DOES INTERNATIONAL LAW REFLECT INTERNATIONAL OPINION? FRENCH NUCLEAR TESTING IN THE TWENTIETH CENTURY

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AUTHOR'S FOREWORD

The following Note was written in the Fall of 1995, as the French government was commencing with its final round of underground nuclear tests in the South Pacific. During the past year, as this work was being prepared for publication, many changes have transpired in the world which are related to the issues discussed in this paper. The French have completed their nuclear testing, have finally signed the 1985 South Pacific Nuclear Weapons Free Zone Treaty,¹ and are among those currently supporting a comprehensive “zero option” Nuclear Test-Ban Treaty.²

After much deliberation, instead of attempting to change the substance of this Note by incorporating every recent development into the existing text and thereby possibly undermining the continuity of the paper, I have decided to leave the essay in its original form. Although taking this approach necessarily changes portions of this Note from a commentary on current events to a historical case study, the legal issues and arguments stemming from France’s nuclear testing remain equally relevant and worthy of analysis, as the same issues would resurface should any nation decide to carry out any nuclear tests today.

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¹ Ramos Hails South Pacific Nuclear Free Zone Treaty, XINHUA ENGLISH NEWSWIRE, Apr. 10, 1996.

² ADDS Russian Backing for Zero Option, AGENCE FRANCE-PRESSE, Apr. 20, 1996.
I. INTRODUCTION

Does nuclear testing violate international law? Now that the Cold War is over, there is a growing sentiment in the world that the nuclear arms race should be over as well.\(^3\) However, on June 13, 1995, France announced that it would stage a series of underground nuclear tests,\(^4\) most likely at Mururoa Atoll in the South Pacific.\(^5\) The first of these detonations, which took place on September 5, 1995 at Mururoa Atoll, was stronger than the atomic blast at Hiroshima during World War II;\(^6\) the blast ended a three-year moratorium on nuclear testing by the French.\(^7\) World response following the French announcement was swift, ranging from carefully worded condemnation by the United States government\(^8\) to outright calls for boycotts of French goods.

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\(^1\) See Focus on Nuclear Testing: The Threat Continues, ATLANTA CONSTITUTION, Aug. 16, 1995, at A8. The article notes that over one million people worldwide have signed a petition urging French President Jacques Chirac to cancel the tests. Id.

\(^2\) France to Resume Nuclear Testing; 8 Blasts Planned in South Pacific, STAR TRIBUNE, June 14, 1995, at 2A.

\(^3\) Paul Chapman and Christopher Lockwood, EU Moves to Block French Nuclear Tests, THE DAILY TELEGRAPH, Aug. 9, 1995, at 12. Mururoa Atoll is the primary testing site used by the French; occasionally, tests are conducted at Fangataufa Atoll, which is more deserted than Mururoa. The most powerful explosions are detonated at Fangataufa Atoll. See Michael Perry, 4 Activists Detained at Site of N-Blast: French Planning More Bomb Tests, SEATTLE POST-INTTELLIGENCER, Sept. 29, 1995, at A24.

\(^4\) Sandy MacIntyre, France Ignores Protests, Sets Off a Nuclear Blast, THE ASSOCIATED PRESS, Sept. 6, 1995. The author explains:
The blast Tuesday equaled less than 20,000 tons of TNT, the French Defense Ministry announced in Paris. By comparison, the atomic bomb that destroyed Hiroshima was equal to about 15,000 tons of TNT.

The second test of the series, which took place on October 1, 1995, was even stronger:
The Defense Ministry said in Paris today that the test, which it detonated Sunday on Mururoa atoll, across the international dateline, was "less than 110 kilotons." New Zealand seismologists estimated the blast was about 100 kilotons and produced a shock wave equal to a 5.9 magnitude earthquake.


\(^5\) See, e.g., France's Announced Nuclear Plans Invite Criticism (CNN television broadcast, June 14, 1995). "The White House yesterday said it was disappointed over the French government's move. . ."
by some Australian citizens. By the middle of August, over one million people worldwide had signed a petition urging French President Jacques Chirac to cancel the tests. In spite of the mounting opposition to the tests, France has refused to cancel them; the French government claims that this series of tests is needed to provide information that will allow France to switch to computer-simulated tests in 1996. President Chirac has pledged to sign a comprehensive nuclear test-ban treaty in 1996.

The staunchest opposition to the planned nuclear tests has come from New Zealand and Australia, who went so far as to challenge the legality of the French tests at the International Court of Justice (I.C.J.). The bulk of this Note will be devoted to assessing the legal positions of New Zealand and Australia and analyzing the ruling in the case. In addition, and perhaps more importantly, this paper will discuss whether these nuclear tests could realistically be stopped, even if deemed illegal by the Court. Ultimately, an analysis of these issues will raise questions about the overall impact that international law has and will continue to have on nuclear weapons testing throughout the world.

II. BACKGROUND

The June 13, 1995 announcement by the French government was by no means the beginning of this controversy. In fact, the roots of this disagreement can be traced back to the early 1960s. It was in 1963 that France moved its nuclear testing center from Algeria to Mururoa Atoll, in the Tuamotu Archipelago. The New Zealand government, after learning of the French move, sent notes to the French government protesting the detonation of nuclear tests in the South Pacific:

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9 Id. "Some Australians are calling for boycotts of French goods."
10 Focus on Nuclear Testing: The Threat Continues, supra note 3.
11 France to Resume Nuclear Testing; 8 Blasts Planned in South Pacific, supra note 4.
There is widespread public apprehension that fallout from any tests in this vicinity will produce hazards to health and contaminate food supplies, both land and marine, in the Cook Islands and indeed in New Zealand itself.

In international forums and in public statements, the New Zealand Government has repeatedly stressed over recent years its opposition to the continuation of nuclear testing. It is the Government's earnest desire to see the cessation of all nuclear tests by means of an effective international agreement . . . .

