NUCLEAR TESTS CASE (NEW ZEALAND v. FRANCE)

(Application of 9 May 1973)

REQUEST FOR AN EXAMINATION OF THE SITUATION

I. INTRODUCTION

1. I have the honour to submit to the International Court of Justice a *Request for an Examination of the Situation* arising out of a proposed action announced by France which will, if carried out, affect the basis of the Judgment rendered by the Court on 20 December 1974 in the *Nuclear Tests Case (New Zealand v. France)*.[1] The immediate circumstance giving rise to the present phase of the Case is a decision announced by France in a media statement of 13 June 1995 by President Chirac (Annex 1). The statement said that France would conduct a final series of eight nuclear weapons tests in the South Pacific starting in September 1995.

2. The deep concern of the New Zealand Government at this decision was registered with the French Foreign Minister as soon as the above statement became known, and subsequently in a variety of ways. The most recent communication sent to the Government of France by the Government of New Zealand stating the New Zealand attitude and informing the Government of France of the New Zealand intention to make

[1] *ICJ Reports 1974*, p.457.

the present Request to the International Court of Justice is a note of 17 August 1995 (Annex 2). New Zealand has not, however, received any indication that France would consider cancelling the tests.

3. In consequence, this Request for an Examination of the Situation is made under the right granted to New Zealand in paragraph 63 of the Judgment of 20 December 1974.

4. Paragraph 63 reads as follows:

> "63. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. 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." (Emphasis supplied.)

5. The Court here had regard to the fact that the French authorities had during 1974 made certain unilateral declarations which the Court interpreted as amounting to legally binding commitments on the part of France that it would not carry out further atmospheric nuclear tests. The Court thereupon found that the claim of New Zealand no longer had any object and that the Court was therefore not called upon to give a decision thereon. At the same time, the Court considered it appropriate to include paragraph 63 as a reservation to its Judgment in order to cover the possibility that France might subsequently cease to comply with its undertakings regarding atmospheric testing or that something else underlying the Court's Judgment was no

longer applicable.[2] The Court thus granted New Zealand the right in such circumstanc to request the resumption of the Case begun by Application on 9 May 1973. In doing, the Court also implicitly indicated that it was preserving its competence in respe of the Case in such circumstances.

6. As a further indication that the Court did not consider that the Case ha been brought to a complete end, paragraph 63 should be read together with paragraph 1 of the Judgment, where the Court characterised the phase of the proceedings with whic it was dealing as one in which it had to deal only with preliminary matters. The Cour continued:

> "... it is appropriate to recall that its approach to a phase of this kind must be, a it was expressed in the *Fisheries Jurisdiction* cases, as follows:
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> > "The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the .erits.""[3]

It seems unlikely that the Court would have found it necessary to make this statement unless it had foreseen the possibility, subsequently expressed in paragraph 63 of the Judgment, that it might have to return to the substance of the matter.

7. The New Zealand Government notes that the operative part of the Judgment of 20 December 1974 contains no words that could be construed as showing any intention on the part of the Court formally to terminate the Case. Nor has the Court made any Order subsequent to the 1974 Judgment formally terminating the Case or

[2] See paragraph 20.
[3] *ICJ Reports 1973*, pp. 7 and 54.

removing it from the Court's list. New Zealand has never sought to discontinue the Case.

8. A situation has gradually developed and has now reached the stage at which, in New Zealand's view, it affects the basis of the Judgment and demands the making of the present Request. In thus returning to the Court the New Zealand Government has no intention of abandoning the spirit of friendship and cooperation which has for so long governed its relations with France.

9 The New Zealand Government believes, further, that one of the Orders sought in paragraph 113 of this Request as well as one of the measures of interim relief about to be sought in a further Request for Provisional Measures, provides France with an opportunity to resolve this matter in accordance with its obligations under international law. This order and measure is that the Court should indicate to France that it should refrain from conducting any further nuclear tests until such time as it has conducted an Environmental Impact Assessment in accordance with generally accepted international standards. It is only if it could be established that the proposed tests would not result in the introduction of any radioactive substances into the marine environment, that France should be then considering whether to proceed, having regard to its obligations under international law.

II. THE CASE BEFORE THE COURT IN 1973-74

A. The institution of proceedings in 1973

10. On 9 May 1973 the New Zealand Government instituted proceedings against France with a view to obtaining from the Court a determination that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law and that these rights would be violated by any further such tests.[4] Similar proceedings were commenced on the same day by Australia.[5]

11. The basis on which the Court's jurisdiction was invoked was two-fold (a) Articles 36(1) and 37 of the Statute of the Court and Article 17 of the General Act for the Pacific Settlement of International Disputes, done at Geneva on 26 September 1928 ("the 1928 General Act") to which New Zealand and France both acceded on 21 May 1931;[6] and, in the alternative, (b) Article 36(2) and (5) of the Statute of the Court.[7] The Court is respectfully referred to paragraph 11 of New Zealand's 1973 Application.

12. The Court did not determine the question of jurisdiction beyond holding in its Order of 22 June 1973, indicating interim measures of protection, that the provisions invoked by New Zealand "appear, *prima facie*, to afford a basis on which the

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[4] The Application (hereinafter referred to as "1973 Application") appears in *ICJ Pleadings, Nuclear Tests*, Vol. II, p. 3.
[5] Ibid, Vol. I, p. 3.
[6] See 1973 Application, Annexes V and VI, pp. 43 and 45.
[7] For the terms of the declarations filed under Article 36(2) by New Zealand and France respectively as in force on 9 May 1973, see *ICJ Yearbook 1972-1973*, pp. 72 and 60 respectively.

jurisdiction of the Court might be founded."[8] However, four Judges of the Court, Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, in a joint dissenting opinion, and Judges de Castro and Sir Garfield Barwick in separate dissenting opinions, went further, holding that Article 17 of the 1928 Act "provides in itself a valid and sufficient basis for the Applicant to establish the jurisdiction of the Court."[9] In paragraph 63 of the Court's Judgment,[10] the Court expressly preserved, for such future consideration as might arise, the status of France's acceptance of the 1928 General Act as it was at the time when the proceedings were commenced in 1973.

13. The substantive content of the Application made by New Zealand (as set out in paragraphs 27 and 28 of the 1973 Application) was that the international law pertaining to, *inter alia*, the safeguarding of the environment, and related rules and principles of international law, were being violated by the nuclear testing undertaken by the French Government in the South Pacific region.[11] New Zealand contended that, amongst other things, such testing:

> "violates the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fallout be conducted;
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> violates the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment and, in particular, of the environment of the region in which the tests are conducted and in which New Zealand, the Cook Islands, Niue and the Tokelau Islands are situated;

[8] *ICJ Reports 1973*, p. 135, at p. 138, para 18.
[9] *ICJ Reports 1974*, p. 510.
[10] See above paragraph 4.
[11] See Annex 3 for a location map of the South Pacific region.

violates the right of New Zealand that no radioactive material enter the territc of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including th air space and territorial waters, as a result of nuclear testing;

violates the right of New Zealand that no radioactive material, having entered t territory of New Zealand, the Cook Islands, Niue or the Tokelau Island including their air space and territorial waters, as a result of nuclear testing, cau harm, including apprehension, anxiety and concern, to the people a Government of New Zealand and of the Cook Islands, Niue and the Tokel Islands;

violates the right of New Zealand to freedom of the high seas, including freedo of navigation and overflight and the freedom to explore and exploit the resourc of the sea and the seabed, without interference or detriment resulting fro nuclear testing." (Emphasis supplied.)[12]

B. The 1973 Order for interim measures of protection

14. Soon after the 1973 Application was filed, the New Zealand Governmer also filed a request, in accordance with Article 33 of the 1928 General Act, Articles 4 and 48 of the Statute of the Court and Article 66 of the Rules of the Court (as then i force), for interim measures of protection to preserve the rights of New Zealand pendin the final decision of the Court.[13] The rights which New Zealand sought to have protecte were those set out in paragraph 13 above. The measures which New Zealand sough were:

> "that France refrain from conducting any further nuclear tests that give rise to radioactive fallout while the Court is seized of the case."[14]

15. France sent a communication dated 16 May 1973 to the Court to the effect that it did not consider that the Court had jurisdiction in the case. To this

[12] 1973 Application, p.8.
[13] See *ICJ Pleadings, Nuclear Tests*, Vol. II, p. 49.
[14] Ibid, p.59.

communication there was attached an annex elaborating the reasons for this contention and requesting the Court to order that the case be removed from the list.[15]

16. On 22 June 1973 the Court made an Order in respect of the Request for the Indication of Interim Measures of Protection.[16] After holding in paragraph 18 of the Order that it appeared *prima facie* to possess jurisdiction,[17] the Court proceeded to examine the Applicant's request for the indication of interim measures of protection. In paragraph 24 of the Order, having referred to the rights which New Zealand claimed had been and would be violated by French nuclear testing, the Court said that "it cannot be assumed a *priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the Government of New Zealand may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application." As the Court said in paragraph 30 of the Order, after referring to New Zealand's assertions regarding the prospects and likely harmful effects of radioactive fallout on New Zealand territory and France's contentions to the contrary:

> "For the purpose of the present proceedings it suffices to observe that the information submitted to the Court ... does not exclude the possibility that damage to New Zealand might be shown to be caused by the deposit on New Zealand territory of radioactive fallout resulting from such tests and to be irreparable."[18]

17. It should be observed that, in relation to each of the matters covered in paragraphs 24 and 30 of the Court's Order, the Court did not express in *positive* terms the standard of proof required of the Applicant. Instead, the Court appears to have

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[15] Ibid, pp. 348-357.
[16] *ICJ Reports 1973*, p.135.
[17] See paragraph 12 above.
[18] Ibid, p.141, paragraphs 30.

adopted a less stringent requirement, namely, a standard which was expressed, in the fi situation, by the words "that it cannot be assumed *a priori* that such claims f completely outside the purview of the Court's jurisdiction" and, in the second, by t words "does not exclude the possibility that damage to New Zealand might be showr The Court then indicated, by way of provisional measures, that the Governments of tl two Parties:

> "should each of them ensure that no action of any kind is taken which migl aggravate or extend the dispute submitted to the Court or prejudice the rights c the other party in respect of the carrying out of whatever decision the Court ma render in the case."

