THE LEGALITY OF ATMOSPHERIC NUCLEAR WEAPON TESTS

—NUCLEAR TEST CASES—

MITSURU KUROSAWA

INTRODUCTION

On May 9, 1973, the Governments of Australia and New Zealand submitted applications to the International Court of Justice instituting proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean. The Governments of Australia and New Zealand asked the International Court "to adjudge and declare that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law."(1)

On December 20, 1974, the Court found that the claim of Australia and New Zealand no longer had any object and that the Court was therefore not called upon to give a decision thereon. In this judgment, the legality of nuclear tests in general remained unsettled although the dispute was settled by the decision of the Court.

In this paper, I will examine the legal issue of nuclear weapon testing in the atmosphere which the Court did not clarify. And to discuss its legality, three aspects of the problem are separately examined. The first is whether or not there is customary international law which prohibits the testing of nuclear weapon in the atmosphere. The second is whether or not these nuclear tests violate the national sovereignty of other states. The third is whether or not a nuclear test is inconsistent with the principle of freedom of the high seas.

Before examining these aspects of the question, it is necessary to settle two preliminary problems. One concerns the nature of the dispute. Some judges and authors claim that the question is not legal but political.(2) Other judges treat the dispute as a legal one.(3) According to the Court's judgment, the dispute having disappeared, the claim of Australia no longer has any object.(4) It may be presumed from this reasoning that a legal dispute had existed at first but because of legally binding declarations made by the French Government,

the dispute has disappeared. Additionally, since the Partial Test Ban Treaty was concluded in 1963, nuclear tests in the atmosphere have been treated as a legal problem. We can not claim that such a dispute is exclusively a political one.

The second preliminary problem is the claim that Australia and New Zealand have themselves accepted the legality of nuclear tests by participating in and assisting with tests by the United Kingdom in the 1950s.(5) However, nearly two decades have passed since then. We have to examine the rules of international law in force at the time when a dispute occurs.

Section I CUSTOMARY INTERNATIONAL LAW

The Government of Australia claimed that France's carrying out nuclear tests was inconsistent with international law and the Charter of the United Nations. The first concrete claim is as follows:

> The right of Australia and its people, in common with other states and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated.(6)

What is claimed here is that France is under obligation to all states—accordingly, to Australia—to abstain from any nuclear weapon testing. In other words, in the Australian opinion, the prohibition of nuclear weapon tests in the atmosphere which is provided for in the Partial Test Ban Treaty of 1963 is now a prohibition having force under general international law, which is binding not only on parties to the Treaty but also on non-parties to the Treaty. The Australian Government claims that the content of the Partial Test Ban Treaty has become a part of customary international law.

As evidence of its claim, Australia states that a great number of states have signed the Treaty, that the General Assembly of the U.

N. has been adopting resolutions which condemn the tests almost every year, and that there is world public opinion which is manifested in the resolutions and declarations of other international organizations or conferences and protests against nuclear tests by many states.

On the contrary, the French Government maintains that the prohibition of nuclear tests can not apply to France because France and China—two nuclear states—are strongly opposed to the Partial Test Ban Treaty, that resolutions of the U. N. General Assembly do not have any legally binding force, and that the Treaty permits easy terms of withdrawal from the agreement.

This is a problem concerning the process by which treaties become customary international law,(7) and it concerns Article 38 of the Vienna Convention on the Law of Treaties. In this section, we have to clarify whether the Partial Test Ban Treaty of 1963 had become general customary international law by the time of the dispute, that is in 1973.

I first point out four legal characteristics of the Treaty.(8) i) The Treaty prohibits tests principally in the atmosphere, in outer space and under water, and tests underground are permitted conditionally. ii) The Treaty provides for the privileged status of the United Kingdom, the Soviet Union and the United States. iii) The Treaty is open to all states without any limitation. iv) The Treaty recognizes the right of withdrawal by a state exercising its national sovereignty.

It is important to describe the international situation when the Treaty was adopted. What is most important is that the Governments of France and of the People's Republic of China expressed their opposition to the Treaty very clearly.(9) On the other hand, a great number of states supported the Treaty, and by the time when the Treaty entered into force on October 10, 1963, 109 states had signed it.