In spite of New Zealand's objections, France conducted its first South Pacific test on July 2, 1966. During the remainder of the 1960s, New Zealand continued to send diplomatic complaints to the French government and joined with Australia in formally protesting the French testing program to the United Nations. Meanwhile, the Australian government decided to seek relief in the International Court of Justice; this plan was communicated to New Zealand in 1972. In the following months, the New Zealand government continued to seek alternative means of settling the dispute, but failed to convince France to halt its testing program. Finally, in February of 1973, New Zealand decided to place the dispute before the International Court of Justice.

16 Id.
17 Id. at 361-62.
18 Id. at 364.
19 Id. at 365. Kós notes that New Zealand hoped to end the dispute in one of the following manners: 1) it sought a regional conference devoted to testing in the Pacific; 2) it pressed for accession by all states to the Partial Test Ban Treaty; 3) it promoted a comprehensive test-ban treaty; 4) it researched the possibility of creating an embargo against the export of nuclear materials to states refusing to join the Partial Test-Ban Treaty; 5) it researched the possibility of a nuclear-free zone in the South Pacific; 6) it considered sending a frigate to patrol the high seas near Mururoa; and 7) it attempted a directly negotiated settlement with France.
20 Id. at 367.
A. The 1973 Cases

An issue of primary importance in the 1973 cases was whether the Court had jurisdiction over the parties. Generally, the International Court of Justice can exercise jurisdiction only if the states involved in a controversy consent. However, under the doctrine of "incidental" jurisdiction, the Court has the power to issue an interim order, even if its general jurisdiction over the merits is disputed; states are deemed to have consented automatically to the Court's "incidental" jurisdiction by signing the U.N. Charter. In 1973, the I.C.J. was called on by New Zealand to issue interim injunctive relief. Specifically, New Zealand requested the Court to "lay down or indicate that France, while the Court is seized of the case, refrain from conducting any further nuclear tests that give rise to radio-active fall-out."

France reacted to the filing of the case by denying the competence of the Court to hear the case; the French government demanded that the Court strike the case from its list and refused to participate in the proceedings. The Court, however, noted that "the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures," and proceeded to determine whether the facts of the case warranted interim relief.

The I.C.J. ultimately decided that it did indeed have the power to grant interim relief, and that the facts surrounding the case necessitated granting such relief to New Zealand. The Court granted the following provisional measures:

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21 Although the Australian and New Zealand cases were not joined, the 1974 opinions were substantially identical. Since New Zealand is the primary party involved in the 1995 Court action, this Note will discuss the 1974 and 1995 portions of the case from New Zealand's perspective.
23 I.C.J. Statute, art. 41; see also Keith, supra note 22, at 351.
24 U.N. Charter art. 93, para. 1.
26 Keith, supra note 22, at 351.
27 Id.
28 1973 I.C.J. at 137.
29 The standard for jurisdiction to indicate interim measures under Article 41 of the Statute of the Court is as follows: the Court cannot indicate interim measures unless it appears, prima facie, to have jurisdiction on the merits. See 1973 I.C.J. at 139.
The Governments of New Zealand and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in this case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of New Zealand, the Cook Islands, Niue, or the Tokelau Islands.\(^\text{30}\) (emphasis added).

This ruling, given in May of 1973, was ignored by France. The French government continued to conduct nuclear tests in the South Pacific during the remainder of 1973 and the beginning of 1974.\(^\text{31}\) In addition, France formally denounced the General Act for the Pacific Settlement of International Disputes, which New Zealand hoped to use as a basis for jurisdiction on the merits.\(^\text{32}\)

When the case finally came before the Court for a determination of jurisdiction on the merits, the Court avoided a direct ruling on the issues in the case. Instead, the Court pointed out that the French government had, in mid-1974, announced that it was ready to stop conducting atmospheric tests and would shift to underground tests in 1975.\(^\text{33}\) These public statements,

\(^{30}\) 1973 I.C.J. at 142.

\(^{31}\) Keith, supra note 22, at 351.

\(^{32}\) Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (1974), at 477. Since France did not grant its consent to be brought before the Court, and had previously qualified its consent under the Optional Clause by excluding disputes concerning matters connected with national defense, New Zealand had to search for some other means to justify the Court’s general jurisdiction on the merits. The General Act for the Pacific Settlement of International Disputes was a 1928 treaty to which France had acceded; the Act contained a stipulation that conflicts would be brought before the Permanent Court of International Justice (predecessor to the International Court of justice).

\(^{33}\) Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (1974), at 474. Actually, France had made this announcement several times in 1974: first, in a communiqué issued by the President’s office stating, “France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.”; second, in a note from the French Embassy in Wellington to the New Zealand Ministry of Foreign Affairs stating in part, “France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground firings as soon as the test series planned for this summer is completed.”; and finally, the French President made a similar statement at a press conference, as follows:
according to the Court, constituted a binding commitment by France to cease atmospheric nuclear testing. Since the Court saw the cessation of atmospheric nuclear testing by France as the objective of New Zealand in filing the case, it concluded that "the dispute having disappeared, the claim advanced by New Zealand no longer has any object. It follows that any further finding would have no raison d'etre." At that, the Court discontinued the proceedings.

Thus, the Court seemed to believe that the controversy was settled. The opinion did, however, leave a loophole in case the controversy erupted again:

However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request.

It was via this paragraph that New Zealand attempted to bring its 1995 complaint before the Court; in essence, since France denounced the General

... on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect. ..

Id. at 469-72.
34 Id. at 475.
35 Id. at 476.
36 Id. at 477. The Court explained:

Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues in abstracto, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

For an assessment of the legality of the Court's discontinuance of the proceedings in this case, see Ian Scobie, Discontinuance in the International Court: The Enigma of the Nuclear Tests Cases, 41 INT'L & COMP. L.Q. 808 (1992).
Act for the Pacific Settlement of International Disputes in 1974, New Zealand had no basis for jurisdiction on the merits of a new case. Accordingly, the New Zealand government attempted to re-open the 1973 case to stop France from conducting underground tests in 1995.

