J. 365, 381 (1962); G. SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS 51 (1958).

11. For a discussion of the legality of the Sahara tests, *see* Note, *French Nuclear Testing and International Law*, 24 RUTGERS L. REV. 144 (1969).

to refrain from such testing in light of the test ban negotiations then underway at Geneva.[12] The tests were widely condemned, but the twenty-two predominantly Middle Eastern and African states were unable to convince the General Assembly to meet in special session to consider the question.[13]

Not until four years later did pressure from the newly independent North African states cause France to discontinue her Sahara testing.[14] Forced to go elsewhere, France resumed testing in the South Pacific in 1966 at the Mururoa Atoll, 750 miles southeast of Tahiti.[15] From then on, all French testing has been conducted atmospherically at that location.

Compared to previous Pacific testing, the current French tests have been fairly small, and the French are understandably angry at the furor they have caused.[16] The first and most extensive testing in the Pacific was conducted by the United States, beginning as early as 1946[17] and continuing sporadically until 1962. In 1952, Great Britain became the second to conduct tests in the Pacific off the coast of Australia.[18] By far, the largest series of Pacific testing took place between April and November 1962 near Christmas and Johnson Islands in the Central Pacific; thirty-five atmospheric tests, ranging from low to high yields, were conducted by the United States.[19] These massive and sometimes harmful tests drew little public protest. Nevertheless, a great many events have occurred since the last non-French testing in 1962 which cast great doubt on the legality and prudence of continued testing, and explain the current protests.

TEST BAN TREATY

The most important event has been the ten year success of the Treaty Banning Nuclear Weapons Tests in Atmosphere, In Outer Space and Underwater (Test Ban Treaty).[20] The treaty calls upon each party to prohibit, prevent, and not carry out any nuclear explosion in the atmosphere at any place under its control "including

12. G.A. Res. 1379, 14 U.N. GAOR Supp. 16, at 3, U.N. Doc. A/4354 (1959). It passed 51 to 16 with 15 abstentions.

13. UNITED NATIONS AND DISARMAMENT, *supra* note 5 at 211.

14. FACTS ON FILE 1964-69, *supra* note 4 at 40.

15. *Id.* at 99.

16. Fischer, *Cronique de Desarmement*, 1971 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 94 (1971).

17. Margolis, *supra* note 3 at 630.

18. KESSING'S RESEARCH REPORT, *supra* note 5 at 5.

19. FACTS ON FILE, DISARMAMENT AND NUCLEAR TESTS 1960-63, at 89-90 (L.A. Sobel ed. 1964).

20. Treaty Banning Nuclear Weapon Tests in the Atmosphere, In Outer Space and Under Water, *done* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

territorial waters or high seas."[21]

France is not a party to the treaty, and, therefore, argues that it should not apply. Normally this would be accurate, but the Test Ban Treaty may now be considered more than mere conventional law. Two suggestions have been made that interpret the Treaty as binding even upon non-signatories. The first is that the Treaty "may itself have started, or at least acknowledged, a general rule of customary International law"[22] which would prohibit *any* nation from conducting atmospheric nuclear tests. The second is that because of the overwhelming acceptance of the Treaty[23] it has become a peremptory norm of international law (jus cogens) as recognized by Articles 53 and 64 of the Vienna Convention on Law of Treaties.[24] Either interpretation would cause any atmospheric nuclear testing to be a violation of international law.

Critics of these suggestions point out that two of the five nuclear powers, France and China, have not signed or complied with the Treaty or its principles, and therefore acceptance is not wide enough to constitute either a customary rule or a peremptory norm.[25] On the other hand, the overwhelming majority of states have ratified the Treaty. More importantly, no nation has taken advantage of its unusually simple withdrawal clause, and no signatory has violated the treaty.

Traditionally, customary rules and general principles have developed slowly in international law. The law was created over the course of decades and even centuries. But as international law becomes increasingly involved in regulating military, commercial and scientific activities, its development must parallel the rapid development of technology in those fields. Such crucial issues as the potential dangers of radiation pollution will not wait decades to be resolved. When there is imminent harm to the human race and to the world's resources, the law must respond accordingly.

In light of the potential danger of nuclear testing to the human race, and the overwhelming acceptance of and compliance with the

---

21. *Id.* at art. 1.

22. D'Amato, *supra* note 6 at 77. One author declares that "[q]uite apart from voluntary treaty-making such as the partial Test Ban Treaty, it may be contended that nuclear testing and the use of nuclear weapons are prohibited by customary international law." Lee, *International Legal Aspects of Pollution of the Atmosphere*, 21 U. TORONTO L.J. 201 (1971).

23. At least 93 nations have ratified, M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA 829 (1973); at least 110 have either ratified *or* signed. EPSTEIN, DISARMAMENT: TWENTY-FIVE YEARS OF EFFORT 19 (1971).

24. G. FISCHER, THE NON-PROLIFERATION OF NUCLEAR WEAPONS 10 (1971).

25. Mercer, *International Law and the French Nuclear Weapons Tests*, 1968 N.Z.L.J. 405, 420 (1968).

Test Ban Treaty by states of every economic, social and political persuasion, it is probable that the principles promoted by the Treaty have become general principles of international law which apply to all nations, whether signatories or not. When such unlikely pairs of nations as the United States and the USSR, Israel and Egypt, Spain and Sweden, South Africa and twenty-three Black African States[26] ratify a treaty, it represents an exceptional agreement.