It is not strictly necessary for all states in the international society to become parties to a treaty in order to make its content customary international law; it is sufficient for almost all states to

become parties, but the situation must be examined case by case when there are some non-parties and especially when some states strongly oppose a particular treaty. The International Court of Justice touched on this problem in the North Sea Continental Shelf Case of 1969 and described the conditions as follows:

> With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were specially affected.[10]

The Court described "a very widespread and representative participation" with the proviso that "participation of states whose interests are specially affected" is necessary.

In using this criterion, the non-participation of France and China, which are states whose interests are specially affected, is critical. As a counter-argument, the Government of Australia contended that "the reaction of the other members of international community to the dissenting behaviour of one or some of them could be an efficient and valid element of proof of the *opinio juris* which is the basis of that norm."[11] However, it is very difficult to certify that customary international law which binds France and China in regard to nuclear tests is being formed when France and China, having direct interest in the problem, expressly and consistently oppose prohibition of nuclear tests.

As an expression of world public opinion, U. N. General Assembly resolutions indeed play a part in progressive development of international law. Sometimes a resolution may be treated as evidence of customary international law, and can be an expression of *opinio juris*. But in this case, that is, in the case of nuclear tests, the attitudes of France and China are very critical, and their consistent opposition may prevent a resolution from becoming evidence of customary international law. In addition, in Stockholm in 1972, the U. N. Conference

on the Human Environment adopted a relevant declaration and resolution. Principle 26 of the declaration provides that "man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction."[10] A resolution which condemned nuclear weapon tests in the atmosphere was also adopted.[11] A similar resolution was also adopted by the World Health Assembly of WHO. The declaration and resolutions approach the problem of nuclear testing from the point of view of the human environment. They are not strictly declarations of the rule of law, but guidelines for goals toward which we should strive.

In concluding this section, we can summarize the problem as follows: The problem of whether or not there is a customary international law which prohibits nuclear weapon tests in the atmosphere depends on two opposite claims. One is the favorable condition for claiming the existence of customary international law by virtue of the Partial Test Ban Treaty, of the heavy support for the Treaty, of a number of U. N. General Assembly resolutions condemning nuclear tests, and of a strong desire for the prohibition of such tests from the angle of protection of the human environment. The other is the negative condition deriving from the consistent opposition to the prohibition of nuclear tests by France and China.

The differnce derives in part from the Treaty itself, the purposes of which are to achieve both disarmament and protection of the human environment. From the point of view of content, treaties on disarmament in strict sense can not develop into customary international law, but treaties on protection of the human environment can very easily do so.

What is critical in this problem is that, as the International Court said, a widespread and representative participation in the Convention including that of states whose intersts are specially affected is necessary for the formation of customary international law from the basis of treaty provisions. Therefore, it is now quite difficult to conclude that the prohibition of nuclear weapon tests in the atmosphere is already

a rule of customary international law, binding also France and China.

Before examining the second problem in the Section II, we have to point out two more radical arguments. First, some authors argue that the prohibition of nuclear weapon tests has the nature of *jus cogens*.[14] This new concept of international law, which is included in the Vienna Convention on the Law of Treaties, is one of the causes of nullity of treaties. There are still opposite views as to the existence of positive rules which have the nature of *jus cogens*.[15] And further, there are many different views about which rules of international law have the nature of *jus cogens*. As Article 53 of the Convention provides for the peremptory norm of general international law, the rule which has the nature of *jus cogens* must be general international law. Because the prohibition of nuclear weapon tests, as I concluded above, can not now be said to be general international law, it is vain to discuss *jus cogens* in this connection.

Secondly, the Government of Australia argued that the obligation to prohibit nuclear weapon tests was an obligation *erga omnes*.[16] This argument has some effect based on the judgment of the I. C. J. in the Barcelona Traction Case. Currently the argument is advanced that in international society there exists a general interest of international community or community interest.[17] The point is related to the admissibility of the application of Australia. However an obligation *erga omnes* presupposes that the rule must be general international law; it is then impossible to talk about an obligation *erga omnes* in the case of prohibition of nuclear weapon tests.