In particular, the Court indicated:

> "The French Government should avoid nuclear tests causing the deposit o radioactive fallout on the territory of New Zealand, the Cook Islands, Niue or th Tokelau Islands."[19]

It may be noted that in the operative part of the Orders the term "nuclear tests" was no limited by the use of the word "atmospheric".

18. In this same Order, the Court also directed that the written proceedings in the Case should be addressed first to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. Written proceedings and, on 10 and 11 July 1974, oral arguments to the Court followed. New Zealand participated in both written and oral proceedings. No pleadings were filed by France, nor was it represented at the oral hearings.

[19] Ibid, p.142.

C. The 1974 Judgment

19. On 20 December 1974 the Court rendered a Judgment[20] in which, as summarily indicated above, the Court took note of a number of unilateral statements made by the French authorities which the Court found amounted to a commitment that France would not carry out any further atmospheric tests.[21] The Court concluded that it "faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific."[22]. After formulating the condition set out in paragraph 63 of the Judgment and quoted in paragraph 4 above, the Court found "that the claim of New Zealand no longer has any object and that the Court therefore is not called upon to give a decision thereon".[23] In that context, the Court appears to have discerned New Zealand's object as being the termination of atmospheric testing, although no such limitation was expressed in the prayer of the Application as to the nature of the nuclear tests which were the subject of complaint. Rather, the Application reflected New Zealand's concern at the risk of any contamination of the environment outside of French territory by radioactive material arising from nuclear testing of any kind.

20. The Court's inclination to narrow the dispute was understandable in 1974. The only mode of testing used by France in the Pacific was atmospheric. The New Zealand statements evidenced a primary concern with fallout from atmospheric

[20] *ICJ Reports 1974*, p. 457.
[21] See Judgment, paragraphs 53 and 54.
[22] In paragraph 55.
[23] See *ICJ Reports 1974*, p.478.

testing, and the French undertaking was in terms of a cessation of atmospheric testing. The Court therefore "matched" the French undertaking with New Zealand's primary concern and felt able to look on the dispute as resolved. Nevertheless, the Court was fully aware that, in its Application, New Zealand had expressed wider concerns. Had the Court realised, in 1974, that a shift to underground testing would raise the same concerns, then, doubtless, the "matching" would not have been made. But the Court had no evidence, at that time, of the potentially adverse or detrimental effects of underground testing, and therefore *no reason to doubt* the adequacy of the "match". In 1995, however, there is such evidence and therefore the whole basis of the Court's 1974 Judgment - the basis upon which the "match" was assumed - has been affected.

III. FRENCH TESTING 1974-92

A. Testing at Mururoa and Fangataufa

21. It is a fact, derived from French Government sources, that between the first Judgment handed down by the Court on 20 December 1974 and the commencement in 1992 of the moratorium which France is now proposing to abandon, France exploded some 134 nuclear devices underground at Mururoa and Fangataufa (126 at Mururoa, 8 at Fangataufa) (Annex 4). Seventy-eight of these devices (76 at Mururoa, 2 at Fangataufa) were exploded in holes drilled through the coral crowns of the atolls. Fifty-six (50 at Mururoa, 6 at Fangataufa) were detonated in shafts drilled through the central parts of the atolls under their lagoons.[24]

[24] Les Atolls de Mururoa et de Fangataufa (Polynesie Francaise), Vol II: "Les Experimentations Nucleaires Effets mechaniques, lumino-thermiques, electromagnetiques", Bouchez J. And Lecomte R., May 1995, page 73.

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22. The advent of testing on Fangataufa during this period has aggravated New Zealand's concern. This island has never been visited by independent scientists and scarcely any information is available about the effects of testing on that atoll's environment. This concern is compounded by the fact that since 1988 Fangataufa has been the site used for all major explosions (over 70 kilotons).[25]

B. Effects of explosions on the atolls and surrounding environment

23. Each of the explosions on Mururoa and Fangataufa has generated very large quantities of radioactive material. While some of this material has a short half-life, substantial quantities of biologically significant materials remain within the structure of the atoll. It is estimated that there are in this material approximately 8,000 and 12,000 teraBecquerels[26] respectively of the longer lived isotopes of strontium and caesium, and 800 teraBecquerels of isotopes of plutonium.[27] In consequence, there are now some 126 nuclear waste "stockpiles" located within the structure of Mururoa atoll at depths of between 500 and 1000 metres, and 8 large stockpiles at Fangataufa.

24. If all or substantial parts of this material were to be released into the marine environment, the effect upon marine natural living resources, especially fish and

[25] Ibid.

[26] Radioactivity is the spontaneous emission of radiation by the nuclei of unstable nuclides as they decay. The Becquerel is the unit of measurement of radioactivity. One Becquerel equals the radioactive disintegration of one nucleus per second. One teraBecquerel equals one million million (10^{12}) Becquerels.

[27] Estimations derived from data in "Environmental Effects of Underground Explosions", Rotblat J. in "Towards a Comprehensive Test Ban Treaty", Pugwash Conferences on Science and World Affairs, Oslo, 1992, pp 46-62.

plankton, could be significant. Radionuclides released into the water are concentrated as they pass through the food chain to higher organisms. The effects would be distributed through the marine ecosystem, affecting highly migratory species - including tuna - on which people of the region rely for sustenance and trade. A major release of radioactivity from Mururoa or Fangataufa would be likely to affect waters which are increasingly being fished by New Zealanders and distant water fishing nations, particularly for tuna and bill fish. These species are either exported directly to northern hemisphere fresh fish (sashimi) markets or are processed by canning or otherwise and distributed on world markets. Such concerns are reflected in paragraph 17 of the 1973 Application:

> "Migratory species of such living natural resources may carry both somatic and genetic effects beyond the range of fallout occurring in the vicinity of an explosion and can affect the protein diet of other species, including man, in widely distributed areas."

25. Until the present, there has been evidence only of very limited and gradual leakage, which is why the New Zealand Government has not hitherto made an issue of the impact of underground tests upon the marine environment, although it has protested regularly against French tests in the Pacific and has expressed concern about the possible environmental effects of the underground testing programme carried out by France at Mururoa and Fangataufa. However, recently - and somewhat belatedly - increasing evidence has emerged of scientific concern about the possible environmental impacts of underground nuclear testing.[28] This includes that set out by Professor Vincent, a noted

[28] Expert Study on Questions related to a Comprehensive Test Ban Treaty, CD/1167, noted in General Assembly Resolution 47/41 of 9 December 1992.

French vulcanologist, in a recent article (Annex 5), as well as the admissions that have recently been made by France that problems have been experienced in the past.[29] There is, therefore, now reason to fear that the risks of a significant release of radioactive material from either or both of the atolls as a result of or consequent upon renewed testing activity are substantially higher than was previously believed to have been the case. These risks include the possibility of a serious collapse or fissuring of the atolls such as to release significant quantities of the radioactive material stored therein with potentially serious consequences for the marine environment.[30]

C. Investigations of the effects of nuclear testing on the atolls

26. Mururoa and Fangataufa, like other Polynesian atolls, are inactive volcanoes which, having been eroded, have sunk below sea level and have then gradually been built up again by the formation of a coral reef. Since the earliest days of the underground testing programme, there has been concern about the suitability of such atolls for the conduct of nuclear tests and a desire for further information.

27. Such concerns led to numerous requests from New Zealand and other South Pacific countries for information on the French nuclear testing programme and for access to the test sites. Following press reports in 1981 of an accident at the Mururoa test site, the New Zealand Minister of Foreign Affairs wrote to his French counterpart in the following terms:

[29] See below, paragraph 54.
[30] See Vincent, Annex 5.

"You may be aware of my Government's longstanding request for access to information which would clearly establish the safety of the testing procedures at Mururoa. These latest reports, and the public concern they have aroused, underline the importance of adequate information being made available. I trust, therefore, that your Government will now feel able to respond positively to the requests we have made for information, and for access to the atoll for a New Zealand scientist and journalists. I would appreciate your specific comments on the allegations which have been made.