STOCKHOLM DECLARATION

While the Test Ban Treaty represents a specific prohibition on testing, other instruments and activities raise more general principles which are applicable to the French situation. The newest instrument is the 1972 Declaration on the Human Environment (Stockholm Declaration).[27]

Principle 21 states that nations have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[28] The French claim that the damage caused by their testing is minimal and that the sites used are better than any used before because of their distance from population centers and exposure to strong winds.[29] Nevertheless, the French do not deny that *some* damage will occur. The question then must focus on whether the potential damage is so insignificant as to be *de minimis* or whether it will be potentially so dangerous as to constitute a violation of Principle 21.

The most significant fact about radiation is that the ultimate long-term effects are simply unknown. It is known, however, that radiation causes genetic effects in the form of gene mutations, chromosome aberrations and changes in the number of chromosomes.[30] It affects immune responses in many ways yet unknown to scientists.[31] Leukemia is a radiation-induced malignancy which often appears years after the exposure.[32] It appears that lung, thyroid and breast cancer are also induced by radiation.[33] A United Nations group visting Pacific islands in the vicinity of the United States' nuclear testing in 1956 reported skin contamination, low white blood cell counts and lowered resistance to diseases.[34]

---

26. NORDQUIST, *supra* note 23 at 824-29.
27. Declaration on the Human Environment, U.N. Doc. A/CONF. 48/14 (1972).
28. *Id.* at 7.
29. N.Y. Times, July 3, 1973, at 2, col. 4.
30. *Report of the U.N. Scientific Committee on the Effects of Radiation*, 27 U.N. GAOR Supp. 25, at 10. U.N. Doc. A/8725 (1972).
31. *Id.* at 11.
32. *Id.* at 15.
33. *Id.*
34. 18 U.N. Trusteeship, Supp. 3, at 26-28, 45, U.N. Doc. T/1278 (1959).

Even with extensive precautions by the United States, the crew of the Japanese fishing boat, Fukuryu Maru, was exposed to radiation eighty miles from the testing site. All on board were injured, five were in danger, and one died from exposure.[35] The United States implicitly admitted its legal responsibility by agreeing to a negotiated $2 million settlement for compensation to the victims. Damage from nuclear testing extends beyond direct exposure to humans. The 4000 pounds of fish on the Fukuryu Maru were dangerously contaminated, and later, over 135 tons of fish were condemned in Japan.[36] As a result of the U.S. Pacific tests, the fishing grounds of the North West Pacific "were gravely depleted."[37]

The French argue that their testing is more isolated and that there is less exposure to the resources of the sea. Yet the Polynesian Islands have a combined population of 90,000, with fish an important staple item.[38] How the testing will affect the genetic balance of marine organisms is unknown. Radiation could either retard the reproductive processes of marine life or contaminate the marine resources, making them unfit for human consumption. In either case, the potential damage is severe.

Almost twenty years ago it was suggested that while there was a duty of states under international law to prevent pollution of international waters, in the absence of any international agreements or decisions directly on point it was "as yet an inchoate one."[39] The duty is no longer inchoate. The Stockholm Declaration and other agreements have codified that duty. Its acceptance is unquestioned. The French testing is not *de minimis*. Its dangers are potentially severe and scientifically uncertain. Under these conditions, continued testing must constitute a violation of international law under Principle 21.

Another principle of the Declaration applies even more directly. Principle 26 calls for man to be "spared the effects of nuclear weapons . . . and [for] destructon of such weapons."[40] This principle was originally introduced to ban nuclear weapons testing.[41] Its expansion into a call for general elimination of all weapons of mass destruction does not lessen that original intent, as a ban on testing is implicitly included in the elimination of nuclear weapons. Further, the prohib-

35. Margolis, *supra* note 3, at 637.
36. *Id.*
37. Mercer, *supra* note 25, at 407.
38. D'Amato, *supra* note 6, at 66, 73.
39. Margolis, *supra* note 3, at 643.
40. Declaration on the Human Environment, *supra* note 27, at 7.
41. Notes, *The Stockholm Conference: A Step Toward Global Environmental Cooperation and Involvement*, 6 IND. L. REV. 267, 278 (1972).

ited "effects" of nuclear weapons clearly include environmental damage from their testing.

China and France were the only two nations voting against Principle 26, and the French delegation announced that it would not be bound by the recommendation.[42] For France, the Stockholm Declaration is not a binding convention. But it is certainly a highly important example of the latest efforts of the world community to deal with the environmental aspects of the nuclear testing problem. These principles, when viewed in context with some of the traditional arguments, create a compelling case against the legality of the French testing.

FREEDOM OF THE SEAS

The past debate over the legality of Pacific testing has primarily concerned the familiar principle of freedom of the seas. This debate began with two now-classic articles written in 1955 concerning U.S. testing in the Pacific. In one, Margolis challenged the legality of the testing,[43] while in the other, McDougal and Schlei justified it.[44] Their respective arguments, having been analyzed and repeated extensively,[45] will only be summarized here.

Margolis argues that freedom of the high seas is essentially an absolute freedom.[46] The only exception is the status of contiguous zones.[47] The creation of any wide danger or warning areas in the high seas is necessarily an interference with this freedom and not condoned by international law.