B. 1995: The Case Ends

On September 22, 1995, the International Court of Justice threw out New Zealand's case against France. The Court refused to re-open the 1973 case, and furthermore denied New Zealand's request for interim relief. The Court stated that the 1973 case could not be re-opened because atmospheric testing is not the issue today. French reaction over the judgment was guarded; Foreign Affairs Minister Herve de Charette stated, "There is no loser, there is one winner: good sense." In spite of the diplomatic French reaction, the ruling was obviously a major defeat for New Zealand. Jim Bolger, Prime Minister of New Zealand, said that he was "disappointed" by the decision, but then attempted to downplay the importance of the judgment:

France can take no comfort from this decision . . . [t]his was a decision on purely technical grounds about the terms of the 1974 judgment. It has no bearings on the merits of French nuclear testing.

More importantly, however, this ruling, when examined in conjunction with the holding in the 1974 case, is illustrative of the continuing weakness of international law in the area of nuclear testing. A comparative analysis of

39 Kathryn Hone, French Announce Next Test as Court Challenge Fails, THE IRISH TIMES, Sept. 23, 1995, at 8. The author reports: The 15 judges decided 12 to three that New Zealand was not authorised (sic) to reopen its 1973 case against French nuclear tests in the South Pacific.
41 Hone, supra note 39.
42 Id.
43 Id.
the 1974 and 1995 rulings will demonstrate that during the last twenty years, very little has changed with respect to international law and nuclear testing.

III. ANALYSIS

A. The Role of the I.C.J.

In discontinuing the 1973 case, the International Court of Justice noted that the dispute between France and New Zealand had “disappeared,” and that allowing the continuation of the proceedings would have been “fruitless.” On its face, this ruling may seem logical. However, several factors suggest that hidden forces may have been at work in influencing this reasoning by the Court.

First, it should be noted that the judgment was made without the Court ever formally deciding that France was subject to its general jurisdiction. In addition, the Court’s interpretation of New Zealand’s objective in filing the case was arguably restrictive. In particular, New Zealand asked the Court to declare that:

the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand’s rights under international law, and that these rights will be violated by any further such tests.

Nowhere in this statement did New Zealand specify that it was concerned only with atmospheric testing. Why, then, did the Court rule that the dispute

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44 1974 I.C.J. at 476.
45 Id. at 477.
46 Keith, supra note 22, at 352. It should be emphasized that there is a difference between incidental jurisdiction, which the Court can use to issue provisional relief, and general jurisdiction on the merits of the case. In 1973, the Court granted provisional measures according to its incidental jurisdiction. At no time (1974 or 1995) did the Court ever address the issue of whether it had general jurisdiction to rule on the merits of the case.
47 Id. at 352. Keith asserts:
The Court, by reference to a series of statements made mainly outside the court proceedings and as late as 1 November, read this narrowly in at least three ways: the concern was with (1) atmospheric tests, (2) so conducted as to give rise to radioactive fallout on New Zealand territory, and (3) carried out in the future (i.e. after 1974).
was moot due to France’s announcement that it was planning to switch to underground tests? The answer to this question could very well explain why the Court really threw out the case in 1995.

It is possible that the I.C.J. realized that it was in a difficult position and was trying to “save face” for all parties involved in the case. By ruling that the controversy was at an end, the Court accomplished several goals: (1) it avoided appearing powerless to the world by not issuing an order that France would simply ignore; (2) it preserved France’s pride by allowing France to appear as if it was making its own decision to proceed to the next technological step in its testing program (i.e. underground tests); and (3) it saved face for New Zealand by purporting to issue a judgment that restricted France in some way from carrying out a practice (i.e., atmospheric testing) that had instigated the case. In effect, it appears as though the Court simply took the easy way out in order to avoid a legal ruling on the question of nuclear testing.

Twenty years later, it seems as though nothing has changed. The September 22, 1995 ruling by the Court once again failed to rule on the legality of France’s actions. Instead, the Court merely held that the case could not be re-opened because atmospheric testing is no longer the issue. Of course, there are those who would say that atmospheric testing never was the issue to begin with—that the legality of nuclear testing in general was the issue. Regardless of how one classifies the true issue in this controversy, it is obvious that the 1995 ruling accomplished exactly what the 1974 ruling accomplished: it prevented the Court from appearing powerless in the world spotlight. One issue remains unresolved: is France’s nuclear testing legal?

49 Keith, supra note 22, at 351. Keith notes, “The Court was immediately in a difficult position. France called on it to strike the cases from its list since it was manifestly incompetent to deal with them.” It is also important to note that France was traditionally a strong supporter of the Court. Id. at 349.

50 Indeed, France had recently ignored the Court’s interim relief order to avoid setting off any more atmospheric tests pending the outcome of the case.

51 Of course, this point could be argued either way: Perhaps France was doing exactly what it wanted by proceeding to underground testing (and still paying absolutely no attention to the Court), or maybe France “decided” to proceed to underground tests because of the case.


B. Treaty Obligations

Since the International Court of Justice is evidently not going to rule on the legality of France’s actions, one might examine whether the nuclear tests violate any of France’s treaty obligations. For example, France is a signator of the *Treaty Establishing The European Atomic Energy Community* (Euratom). Article 34 of the treaty states that:

> Any Member State in whose territories experiments of a particularly dangerous nature are to take place shall take additional health precautions, concerning which it shall first obtain the opinion of the Commission.

> The consenting opinion of the Commission shall be required when such experiments are likely to affect the territories of Member States.

