APPLICATION N° 28204/95

Noel Narvii TAUIRA and 18 others v/France

DECISION of 4 December 1995 on the admissibility of the application

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Articles 2, 3 and 8 of the Convention, Article 1 of Protocol No. 1 and Article 25 of the Convention *Decision of June 1995 (France) to resume nuclear testing As the consequences, if any, of the resumption of the tests at issue are too remote to affect the applicants' personal situation directly, they have failed to substantiate their allegations and cannot claim to be victims of a violation of the provisions they invoke*

Article 13 of the Convention *The right recognised by this provision may be exercised only in respect of an arguable claim within the meaning of the case-law of the Convention organs*

Article 25 of the Convention

a) The Convention does not provide for an "actio popularis"

b) The concept of "victim" is autonomous It must be interpreted independently of concepts of domestic law concerning such matters as interest or capacity to take legal proceedings

c) The word "victim", in the context of Article 25, denotes the person directly affected by the act or omission which is at issue

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THE FACTS

I THE APPLICANTS

Applicant No 1, Vaihere Bordes, who is a French citizen, was born in 1953 She is a farmer and lives in Papeete on the island of Tahiti, 1,200 kilometres from Mururoa atoll

Applicants Nos 2 and 3, Noel Narvii Tauira and Simone Tauira, born in 1953, and Raitea Reynold Tauira, born in 1974, are French citizens Applicants Nos 2 and 3 are employed by the local council and Applicant No 4 is a student They all three live in Papeete

Applicant No 5, Charles Hkaiha, who was born in 1966, is unemployed and lives in Faaa in Tahiti He states that he worked on Mururoa but does not specify any dates

Applicant No 6, Teharetua Avaepu, who was born in 1956, is the foreman of a welding workshop and lives in Toahotu in Tahiti He states that he worked on Mururoa but does not specify any dates

Applicant No 7, Edwin Haoa, is employed in various capacities in the construction industry He was born in 1938 and lives in Faaa in Tahiti He states that he worked on Mururoa between 1963 and 1979 He alleges that he had to go into hospital for three months as early as 1968, suffering from bouts of fever and severe fatigue He states that in 1985 he started having severe fits of breathlessness, which he had never suffered from before, and had to be placed on a ventilator Tahiti Civil Hospital did not, he alleges, inform him of the causes or the nature of his illness On 8 November 1995 he was examined by a doctor at Bonn Private General Hospital for Nuclear Medicine who performed a lung perfusion scan A full diagnosis is not yet available, however He alleges, finally, that his wife lost five children in unexplained circumstances after miscarrying in 1978, 1979 and 1986 and losing two other children aged seven years and nine months, in 1979 and 1981 respectively The applicant states that he was informed by a nurse that one of his children had died of leukaemia, but that the hospital refused him access to the medical files

Applicant No 8, Leonard Tuahu, was born in 1956 He is a painter and lives in Afareaitu in Tahiti

Applicant No 9, Damien Tehuiota, who was born in 1944, is unemployed and lives in Faaa in Tahiti He states that he worked on Mururoa between 1970 and 1978, that on several occasions his skin peeled and his hair fell out and that he had to go to metropolitan France several times for treatment He states that he has no children for fear that they will be born with congenital malformations

Applicant No 10, Enrico Tahitoe, was born in 1933 He is an administrative officer and, according to the power of attorney given to his lawyer, also lives in Faaa However, according to a letter of 14 November 1995, he regularly goes to his native island of Raroia, which is 600 km from Mururoa

Applicant No 11, Nataio Nanunea, who was born in 1943, is unemployed and lives in Punaauia in Tahiti He states that he left his job on Mururoa in 1976 after becoming partially paralysed

Applicant No. 12, William Teagai, who was born in 1942, is unemployed and lives in Pirae in Tahiti.

Applicant No. 13, Tehei Naehu, who is a French citizen, was born in 1925 He is retired and lives in Hivaoa Narquises in Tahiti.

Applicant No 14, Hoatuau Matattai, who is a French citizen, was born in 1927 He lives in Rikitea on Mangareva island, 400 km from Mururoa He is a clergyman Mangareva, which is one of the islands of the Gambiers archipelago, has a total population of 500.