On the other hand, McDougal and Schlei argue that freedom of the seas is "not absolute, and never has been."[48] The law of the sea, they contend, is a continuously changing set of competing norms. One group of norms is a set of principles generally described as "freedom of the seas," which allows freedom of navigation, fishing and the laying of cables. Another group of norms represent a variety of prescriptive demands conflicting with absolute freedom of the seas, among which are territorial waters, contiguous zones, customs zones, security zones, national claims to continental shelves and fishing

42. *Id.*

43. Margolis, *supra* note 3 at 643.

44. McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955).

45. *See generally* D'Amato, *supra* note 6; Fliess, *The Legality of Atmospheric Nuclear Tests: A Critical View of International Law in the Cold War*, 15 U. FLA. L. REV. 21 (1962); McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356 (1955); Mercer, *supra* note 25; Taubenfeld, *supra* note 10; Note, *supra* note 11.

46. Margolis, *supra* note 3, at 634.

47. *Id.* at 635.

48. McDougal & Schlei, *supra* note 44, at 663.

claims.[49] The ultimate standard as to which prescriptions will be honored is one of reasonableness.[50] There must be a balancing test between the interference caused to basic freedoms of the sea and the value of the interfering activity to the world community. If, on balance, the interference is reasonable, it should be allowed. The focus of the McDougal-Schlei argument was that the overwhelming importance to the "free world" of the U.S. testing, when balanced against the relatively minimal interference with international trade and commerce, clearly justified the testing under international law. The U.S. testing represented the compelling norm of self defense at a time when ". . . expectations of imminent violence in the world arena . . . [were] more realistic and intense."[51]

This debate was echoed in the 1958 Geneva Conference on the Law of the Sea and the subsequent literature. In terms of the current series of French tests, however, it appears that a fair application of the criteria proposed by either side of the debate would lead to the same conclusion.

The clearest example of Freedom of the Seas is the 1958 Geneva Convention on the High Seas (Geneva Convention).[52] Article 2 states:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:
>
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

The relation of Article 2 to the legality of nuclear testing was an important point of discussion in the Second Committee of the Conference, which drafted it.[53] To an extent, the debate reflected the classical argument between an absolute freedom and one explicitly based on a standard of reasonableness, and to an extent, it reflected Cold War politics.

---

49. *Id.* at 663-674.

50. *Id.* at 684.

51. McDougal, *supra* note 45, at 361.

52. Convention on the High Seas, *done* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

53. *See generally* Summary Record of the 2d Committee, U.N. Doc. A/CONF. 13/40 (1958). Article 2 was debated as art. 27 in the draft articles and in this report.

Poland first noted that the creation of nuclear danger zones created *de facto* sovereignty which would be prohibited by the article.[54] The entire Soviet bloc supported this interpretation as did Japan,[55] India,[56] Tunisia,[57] and Nepal.[58] In the course of debate on Article 2, another article was proposed which would have *directly* prohibited nuclear testing on the high seas.[59] Arguing against adoption, the United States and Great Britain submitted that the subject of nuclear testing did not fall within the scope of the Conference, and further that any applicable article must adopt a standard of reasonableness.[60] This article was never directly voted upon, however, because the question was directed by the Conference to the General Assembly for its consideration.

Nevertheless, it is interesting to note the position of the French delegation on Article 2. France was one of the nations arguing most strongly for the principle of absolute freedom of the seas. The delegation suggested that "[e]xercise of the freedom of the high seas is regulated by international law in order to ensure their use in the interests of the entire international community."[61] To this end, they proposed language, adopted by the Conference, that in regard to the high seas, "no State may validly purport to subject *any part of them* to its sovereignty."[62] (Emphasis supplied.)

These debates were transpiring, of course, when only the United States and United Kingdom were testing in the Pacific, two years before France perfected her first nuclear device, and presumably, well before France had an idea that events would force her to test in the Pacific. In this regard, the French attitude on draft Article 48 (now Article 25) is most interesting. Article 25 states:[63]

> 1. Every State shall take measures to prevent pollution of the seas from the dumping of radio-active waste, taking into account any standards and regulations which may be formulated by the competent international organizations.
>
> 2. All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or other charmful agents.

---

54. *Id.* at 6.
55. *Id.* at 11.
56. *Id.* at 14.
57. *Id.* at 21.
58. *Id.* at 23.
59. U.N. Doc. A/CONF.13/L.30 (1958).
60. Summary Records, *supra* note 53, at 15.
61. U.N. Doc. A/CONF.13/C.2/L.6 (1958).
62. *Id.*
63. Convention on the High Seas, *supra* note 52, at art. 25.

It is often argued that this article had been drafted to control only peaceful and commercial uses of atomic energy, as evidenced by the term "dumping" of radioactive wastes which seems to narrow the intent. Several states, however, have interpreted it as directly prohibiting testing of nuclear weapons on the high seas.[64] Its ambigious language could possibly justify such a conclusion. But an amendment which was proposed in the Second Committee by France would have assured such an interpretation. The French wanted to broaden the scope of the Article to cover any "*contamination* by radioactive substances,"[65] as opposed to merely "dumping." The delegation suggested that to put radioactive pollution " 'on the same footing as pollution by oil,' was a mistake; there could be no doubt that pollution by radioactive substances was much more serious."[66] Had the French proposal been adopted, the conventional restrictions on testing on the high seas would have been stronger.