Thus, arguably, the European Union could require France to obtain the “opinion” of the Commission if the nuclear tests threaten to affect the territory of any Member State. In addition, Article 203 of the Euratom treaty states:

> If any action by the Community appears necessary to achieve one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.

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55 *Id.*, art. 34.

56 Alex Spillius, *Pitcairn May Stop Nuke Tests*, DAYTON DAILY NEWS, Sept. 18, 1995, at 4A. The article reports that Pitcairn Island, a British Colony in the Pacific with a population of 55, may be used to invoke Article 34 of Euratom:

> The 55 islanders take much of their food from the sea and are concerned their diet could be at risk from radioactive waste leaking through cracks in the atoll . . . Now Ritt Bjerregaard, the Danish head of the EU’s environment and nuclear safety commission, is aiming to invoke Article 34 . . . Britain, which hasn’t condemned the tests, will be powerless to intervene even though the deciding factor will be the effects of the tests on one of its dependencies.

57 *Euratom*, *supra* note 54, art. 203.
This broad clause seems to give the Community almost unlimited power to enforce its “aims.” Thus, if the French testing appeared to pose a threat to the Community, appropriate action could be taken.

The major problem with looking to the Euratom Treaty as a means of halting France’s nuclear testing is that other members of the European Union have been hesitant to criticize the French actions. In spite of speculation in the media that environment officials in the European Commission in Brussels have considered legal action of some sort, there has been no official move. In fact, France has received overt support from at least one other European country on the resumption of testing. In effect, some people evidently believe that the European Community may actually stand to benefit from a strong French arsenal; thus, it seems doubtful that other European countries will attempt to stop France, via the Euratom treaty or otherwise, from conducting this final round of nuclear tests.

Many commentators have suggested that France has violated the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which France itself reaffirmed in 1995, by restarting nuclear testing. Article VI of the NPT states:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

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58 See Chapman and Lockwood, supra note 4, at 12.
59 Michael Shields, Bonn Sees New Role For French Weapons, THE IRISH TIMES, Aug. 26, 1995, at 10. The author notes: Germany said yesterday it would like France to expand its nuclear force beyond its own territory and suggested French weapons could put real muscle into an integrated European defence policy.
60 See, e.g., New Zealand Urges World Court to Declare Nuclear Arms Illegal, AGENCE FRANCE PRESSE, Nov. 9, 1995 (quoting Wellington, New Zealand, public prosecutor Paul East); see also Thalif Deen, Disarmament: Four Western States Join Anti-Nuclear Move, INTER PRESS SERVICE, Nov. 7, 1995 (quoting Utula Samana of Papua, New Guinea).
63 NPT, supra note 61, art. VI.
Thus, by being one of the two admitted nuclear powers to test nuclear weapons in 1995, France is arguably in violation of this good-faith clause of the NPT; testing nuclear weapons is hardly an "effective measure relating to cessation of the nuclear arms race."

The problem with this argument is that Article X of the NPT states:

> Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.

In effect, this article is a loophole that any party could use to circumvent its obligations under the Treaty. It is important to note that the Treaty does not, on its face, require that the "extraordinary event" be objectively threatening to a country's supreme interests. For example, France could conceivably assert that its supreme interests are jeopardized by rumors that North Korea is building a nuclear arsenal.

Another problem with pointing to the NPT as a source of illegality for the actions of France is that the treaty itself contains no explicit reference to nuclear testing. French Prime Minister Alain Juppe has stated that France is, in fact, committed to the "struggle against proliferation." Thus, it certainly appears as though France does not consider itself to be in violation of the NPT. This fact, when taken with the "national interests" escape clause, makes the NPT an unlikely vehicle for asserting that the actions of France are a violation of international law.

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65 NPT, supra note 61, art. X.

> Our attachment to a deterrent does not contradict our wish to reduce the level of arms in the world and the struggle against proliferation. France, which never participated in the arms race, has voluntarily reduced its nuclear arsenal by 15 per cent since 1991. Its diplomacy and that of the European Union under a French presidency were particularly active and effective in obtaining the indefinite and unconditional renewal of the Non-Proliferation Treaty in May.
It is also important to examine any relevant treaties which could be used by South Pacific nations to stop the testing in their region. An obvious starting point for analysis here is the Convention for the Protection of the Natural Resources and Environment of the South Pacific region (SPREP Convention). The SPREP Convention, to which France is a signatory, is a key instrument in the protection of the South Pacific environment. However, the SPREP Convention contains no explicit prohibition of nuclear tests; in fact, the only possible restriction on testing is found in Article 12, which states: "The Parties shall take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices." This provision seems to be rather easily complied with, especially since "appropriate measures" is an undefined and vague standard, at best. Moreover, the very language of this provision almost assumes that nuclear testing will occur. Accordingly, the SPREP Convention is not the answer for those seeking to hold France accountable under international law.

C. Customary Rules of International Law

Although France has evidently not entered into any treaties which render its renewed nuclear testing illegal, there may be agreements in existence to which France is not a party, yet which could nonetheless be binding on France as rules of customary international law. The International Court of Justice has summarized the process whereby a treaty can generate a rule of customary international law and thereby become binding on third parties:

[The process involves] treating [an] Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or

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68 South Pacific Region: Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 26 I.L.M. 38 [hereinafter SPREP Convention].
70 SPREP Convention, supra note 68, art. 12.
71 At least one commentator has observed that the SPREP Convention implicitly allows nuclear testing. See Osmundsen, supra note 69, at 760-63.
72 For a thorough discussion of how a treaty rule can become binding on a third state as a rule of customary international law, see Grief, supra note 66, at 26.
contractual in its origin, has since passed into the general corpus of international law... so as to have become binding even for countries which have never, and do not, become Parties to the Convention. There is no doubt that this process is a perfectly possible one (and) constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.73