Section II NATIONAL SOVEREIGNTY

The second claim of the Australian Government is as follows:

The deposit of radio-active fall-out on the territory of Aus-

tralia and its dispersion in Australia's airspace without Australia's consent:

(a) violates Australian sovereignty over its territory;

(b) impairs Australia's independent right to determine what act shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources.[18]

The claim of Australia here is concerned, in the first place, with national territorial sovereignty and, in the second place, with the right to decide independently, that is, decisional sovereignty. First, as the Australian Government claimed from the legal point of view, each state, including Australia, possesses both territorial inviolability and decisional inviolability. Second, each state is subject to a general duty to each other state to respect the territorial integrity and decisional integrity of the others. Third, a state may be in breach of that obligation although no fault exists in it. The obligation is a strict one. Fourth, once the obligation is broken, international responsibility is engaged. Fifth, territorial integrity is voilated by interference with the exclusive authority of the sovereign. Sixth, international responsibility is engaged although no pecuniary harm is inflicted.[19]

The problem concerns the question of the international responsibility of states. When we discuss this problem, we have to make clear whether or not the action which causes the deposit of radioactive fall-out on other states, that is, atmospheric nuclear weapon testing itself is an illegal act. The Australian Government, as mentioned in Section I, claims that nuclear weapon tests in the atmosphere themselves are inconsistent with the rule of international law and illegal. According to this claim, it is natural that the state which conducts an illegal act and affects other states is responsible under international law.

However, as I mentioned in the previous Section, the act itself, the testing of nuclear weapons in the atmosphere can not always be thought illegal because the rule is not yet one of general international

law. In its public sitting, the Government of Australia referred also to the doctrine of abuse of rights as an alternative to the argument already outlined. This argues that "the deleterious nature of the radioactive fall-out and its effect, actual and potential, upon Australia and upon its population, are such that testing which deposits such fall-out amounts to an abuse of the right to test."[20] In this argument, Australia does not presuppose the illegality of nuclear tests.

When we view the nuclear testing itself as not illegal, the problem is whether or not the state whose act causes some effect on other states beyond its boundaries is responsible. The Trail Smelter Case presents a very similar situation. One author contends that "the award in the Trail Smelter Case could be a precedent for viewing nuclear weapon tests such as the Bikini incident."[21] In the Trail Smelter Case, the Arbitral Tribunal found as follows:

> Under the principles of international law, as well as of the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[22]

This is the principle of *sic utere tuo alienum non laedas* which is generally recognized as a principle of international law and which is also expressed as principle 21 of the declaration of the U. N. Conference on the Human Environment.

This principle adopted in the Trail Smelter Case could be applied to the Nuclear Test Case. But in applying it, we confront the problem of damage. For, in the Trail Smelter Case it is presupposed that "the injury is established by clear and convincing evidence" from which the Tribunal finds compensation for reduction in the value of use or rental of the land caused by the fumigations. In this point, the Nuclear Test Case is quite different from the Trail Smelter Case because what the Australian Government seeks in the dispute is not conpensation but a declaratory judgment that nuclear weapon tests in the atmosphere

are illegal and a discontinuation of French testing. The request of a declaratory judgment from the Court reminds us of the Corfu Channel Case of 1949, in which the International Court of Justice said as follows:

> Between independent states, respect for territorial sovereignty is an essential foundation of international ralations. ...to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. ...This declaration by the Court constitutes in itself appropriate satisfaction.[23]

In Corfu Channel Case, the illegality of the British act, that is, the clearing of the mines in the channel, is presupposed, and the Court declared the illegality of it. In Nuclear Case, as I mentioned before, the illegality of nuclear weapon testing in itself has not been established. Therefore, the reasoning of the Corfu Channel Case can not be applied to the Nuclear Test Case and the judgment can not be a precedent for Nuclear Test Case because the illegality of the action can not be established.

The problem of damage arises when an act itself can not be said illegal, in order to make a state responsible for its act. In the Trail Smelter Case, Canada was held responsible because the injury was established by clear and convincing evidence. It is necessary even in the Nuclear Test Case that damage be clearly established. In this point, the meaning of damage becomes very important and decisive. The question is whether the deposit and the dispersion of radio-active fall-out on the territories of other states constitutes real damage or not. The Australian Government claims that it violates its territorial sovereignty. Günter Handl submits that "injury in the sense of material damage is the foundation of state responsibility in cases where a state activity lawful *per se* entails extraterritorial environmental effect. The mere fact of the "violation of sovereignty" implicit in the transfrontier crossing of pollutants is thus insufficient to render a state liable for the activity generating the pollutant."[24] According to the opinion of

Handl, the Australian claim can not be sustained.