In short, before France had probably ever contemplated the need to use the Pacific for nuclear testing and was, presumably, more objective in outlook, she stood on the side of absolute freedom of the seas and strict controls on radioactive pollution. France did not, however, ratify the High Seas Convention and does not consider herself bound by it. The French position is now one close to the McDougal-Schlei approach, but even this more restrictive approach cannot justify the French testing.

The two major elements of the McDougal justification of the U.S. Pacific testing were the reasonableness of the tests, as reflected by their "minimal" inteference with use of the high seas, *and* the importance of the testing to the "free world."[67] This basic test involves a balance between infringement of basic rights and necessity to the world community.

To many in the 1950's, the necessity of nuclear parity in that bipolar political world was of paramount importance. For the "free world," it was essentially a matter of preparing for self defense "under conditions of high necessity and absence of alternatives."[68] This was a view held not only by the United States, but by an "overwhelming" majority of nations.[69]

Clearly, in the 1970's, the French testing does not have such support. Of the nations of the world, only China has been vocal in

64. *Cf.* remarks of the representative of Ceylon in Summary Records, *supra* note 53, at 14.

65. U.N. Doc. A/CONF.13/C.2/L.6 (1958).

66. Summary Records, *supra* note 53, at 85.

67. D'Amato, *supra* note 6, at 67-68.

68. McDougal, *supra* note 45, at 361.

69. D'Amato, *supra* note 6, at 68.

its support of the French testing. The justifications for the testing discussed earlier simply do not create a compelling argument of necessity. On the contrary, rather than adding to world security, the French development of a nuclear capability is a definite threat to world security. The tests themselves have become a serious source of friction between the Pacific states concerned and France. Additionally, the danger of a catastrophic nuclear accident is far greater in a large multipolar system of nuclear nations.[70] Most importantly, however, the French development of an independent nuclear arsenal gives impetus and justification to other nations of a similar size or position to create their own independent nuclear forces, either as a perceived military necessity or as a symbol of prestige.

Applying the classic balancing test, the value to the international community of the French testing is at best nonexistent and is more probably negative. One commentary has declared that the "French bomb is as irrelevant to the world as Louis XVI was to the France of 1789."[71] Therefore, for the tests to be justified, their infringement on the basic freedom of the seas must be negligible.

There is nothing negligible about the creation of a danger zone in the middle of the high seas with a radius of 200 miles and a down wind corridor of 500 miles.[72] It is not certain to what extent navigation was disrupted by the danger zone during the first tests, but at least one vessel, the American schooner Fri, was boarded by the French and the crew physically removed in international waters.[73] Even this minimal interference with free navigation in the high seas should be enough to tip the scales against France. More importantly, however, it is necessary to look at the potential cumulative effects. It has been suggested that if the French tests are justified, similar testing could then become virtually unlimited in the Pacific, thus causing an infringement of major significance.[74]

In short, on the basis of a strict interpretation of freedom of the seas, France has without doubt violated international law. Even with the less restrictive balancing test of reasonableness, however, France seems to be outside the bounds of international law in conducting its Pacific testing. The risks to the indigenous population and the resources on which they rely simply does not justify the negligible value of the testing to the world community. As Margolis stated concerning the U.S. testing in the 1950's, "it seems eminently reasonable that

70. *Id.* at 70.
71. *French Filth*, FAR EASTERN ECON. REV., July 30, 1973, at 11.
72. N.Y. Times, July 10, 1973, at 2, col. 4.
73. N.Y. Times, July 23, 1973, at 1, col. 4.
74. D'Amato, *supra* note 6, at 76.

. . . [those] who are undertaking to produce a weapon of such destructive power, are the people who should make the sacrifices which may be necessary for perfecting it."[75]

FRENCH DUTY UNDER ARTICLE 73

The potential dangers to the indigenous population raise the question of French conduct under Article 73 of the United Nations Charter. That article gives the following mandate:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants. . ."

If Article 73 applies to the French administration of the Polynesian Islands, France has clearly violated her "sacred trust" by placing her own national interests ahead of the "paramount" interests of the native population. France argues that Polynesia is not a trust territory within the meaning of Article 73, but is instead an overseas part of France.

It has been persuasively argued that France is estopped from raising this argument.[76] Section (e) of Article 73 requires all administering governments to submit reports to the Secretary-General concerning their territories. France did so in 1946 concerning "French Establishments in Oceania."[77] At that time, the General Assembly, arguably in reliance on the French and other nations' reports,[78] declared that all territories, included in the reports submitted, were to be considered the non-self-governing territories to which Article 73 would apply. If therefore, the French territories fall within the scope of Article 73, it can reasonably be argued that France is in violation of that portion of the U.N. Charter.

NON-PROLIFERATION TREATY—DISARMAMENT DECADE

Article I of the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty) states that each nuclear-weapon state should do nothing to "assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."[79] It has already been noted that the

---

75. Margolis, *supra* note 3, at 647.

76. D'Amato, *supra* note 6, at 73.

77. *Id.* at 72.

78. *Id.*

79. Treaty on the Non-Proliferation of Nuclear Weapons, *done* July 1, 1968, 21 U.S.T. 483, T.I.A.S No. 6839.

development of a nuclear capability by France may seriously encourage others to develop a similar capability for reasons of either defense or prestige. It has been said that "France provides a model for several nuclear club candidates."[80] France is not a signatory to the Non-Proliferation Treaty, but has promised to behave exactly as the contracting states to the Treaty.[81] Thus while explicitly, but not legally, accepting the principles of the Treaty, France is effectively violating them.