"You will appreciate that in putting these requests to you, I speak not only on behalf of my Cabinet colleagues with whom I have discussed this matter, but on behalf of a concerned New Zealand public. They in turn share the widespread apprehension of the effects of nuclear testing which is felt throughout the South Pacific and which was reflected in the last South Pacific Forum resolution on this question. There is no doubt that the entire South Pacific region is of one mind in its belief that nothing should be allowed to harm the marine environment on which we are all so dependent."[31]

28. Despite substantial pressure, the French Government has never permitted a full scientific investigation of Mururoa atoll. Three limited investigations are all that has been allowed. The first of these was carried out between 26 and 28 June 1982 by a group under the leadership of M Haroun Tazieff, a noted French vulcanologist. The second was a team of scientists from New Zealand, Australia and Papua New Guinea, led by Mr Hugh Atkinson, then Director of New Zealand's National Radiation Laboratory, who were invited to visit the atoll for four days between 25 and 29 October 1983. The third was a scientific and film team from the Cousteau Foundation, led by Commander Jacques-Yves Cousteau, which visited the atoll for five days between 20 and 25 June 1987, but was allowed only two days for the collection of samples.[32]

[31] Letter of 9 December 1981 from Mr Talboys, Minister of Foreign Affairs of New Zealand to M Cheysson, Minister of Foreign Affairs of France.

[32] The reports of these investigations are too lengthy to be reproduced in the Annexes, but copies are being made available to the Court.

29. No independent scientific mission has ever been permitted to visit Fangataufa where the larger explosions have occurred.

30. As noted, each of the missions to Mururoa was short and incomplete and was strictly confined by the French authorities as to its scope, access and duration. Access was consistently denied to those areas of the atoll believed to be the most heavily contaminated. Even so, each of the missions concluded that radioactive material had been introduced into the aerial and marine environments as a consequence of the underground testing programme.

31. M Tazieff noted that his had only been an exploratory investigation and he called for a long term mission to follow up his work. He observed that the lack of a scientific team charged with observing the programme, and interpreting and publishing the results, was seriously felt. Professor Salvat, a member of the Tazieff team, recommended thus:

> "It appears to us indispensable that a general study of the environment of Mururoa and Fangataufa should be carried out in the immediate future. These locations have not been visited by specialists since 1979."[33]

No such independent studies have ever been undertaken.[34]

D. Short-term releases of radioactivity into the Mururoa aerial and marine environments

[33] Tazieff Mission report, p 6.

[34] Neither the Atkinson nor the Cousteau mission was a long term mission as recommended by Tazieff; nor could either be described as a general study as recommended by Salvat.

32. As stated, it is now well established that radioactive material has been released into the aerial and marine environments of Mururoa during even routine activities associated with the testing programme.

33. Commenting on the effectiveness of the containment of radioactivity within the detonation chambers, M Tazieff said that the possibility that normally gaseous or highly volatile radioactive products may partially escape into the atmosphere (through the phenomenon known as "venting") could not be excluded, although he lacked evidence.[35] The Atkinson Mission, however, found evidence of venting, and commented that the amount was greater than would have been expected if the sole cause had been the imperfect sealing of the emplacement well.[36]

34. In his visit in 1987, Commander Cousteau found clear evidence that radioactivity had been released shortly before his arrival. The French authorities eventually acknowledged that a release had occurred during a post-test drilling operation to obtain samples from detonation chambers, but maintained that the accident was "quite exceptional".[37] However, at least one other similar release is known to have occurred during a post-test sampling operation in June 1990.[38]

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[35] Tazieff Mission report, p. 6.
[36] Atkinson Mission Report, p 132.
[37] Cousteau Mission report, p. 33.
[38] Precise Determination of the Concentration of Radiocesium in the Water of Mururoa Lagoon", Bourlat Y. and Martin G. J., Environ. Radioactivity 17 (1992) 13-29, p. 27. Bourlat and Martin are members of the Service Mixte de Sécurité Radiologique of the Commissariat à l'Energie Atomique.

35. Plutonium is present in all types of samples from Mururoa. In 1991, plutonium levels in excess of those attributable to fallout from atmospheric testing were measured by a team from the International Atomic Energy Agency which took samples outside the 12 mile territorial limit around Mururoa.[39] While interpretations differ, part of this plutonium is believed to have resulted from weapon safety trials which caused the dispersal of plutonium over an area of the atoll rim.[40] Thereafter, an attempt was made to seal off the affected ground with bitumen but a cyclone in 1981 scattered some of the plutonium-laden bitumen around the atoll. This accident caused the French authorities to undertake a protracted clean up of the atoll and has led to plutonium washing out of sediments into the Mururoa lagoon, and to dispersal into the ocean. Tazieff, therefore, called for general studies to be done of the dispersal of plutonium within the atoll and into the marine environment,[41] but no such independent study has taken place.

[39] Summary of Radionuclide Intercomparison Results in Seawater and Plankton Collected Outside Mururoa Atoll, Ballestra S. and Noshkin V., IAEA/AL/044, IAEA-ILMR Report No. 48, July 1991.
[40] Atkinson, p 141; Cousteau, p 36.
[41] Tazieff, p 7.

E. Long-term leakage of radioactivity into the marine environment

36. Water circulates through and saturates the entire geological structure of atolls such as Mururoa and Fangataufa. In general, water rises only slowly through the volcanic rock, following the minute fissures which permeate it. But water rises much more rapidly through the limestone layers of the upper part of the atoll, taking only a few years to percolate through to the surface. This movement of water can carry radioactivity from the detonation chambers towards the surface where it can be released into the environment. In order to prevent such release, it is crucial that a substantial thickness of volcanic rock above the detonation chamber and the surrounding fractured rock remains undamaged by testing activities.

37. All the independent scientific missions that have visited Mururoa agree that long term leakage will occur

38. None of the missions has had access to sufficient data to estimate reliably the time scale involved. Tazieff commented that a systematic study over a number of years of the most mobile radionuclides in ground water and in the sea would be required for an assessment of the effectiveness of containing the radioactivity[42] but, again, no such independent scientific study has been permitted

39. The Atkinson Report considered the dangers of the leakage of radioactive material from the atoll into the surrounding environment. It stated that:

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[42] Ibid.

> "At the underground test sites water is available for leaching the radioactive material (which can be equated to high-level waste). Mechanisms exist for the transfer of this contaminated water into the biosphere, at least in the long term (greater than 500 y). The radiological consequence of this leakage depends markedly on the depth of placement of the weapons tested and on their relative placement, one test to another. Precise details of placement are not known."[43]

40. Commander Cousteau reported that the French authorities had apprised him during his visit in June 1987 of the manner by which they calculate the required depth for placement of each test device.[44] This was the first time such information had been made public. On the basis of that information, Cousteau concluded that leakage could occur on a time scale of 100 to 300 years. This is significantly shorter than previous estimates.

F. Effects on the atoll structure

41. Nuclear explosions have had a substantial impact on the atoll's structure.

42. Shock waves from an explosion cause localised surface subsidence and fissuring. On occasions, whole sections of the outer limestone flanks of the atoll collapse. Such submarine landslides of the limestones and/or sediments are known have occurred in 1977, 1979 and 1980 as a result of large explosions conducted under the atoll rim.[45] During its aerial inspection of the atoll the Atkinson Mission noted that there was fissuring of the atoll surface attributable to the testing programme and reported that there had been regional subsidence and submarine slides as a consequence of the tests.[46]

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[43] Atkinson, p 11.
[44] Cousteau, p 42.
[45] Ibid, p 153.
[46] Atkinson, pp 95-8.

It concluded that the integrity of the carbonate part of the atoll had been impaired.[47] The French authorities subsequently acknowledged that substantial parts of the atoll had subsided by one meter or more due to the tests, causing some areas of the outer rim to be permanently submerged.[48] It is believed that it was to avoid the risk of further such incidents that the tests were moved from the outer rim of the atoll into the central region under the lagoon. Similarly, the risk that repeated underground explosions might cause serious fractures in the rock structure of Mururoa is reported to have contributed to the decision to move the largest tests to Fangataufa in 1988.[49]

43. Underwater filming down to 230 meters by the Cousteau team revealed spectacular fissures and collapses of rock in the atoll that could only have been caused by the underground explosions. Some of the fissures observed were of recent origin and, :ore, could have only been caused by testing under the lagoon. There remains a real risk of further slumping on the outer flanks if more tests are carried out anywhere on the atoll

44. There are no publicly available reports on the condition of the lower limestone flanks of the atoll below 230 meters or on the lower basalt flanks of the volcano itself. If fissuring were to affect the basalt foundation and were to reach the old test chambers closest to the volcano's edge, that would provide a means of escape of radioactivity into the environment. In his article, Professor Vincent noted the evidence

[47] Ibid, p 105.
[48] Bouchez and Lecomte, pp 138-143.
[49] Ibid, p 73; see also comments of Vice Admiral Thireaut, reported in International Herald Tribune of 28 March 1988 and La Depeche of 29 March 1988.

of the existence of a network of fractures of the upper part of the atoll attributable to the earlier tests. Weighing this information in the light of France's decision to resume testing on Mururoa, he comments:

> "All the factors now known to be conducive to the destabilisation of volcanoes - major weathering and fracturing of materials, and steep sides - are present at Mururoa. In view of that fact, the shock wave produced by one of the planned new explosions, even if it were conducted beneath the lagoon, could be big enough to cause one or more of the large 'pre-perforated blocks' to shear away. This situation, which has no parallel elsewhere, can only be described as high risk."[50]

G. Unsuitability of Mururoa and Fangataufa as testing and nuclear waste sites

45. Mururoa and Fangataufa are not suited to the purposes for which they have been used.

46. As described in the preceding paragraphs, there are serious doubts about the structural integrity of Mururoa atoll as a consequence of the many tests that have been carried out there. While many fewer tests have been carried out at Fangataufa, it is known that those that have been carried out on that atoll have been significantly larger than those carried out in recent years on Mururoa.