These days some activities inherently dangerous are increasingly treated under the doctrine of strict liability.[23] In the case of nuclear tests, it is very difficult for the victims to prove the fault of the state which conducts nuclear tests. But even when we adopt the doctrine of strict liability when considering nuclear tests, the occurence of damage is a prerequisite for liability of a state whose activity has some effect on other states.

According to the rule of traditional international law, material damage is a prerequisite for rendering liable a state whose activity, lawful itself, has some effect on other states. It is true even in cases to which the doctrine of strict liability can be applied. When material damage is not established clearly, the state conducting nuclear weapon tests which have some transfrontier effects is not responsible for these effects.

Finally, we have to examine the question whether the problem of nuclear weapon tests can be treated in the category of transfrontier pollution. The Australian Government considers fall-out is of a quite different nature from the usual pollutant of air or water. It argues that nuclear weapon tests themselves are unusual, abnormal, unnatural and extremely dangerous activities and which are in themselves harmful. The claim here is that nuclear weapon tests are an activity ***sui generis***.

If the nuclear weapon tests are, as the Australian Government claims, an activity ***sui generis*** and a completely new activity, and if they can not be disposed of by the rule of traditional international law, we need a new rule of international law. Studies of the effects of nuclear weapon tests are increasing in the field of natural science, and world opinion reflects how dangerous the nuclear tests are. We need a rule of law which prohibits the conducting of nuclear tests in light of the human environment. In this respect, the problem has some connection to the legality of nuclear weapon tests themselves as mentioned above in Section I.

In conclusion, from the point of view of positive international

law, there is no rule of law which prohibits fall-out and dispersion of radio-activity itself where there is no proof of material damage.[28]

Section III FREEDOM OF THE HIGH SEAS

The third right which the Australian Government claims to have been violated by French nuclear tests is as follows:

> The interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radio-active fall-out, constitute infringements of the freedom of the high seas.[29]

Two claims are maintained here by Australia on the basis of the principle of the freedom of the high seas. The first is against the violation of the right of free navigation. The second is against the violation of the right to fish in unpolluted seas.

The first claim, that is, against the violation of the right of free navigation, concerns the establishment of control over parts of the high seas by virtue of French nuclear weapon tests. The French Government established 'zones interdites' to aircraft since 1965, 'zones dangereuses' to aircraft and ships during the test series, and a 'zone de sécurité' in 1973. The Government of Australia contends that "when a state purports to declare areas of the high seas prohibited or dangerous, that is, in the eyes of international law, a sufficient interference with the right of others."[30]

On the contrary, the French Government maintains that it is usual to establish danger zones on the high seas because of military manoeuvres or firing exercises, and that even during earlier nuclear tests they were established legally.[31] It continues to argue that the danger zones established by France are quite reasonable in respect to duration, area, notification, routine navigation and fishing.[32]

This problem was very hotly discussed in connection with the nuclear tests performed by the United States in the 1950s and in the process of negotiation of the Convention on the High Seas of 1958. The geographical features of Marshall Islands in which the nuclear tests were conducted by the United States are similar to those of Mururoa Atoll in which nuclear tests were conducted by the French Government.

Many arguments have been advanced concerning the relation of the freedom of the high seas and nuclear weapon tests which led to the establishment of danger zones. The first three points argue the illegality of the test, and the last three then legality. First, some authors maintain that the nuclear weapon tests are contrary to the freedom of the high seas and illegal because of the establishment of the danger zones themselves. They submit that "the establishment of such zones on the high seas does not necessarily mean the establishment of sovereignty but that it is a kind of control or jurisdiction which violates the principle of the freedom of the high seas."[81]

Second, it is submitted that "although the establishment of danger zones is not in itself illegal, every activity on the high seas is not permitted because the interest which should be protected in international society is the interest of navigation and fishing. Nuclear weapon tests are illegal if and to the extent that they violate the freedom of navigation or fishing."[82] Some scholars, in addition, enumerate the freedom to lay submarine cables and pipelines and the freedom of overflight.[83]

Third, a commentator contends that "conducting nuclear weapon tests on the high seas is generally recognized as one of the freedom of the use of the high seas but that the tests can not be allowed to disturb the other uses of the high sea by other states. Two conditions, equality and temporality, must be maintained. Therefore, the nuclear tests by the United States in the 1950s constitute, in effect, an abuse of this right and a violation of international law."[84]

Fourth, an argument, which is opposed to the first one, is submitted

that "the high seas are free and that it is permitted under international law to use them for nuclear weapon tests provided that appropriate preventive measures, such as the establishment of danger zones, are taken."[95] According to this opinion, the establishment of the danger zones is a justification for conducting nuclear test.