Applicant No 15, Tepono Teakarotu, is a French citizen who was born in 1934 He is a farmer and also lives on Mangareva island

Applicant No 16, Louise Labbeyi, who was born in 1914, is a French citizen She is unemployed and lives in Rikitea, on Mangareva

Applicant No. 17, Siméon Pakaiti, who was born in 1914, is a French citizen He is a cultured pearl farmer on Mangareva

Applicant No 18, Ciprian Puputauki, who was born in 1934, is a French citizen He is a diver and lives on Mangareva He states that he worked on Mururoa but does not specify any dates

Applicant No 19, Denise Shivo-Abe, who was born in 1928, is a French citizen She also lives on Mangareva where she works as a fish farmer

In the proceedings before the Commission, all the applicants were represented by Mr Michael Bothe, Professor of Law at the University of Frankfurt

II. THE FACTS OF THE CASE

The facts of the case, as submitted by the parties, can be summarised as follows

The applicants all live in French Polynesia which is an overseas territory (Territoire d'Outre-Mer) situated in the most easterly part of the South Pacific It is an archipelago of approximately 130 islands inhabited by some 200,000 people, half of whom live on the largest island, Tahiti

France, with a view to developing its nuclear strike force, decided, after conducting nuclear tests in Algeria between 1960 and 1966, to transfer its nuclear testing programme to Polynesia It chose the uninhabited atolls of the Tuamotu

archipelago, namely Mururoa (or Moruroa) and Fangataufa atolls, which lie 1,200 km south of Tahiti, 2,000 km from the Cook islands, 4,200 km from New Zealand, 6,000 km from Chile and 6,500 km from Mexico The closest inhabited island is Tureia (approximately 60 inhabitants), which is 100 km away Fangataufa is 40 km south of Mururoa The closest inhabited archipelago is that of the Gambier islands of which the main island is Mangareva, situated 400 km from Mururoa

On 6 February 1964 the Permanent Commission of the Territorial Assembly of French Polynesia leased the two atolls in question to the French State for the duration of the nuclear tests

A series of 44 atmospheric tests began with the first nuclear test on 2 July 1966 and ended on 5 June 1975 with the first underground test on Fangataufa atoll Since 1975 there have been 127 underground tests (or at least 138 according to the applicants), mainly on Mururoa atoll In a Presidential Declaration of 8 April 1992, France announced that it was suspending its tests in support of its diplomatic initiative in favour of nuclear disarmament That moratorium was extended to 1993 after the main nuclear powers had announced that they were suspending their own tests China alone conducted further tests after that, *inter alia* in August 1995

At a press conference on 13 June 1995, the newly elected President of the French Republic announced his decision to resume, from September 1995 until the spring of 1996, the series of seven tests which had been suspended following the moratorium in 1992 He stated that these tests would be the last of a series conducted by France before the Comprehensive Test Ban Treaty which was then being negotiated at the Conference on Disarmament in Geneva and is due to be signed in 1996

At the date of the Commission's decision, four tests have already been conducted in implementation of the President of the Republic's decision the first test, on 5 September 1995, of an approximate yield of 20,000 tonnes of TNT (i e roughly the same yield as the Hiroshima bomb), was conducted on Mururoa, the second, on 2 October 1995, with a yield of 110,000 tonnes of TNT, on Fangataufa and the third, on 28 October 1995, with a yield of 60,000 tonnes of TNT, on Mururoa A fourth test, with a yield of 40,000 tonnes, was conducted on Mururoa on 21 November 1995

The resumption of the tests has been widely criticised by the international community, ecological organisations and the public, with reactions ranging from expressions of "regret to demonstrations in Papeete and in a number of capital cities In particular, during the 4th Assembly of the Organisation for Security and Cooperation in Europe (O S C E) in Ottowa in July 1995, the French authorities were urged to go back on their decision to resume nuclear tests Similarly, the U N Disarmament Commission adopted a resolution on 16 November 1995 condemning French nuclear tests

- Underground nuclear testing technique on Mururoa

Mururoa is a former volcano which has been extinct for almost 9 million years It formed on a hot spot on the ocean floor and has today moved thousands of kilometres away from the Pacific belt After being eroded at sea level and collapsing under its own weight, its base rests on the seabed at 3,000 metres It is therefore comparable to Etna in height The atoll is the part of it which is above sea-level. It stands less than 3 metres high, is 28 km long and 11 km wide and consists of a virtually continuous reef crown, except for a natural pass to the west which is 5 km wide and encircles a 40m deep navigable lagoon

The submerged upper layers, comprised of coral and limestone, are approximately 300 to 450m deep and underlaid by clay. The volcanic base consists of solid basalt rock flows.

Until 1981, the tests were conducted beneath the atoll rim by drilling a vertical shaft into the coral crown, 500 to 1,000 metres deep depending on the yield of the device being tested The nuclear device and the "diagnostic instruments" were placed in a sealed canister 15m long and lowered into the shaft The shaft was then filled in and, after the blast, rock fragments were obtained by core drilling in order to assess the radiochemical result of the blast

From 1981, shafts were also drilled beneath the lagoon water using the offshore drilling technique and since 1987 all the tests have been conducted beneath the lagoon.