47. The reality is that there have always been doubts about the suitability of any of the atolls for underground testing, given the extreme hazards that can accompany nuclear explosions and accompanying activities. The sites were chosen not because of their inherent suitability for underground testing but because they were removed from

[50] See Annex 5.

significant population centres, and the infrastructure for the testing programme was already in place as a result of the previous atmospheric testing programme.

48. As noted, the nuclear explosions conducted in Mururoa and Fangataufa release enormous amounts of energy and radioactivity. The detonation chambers under the atolls have become, in effect, unprotected, high-level nuclear waste storage sites. In addition, a significant quantity of nuclear waste products from French Polynesia is stored in used detonation shafts and in other wells drilled for the purpose.

49. Mururoa and Fangataufa atolls fail to meet the principal criteria accepted internationally for the safe long-term disposal of nuclear waste in an underground depository.[51] While much of the radioactivity is fused into glass-like lava, this lava does not itself meet the international standards for immobilisation of radioactivity. There are no additional barriers to contain the radionuclides and prevent their migration into the environment. The volcanic basalt fails to meet the geological and hydrological criteria normally required of a repository medium It is severely fractured and its capability for retarding the movement of radionuclides is suspect

50. One of the major features which distinguishes Mururoa and Fangataufa from nuclear waste storage sites is the saturated nature of the atoll environment. The absence of ground water is arguably the most important requirement for a nuclear waste repository. Yet, on Mururoa and Fangataufa, ground water circulates throughout the

[51] Rotblat, pp. 54-56.

volcanic core and limestones of the atoll. With each nuclear test, water rapidly fills the cavity created by the explosion and percolates towards the surface.

51. In this regard, the South Pacific sites used by France are quite unlike any of the other sites that have been used for the conduct of underground nuclear explosions. Unlike a continental land mass or other oceanic islands which have been used for underground testing,[52] coral atolls such as Mururoa and Fangataufa are an integral part of their surrounding marine environment. Water passes from the ocean into the atoll, including its central core, and from the atoll into the ocean.

52. Thus the boundary between land and sea is indistinct. The entire atoll is a "marine feature" which cannot be considered as land in any normal sense and must be considered as part of the marine environment. Accordingly, the harm to the marine environment in this case is direct and is already occurring. The disposal of radioactive waste in an atoll has similarities to oceanic storage as well as to storage on dry land.[53] These factors alone demonstrate the inherent unsuitability of Mururoa and Fangataufa for the purposes for which they have been used in the development of France's nuclear weapons programme.

H. Inadequacy of French assurances of safety

[52] Such as Amchitka in the Bering Sea, a former testing site used by the United States, or Novaya Zemlya in the Arctic Ocean, which was used by the former Soviet Union.
[53] See discussion at paragraphs 100 and 101.

53. Since the inception of the underground testing programme, French officials have repeatedly assured New Zealand, other countries of the South Pacific and the United Nations that the tests pose no harm to human health or to the environment.[54] These assurances have been repeated since the announcement that testing was to resume.[55] Experience suggests, however, that such assurances must be treated with caution. For example, the assurance provided by the French Minister of Foreign Affairs in January 1982 that cracks that had appeared on the sides of the atoll were due to natural causes and not to the tests[56] was subsequently disproved by the Atkinson and Cousteau Missions.

54. In recent years other evidence has emerged about accidents which have caused or have had the potential to cause harm to the immediate environment of Mururoa and beyond. In particular, the following incidents, the existence of which had previously been concealed or denied to the outside world, have now been confirmed:

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[54] For example: Note dated 10 June 1974 from French Embassy to New Zealand to Ministry of External Affairs reproduced at p. 298, Vol II, *Pleadings, Nuclear Tests Case (New Zealand v France)*; Statement by French Representative to Special Political Committee on 6 October 1979, Official Records of the General Assembly at its Thirty-Fourth Session, A/SPC/34/SR.5, p 5; Letter dated 12 January 1982 from M Cheysson, Minister of Foreign Affairs of France, to Mr Cooper, Minister of Foreign Affairs of New Zealand (Annex 6); Statement by French Representative to Special Political Committee on 9 October 1986, Official Records of the General Assembly at its Forty-First Session, A/SPC/41/SR.4, p 7.

[55] Statement by M Chirac, President of France, at press conference at Palais de l'Elysee, 13 June 1995, (Annex 1).

[56] Letter dated 12 January 1982 from M Cheysson, Minister of Foreign Affairs of France, to Mr Cooper, Minister of Foreign Affairs of New Zealand (Annex 6), written in response to letter referred to in note 31.

(a) In June 1987 officials on Mururoa admitted to Cousteau the accidental release of approximately 1.5 teraBecquerels of radioactive iodine plus other volatile material.[57]

(b) In 1992 scientists of the Combined Radiological Safety Service on Mururoa acknowledged that 0.2 teraBecquerels of radioactive iodine had been accidentally released in 1990 in similar circumstances.[58]

(c) In June 1995 an official publication of the French Atomic Energy Commission acknowledged for the first time that a device which had become stuck in the detonation shaft had been deliberately detonated at less than its intended depth in 1979.[59] This acknowledgment contrasts markedly with the assurances given by the French representative to the Special Political Committee of the United Nations General Assembly in 1979 in the consideration of the item on the Effects of Atomic Radiation. On that occasion the Committee was told that there had been no mishap with respect to the conduct of a test and that "all the underground tests had been kept perfectly under control".[60]

In fact the incident caused a submarine landslide of about one million cubic meters (ie 100 meters x 100 meters x 100 meters) of material off the mass of the atoll which set off a tsunami which washed over part of the atoll, seriously

[57] See note 37.
[58] See note 38.
[59] Bouchez and Lecomte, p 93.
[60] Official Records of the General Assembly at its Thirty-Fourth Session, A/SPC/34/SR.5, p 5.

injuring two persons.[61] Since that incident, all persons on the atoll are required to be on raised platforms whenever a nuclear test is being conducted.

These incidents belie assurances as to the safety of the nuclear tests and their lack of impact on the environment.

55. The above account demonstrates three key points:

(i) There have been leaks of radioactive material into the aerial and marine environments as a consequence of past nuclear tests and there will certainly be leakages of further radioactivity over time.

(ii) There is a risk that the weakened structure of Mururoa has become so undermined by previous explosions that a resumption of nuclear explosion could cause a serious collapse or fissuring which would open up existing detonation chambers, thereby releasing significant amounts - which cannot be quantified for lack of information but which cannot be disregarded - of the stored radioactive material with potentially serious consequences for the environment.

(iii) Notwithstanding the proven damage caused to the atolls by the underground explosions, France has consistently claimed that its nuclear testing programme is safe, but has limited or denied access to the test sites.

IV THE INTERNATIONAL CONTEXT

[61] Rotblat, p 57.

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[61] Rotblat, p 57.

56. At no time since nuclear testing in the South Pacific region began can France have been in any doubt about the attitude of New Zealand towards such testing. As can be seen from the annexed list (Annex 7), there is a long history of New Zealand's expression of its firm opposition to French nuclear testing, as well as nuclear testing generally. New Zealand, and other countries of the region, in particular by means of the communiques of the annual meetings of Heads of Government of South Pacific Forum member countries, and in the very recent Declaration by South Pacific Environment Ministers on Nuclear Testing adopted at their meeting of 16-17 August 1995 (Annex 8), have never accepted French nuclear testing in the region.

57. France, for its part, as already indicated in paragraph 2 of this Request, is adamant that the tests which it has announced will take place over the period between September 1995 and 1 d of May 1996. As can be seen from the statement made by President Chirac on 13 June 1995,[62] which overturned a moratorium on further underground nuclear tests which the Government of France had declared in April 1992 and subsequently observed,[63] France considers the tests necessary for its "higher interests". The decision to conduct them is stated to be irrevocable.

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[62] See Annex 1.

[63] It is noted that the President of France, President Mitterrand, during the moratorium provided assurances as to the linkage between the moratorium declared by France and the moratoria observed by three of the four other nuclear-weapon States (Russia, United Kingdom, United States). For example, in April 1994, consistently with statements to similar effect in 1993, he "stated that the question of the resumption of France's nuclear tests depended on the actions of other nuclear powers; if they did not resume testing, neither would France" (see doc. prepared for Non-Proliferation Treaty Review and Extension Conference, NPT/Conf.1995/2, of 15 March 1995, page 10, paragraph 33).

58. In the 13 June 1995 statement France has taken the position that "the tests take place ... in conditions which ... have absolutely no consequence on the environment". It asserts that the absence of any danger to the environment "has been confirmed by many foreign specialists and scientists on location". However, as is evident from the scientific material presented in Part III of this Request, this proposition cannot be sustained. No scientific study has been able to give any assurance on the point which now most disturbs New Zealand, namely, the potential for the distribution of accumulated radioactive materials into the marine environment.

59. National and international opposition to nuclear testing has intensified since the Case was initiated in 1973. Every year since then, the United Nations General Assembly has adopted a resolution, with the co-sponsorship of New Zealand, pointing to the urgent need for a comprehensive nuclear test ban treaty. In 1993 and 1994, the resolution was adopted unanimously. Since 1992, four of the five nuclear-weapon states, including France, have been observing a *moratorium* on nuclear testing. In May 1995, the Parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons,[64] including France, adopted unanimously at their Review and Extension Conference a set of principles and objectives for nuclear non-proliferation and disarmament. This provided for a programme of action towards the full realisation and effective implementation of Article VI of that Treaty[65] including the negotiation of a universal and

[64] Text in 729 *UNTS 161*.