Fifth, contrary to the second opinion above, it is argued that freedom of the high seas means not only freedom of navigation and fishing. They say that claims of navigation and fishing and those that may interfere are of a common character and the all-pervading test for resolving competing claims to authority and control on the high seas is the test of reasonableness. The nuclear weapon tests by the United States were reasonable and hence lawful.[96]

Sixth, there is an argument which is concerned with self-defense. The claim is that "it can not be reasonably concluded that it is unreasonable for the United States to engage in such temporary and limited interference with navigation and fishing as are involved in the hydrogen bomb tests, in preparation for the defence of itself and all allies and of all the values of a free world society."[97] But the justification of nuclear weapon tests which have some effect on the high seas by a claim of preparation for self-defense necessarily encounters very strong criticism.[98] In addition, some authors maintain that international law in existence is unclear about this new problem[99] and further that this problem can not be solved by positive law.[100]

In process of negotiating Article 2 of the Convention on the High Seas, the socialist states mainly claimed that nuclear testing on the high seas was inconsistent with the freedom of the high seas. At the Geneva Conference of 1958, it was impossible to insert an express provision to the effect that nuclear weapon tests on the high seas should be prohibited. So the Convention provides that the freedon of the high seas "shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas". It is submitted as a construction of this provision that the standard of "reasonable consideration" applies even to nuclear tests

on the high seas, and if reasonable consideration is taken, nuclear tests would be permitted and regarded as legal. On the contrary, it is also argued that the provision prohibits nuclear weapon tests.

In conclusion, it is very difficult to draw a precise status of law concerning nuclear weapon tests which have some effects on the high seas from the arguments of the 1950s and Article 2 of the Convention on the High Seas. The problem depends on whether the nuclear weapon tests are, as France argues, almost the same as the traditional uses of the high seas for military manoeuvres or firing exercises or, as Australia argues, quite different from these traditional uses.

The second protest by Australia is against the violation of the right of fishing in unpolluted seas. The Government of Australia maintained that the test of an actual breach of the freedom of the high seas was not whether a specific ship or aircraft has deen contaminated by radio-activity arising from nuclear tests. The real question is whether the conduct of France is likely to affect adversely the general right possessed by other states to use and enjoy the sea and its resources.[41] Behind this claim exists the idea that radio-activity, even if very little, is inherently harmful to human beings and their circumstances and that men should not be exposed to radio-activity unless they get compensatory advantages. On the other hand, the French Government holds that "the radio-active elements produced during the tests are in fact so small that they have to be considered negligible and have no effect on human health."[42]

Positive efforts to protect the human environment from various kinds of pollution are being made in international society. In 1972, the U. N. Conference on the Human Environment was held and it adopted a declaration and a programme of action. Concerning marine pollution, some conventions have been adopted. Article 25 of the High Seas Convention deals with pollution by radio-active materials. From these documents, Australia argues that "it is the duty of states not to subject the natural resources of the high seas to any unwarrented environmentel hazard."[43]

It is very desirable to protect the high seas from pollution by radio-active fall-out, and protection of the environment is a recent trend in international law. But, in conclusion, it is very difficult to prove the existence of a rule of international law on the environment which has the effect of prohibiting every kind of nuclear weapon test.

The above-mentioned two claims in regard to freedom of the high seas are an attempt to draw concrete rules of international law from the general principle of freedom of the high seas. And both parties, that is, Australia and France, sought to draw concrete rules which are advantageous to themselves. Further, the claims of various authors are too diverse to deduce a conclusion.

Based on the foregoing examination, it is my opinion that it is not correct to maintain that every nuclear weapon test which has some effect on the high seas—regardless of its nature, scale, location or the scale of its influence—is inconsistent with freedom of the high seas. It might be held that some of the nuclear tests undertaken by the United States and France are, by examining the concrete circumstances, contrary to freedom of the high seas. But it would be impossible to obtain a declaratory judgment to the effect that every nuclear weapon test in the atmosphere which has some effect on the high seas is illegal.