This kind of indirect violation[82] becomes more serious in light of on-going global activities to limit or eliminate the nuclear arms race. Since the 1950's, the U.N. General Assembly has passed over 20 resolutions calling for the end to all nuclear testing. Most importantly, it has declared "the Decade of the 1970s as a Disarmament Decade."[83] Indeed, the 1970's have seen some encouraging developments, such as the 1971 implementation of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor,[84] and the on going Strategic Arms Limitations Talks (SALT) between the United States and the Soviet Union.[85] These kinds of activities have two functions. First is to achieve practical, specific agreements to limit arms or to introduce safety measures against accidents. Just as importantly, they have served to create a global atmosphere conducive to negotiations and to lessen tensions. This kind of atmosphere is imperative for successful negotiations to reach meaningful disarmament measures. By their continued testing and development of nuclear devices, both France and China place this healthy global atmosphere in danger. They violate the overwhelmingly supported spirit of the Disarmament Decade by flaunting the international community and continuing their testing which is dangerous not only to life and health, but to world peace and security.

VARIOUS OTHER PRINCIPLES

A variety of other possible violations of international law by the French testing have been suggested or are apparent. A few will be briefly mentioned.

---

80. WENTZ, *supra* note 6, at 86.

81. U.N. Doc. A/PV.1672 (Prov.) at 3, 6; *also* UNITED NATIONS AND DISARMAMENT, *supra* note 5, at 294.

82. It has been suggested that France may be *directly* violating the treaty as well by secretly providing support to an Israeli nuclear arms program. WENTZ, *supra* note 6, at 110.

83. G.A. Res. 2602E, 24 U.N. GAOR Supp. 30, U.N. Doc. A/7630 (1969).

84. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor, *done* Dec. 7, 1970. conveniently found in 10 INT'L LEGAL MATERIALS 145 (1971).

85. *See generally* KESSING'S RESEARCH REPORT, *supra* note 5, at 358-75.

A. *Poisoned Weapons*

It has been argued that nuclear devices, with their resultant radioactive fallout, should be classified as poisoned weapons within the meaning of various international conventions[86] including the Hague Peace Conventions of 1899 and 1907 and the 1925 Geneva Protocol on Poisonous Gases and Analagous Materials, which was ratified by France.[87] If thus classified, the use of nuclear weapons, because of their contamination, would be prohibited, even in time of war. But this prohibition on the use of poisonous materials would "apply even more compellingly in time of peace to the incalculable poisonous effects of nuclear tests upon innocent parties."[88]

B. *Trail Smelter*

It has been suggested that the 1941 arbitration between Canada and the United States (Trail Smelter Arbitration) is a valid precedent in international law for environmental disputes.[89] In this dispute, the United States sought damages and an injunction against the operation of a smelter just across the border in Canada. In finding for the United States, the tribunal declared that:

> no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and injury is established by clear and convincing evidence.[90]

Certainly, by analogy, injury by radioactive wastes is as serious as injury by fumes and is, thus, includable in the Trail Smelter principle. But the applicability of the principle has been challenged as pertaining only to determining liability and compensation for damages and not a "prohibition of prospective harmful or illegal activity."[91] Yet if Trail Smelter is to serve as a principle of international law, it must be noted that remedies for environmental damage included both damages and *injunction*. If therefore, injury has resulted of "serious consequence" which is "established by clear and convincing evidence," the activity causing the injury should be stopped. When the issue to which the principle is to be applied is narrowed to just the current series of French testing, no serious injury has yet resulted. If, however, the issue is broadened to include the legality of all testing in the Pacific or at sea in general, the injuries caused by the U.S. testing in the 1950's, causing at least one death and the

86. Fliess, *supra* note 45, at 26; SCHWARZENBERGER, *supra* note 10, at 26-37.

87. C.J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 21 (6th ed. 1967).

88. Fliess, *supra* note 45,at 26.

89. Nanda, On Establishing Standards of International Environmental Injury 7 (not yet published); Lee, *supra* note 22, at 207.

90. Trail Smelter Arbitration, IAA at 1965-66.

91. Mercer, *supra* note 25, at 419.

destruction of a large volume of fish, are of serious enough consequence to justify a total prohibition against all future testing in the Pacific.

C. *Genocide Convention*

It has been suggested that the 1948 Convention Against Genocide may be violated by the French testing.[92] The convention prohibits any activity which may "destroy, in whole or in part, a national, ethnical, racial or religious group," in any number of ways including the causing of "serious bodily or mental harm to members of the group."[93] The indigenous population of the South Pacific is, of course, exposed to both serious physical and mental harm from the tests. But the Convention is of limited application, because it requires that the activity must be committed with the *intent* to destroy the group. No one can seriously argue that France has any such intent.

CONCLUSIONS ON THE LEGALITY OF THE FRENCH TESTS

A wide variety of international legal principles, customs and conventions have been discussed which bear on the matter. It has been shown that the French Pacific testing, and probably any atmospheric testing, is in clear violation of international law. An analysis of the Test Ban Treaty, the Stockholm Declaration, the classic principle of freedom of the seas, the test of reasonableness, the efforts of the United Nations and its Charter, and a number of other principles and activities provide the persuasive evidence.