[65] Article VI reads as follows:

"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."

internationally and effectively verifiable Comprehensive Nuclear-Test-Ban Treaty to be completed no later than 1996. The programme of action also provided that, pending the entry into force of such a Treaty, the nuclear-weapon States should exercise the utmost restraint. Negotiations on the Comprehensive Nuclear Test Ban Treaty are underway in the Conference on Disarmament in Geneva. Non-nuclear-weapon States Parties to the Non-Proliferation Treaty, now comprising over 170 states, have complied virtually completely with their side of the bargain not to manufacture or otherwise acquire nuclear explosive devices.

60. Further evidence of the intensification of national and international attitudes is to be seen in the South Pacific Nuclear Free Zone Treaty, which was adopted at Rarotonga on 6 August 1985 and entered into force on 11 December 1986.[66] Each party to the Treaty undertakes, inter alia, to prevent in its territory the testing of any nuclear explosive device and not to take any action to assist or encourage the testing of any such device. Nuclear-weapon States are invited to become party to Protocols to the Treaty in which they would undertake, inter alia, not to contribute to any act of a Party to the Treaty or to a Protocol which constitutes a violation thereof and not to test any nuclear explosive device anywhere within the South Pacific Nuclear Free Zone. France is not party to any of the Protocols. It is also not party to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under water of 5 August 1963,[67] which prohibits, inter alia, any nuclear explosion in any other environment if such

[66] Text of the Treaty and draft text of the three associated Protocols in 24 *ILM* 1442 (1985); final text of the Protocols in 28 *ILM* 1599 (1989).
[67] 480 *UNTS* 43.

explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted. The fact that France has not become a party to this treaty in no way diminishes its significance as evidence of the standard of behaviour favoured by virtually all the rest of the world.

V. THE SIGNIFICANCE OF PARAGRAPH 63 OF THE 1974 JUDGMENT

61. It is at this point necessary to return in greater detail to paragraph 63 of the 1974 Judgment and its consequences. As already indicated, the Court in that paragraph preserved the right of the Applicant to seek to resume the proceedings. The essential words of the paragraph provided 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;[68]

62. Although this passage does not expressly identify the "basis" of the Court's Judgment, it seems most likely that the Court is referring to its finding in the earlier part of its Judgment that the statements made by the high French officials amounted to a binding legal undertaking not to carry out further atmospheric nuclear tests in the South Pacific region.[69] As the Court said in paragraph 58:

> "If the declarations of France concerning the effective cessation of nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, *all the necessary* consequences must be drawn from this finding."

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[68] *ICJ Reports 1974*, p 457, at p.477

[69] See para. 53 of the Judgment

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63. It is, in passing, pertinent to observe that no time limit was associated with the French undertakings. Indeed, the Court expressly found "that the unilateral undertakings resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration."[70]

64. One may now return to the question raised by paragraph 58 of the Judgment: what was the dispute thought by the Court to have been thus brought to an end? The 1973 Application makes it clear that the dispute was in its origin about nuclear contamination of the environment arising from nuclear testing of whatever nature. The "atmospheric" feature was merely incidental to the "contamination" feature, which was of the essence.

65. Indeed, it should be emphasised that the adjective "atm ric" does not appear in the prayer or submission with which the New Zealand Application concludes:

> "Accordingly, New Zealand asks the Court to adjudge and declare: that the conduct by the French Government of nuclear tests in the South Pacific ... constitutes a violation of New Zealand's rights under international law ...". (Emphasis supplied.)

The absence of any qualifying adjective before the word "nuclear" may be noted. In fact, New Zealand commenced its proceedings in 1973 to prevent nuclear contamination whatever the source - at that time understood to be limited to atmospheric tests. Moreover, although the Court may have thought that the French declarations made in

[70] *ICJ Reports 1973*, p.475, para. 53.

1974 matched the final objective sought by New Zealand in the Case, the Court itself does not appear to have attached any controlling importance to the use of the adjective "atmospheric". The word does not appear in the operative part of the Court's Order of 22 June 1973 where the Court indicated that "in particular, the French Government should avoid nuclear tests causing the deposit of radioactive fallout on the territory of New Zealand...."[71]

66. The scope of the 1973 Application was not limited to land territory exclusively. In paragraph 17, New Zealand referred to the effect of fallout on the living natural resources of the *sea*. Even more to the point, paragraph 22 of the Application included in its identification of the consequences of further testing:

> "the entry into territory of New Zealand, the Cook Islands, Niue and the Tokelau Islands, including their territorial sea ... of additional radioactive material ...; renewed restrict[illegible] freedom of the high seas ... and the freedom to explore and exploit the resources of the sea and seabed; and the continued pollution of the territorial, maritime and aerial environment of New Zealand [etc], of other countries and territories and of areas beyond the limits of national jurisdiction." (Emphasis supplied.)

And in paragraph 28 of the Application, New Zealand asserted that international law was violated by nuclear testing undertaken by the French Government in that, *inter alia*, it violates the right of New Zealand:

> "to the preservation from unjustified artificial radioactive contamination of the ... marine ... environment" as well as the right of New Zealand "to freedom of the high seas, including freedom of navigation ... and the freedom to explore and exploit the resources of the sea and the seabed, without interference or detriment resulting from nuclear testing". (Emphasis supplied.)

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[71] *ICJ Reports 1973* at p.142.

67. It is true that the French declarations had said that, in giving up atmospheric testing, France would be in a position to pass to the stage of underground testing. Thus even though the prospect of underground testing was in the mind of the Court, it did not specifically rule that underground testing would end the dispute absolutely. The crucial point to recall is that no one had any idea at that time that the underground testing subsequently to be carried out at Mururoa or at Fangataufa could, or would in due course, lead to some of the results that it was thought the termination of atmospheric testing would avoid, namely, pollution of the marine environment by radioactive material. If it had been so contemplated, the Court could hardly have taken the view that the French renunciation of atmospheric testing could by itself have brought the "dispute" to an end - for evidently it would not have.

68. Another way of putting the point is that the scope of the Court's 1994 Judgment must be measured not by reference to atmospheric testing as such, but rather by reference to the true and stated objective of the Application which was to prohibit testing likely to produce contamination of the Pacific marine environment by any artificial radioactive material.

69. In 1974, the assumption was made that the termination of atmospheric testing and its replacement by underground testing would put an end to the prospect of contamination. That assumption, if ever valid, certainly is not so now in relation to nuclear testing either at Mururoa or Fangataufa. If it had been appreciated that contamination could still occur as a result of underground testing, the substitution of the

latter for the former could scarcely have been seen as a means of resolving the dispute then before the Court.

70. It should be added, by the same token, that the fact that the term "fallout" was used to describe the manner in which the radioactive material reached the destination in which it could do injury does not mean that the case cannot be reopened because "fallout" as such is not alleged. The equivalent of fallout is achieved if contamination spreads to and through the ocean as a result of the escape of radioactive materials from the structure of the atoll.

71. The case that New Zealand now presents is that, on the basis of the scientific evidence set out above, underground nuclear testing at Mururoa and Fangataufa has already led to some contamination of the marine environment and that there appears to be a real risk of it leading to further, potentially significant, contamination. The basis of the 1974 Judgment (whether the abandonment by France of testing likely to lead to pollution of the marine environment by radioactive material or the assumption as to the "match" referred to in paragraph 20) has therefore been altered. New Zealand may in consequence "request an examination of the situation in accordance with the provisions of the Statute" This means that New Zealand is entitled to seek a resumption of the 1973 proceedings. The Court remains seized of the original case. As a result, the jurisdiction of the Court is the same as it was in 1973, based upon the 1928 General Act, as well as France's acceptance of the Optional Clause as it stood at the time of the original Application.

VI. LEGAL CONSIDERATIONS

72. Having regard to the facts set out above New Zealand contends that the resumption by France of underground nuclear testing at Mururoa and Fangataufa will be a breach of international law and, in particular, of the rights of New Zealand as well as of the rights of other countries, as set out in paragraph 28 of the 1973 Application.

A. The obligation of France to conduct a prior Environmental Impact Assessment

73. There is, first, a clear legal obligation upon France to conduct an Environmental Impact Assessment before carrying out any further nuclear tests at Mururoa and Fangataufa. This obligation flows, first, from a specific treaty undertaking and, second, from customary international law derived from widespread international practice.

1. Specific treaty undertaking: the Noumea Convention

74. One instrument in particular is directly binding on France as well as New Zealand and other States in the South Pacific Region. This is the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region concluded on 25 November 1986 ("the Noumea Convention").[72] It entered into force for both New Zealand and France on 22 August 1990.

[72] Text in 26 ILM 38 (1987).

75. *Article 16, "Environmental Impact Assessment", of this Convention,* provides as follows:

> "1. The Parties agree to develop and maintain, with the assistance of competent global, regional and sub-regional organisations as requested, technical guidelines and legislation giving adequate emphasis to environmental and social factors to facilitate balanced development of their natural resources and planning of their major projects which might affect the marine environment in such a way as to prevent or minimise harmful impacts on the Convention Area.
>
> 2. Each Party shall, within its capabilities, assess the potential effects of such projects on marine environment, so that appropriate measures can be taken to prevent any substantial pollution of, or significant and harmful changes within, the Convention Area.
>
> 3. With respect to the assessment referred to in paragraph 2, each Party shall, where appropriate, invite:
>
> (a) public comment according to its national procedures,
> (b) other Parties that may be affected to consult with .. and submit comments.
>
> The results of these assessments shall be communicated to the Organisation [the South Pacific Commission], which shall make them available to interested Parties."