CONCLUSION

The first claim of Australia before the International Court of Justice can not be accepted. To this claim that the prohibition of nuclear weapon tests in the atmosphere has become a part of general international law, the negative attitude of France and China is critical. It is impossible to impose obligation under the Partial Test Ban Treaty

upon France and China who oppose to an international Pax Russo-Americana and continue their own nuclear development. But the development of the prohibition of nuclear tests into customary international law is particularly important as *lex ferenda* as world public opinion emphasizes.

The second claim of Australia also can not be recognized in the formula the Australian Government argues. Although the deposit and dispersion of radio-active fall-out may cause various types of damage to other states, the simple fact of deposit and dispersion, without any proof of material damage, is not enough to render the nuclear weapon tests illegal. The Australian Government should have shown actual material damage and shown an interrelationship between the damage and the fact of the deposit and dispersion. Then it should have claimed the discontinuance of nuclear weapon tests. In this point, citation from scientific studies of the dangers of radio-active fall-out to human beings and their environment is very important. It may be expected that the dangers of radio-active fall-out will lead to a new rule of international law which prohibits any kind of nuclear weapon tests in the atmosphere.

The third claim of Australia, the claim in the light of freedom of the high seas, also can not be sustained. Because the effects of nuclear weapon tests in the atmosphere are extremely various, it can not be held that every test is directly contrary to freedom of the high seas. In the case of the French tests, the French Government would be responsible in respect that it established a very large security zone and caught some ships. In this respect too, the Australian Government should have proved the concrete material damage, and then it should have claimed illegality on the basis of scientific studies.

In conclusion, none of the three claims of Australia can be accepted as a rule of positive international law, but all three claims show the direction in which international law is tending to develop. As a result, the Australian claims are extremely important as an expression of *lex ferenda*. Development of international law in the

field of second and third claims would help development of law in the first field.

The International Court of Justice didn't consider the legality of the nuclear weapon tests in the atmosphere directly, but it contributed indirectly to the progressive development of the body of international law which prohibits nuclear tests. In the order of the interim measure in 1973, the Court indicated that "the French Government should avoid nuclear tests causing the deposit or radio-active fall-out on Australian territory."[44] In the judgment of December 20, 1974, the Court found that the claim of Australia no longer had any object and that the Court was therefore not called upon to give a decision thereon. By the finding of the Court, the object of the claim has clearly disappeared because the unilateral declarations by the Government of France constitute an undertaking possessing legal effect. What is the most important is the finding of the Court that by its declarations France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.

The role of the Court in making the law clear and in promoting the progressive development of law must be appreciated. Since the judgment France has not conducted nuclear weapon tests in the atmosphere. In 1976, the President of France guaranteed to the Premier of New Zealand that his country would never conduct atmospheric nuclear tests in the South Pacific.

In sum, we can say that the development of a general international law which prohibits nuclear weapon tests in the atmosphere has begun.

FOOTNOTES

(1) *Australia's Application*, 9 May 1973, p. 28.

(2) *Livre blanc sur les expériences nucléaires*, Comité interministériel pour l'information, juin 1973, p. 23. ; Judge Gros, *I.C.J. Reports*, 1974, p. 288. ; Judge Petrén, *I.C.J. Reports*, 1973, pp. 126–127. *I.C.J. Reports*, 1974, pp. 303, 306. ; Judge Ignacio-Pinto, *I.C.J. Reports*, 1973, p. 133. *I.C.J. Reports*, 1974, pp. 308–309. ; Judge Forster, *I.C.J. Reports*, 1974, p. 275. ; Jean-Pierre Cot, "Affaires des essais nucléaires (Australie c / France et Nouvelle Zélande c / France), Demandes en indication des mesures conservatoires, Ordonnances du 22 juin 1973," *Annuaire Français de Droit International*, 1973, pp. 253–4.

(3) Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *I.C.J. Reports*, 1974, p. 366

(4) *I.C.J. Reports*, 1974, pp. 269–272.

(5) *Livre blanc*, pp. 13, 17. ; Judge Gros, *I.C.J. Reports*, 1974, p. 281.