The I.C.J. narrowed this definition to three main requirements necessary to establish a customary rule: first, the provision must be of a norm-creating character;74 second, one must regard the degree of participation in the treaty at issue,75 and third, within the time period in question, state practice, including that of states whose interests are specially affected, should be extensive and uniform in the sense of the provision at issue, and should occur in such a way as to demonstrate opinio juris.76 A key aspect of a customary rule of international law is that it would not be binding on a state which has always refused to recognize it.77

In the case of France, it has been suggested that its nuclear testing has violated Principle 21 of the Stockholm Declaration on the Human Environment,78 under which states have the responsibility to "ensure that activities within their jurisdiction or control do not cause damage to the environment[s] of other States or of areas beyond the limits of national jurisdiction."79 This Principle, which is declaratory of customary international law,80 is binding on France unless it can successfully claim to be a "persistent objector."81

Assuming that France is bound by this Principle, one must still prove that

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74 Grief, supra note 66, at 27.
75 Id.
76 Id. Opinio Juris has been defined as the requirement that practice be accepted as law.
Louis Henkin et al., International Law Cases and Materials, 56 (3d ed. 1993).
77 Grief, supra note 66, at 28.
78 11 I.L.M. 1416. The argument that follows is summarized from Grief, supra note 66.
79 Grief, supra note 66, at 33-34.
80 Id. at 38 n.96.
81 Id.
the testing has caused damage to the environment of some other state or to an area outside of France's jurisdiction. Although there have been many reports that the testing at Mururoa Atoll has damaged the atoll itself, the evidence regarding harm to territory not under French control is conflicting. As we have already seen, the British Colony of Pitcairn is concerned about the contamination of sea life in its environment; similarly, inhabitants of the Cook Islands maintain that fish poisoning is prevalent in that area. If these allegations can be proven, a strong argument could be made that France is in violation of Principle 21 of the Stockholm Declaration.

France, however, has declared that its tests pose "no ecological harm," and has issued reports stating that after 30 years of underground tests, "the percentage of radionuclides in French Polynesia is less than that of France or northern Europe." The bottom line is that experts can readily be found to support both sides of the argument. In order for France to be found in violation of the Stockholm Declaration, one group of experts will have to be proven wrong; this would be a difficult task indeed.

D. General Principles of International Law

Aside from customary rules of international law, there remain general principles of accepted international law that might be violated by underground nuclear testing. For example, the "mere intrusion of intrinsically harmful radioactive particles into the territory of another State would arguably violate the territorial integrity of that State." This argument is

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82 See, e.g., Michael Perry, Pacific Leaders Reject Australian Nuclear Report, THE REUTER EUROPEAN COMMUNITY REPORT, Aug. 17, 1995 ("[An] Australian-New Zealand scientific report released on Wednesday said testing had damaged the atolls, causing submarine landslides and cracking, and continued testing would result in radiation leakage within 50 years."). See also Osmundsen, supra note 69 ("Three separate research teams conducted investigations at Mururoa between 1983 and 1987, the last of which was led by Jacques Cousteau. Cousteau's report warned that deep cracks existed in the atoll.").

83 Perry, supra note 82. "There is concern by many people who refuse to eat fish or shell fish on the eastern side of the island, which lies closest to French Polynesia . . . [the] people are concerned, scared about what is going on."


85 Id.

86 Id. "Reports contradict each other, experts oppose experts."

87 The following arguments are adapted from Grief, supra note 66.

88 Grief, supra note 66, at 34.
similar to that which may be used by an outside state to assert that Principle 21 of the Stockholm Declaration is being violated; the major difference, however, is that no harm is required for a violation of territorial integrity to take place. The very presence of radiation would be a violation of territorial integrity.

In addition, one might also assert that the involuntary receipt of such particles would violate the receiving state’s decisional sovereignty. The argument here is that every state has the right to decide for itself what level of radioactivity to allow within its own borders; that right would be violated if another state’s actions caused those levels of radioactivity to be affected. The inherent difficulty with this argument is that it would be difficult to prove how much of the radiation that is introduced into the receiving state’s environment comes from the nuclear testing of the accused state.

The argument has also been made that nuclear testing is a violation of human rights. Principle I of the 1972 Stockholm Declaration on the Human Environment states:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to project and improve that environment for present and future generations.

This Principle, which may assert an emerging rule of customary international law, would certainly be violated if the fears of the people of Pitcairn and the Cook Islands are justified. Moreover, this Principle would seemingly apply to residents of French territories as well as outsiders. This fact is of particular significance, as there have been widespread reports of adverse effects from the testing on people who live in French Polynesia:

[T]here is anecdotal evidence suggesting numerous birth defects and certain cancers among islanders living near the test site. Hans Veeken, of the charity Doctors Without

89 Id.
90 Id.
92 Grief, supra note 66, at 35.
Borders, wrote in the [British Medical Journal] ... that children are being born without [anus].

A similar account stated that there have been reports of dramatic increases in the incidence of brain tumors, leukemia and thyroid cancer among the inhabitants of the Polynesian islands over the last two decades.

These allegations, if true, would all violate the human rights standards set forth in the Stockholm Declaration. The problem, however, remains one of proof: how do we know precisely what has caused these aberrations? Seemingly, New Zealand would be unable to make claims such as these at the I.C.J., because the effects of the tests have not been so severe in that country. It would be interesting, however, to see how the Court would handle a case brought in the future by a then-independent French Polynesian state. Undoubtedly, the issue of causation would be much easier for the Court, considering the proximity of the would-be complainants to the nuclear testing center. This analysis, however, assumes that the Court would find a way to exercise jurisdiction over the merits of such a case, an assumption which is tenuous at best. It is still far from certain that the Court ever had jurisdiction over the 1973 case, much less any new case involving French nuclear testing.