The definition of "pollution" in the Convention is quite broad enough to cover the seepage or escape of radioactive waste from the atolls into the surrounding marine environment.[73]

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[73] "Pollution" is defined in Article 2(1) as follows:
""pollution" means the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities; in applying this definition to the Convention obligations, the Parties shall use their best endeavours to comply with the appropriate standards and recommendations established by competent international organisations, including the International Atomic Energy Agency."

76. There is no provision which exempts nuclear testing from the requirements here laid down. On the contrary nuclear testing is expressly covered by the Convention, along with other actions which might damage the environment. Article 12 provides that "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". But this reference to nuclear testing does not exclude such activity from the clear duty expressed in Article 16 to carry out an environmental impact assessment. It may be noted that the United States - which has carried out many more underground nuclear tests than France - has not shared French inhibitions about public knowledge of the safety aspects of its nuclear testing.

77. The procedure of an Environmental Impact Assessment involves an open consideration of the issues, the provision of an opportunity for all interested parties to present their views, a statement by the party proposing the action of all the scientific elements involved, together with an indication of why the measures are proposed and of their possible effect upon the environment. The mere carrying out of an assessment does not mean that that party can proceed in any event. It can only do so if the project is then approved as being environmentally acceptable following the full consideration of any objections. In the case of the underground nuclear tests in a location so intimately related to the sea, "environmentally acceptable" necessarily means that before the tests may be conducted the assessment must conclude that no radioactive material will be introduced into the marine environment as a result of the tests.

78. France has apparently not carried out such an assessment. If it has, it has failed to share the results with the rest of the international community and, in particular, with the States of the South Pacific Region with which, by reason of its participation in the Noumea Convention,[74] it has a special relationship and to which it owes a specific obligation under the last sentence of Article 16 to make the results available to the South Pacific Commission and, through it, to interested Parties.[75]

79. Not only has France itself not carried out the required prior assessment; it has not allowed scientists from outside to carry out the necessary tests and ascertain all the information that is essential for the formation of an impartial, balanced and comprehensive view of the matter before a test or specific series of tests is held. Various proposals which have been made for assessing the situation show the kind of detailed investigation that must be carried out and made public as part of any assessment of the safety of the proposed tests. Such tests should be considered only if an assessment were to report that the risks of contamination by radioactive material were nil.

80. The French Government has sought to allay public anxiety by stating that the tests are perfectly safe and that their effects upon the atolls and the adjacent marine environment are carefully monitored after each blast.

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[74] See above, paragraph 74.
[75] Article 16. See above paragraph 75.

81. As to the first of these contentions, that the tests are perfectly safe, it must be recalled that a risk of accidental escape of radioactive material accompanies every test. By reference to the standard of behaviour which the international community has adopted in relation to the deposit of radioactive material or waste in the marine environment, such risks are not acceptable. As noted earlier, there have already been accidental escapes of radioactive material which, having initially been denied by France, were subsequently admitted to have occurred. Even though the quantities involved may have been small, the very occurrence of such escapes shows that accidents may occur. There is also evidence that the explosions which have taken place so far have caused damage to the structure of the atoll. Large slabs of rock have broken off the side of the atoll below water level. What has already happened can happen again.

82. Nor is the French contenti[illegible]t the effects of the tests are carefully monitored sufficient to discharge France's legal obligations. It is not sufficient that monitoring takes place *after* the event. The requirement of Environmental Impact Assessment is one of conduct *prior* to each test or series of tests. The whole purpose of such assessments is to determine in advance of experiments that they do not entail an unacceptable degree of risk to the environment. This is inherent in the concept of Environmental Impact Assessment and is reflected in the wording of the statements of obligation binding France in Article 16 of the Noumea Convention. This obligation is expressed in the words of paragraph 2 of that Article that "each Party shall, within its capabilities, assess the potential effects ... on the marine environment ... " (of major projects which might affect the marine environment). The word "potential" used in

conjunction with "effects" indicates an obligation to perform the assessment before the tests. Subject to variations of language, the same is true of the other treaties which adopt the concept of Environmental Impact Assessment.

83. In any event, to the extent that such *post hoc* monitoring is carried out, it would appear from the French report entitled *Situation Radiologique de la Polynesie Francaise,*[76] of which the latest issue is that of 1994, that the monitoring does not extend to an examination of the cumulative effect of testing upon the structure of the atolls themselves. Rather, it relates only to a consideration of radioactivity in the environment and of the exposure to radioactivity of the population of French Polynesia.

84. This is a long way from the systematic, comprehensive and public scrutiny ...dependent scientists and others before the event that is required if international standards are to be met.

85. The examination that should be conducted at Mururoa and Fangataufa as part of the Environmental Impact Assessment should include investigation of the following matters: the topography of the atolls; a shallow seismic testing programme; a comprehensive sampling campaign to investigate the concentration of radionuclides in fish, planktonic organisms, sediments and coralline structures; an extensive determination of the hydrology of the atoll and reef structure; and an epidemiological study. In

[76] The report carries on its front cover the names of the Ministère de la Defense, the Direction des Centres d'Experimentations Nucléaires, the Commissariat à l'Energie Atomique and the Service Mixte de Surveillance Radiologique et Biologique de l'Homme et de l'Environnement.

addition, a judgment of the potential for radionuclide release from the testing sites should be made not only by reference to the standards routinely enforced for civil nuclear installations, but also by reference to estimates which should be provided by France of the strength and radioactive yield of the proposed detonations.

86. Moreover, the results of such investigations should be made public so that the debate about their significance can take place in a systematic, open and orderly manner as part of a transparent process of prior assessment; and the considerations which those performing the assessment take into account can be clearly identified and the validity of their conclusions can be the subject of proper and objective scientific scrutiny by other interested but fully independent scientists and others.

87. An additional reason for a full prior assessme the important requirement that the process must entail some consideration of the benefits which those responsible for the project may hope to achieve, coupled with a balancing of those claimed benefits against the risks involved in such activity.[77]

[77] The application of this principle within the European Community is to be found in Article 6(a) of Directive 80/836/Euratom (O.J.L. 246, p.1), as amended by Directive 84/467/Euratom (O.J.L. 265 p. 4). This lays down the so called "justification" requirement. According to this, the various types of activities which entail exposure to radiation require prior justification by reference to the advantages to be gained through these activities. An English Judge has held that an abstract balancing of advantages and disadvantages would not be sufficient to comply with this requirement. The provision calls for the balancing of "particular practices which affect particular individuals in particular circumstances". (See Potts J. In R v Secretary of State and others, ex p. Greenpeace and Lancashire County Council, judgment of 4 March 1994, (1994) Journal of Environmental Law, 312 at 323)

88. The consideration which triggers the requirement of an Environmental Impact Assessment is the prospect that the proposed conduct could occasion a significant adverse impact upon the environment. There can be no real doubt that, in the light of the factual and legal developments herein, the resumption of underground nuclear testing by France falls into this category. Even if the point were not self-evident, the burden would, by reason of the application of the precautionary principle, to which reference is made below,[78] lie on France to prove that there is no necessity for an Environmental Impact Assessment, rather than upon New Zealand to prove that there is one. In any case, it is instructive to examine the lists contained in the European Community Council Directive 85/337/EEC of 27 June 1985 - a directive which is applicable to the tests - as showing the kind of matter which the European Union, of which France is a member, regards as calling for an Environmental Impact Assessment, and, in particular, as deı .ating the concern that exists regarding any kind of nuclear activity. These matters include the construction of nuclear power stations, installations for the permanent storage or final disposal of radioactive waste and installations for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels and for the collecting and processing of radioactive waste. *A fortiori*, nuclear testing must require prior assessment.

2. Customary international law

[78] See paragraph 105-107.

89. Even if France were not bound by the Noumea Convention, it would still be required by customary international law to carry out an Environmental Impact Assessment before conducting nuclear tests at Mururoa. The obligation to carry out such assessments exists in relation to any activity which is likely to cause significant damage to the environment, particularly where such effects are likely to be transboundary in nature. It is difficult to conceive any act that more clearly demands such an assessment than a nuclear test:

(i) which is conducted beneath a small atoll

(ii) that has already been the scene of numerous substantial explosions

(iii) that must contain significant deposits of radioactive material within the test chambers

(iv) which could be released into the immediately surrounding marine environment

(v) through existing fissures liable to be opened up further by more explosions.

The accumulation of these five factors distinguishes the tests at Mururoa and Fangataufa from underground nuclear tests conducted within continental land masses.

90. The basis of the submission that there is an obligation to carry out Environmental Impact Assessments in such circumstances is the existence of a considerable amount of concordant State practice evidencing the opinions of States in this regard.

91. The 1978 UNEP Draft Principles of Conduct proposed that:

"states should make an environmental impact assessment before engaging in any activity with respect to a shared natural resource which may create a risk of

significantly affecting the environment of another state or states sharing that resource".[79]

92. The concept was subsequently developed, first, in a number of non-binding instruments and then, and in part concurrently, in a number of treaty arrangements, such as:

(i) Articles 205 and 206 of the 1982 United Nations Law of the Sea Convention;[80]

(ii) the 1985 ASEAN Agreement;[81]

(iii) the 1985 European Community Environment Assessment Directive;[82]

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[79] See Sands, *Principles of International Environmental Law*., Vol I (1995), p.580.