In spite of their overwhelming condemnation by the international community and their patent illegality under international law, the tests continue. The available legal mechanisms have been invoked to no avail. The efforts of the international community to stop these tests provide a disturbing case study of the inefficacy of current procedures of enforcing international law and settling disputes.

PART II—RESOLVING THE CONFLICT

Article 33 of the United Nations Charter[94] suggests a variety of peaceful methods for the settlement of disputes. The failure of these methods (almost all have been attempted) to resolve the dispute over French nuclear testing illustrates some of the weaknesses of the current international system of conflict resolution.

EFFORTS TO USE THE UNITED NATIONS FORUM

The battle began in 1958 after France announced she would soon

92. D'Amato, *supra* note 6, at 76.

93. U.N. Doc. A/810 (1948).

94. "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. CHARTER art. 33, para. 1.

be proceeding with her first tests in the African Sahara. Twenty-two African and Middle Eastern states responded by introducing the first successful General Assembly resolution against nuclear testing.[95] It was directed exclusively against France, spoke of the "dangers and risks" of the Sahara testing, expressed its "grave concern" and directly requested France "to refrain from such tests."[96] This United Nations effort had no effect upon France. Neither have the more than twenty resolutions which have followed over the years, most of which have been directed at testing generally, and not at France in particular.

There have been two trends in these resultions. First is a notable increase in concern about the urgency of stopping all testing. Secondly there has been a growing emphasis on the health and environmental dangers of the testing and far less on the military danger. As early as 1960, the General Assembly warned against the "hazards of radiation resulting from test explosions as well as their adverse consequences to the prospects of world peace."[97] A decade later, reflecting the ecology movement, the General Assembly declared "*with special concern* that the continuation of nuclear weapon tests in the atmosphere is a source of growing pollution."[98]

Beyond this, the discussion in the General Assembly has now returned to the focal point where it began—opposition, almost exclusively, to French testing. One of the primary forums of debate has been the Ad Hoc Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction. In 1971, several Pacific nations used the Committee to call upon France to cease atmospheric testing "in view, *inter alia*, of the possibility of serious harm to the marine environment and to marine life."[99] The next year these countries complained that the tests were a health hazard without any compensating benefit to the victims.[100] Again they called upon France to halt the testing. France responded that nuclear tests had never been conducted under such strict controls with regard to the prevention and monitoring of side effects and claimed that there had been no appreciable pollution resulting from them.[101] Further, France pointed out that it had regularly submitted

95. G.A. Res. 1379, 14 U.N. GAOR Supp. 16, at 3, U.N. Doc. A/4354 (1959). Adopted 51-16 with 15 abstentions.

96. *Id.*

97. G.A. Res. 1648, 16 U.N. GAOR Supp. 17, at 3, U.N. Doc. A/5100 (1962).

98. G.A. Res. 2828, 26 U.N. GAOR Supp. 29, at 33, U.N. Doc. A/8429 (1971).

99. 26 U.N. GAOR Supp. 21, at 246, U.N. Doc. A/AC.135/SC.III/L.4 & Add 1 (1970).

100. 27 U.N. GAOR Supp. 21, at 65 (1972).

101. *Id.* at 66.

reports to the U.N. Scientific Committee on the Effects of Atomic Radiation which, in the absence of any comment on them, has implicitly confirmed their harmlessness. Finally, France claims that the assertions of environmental damage have all been made with no empirical evidence.[102] The only nation coming to France's defense in the debates was China, who claimed that the prohibition of nuclear testing would be precisely advantageous to the consolidation of the monopoly of the United States and Soviet Union over nuclear weapons.[103]

The debates within the United Nations resulted in a 1971 resolution which called for a halt to all atmospheric testing by August 5, 1973.[104] The 1972 resolution, reaffirming this deadline, singled out the French testing, thus capping a series of resolutions of which the original had been directed against France. It did so by *"[e]xpressing serious concern* that testing of nuclear weapons in the atmosphere has continued in some parts of the world, including the Pacific area, in disregard of that [Test Ban] Treaty and of world opinion."[105]

Nevertheless, it remained clear that France had no intention of complying with this overwhelming global sentiment. In response, the Prime Ministers of Australia and New Zealand issued strong declarations that France "must bear full responsibility" for the decision to continue testing.[106] Even stronger language was used by the foreign ministers of the "downwind" countries of Bolivia, Chile, Colombia, Ecuador and Peru.[107] Throughout the first part of 1973, an exchange of diplomatic notes took place between France and Australia which were unsuccessful in modifying the French position.

USE OF THE INTERNATIONAL COURT OF JUSTICE

It was as a final resort that Australia and New Zealand brought their dispute with France to the International Court of Justice (ICJ) in early May 1973.[108] Their reluctance to do so earlier resulted from two major factors. First there were serious jurisdictional problems which posed certain difficulties. France has strongly argued that the Court lacks jurisdiction and made it clear that it would not recognize the Court's jurisdiction. Secondly, aside from the force of public opinion and a sense of international responsibility, the only concrete means of forcing compliance with an ICJ order or decision is through

102. *Id.*
103. *Id.*
104. G.A. Res. 2828, *supra* note 98 at 33.
105. G.A. Res. 2934, 27 U.N. GAOR Supp. 30, at 17-19, U.N. Doc. A/8730 (1972).
106. U.N. Doc. A/8741, at 2 (1972).
107. U.N. Doc. A/8740, at 2 (1972).
108. Nuclear Tests Case, *supra* note 1, at 749.

an action of the U.N. Security Council.[109] As a permanent member, France can veto any Security Council action.