E. Enforcement

The foregoing analysis has focused on arguments that could be advanced in favor of the idea that France has somehow violated international law by conducting nuclear tests. Even if we assume for the moment that France is indeed in violation of some international rule, or that the International Court of Justice had found that France broke the law with respect to New Zealand, a key question arises: Does it matter? Does it make a difference if France is in violation of multiple international rules? In effect, is there any way to stop France from carrying out these tests?

A look at the outcome of the action brought by New Zealand suggests that the answer to the above question is “no.” A frank assessment of what happened in 1974 reveals that France did exactly what it wanted to do. To be sure, France did not detonate any more atmospheric blasts after 1974, but,

93 Kole, supra note 84, at A2.
as we have already seen, this fell well short of the relief that New Zealand had requested. Moreover, it appears that France's shift to underground testing was not a result of the Court's ruling, but instead was a previously-determined course of action due to advances in technology: "We have reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year."\footnote{1974 I.C.J. at 471, quoted in Grief, supra note 66, at 29-30.}

There appears to be no reason why France would not simply ignore any adverse ruling by the I.C.J. today just as it did in 1974. Indeed, the fact that the French government has officially denounced the \textit{General Act for the Pacific Settlement of International Disputes} suggests that France would do just that.

If France were to violate an interim order given by the Court, New Zealand could bring the matter before the Security Council.\footnote{Kós, supra note 14, at 386.} However, the problem with this course of action is that, if New Zealand obtains the majority, France could simply veto any motion condemning its actions.\footnote{Id. Kós suggests that this is exactly why New Zealand did not bring the 1973 French violation of the injunctive order before the Security Council. Under Article 27 of the U.N. Charter, decisions of the Security Council on all nonprocedural matters are made by an affirmative vote of seven members, including the concurring votes of the five permanent members. U.N. Charter art. 27, para. 3.} Thus, it would appear that any ruling, interim or final, would simply be ignored. Is there any way to enforce international rules of law?

One way to ensure that a country follows its obligations under international law is for other countries to use political pressure.\footnote{This use of pressure could occur: (1) if a state is deemed to be in violation of international law after an adverse International Court ruling, or (2) if, as in the case of France, there is no official ruling that international law has been violated, but world opinion strongly condemns the disputed actions.} This pressure does not have to manifest itself in a violent manner. On the contrary, it would be quite plausible for military allies to exert political pressure on each other to ensure uniform application of international law. In the case of France, there have been several examples of this type of pressure.

The Japanese government has been strongly opposed to the resumption of France's nuclear testing.\footnote{See Local Pref. Halts French Chopper Purchase Over N-Test, JAPAN POLICY & POLITICS, Sept. 18, 1995, available in 1995 WL 2227278.} In order to dissuade France from carrying out
this series of tests, Japan has opted to use political pressure. After public condemnations of the French plans failed to prevent the tests from beginning on September 5, a division of the Japanese government stepped up its protest:

Saitama Gov. Yoshihiko Tsuchiya said Monday that to protest France’s resumption of nuclear tests he has decided to put off plans to buy a French-made helicopter. Deputy Gov. Hiroaki Nakagawa said the 924 million yen purchase will be scrapped completely if France conducts another nuclear test.

Thus, in spite of the failure of the I.C.J. to address the legality of France’s actions, the government of Japan is banking on the notion that France will think twice before jeopardizing a 924 million yen deal.

A similar turn of events has transpired in Australia, whose government has been among the most outspoken against the French nuclear tests. After bringing the case before the I.C.J., Australia continued its efforts to stop the testing by using political pressure similar to that used by Japan:

The worst fallout was in Australia, where France recalled its ambassador on August 2 after [Defense Minister Robert Ray] eliminated the French firm Dassault from the bidding for an A$1 billion ($720 million) defence contract.

In effect, Australia, like Japan, is hoping that economic pressure will be more effective than the legal action brought before the World Court.

100 New Zealand and Cook Islands Hand the French a Protest of Nuclear Testing, BALTIMORE SUN, Aug. 29, 1995, at 5A.
101 Local Pref. Halts French Chopper Purchase Over N-Test, supra note 99.
102 It should also be noted that the helicopter in question is manufactured by Eurocopter, a merger of French and German Aerospace companies. Perhaps Governor Tsuchiya is hopeful that the German company will be unwilling to jeopardize such a contract and will likewise urge the German government to pressure France to abort the remaining tests. This scenario, though compelling, is unlikely to come about in light of the German government’s support for a unified European defense arsenal. See supra note 59.
Evidently, the theory is that a toothless court ruling is easier to ignore than the loss of billion dollar contracts.

These actions, which have been categorized in this essay as "political pressures," are in reality economic actions sanctioned by the governments of concerned states. In theory, these actions are sound, as money talks. However, such sporadic efforts as Japan and Australia have undertaken are unlikely by themselves to deter France's defense goals. This seems especially true considering the support that France has received from other European states.105

In addition, with respect to the Australian economic pressure, a problem arises in that France had an A$750 million trade surplus with Australia in the 1993-94 fiscal year;106 France has threatened to suspend its imports of Australian uranium and coal if Australia continues to use economic pressures.107 The bottom line is that a more unified international economic effort against a state might affect that state's policy, but isolated individual efforts are unlikely to succeed.

A second means by which to ensure that a country follows its obligations under international law can be via "popular" pressure. This type of pressure, unlike political pressure, does not involve any official state action. Conversely, individuals throughout the world can exert pressure on states who either fail to follow an I.C.J. ruling or simply flout popular opinion. For those who believe that people cannot make a difference in world affairs, one has only to point to the recent Brent Spar affair,108 in which the international environmental organization Greenpeace began protesting the Royal Dutch Shell Oil Company's plans to bury an obsolete oil storage rig (the Brent Spar) at the bottom of the North Sea. The Greenpeace protests were initially ignored by Shell, but the tide soon turned:

The David and Goliath stand-off generated lots of dramatic media coverage, arousing public opinion and, in Germany, sparking the first boycotts of Shell gasoline stations. Unmoved by the growing public opposition, Shell began on

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105 See supra note 59 and accompanying text.
106 Rees and James, supra note 104.
107 Id.
June 12 to tow the Brent Spar toward its watery grave . . . . By this time, motorists in Denmark and Holland were also shunning Shell. Soon public officials of all stripes were rushing to claim spots at the front of the gathering parade of outrage . . . . But the boycotts hurt Shell the most. In Germany alone, service station income fell 30 percent. Losses estimated in the millions, along with the blackening of the company's name, provoked dissension within the company.  