[80] *United Nations Convention on the Law of the Sea, done at Montego Bay, Jamaica, 10 December 1982*
Article 205. "Publication of reports
States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organisations, which should make them available to all States.
Article 206. Assessment of potential effects of activities.
When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205." Text in 21 ILM 1261 (1982).
See also note 93.

[81] *The ASEAN Agreement on the Conservation of Nature and Natural Resources, 9 July 1985.* (Not yet in force).
Article 14(1) provides: "Impact assessment. The Contracting Parties undertake that proposals for any activity which may significantly affect the natural environment shall as far as possible be subjected to an assessment of their consequences before they are adopted, and they shall take into consideration the results of this assessment in their decision-making process."
Article 20(3)(a) provides that Contracting Parties shall endeavour "to make environmental impact assessment before engaging in any activity that may create a risk of significantly affecting the environment or the natural resources of anther Contracting Party or the environment or natural resources beyond national jurisdiction;".
(Text in Sands *et al., Documents in International Environmental Law (hereinafter "Sands, International Documents")*, Vol IIA, p. 958.

[82] *Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.*
"Article 2.
1 Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4.

(iv) the 1989 World Bank Operational Directive;[83]

(v) the 1991 Espoo Convention;[84]

(vi) the 1991 Protocol on Environmental Protection to the Antarctic Treaty;[85] and

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2 The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3 Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive. In this event, the Member States shall:

a Consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

b make available to the public concerned the information relating to the exemption and the reasons for granting it;

inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information, made available, where appropriate, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the Council on the application of this paragraph.

Article 4

1 Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2 Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10." (Text in Sands and Tarasofsky, *Documents in European Community Environmental Law*, vol.III (1995), p.266).

[83] See Sands, *Principles*, p.593, which also sets out the history of the development at pp., 579-594.

[84] *Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, 25 February 1991.* (Not yet in force.)

"*Article 2.*

1 The Parties shall either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.

2 Each Part shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix 1 that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

3 The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorise or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact."

(Text in 30 *ILM* 802 (1991) and Sands, *International Documents*, vol.IIB, p.1332.)

[85] *Protocol on Environmental Protection to the Antarctic Treaty, done at Madrid, 4 October 1991.* (Not yet in force). France was a leading proponent of this Protocol, Article 8 of which provides:

"*ENVIRONMENTAL IMPACT ASSESSMENT*

1. Proposed activities referred to in paragraph 2 below shall be subject to the procedures set out in Annex I for prior assessment of the impacts of those activities on the Antarctic environment or on dependent or associated ecosystems according to whether those activities are identified as having:

(a) less than a minor or transitory impact;

(vii) the 1992 Convention on Biological Diversity.[86]

As has been stated in the latest treatise on the subject:

> "the idea that environmental impact assessments may now be required as a matter of customary law, particularly at the regional level, is capable of being argued, particularly when the project concerned is likely to have very significant effects on the environment and those effects will be transboundary".[87]

93. A recent reflection of the same principle is also to be found in Principle 17 of the Rio Declaration, which France supported. This states that:

> "environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority". (Emphasis supplied)

(b) a minor or transitory impact; or

(c) more than a minor or transitory impact.

2. Each Party shall ensure that the assessment procedures set out in Annex I are applied in the planning processes leading to decisions about any activities undertaken in the Antarctic Treaty area pursuant to scientific research programmes, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII (5) of the Antarctic Treaty, including associated logistic support activities.

3. The assessment procedures set out in Annex I shall apply to any change in an activity whether the change arises from an increase or decrease in the intensity of an existing activity, from the addition of an activity, the decommissioning of a facility, or otherwise.

4. Where activities are planned jointly by more than one Party, the Parties involved shall nominate one of their number to coordinate the implementation of the environmental impact assessment procedures set out in Annex I."

Substantial elaboration of the environmental impact assessment procedures are set out in Annex I to the Protocol.

(Text in 30 *ILM* 1461 (1991))

[86] *Convention on Biological Diversity, 5 June 1992.*

"Article 14. Impact assessment and minimising adverse impacts.

1 Each Contracting Party, as far as possible and as appropriate, shall:

a Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimising such effects and, where appropriate, allow for public participation in such procedures;

b Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account."

(Text in 31ILM 822 (1992) and Sands, *International Documents*, vol .IIA, p.845.)

[87] Sands, *Principles*, p. 594. The work of the International Law Commission in its draft Articles on International Liability for Injurious Consequences of Acts Not Prohibited by International Law is also relevant to France's obligation to carry out a prior and adequate Environmental Impact Assessment before conducting further nuclear tests in the South Pacific.

94. Another relevant text also binding on France is the Euratom Treaty, Article 34 of which provides:

> "Any Member State in whose territories particularly dangerous experiments are to take place shall take additional health and safety measures on which it shall first obtain the opinion of the Commission. The assent of the Commission shall be required where the effects of such experiments are liable to affect the territories of other Member States."

95. As New Zealand is not a party to the Euratom Treaty it cannot invoke this provision as one that is legally binding between it and France. The provision is, however, yet another illustration of the international standards accepted by France as applicable in this sphere of activity. Indeed, the European Commission has taken the position that French nuclear testing falls within the scope of this requirement.[88]

96. It is France's consistent refusal to carry out a procedure which is now accepted virtually world-wide as absolutely essential in this class of activity that constitutes the first element of illegality in the position that France is now taking.

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[88] On 21 June 1957, when the French National Assembly was considering the ratification of the Euratom Treaty, M. Maurice Faure, the French Foreign Minister, stated in the relevant Committee of the Assembly that the provisions of Article 34 apply to both civilian and military "particularly dangerous experiments". In consequence, the Committee, in its report on this Bill authorising the President of France to ratify the Treaty, stated: "Les dispositions de l'article 34 s'appliquent à toutes les experiences particulierement dangereuses, civiles ou militaires" (See S. Neri and H. Sperl, Traité instituant la EURATOM, Travaux préparatoires. Déclarations interpretative des six Gouvernements. Documents parlementaires, Cour de Justice des Communautés Européennes, Luxembourg 1962, p. 122). In the early 1960's France notified its atmospheric military nuclear tests in the Sahara and complied with the procedure laid down in Article 34 of the Euratom Treaty. It is understood that the European Commission has asked France to furnish data in relation to the tests now proposed. It is not however known whether France has done so. See also Deimann and Betlem, "Nuclear Testing and Europe", New Law Journal, 11 August 1995, p. 1236.

B. The illegality of conduct which causes, or is likely to cause, the introduction into the marine environment of radioactive material

97. Having presented its case first in terms of the failure of France to meet its specific obligations to conduct an Environmental Impact Assessment, New Zealand now turns to another respect in which the conduct of France is illegal.

98. The well established proposition of customary international law, stated and reflected in principle 21 of the Stockholm Declaration on the Human Environment 1972 and principle 2 of the Rio Declaration on Environment and Development 1992, now takes binding treaty form for the South Pacific region in Article 4(6) of the Noumea Convention:

> "Nothing in this Convention shall affect the sovereign right of States to exploit, develop and manage their own natural resources pursuant to their own policies, taking into account their duty to protect and preserve the environment. Each party shall ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of its national jurisdiction."

Another convention binding both New Zealand and France, the Convention on Biological Diversity of 5 June 1992,[89] Article 3, is to the same effect.

99. In addition to this general obligation, special rules have developed in relation to conduct which involves, or may involve, the introduction of radioactive material into the oceans. This is regarded as a matter of special concern calling for the most extensive, if not absolute, prohibition. The duty of States in this respect is not

[89] 31 ILM, at 824 (1992).

merely to take care. Nor is their obligation to be measured by reference to the quantity of material so introduced. Suggestions that States may introduce, or permit the introduction of, such material into the oceans if the quantities are negligible, or are unlikely to cause harm or may not have significant effects, are quite out of place. The interdiction is absolute. Any relaxation of the absolute character of the prohibition must be justified by reference to the benefits which are claimed to arise from the activity causing the contamination. The emphatic judgment of the world community that testing of nuclear weapons gives rise to no benefit, is becoming more clearly evidenced by the day.

1. Pertinent treaties

100. The need to ensure that no radioactive material is introduced into the marine environment has, indeed, been recognised by France, which has joined in action to develop a range of norms with that objective in mind. The extent of this obligation is demonstrated in instruments adopted after France announced its moratorium on underground nuclear tests in 1992 shortly before the United Nations Conference on Environment and Development in June 1992. At that Conference France supported Agenda 21, paragraph 22.5(c). States should not:

> "promote or allow the storage or disposal of high-level, intermediate-level or low-level radioactive waste near the marine environment unless they determine that the scientific evidence, consistent with the applicable internationally agreed principles and guidelines, shows that such storage or disposal poses no unacceptable risk to people and the marine environment or does not interfere with other legitimate uses of the sea, making, in the process of consideration, appropriate use of the concept of the precautionary approach."