(6) *Australia's Application*, 9 May 1973, p. 26.

(7) See, R. R. Baxter, "Multilateral Treaties as Evidence of Customary International Law", *British Yearbook of International Law*. Vol. XLI, 1965–66. pp. 275–300.; R. R. Baxter, "Treaties and Custom," *Recueil des Cours*, 1970–1, pp. 25–106; Anthony A. D'Amato, *The Concept of Custom in International Law*, 1971, pp. 103–166.

(8) As to the process of making of the Treaty, see, Harold Karan Jacobson, "The Test-Ban Negotiations: Implications for the Future," *The Annals of the American Academy of Political and Social Sciences*, Jan. 1964, pp. 92–101.; Richard Scott, "A Ban on Nuclear Tests; The Course of the Negotiations 1958–1962," *International Affairs* (London), Vol. 38, No. 4, Oct. 1964, pp. 501–510.; Arthur H. Dean, *Test Ban and Disarmament: The Path of Negotiation*, 1966; Harold Karan Jacobson and Eric Stein, *Diplomats, Scientists, and Politicians: The United States and the Nuclear Test Ban Negotiations*, 1966; As to the content of the Treaty, see, Georges Fischer, "L'interdiction partielle des essais nucléaires," *Annuaire Français de Droit International*, 1963, pp. 3–34.; P. Chandrasekhara Rao, "The Test Ban Treaty 1963, Form and Content," *Indian Journal of International Law*, Vol. 3, July 1963, pp. 315–322.; Egon Schwelb, "The Nuclear Test Ban Treaty and Interna-

tional Law," Vol. 58, 1964, pp. 642-670.; Mahamed Ibrahim Shaker, "The Moscow Test Ban Treaty," *Revue Egyptienne de Droit International*, 1971, pp. 41-56.

(9) News Conference Remarks by President De Gaulle, July 29, 1963, in *Documents on Disarmament 1963*, pp. 267-8. Statement by the Chinese Communist Regime, July 31, 1963, in *Ibid*, pp. 269-272.

(10) *I.C.J. Reports*, 1969, p. 43.

(11) *Memorial of the Government of Australia* (*Questiones of Jurisdiction and Admissibility*), Nov. 1973, p. 94.; *I. C. J. Verbatim Record of Public Sitting, Australia*, 8 July 1974, CR 74/8, pp. 44-45.

(12) *Reports of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972, A/CONF. 48/14/ Rev. 1, p. 5.

(13) *Ibid.*, p. 32.

(14) H. Waldock, in *Yearbook of International Law Commission*, 1964, Vol. I, p. 78.; Luke T. Lee, "The Legality of Nuclear Tests and Weapons," *Österreichische Zeitschrift für öffentliches Recht*, Bd. XVIII, H. 2-3, 1968. S. 308.

(15) See, Alfred Verdross, "Forbidden Treaties in International Law," *American Journal of International Law*, Vol. 31, No. 4, Oct. 1937, pp. 571-577.; Alfred Verdross, "Jus dispositivum and Jus cogens in International Law," *American Journal of International Law*, Vol. 60, 1966, pp. 55-63; Georg Schwarzenberger, "International *Jus Gogens*?" *Texas Law Review*, Vol. 43, 1965, pp. 454-478.

(16) *Memorial of the Government of Australia* (*Questions of Jurisdiction and Admissibility*), Nov. 1973, pp. 94-95.

(17) See, Philip C. Jessup, *Modern Law of Nations*, 1974; Lord McNair, *The Law of Treaties*, 1961, pp. 255-271.; T. Olawale Elias, "Modern Sources of International Law," *Transnational Law in a Changing Society, Essays in Honor of Philip C. Jessup*, 1972. pp. 34-69.; Shabtai Rosenne, "Bilateralism and Community Interest in the Codified Law of Treaties," *Ibid.*, pp. 202-227.

(18) *Australia's Application*, 9 May 1973, p. 28.

(19) *I.C.J. Verbatim Record of Public Sitting, Australia*, 8 July 1974, CR 74/8, p. 13.

(20) *I.C.J. Verbatim Record of Public Sitting, Australia*, 8 July 1974, CR 74/8, p. 15.; Also see, Asian-African Legal Consultative Committee, "Conclusions

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