Nevertheless, these governments, believing that they had exhausted all other possible avenues asked the World Court to determine if the French testing was a violation of international law and, pending its decision, to issue an interim order under Article 41 of the Statutes of the Court[110] prohibiting the conduct of any further nuclear testing. That the governments of Australia and New Zealand took the petition with the utmost seriousness is demonstrated by their appointment of the Chief Judge of the Australian Supreme Court as *ad hoc* judge in the ICJ proceedings.

The Court's response to the petition indicates two important lessons concerning its potential use as a forum for conflict resolution. First, the Court can act relatively quickly, and with flexibility, when the urgency of a situation so warrants. Secondly, the efficacy of the Court's decision depends upon the true desire of each party to allow the Court to resolve the dispute.

OPINION OF THE COURT

The initial petitions were filed on May 9, 1973.[111] Public hearings were held from May 21-25. An order for interim measures of protection pending a decision on the merits was issued on June 22. The operative part of the order read:

> "The governments of Australia [New Zealand] and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute . . . and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian [New Zealand] territory. . ."[112]

The stickiest issue in the Court's 8-6 decision was that of jurisdiction. The question centered on what degree of certainty about its own jurisdiction, if any, is necessary before the Court may issue a binding order of interim protection. The majority held that evidence which appears, prima facie, to constitute a basis on which "the jurisdiction of the Court *might* be found" [emphasis supplied] is sufficient to justify interim measures of protection. The philosophy is that when there is a possibility that the Court will hear the case, and there is danger of immediate and irreparable injury to one of the parties, it is both prudent and proper to order measures to avoid the injury. This conclusion was also endorsed by at least one dissenting judge

109. U.N. CHARTER art. 94.

110. "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

111. Nuclear Tests Case, *supra* note 1, at 750.

112. *Id.*

who, however, found no such prima facie evidence of jurisdiction.[113]

The majority's decision on this issue seems to have a sound basis in legal authority.[114] The question is not novel; it has been raised on several occasions before the World Court.[115] In 1951, the ICJ was first confronted with a request for interim measures of protection in the *Anglo-Iranian Oil Company Case*.[116] The United Kingdom had brought an action against Iran after nationalization of the Iranian oil industry. Ultimately, Iran won when the Court announced that it did not have jurisdiction. Before that decision, however, the Court had issued an order calling for strong interim injunctive measures. In issuing that order the Court ruled that when "it cannot be accepted *a priori* that a claim . . . falls completely outside the scope of international jurisdiction," then measures of interim protection can be issued without in any way determining the ultimate issue of competence to deal with the merits.[117] When Iran failed to comply with the preliminary order, Britain raised the matter in the U.N. Security Council, requesting enforcement. The request became moot, however, when the Court announced shortly thereafter that it did not have jurisdiction, causing the interim measures to collapse.[118]

When a request for interim measures of protection was raised in 1957 in the *Interhandel Case*,[119] the Court neatly avoided the issue of jurisdiction by declaring that the good faith of the respondent (United States) was sufficient protection. The question of jurisdiction on the merits was ultimately avoided as well.[120]

The next cases raising the issue were the recent *Icelandic Fisheries Jurisdiction Cases*.[121] This dispute evolved from British and West German opposition to the establishment by Iceland of a 50 mile fishing zone in 1972. Again a question of jurisdiction was involved, and again prior to deciding upon that question, the Court entered an order of interim measures of protection. Despite the rather clear competence of the ICJ based upon an exchange of notes in 1961 authorizing it, Iceland simply refused to submit to the Court's jurisdiction. As a

113. Dissenting Opinion of Judge Petren in Nuclear Tests Case, *supra* note 1, at 765.

114. E. DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 165, 186 (1933); S. ROSENNE, I THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 424 (1965).

115. For their early use by the Permanent Court of International Justice, see DUMBALD, *supra* note 114, at 147-54.

116. [1952] I.C.J. 93.

117. P.J. LIACOURAS, THE INTERNATIONAL COURT OF JUSTICE 61 (1962).

118. ROSENNE, *supra* note 114, at 156-59.

119. [1957] I.C.J. 105.

120. LIACOURAS, *supra* note 117, at 209-10.

121. Fisheries Jurisdiction Case, 12 INT'L LEGAL MATERIALS 743 (1973).

result, the interim measures were highly unsuccessful.[122] A settlement was finally agreed upon in late 1973 outside the forum of the World Court and only after a potentially dangerous military standoff between the two countries.[123]

Against this unhappy background, it is not surprising that the attempt to impose interim injunctive measures in the nuclear testing controversy was not successful. From the outset, France argued that it was not subject to the Court's jurisdiction in the matter since it fell into the scope of an express limitation to the 1966 French acceptance of compulsory jurisdiction, specifically excluding "disputes concerning activities connected with national defense."[124] The petitioners relied on Article 33 of the General Act of 1928 for the Pacific Settlement of International Disputes to which France was a signatory.[125] That article called for compulsory jurisdiction of the Permanent Court of International Justice for certain disputes. On the possibility that the 1928 Act had not been superseded by the 1966 declaration or, in the alternative, the possibility that nuclear weapons testing may not be included in the concept of "national defense," the majority found that a prima facie case had been made that the Court *might* have jurisdiction.[126] These fragile possibilities were enough to justify issuing the Order, but not enough to convince France to accept the Court's decision and act accordingly. Just one month after the Order was issued France began its new test series.