Eventually, Shell gave in to public opinion and abandoned its plan to sink the ship, proving that individuals can be players in world events.

In the case of France, people across the world have expressed outrage at the latest round of nuclear tests. Protesters have surfaced from across the globe, ranging from the Association of Southeast Asian Nations to the Prime Minister of Denmark (who actually rode a bicycle with other protesters). In France itself, 60% of the population wants Chirac to cancel the tests; protest marches in Paris have included nearly 3,000 people. In addition, in Australia, French Cafes have changed their names to disguise their French identity, and wine shops have reported that consumers are shunning French labels. In the United States, cosmetics giant Estee Lauder has even been forced to remind its customers that it is not French. In French Polynesia, there has been "furious rioting," during which protestors battled police, looted shops, and even took over an airport, causing $15 million in damage. Finally, Greenpeace has, in addition to urging boycotts on French goods, orchestrated a "citizens' flotilla" of about 30 boats that will protest near Mururoa Atoll.

Granted, the French government is not as economically vulnerable as Shell Oil was, but how high a political price is Jacques Chirac willing to pay to

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109 Id.
112 Rees and James, supra note 104.
113 Focus on Nuclear Testing, supra note 110.
115 Hertsgaard, supra note 108.
The idea behind the "popular pressure" mode of enforcing international law or international opinion has been explained by the executive director of Greenpeace International:

There's no way [Greenpeace] can physically stop [France]. But [that] isn't really the point. The role of Greenpeace is to inspire others to join the fight. The Brent Spar affair may have inaugurated a new era in environmental politics, an era in which direct action is practiced, not only by countercultural monkey-wrenchers but also by bourgeois consumers, all united in a militant, multinational mass movement.\(^{117}\)

In effect, we have seen that individuals, via boycotts or protest marches (both peaceful and violent), can enforce international opinion; this is true regardless of whether states choose to take official action themselves. In the case of France, this is the best chance that the international community has to stop the nuclear tests. It is obvious that no I.C.J. action is forthcoming, and political pressure has been sporadic at best. If people across the world can maintain a concerted effort to halt France's actions, there is certainly a possibility of success.\(^{118}\)

\(\text{F. Fueling the Controversy}\)

Thus far, this essay has focused on the issues springing from the French decision to resume nuclear testing in the South Pacific. An important aspect

\(^{116}\) Id.
\(^{117}\) Id.
\(^{118}\) This is not, of course, an easy feat to accomplish. It is difficult to organize a movement of individuals across the world. Greenpeace was able to accomplish this in the Brent Spar affair, but it is rarely that simple. For example, see Michael Perry, 4 Activists Detained at Site of N-Blast, SEATTLE POST-INTELLIGENCER, Sept. 29, 1995, at A24:

Producers of French wine, fruit and vegetables took Greenpeace to court for an Aug. 29 advertisement that listed producers opposed to the testing and urged others to join in. The food producers say Greenpeace suggested people should boycott producers who didn't. Their suit says Greenpeace violated their freedom of speech by pressing them to express an opinion.

This demonstrates a pitfall for anyone attempting to influence world opinion: not everyone will always be a willing participant.
of this controversy has not yet been discussed: the parties involved each have unique motives that have been fueling the controversy.

In France, President Jacques Chirac was elected following a 14-year incumbency by Francois Mitterand. Mitterand had imposed a moratorium on French nuclear testing that lasted until the end of his Presidency. Chirac's political style, however, is of the Gaullist approach; he has been described as a "radical nationalist . . . determined to project French influence beyond the borders of Europe." In France, Chirac "considers nuclear deterrence to be at the heart of France's foreign policy, and a vital symbol of the country's claim to great power status." In effect, the new leadership in France is determined to restore its country to a position of power and influence in the world. The latest round of nuclear tests has quite possibly become a symbol for Chirac—a symbol of the "new" France: independent, powerful, and determined to be taken seriously.

A closely related facet of this controversy involves Franco-American relations. In the midst of Chirac's drive to embolden France, the status of France's relations with the United States is changing rapidly. Shortly after the wave of protests began over the French announcement that it would recommence nuclear testing, several members of the French government charged that the protests were secretly being instigated by the United States in an attempt to undermine French influence. The President of the French Parliament, Philippe Seguin, went so far as to accuse all English-speaking countries of "conspiring to keep Europe dependent on the American nuclear deterrent."

While these accusations may be far-fetched, they serve to illustrate France's present distrust of and reluctance to rely on the United States. French Prime Minister Alain Juppe has explained the French desire to break free of American protection in more diplomatic terms than his colleagues in French Parliament:

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119 Friedman, supra note 103.
120 Eldon Griffiths, Oranges & Lemons // La Belle France is Making a Flashy Comeback, ORANGE COUNTY REGISTER, Aug. 11, 1995, at B8.
121 Morris and Yallop, supra note 114. See also Juppe, supra note 67.
122 Rees and James, supra note 104.
123 Id.
France is convinced that the [European] Union will not survive if it abandons its responsibilities in the domain of security and defence. The temptation is great to close our eyes to long-term threats and to rely solely on the alliance with the United States for our security—but a strong and respected Europe will not be built on such a basis.\(^{124}\)

Thus, in the midst of the controversy surrounding the French nuclear tests, one can see the unwavering desire of the new French government to break free of American influence. This goal cannot, in the mind of President Chirac, be accomplished without an independent nuclear arsenal.