101. This general principle is reflected in and supported by a range of treaties to which France is a party. Under Article 10 of the Noumea Convention: "The Parties agree to prohibit the dumping of radioactive wastes or other radioactive matter in the Convention Area." In September 1992 France signed in Paris the Convention on the Protection of the Marine Environment of the North-East Atlantic[90], which prohibits the dumping of all radioactive substances, including wastes, in order to prevent, *inter alia*, harm to living resources or marine ecosystems (biodiversity).[91]

102. Additionally, and with wider geographical effect, in January 1994 France became bound by the amendment to Annex 1 of the 1972 London Convention[92] which prohibited the disposal of all radioactive wastes at sea. Initially the Parties to this Convention had agreed to the prohibition only of the dumping at sea of high level ·active wastes. In 1985, however, they adopted a Resolution, 21(9), applying an indefinite moratorium on the dumping of all radioactive wastes at sea to "permit time for ... a broader basis for an informed judgment on proposals and to allow additional studies to be made of the wider political, legal, economic and social aspects of radioactive waste dumping at sea". Subsequently, Agenda 21 called on all States to encourage "the London Dumping Convention to expedite work to complete studies on replacing the current voluntary moratorium on disposal of low-level radioactive wastes at sea by a ban, taking into account the precautionary approach ..." (paragraph 22.5(b)). Finally, in November 1993, the Sixteenth Consultative Meeting completed the prohibition of the

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[90] 32 ILM 1069 (1993).
[91] Annex II to the Convention, Art 3(3) (a) and (b).
[92] Adopted by Resolution LC51 (16) Concerning Disposal at Sea of Radio-active Wastes and other Radio-active Matter, November 1993.

dumping of wastes by adopting the above amendment prohibiting the disposal of all radioactive wastes at sea.[93]

103. It is broadly consistent with this body of international law and principle that French national law and practice relating to civilian nuclear power plants and the handling and storage of "civilian radioactive waste" incorporate a higher standard of care than that applicable to other activities involving less risk.[94] It is not clear whether this body of law applies to French Polynesia or to Mururoa and Fangataufa. But whether it does or not cannot affect the quality of the rule as evidence of the standard which France itself regards as appropriate in such matters.

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[93] Reference should also be made more generally to the United Nations Convention on the Law of the Sea, 1982. Article 192, provides that: "States have the obligation to protect and preserve the marine environment". Article 194 provides as follows:

Measures to prevent, reduce and control pollution of the marine environment

1. *States shall take, individually or jointly as appropriate, all measures consistent with this* Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping ....."

It is to be noted that these Articles of the Convention form part of Part XII on protection and preservation of the marine environment and that, upon signature of the Convention, France made a declaration that: "The provisions of the Convention relating to the status of the different maritime spaces and to the legal regime of the uses and protection of the marine environment confirm and consolidate the general rules of the law of the sea and thus entitle the French Republic not to recognise as enforceable against it any foreign laws or regulations that are not in conformity with those general rules."

[94] See decrees 77-974 of 19 August 1977, 63-1228 of 11 December 1963 (as amended) and Law 91-1381 of 30 December 1981.

104. These international and national instruments reflect the view that the introduction of radioactive material into the marine environment is considered undesirable and is generally prohibited. Moreover, even the storage of radioactive wastes (including the produce of nuclear tests) is prohibited unless there is compelling evidence to the effect that such storage will not lead to the introduction of radioactive material into the marine environment. France has accepted these stringent requirements, which must be considered now as general principles of international law, applicable to all activities of this type, including in particular the consequences of underground nuclear testing and the dispersal of its products.

2. The precautionary principle

105. It is, also, pertinent to refer to a significant development which has a direct bearing on the application of these rules in the environmental field. In the traditional approach to the establishment of responsibility for violations of international law, the burden of proof would normally rest upon the complainant, unless access to the evidence was all within the control of the respondent, as in large part is the case with French nuclear testing. But in the field of environmental protection it has come to be realised that insistence that a complainant must carry the burden of proving that the conduct contemplated by the respondent will lead to damage, could give rise to situations in which irremediable damage would occur. As a result there has emerged a very widely accepted and operative principle of international law referred to as the "precautionary principle". This has the effect that in situations that may possibly be

significantly environmentally threatening, the burden is placed upon the party seeking to carry out the conduct that could give rise to environmental damage to prove that that conduct will not lead to such a result. This principle has been described in the most recent major textbook on the subject, as follows:

> "The precautionary principle provides guidance in the development and application of international environmental law where there is scientific uncertainty... The precautionary approach has been relied upon in relation to measures to protect ... environmental media, especially the marine environment. The Preamble to the 1984 Ministerial Declaration of the International Conference on the Protection of the North Sea reflected a consciousness that States 'must not wait for proof of harmful effects before taking action', since damage to the marine environment can be irreversible or remediable only at considerable expense and over long periods".[95]

Again, in 1990, the Bergen Ministerial Declaration on Sustainable Development in the ECE Region provided that:

> "...environmental measures must anticipate, prevent and attack the causes of environmental degradation Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environment degradation."[96]

106. In 1989, the UNEP Governing Council had already recognised that "waiting for scientific proof regarding the impact of pollutants discharged into the marine environment could result in irreversible damage to the marine environment and in human suffering" and recommended that all Governments adopt "the principle of precautionary action as the basis of their policy with regard to the prevention and elimination of marine pollution". As the same treatise indicates, "since that time at least seven environmental treaties, two of which are of global application on environmental matters of broad

[95] Sands, *Principles*, pp.208-210.
[96] Ibid. p.210.

concern and applicable to almost all human activities, have adopted the precautionary principle or its underlying rationale". The same author concludes:

> "The legal status of the precautionary principle is evolving. At a minimum, however, there is sufficient evidence of state practice to justify the conclusion that the principle, as elaborated in the Rio Declaration and the Climate Change and Biodiversity Conventions, has now received sufficiently broad support to allow a good argument to be made that it reflects a principle of customary law."[97]

107. The most cogent proof of all that the precautionary principle is one by which France must guide its conduct is the fact that it has in terms been adopted as one of the directing principles of the French Law No. 95-101 of 2 February 1995 on the Strengthening of the Protection of the Environment:

> "the precautionary principle, according to which the absence of certainty, having regard to scientific and technical knowledge at the time, should not hold up the adoption of effective and proportionate measures with a view to avoiding a risk of serious and irreversible damage to the environment at an economically acceptable cost."[98]

108. It follows that before France can carry out underground nuclear tests which will lead to the deposit and storage of radioactive wastes near the marine environment, it must provide evidence that the tests will not result in the introduction of any radioactive material to that environment As has already been stated, that obligation can only be satisfied by carrying out a full Environmental Impact Assessment in accordance with international standards

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[97] Ibid. pp 212-213.

[98] *J.O.* of 3 February 1995. France is also party to the Treaty of the European Union (Maastricht Treaty), 1992, which provides, in Title XVI, Article 130r, that the precautionary principle is to form the basis of European Union environmental protection.

109. This conclusion is further strengthened by certain general considerations which have even greater force now than they did in 1973. New Zealand remains convinced that contemporary international law does not countenance the continuance of nuclear testing which causes radioactive contamination of the environment outside the territory of the testing state. This is the consequence of the binding quality of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water of 5 August 1963 and of the fact that the principles underlying that particular rejection of nuclear testing have in the ensuing third of a century become generalised by the conscience of the world into an outright legal condemnation. This condemnation is based on the proclamation in the preamble of the 1963 Treaty of the objective of the Parties "to achieve the discontinuation of all test explosions of nuclear weapons for all time" and of their desire "to put an end to the contamination of man's environment by radioactive bstances".

110. The position taken by New Zealand 20 years ago at the beginning of this Case has now been confirmed in customary international law. At that time New Zealand contended that all members of the international community had the right to be free from nuclear tests which give rise to radioactive fallout and, as well, the right to be preserved from "unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment".[99] Similarly, Australia contended in 1973 that the 1963 Treaty "embodied and crystallised an emergent rule of customary international law". The overwhelming attitude of the world community mentioned earlier should remove any suggestion that

[99] *ICJ Reports 1973*, at p.139.

principles of such magnitude, reflected in a Treaty to which more than 130 States are now parties, has not in the course of the years assumed binding customary force in the international legal system.

VII. CONCLUSIONS

111. For all the reasons set out above, New Zealand submits that the Court should, in the words of paragraph 63 of the 1974 Judgment, "examine the situation" as it now exists. New Zealand contends that that examination should lead the Court to make appropriate procedural orders in respect of the New Zealand Application of May 1973 with a view to according New Zealand the relief that is requested in paragraph 113 below. As a matter of priority and urgency New Zealand will, however, first be asking the Court for provisional measures to protect its rights pending furthe . . sideration of the Case.

112. The rights for which New Zealand seeks protection all fall within the scope of the rights invoked by New Zealand in paragraph 28 of the 1973 Application (see above, paragraph 13). At the present time, however, New Zealand seeks recognition only of those rights that would be adversely affected by entry into the marine environment of radioactive material in consequence of the further tests to be carried out at Mururoa or Fangataufa Atolls, and of its entitlement to the protection and benefit of a properly conducted Environmental Impact Assessment.

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113. Within these limits, therefore, New Zealand asks the Court to adjudge and declare:

(i) that the conduct of the proposed nuclear tests will constitute a violation of the rights under international law of New Zealand, as well as of other States;

further or in the alternative;

(ii) that it is unlawful for France to conduct such nuclear tests before it has undertaken an Environmental Impact Assessment according to accepted international standards. Unless such an assessment establishes that the tests will not give rise, directly or indirectly, to radioactive contamination of the marine environment the rights under international law of New Zealand, as well as the rights of other States, will be violated.

.....

Co-agent of the Gov ent of New Zealand

Dated 21 August 1995