The next step in the case is scheduled to be a decision on whether the Court has competence to entertain the dispute. In light of the French attitude toward the initial Court action, it would be easy to label further proceedings as wasteful and fruitless. It may well be, however, that despite the French intransigence, the use of the World Court may still prove useful in changing their current policy.

IMPACT OF THE COURT OPINION UPON FRANCE

In evaluating these international maneuvers, it must be noted that France is by no means solidly united on the issue of nuclear testing. Widespread opposition to the current series of tests is evident; sentiment is especially strong among the influential French clergy.[127]

It appears that the attitude of the French elite on the issue is

122. In the year after the measures were ordered, the nets of 68 British trawlers were cut, live shots fired by Icelandic gunboats, and 13 collisions occured between Icelandic and English ships. N.Y. Times, Oct. 3, 1973, at 3, col. 5.

123. N.Y. Times, Oct. 17, 1973, at 8, col. 4.

124. I.C.J. YEARBOOK 1972-73, at 60.

125. Nuclear Tests Case, *supra* note 1, at 750.

126. *Id.* at 751.

127. N.Y. Times, July 18, 1973, at 1, col. 6.

sharply divided. In 1966, an in-depth series of interviews with a large number of the French elite indicated considerable opposition to maintenance of a nuclear "force de frappe." When asked if they considered a national deterrent to be a prerequisite to a nation's independence, over half said they did not.[128] When asked if they considered an independent deterrent necessary for a nation's prestige in the world, only 29 percent responded that they did.[129] Finally, by a slim margin, the elite felt that the development of a nuclear capability was not worth the cost.[130] While these results may be slightly outdated, there is little reason to believe that French attitudes have hardened in the years since.

It is, then, upon French attitudes and politics that the ICJ action, and the international response to it, may have the most influence. Global reactions have put the French on the defensive. Following the Court order, the French Ambassador to the United States felt compelled to reply in length to a New York Times editorial on the subject. Setting the stage for a justification of the violation of the Court order which was obviously to follow in a few days, Ambassador Kosciusko-Morizet wrote that the other parties were "the first to set themselves in contradiction with the court's request" through measures such as boycotts of French products and transportation, and the cutting off of mail and telephone communication between the two countries.[131]

From this kind of reaction, it is clear that the French are sensitive to world public opinion. Their defiance of the Court order has aroused a number of official diplomatic protests,[132] severe criticism from legal scholars[133] and scathing denunciation in various media.[134] This barrage of negative reaction is bound to have some influence on French attitudes.

There is, among some scholars, a healthy trend to look beyond the obvious frailties of the international adjudicatory system to a more subtle, but highly important, role of international law in formulating national policy. This role simply can be to "operate as a restraint by raising the political cost which a country pays for engaging in certain conduct."[135] The Acting Legal Adviser to the U.S. Depart-

128. K. DEUTSCH, ARMS CONTROL AND EUROPEAN UNITY: ELITE ATTITUDES AND THEIR BACKGROUND IN FRANCE AND THE GERMAN FEDERAL REPUBLIC 130 (1966).

129. *Id.*

130. *Id.*

131. N.Y. Times, July 10, 1973, at 40, col. 4.

132. 12 INT'L LEGAL MATERIALS 749n. (1973).

133. Nanda, *French A Tests Stir Storms of Protests*, Rocky Mountain News, Nov. 25, 1973, Global News Section, at 1, col. 1.

134. *See French Filth*, supra note 71.

135. R. FISHER, INTERNATIONAL CONFLICT FOR BEGINNERS 174 (1969).

ment of State recently noted that "the absence of a comprehensive and dispositive system of adjudication does not necessarily lead to international anarchy. States comply with law among other reasons because it is politic to do so."[136]

It remains to be seen how much France will be influenced by world opinion. A good deal depends upon the reaction of the French people and the resolve of the government. Thus even though a continued deliberation of the issue in the World Court might be fruitless in producing concrete compliance with any orders to discontinue testing, its influence on world public opinion may be an important factor in any French decision to discontinue testing. There is clearly something more sacrosanct about a World Court opinion than a General Assembly resolution. Perhaps, the traditional independence of the courts in many municipal systems, and the strong popular respect the judiciary receives among the public, makes an ICJ decision have even greater potential impact upon public opinion than upon the development of concrete international law.

There is little room for compromise on this particular issue. "Ultimately the only alternatives are the continuance or the cessation of the French nuclear tests in the Pacific."[137] Given this situation, the various possible diplomatic procedures which have been suggested[138] can provide little direct benefit since each are designed to facilitate compromise. More attention has been focused upon the testing since Australia and New Zealand went to the ICJ than any time previously. A continued pursuit of this course of action may prove to be the best one in the immediate future.

William K. Ris, Jr.

136. Brower, *International Law as an Instrument of National Policy*, 3 DENVER J. INT'L L. & POLICY 285 (1973).

137. Dissenting opinion of Judge Forster, Nuclear Tests Case, *supra* note 1, at 758.

138. *See* for example Note, *supra* note 11.