A less prominent but certainly ever-present theme running throughout this controversy is the desire of French Polynesia to be independent. As we have already seen, the announcement of the plans to restart testing at Mururoa Atoll resulted in furious rioting in Papeete, the capital of French Polynesia.\(^{125}\) These riots were motivated by a combination of factors:

The riots were a complex brew of public opposition fed by health concerns about radioactivity, demands for Tahitian independence, and frustration at high unemployment on an island where the rich lifestyle of the European minority clashes with the poverty of much of the 80% Polynesian majority.\(^{126}\)

Also illustrative of the growing strength of the independence movement is the outcome of the June 1995 elections, which resulted in the pro-independence party Tavini Huira-atira winning 15% of the popular vote and contesting all 48 constituencies, as compared with only two in the previous election.\(^{127}\) According to one member of the independence movement, "The Polynesian people have been pacifist and calm for 17 years and we've had enough of it. If the other nations can't help us, we're going to have to go out on the streets with our bare hands and try to do something."\(^{128}\)

\(^{124}\) Juppe, supra note 67.

\(^{125}\) See supra, p. 208.


\(^{127}\) Id.

\(^{128}\) Id.
In effect, the resumption of nuclear testing has apparently served to energize the independence movement in French Polynesia. As one member of New Zealand’s ruling party stated, “it is inevitable for the French that if they behave as an arrogant colonist power in the Pacific the nations surrounding it will encourage those independence movements within French Polynesia.” This issue will, no doubt, continue to cause turmoil as the nuclear tests continue.

G. The 1996 Test-Ban Treaty

President Chirac has stated that France remains committed to signing a comprehensive test-ban treaty in 1996. In light of France’s refusal to cancel its nuclear tests in the face of international opposition, however, one might wonder whether the test-ban treaty has been jeopardized. Some commentators have speculated that this is the case, especially since France has admitted that some of the current tests are being used to try out a new warhead. The rationale behind such an opinion is apparently that France’s testing of new weapons may lead other nuclear powers to doubt the effectiveness of their own arsenals; these doubts may lead the other nuclear powers to desire to “modernize” their own arsenals before signing any treaty, thus delaying the implementation of a test-ban treaty.

While these worries are certainly justified, they are likely misplaced. France and China, the only two nuclear powers to detonate bombs in the 1990s, have both stated that they will sign a test-ban treaty in 1996. The signing of a test-ban treaty, however, is not the problem. The true danger posed by France’s refusal to stop testing lies in the adherence to a future test-ban treaty. If France can so easily detonate bombs in order to test new warheads after reaffirming the Non-Proliferation Treaty, what is to stop any other country from testing its nuclear arsenal after signing a test-ban treaty? Surely, any nation that does so will simply point to France’s actions in 1995 to justify its own. To be sure, some countries would be outraged at

129 Id.
130 Kole, supra note 12.
131 Id. The author reports that the International Society of Doctors for the Environment, a group representing physicians and scientists from 65 countries (including France) fears that a test-ban treaty is jeopardized by France’s actions.
133 See supra note 67.
such actions, but considering the half-hearted reaction of most governments to France's 1995 testing, any stronger reaction in the future would seem hypocritical and hollow.

IV. CONCLUSION

An analysis of the legality of France's nuclear testing, and, indeed, any analysis of international law in general, leads one to wonder whether "law" can even exist without the tangible presence of a police force to enforce it. In the United States, when a law is broken, the police department is summoned to arrest the wrongdoer. Under international law, the process is, as we have seen, much different. When a state acts in a certain manner, other states may believe that international law is being violated; however, in areas such as nuclear testing, where the law is not yet settled, there is a question of whether international law has been broken at all. When the International Court of Justice dodges questions of this nature, as it did in the Nuclear Test Cases, the question of the legality of a state's actions is left unanswered; as a result, nothing is done, and "international law" tends to resemble morality more than law.

Perhaps, for all practical purposes, whether a certain act is illegal under international law depends on whether the community of nations is willing to put a stop to it. Seemingly, if enough states believe that a particular act is unconscionable, then such an act will indeed be illegal, through treaty law or custom. For those of us who believe that laws should not be a matter of argument or debate every time a certain act is called into question, this process is of little consolation.

As we have seen, there are political forces at work in the international arena which mandate certain reactions at certain times, regardless of the morality of states' actions. The United States, for example, could hardly expect to be taken seriously if it had objected to France's nuclear testing because the U.S. has tested many more such weapons than France. Considerations such as these seem to pervade international relations. Unfortunately, this is the reality of the international community—isolated events melt into broader considerations of policy; this fact is understood, and it allows states to take advantage of the international process.

What if, however, international law could exist on a level completely separate from states? What if, when a law was broken on the international level, the perpetrator could be brought to justice without any state intervening? The Brent-Spar affair is a unique example of individuals coming
together to put a stop to what they believe is wrong. Perhaps this isolated example illustrates what international law should be. After all, the international community is, at its most basic form, comprised of people. When Shell Oil decided to ignore the growing public outcry against its plans to bury the Brent-Spar, the people united to implement their will. Was this an example of "pure" international law at work?

The ever-improving technology in the field of communications is causing the world to shrink. We have seen that international opinion polls condemned France's nuclear testing; even the French people failed to support Chriac's decision to renew the blasts. Although the international community was clearly against the French move, there was no sustained attempt to pressure France to call off the tests. As the use of technology such as the Internet continues to grow, perhaps people across the world will become better equipped to coordinate international efforts to put a stop to such unpopular actions. When we reach that stage, it may not matter that the community of nations and the World Court are unwilling to speak for the people of the world; the people will then speak for themselves.