The nuclear reaction, which lasts less than a nanosecond, generates intense flux, heat and pressures (several tens of millions of degrees and several millions of atmospheres) The heat given off causes the basalt rock to melt around point zero of the explosion The French Government have always maintained that this siliceous liquid solidifies, as it cools down, into a glass-like material which "traps" virtually all the radioactive residues the rate of plutonium retention is thus 100% while that of caesium-137 and strontium-90 is between 20 and 40%

- Facilities for controlling and monitoring the environment

Since nuclear testing began in French Polynesia, the Government have installed facilities for controlling and monitoring the atolls and their environment the competent authorities are two laboratories located in Montlhéry (in France) and on Mururoa or Faaa (the Joint Radiological Safety Unit and the Joint Biological Control Unit), which are both subordinate to the Government Office in charge of Nuclear Testing Centres

(direction des centres d'expérimentations nucléaires - "D.I.R.C.E.N."). The Radiological Safety Unit is responsible for radiological safety of the tests and protection of the population from radioactivity, while the Biological Control Unit is in charge of radiological surveillance and safeguarding animals, food and drinking-water near the test site. However, most of the information gathered by these departments falls into the category of defence secrets.

The Government have, nevertheless, authorised three investigative teams of international scientists to study the geological and radiological aspects of Mururoa atoll. The first of these was the mission led by Haroun Tazieff (26-28 June 1982), the second, the Atkinson mission (25-29 October 1983), which comprised experts from Australia, New Zealand and Papua-New Guinea and the third was the Cousteau mission (20-25 June 1987), the last-mentioned team being the only one authorised to take plankton, sediment and water samples from the site the very day after an explosion. The International Atomic Energy Agency (I.A.E.A.) was also authorised to take marine and terrestrial samples in 1991 and 1994 as part of an intercomparison exercise to check the consistency of analysis between participating laboratories.

The Government stress that France is the only country in the world to have granted foreign scientists access to its nuclear firing range and that all publishable data has been published, bearing in mind that obviously not all information as to the loads, their yield and their effects can be published, as the purpose of the exercise is to allow France to test the nuclear weapons on which its defence is based. The Government submit further that all the teams arrived at the conclusion that there was a low concentration of isotopes in the lagoon and surrounding area which was compatible with the levels of contamination resulting from earlier atmospheric nuclear tests carried out on Mururoa and elsewhere.

The applicants, for their part, argue that the investigations by teams of international scientists authorised by the French Government in actual fact merely served as alibis for the Government to attempt to justify their contention that the tests were completely innocuous. They stress that the missions in question were extremely short (between two and five days), that the experts themselves described them as "exploratory", that the experts did not have free access to all parts of the Mururoa site to collect samples and that no team was given permission to go to Fangataufa. Finally, they allege that the experts' conclusions have not met with unanimous approval in the scientific community.

Furthermore, both New Zealand and Australia "monitor" the French nuclear tests as part of an international programme for monitoring nuclear tests, which is based in Washington. Thus, the New Zealand National Radiation Laboratory, in Christchurch, has been monitoring radioactivity in the Pacific islands since 1961, when the United States and the United Kingdom were also conducting atmospheric tests in the area. The closest monitoring station to Mururoa, which records, *inter alia*, earth tremors

caused by a nuclear explosion, is situated in the Cook islands, in Rarotonga The New Zealand Radiation Laboratory published reports on radioactive fallout in the South Pacific in 1991, 1992 and 1993.

Finally, at the request of the Australian Minister for the Environment, a report on the impact of nuclear testing at Mururoa and Fangataufa was submitted to the South Pacific Environment Ministers Meeting in Brisbane in August 1995

- Medical check-ups of the populations concerned

Radiation affects the organism either by external irradiation or by internal irradiation following the penetration of radioactive substances into the organism through the respiratory, ingestive or cutaneous passages. The major long-term effect of ionizing radiation is the possible initiation of cancer which may then remain latent for several decades.

The principal radioactive substances which may concentrate in the human organism, mainly through the food-chain, are: *strontium-90*, an oxygen isotope with a half-life of 28 years, which behaves similarly to calcium and may therefore concentrate in the bones; *caesium-137*, with a half-life of 30 years, which behaves like potassium but is not retained by the body as long as strontium, half of a given dose being eliminated in 4 months, and *iodine-131*, which concentrates in the thyroid gland but has a half-life of only 8 days Strontium-90 and caesium-137 are medium soluble radio-elements, whereas iodine-131 is volatile

There is also a disease specific to the South Pacific (and to the Caribbean islands), called ciguatera. Ciguatera is non-fatal poisoning by a toxin which is produced by a micro-organism living in algae growing on dead coral. This toxin is transmitted to herbivorous fish and then to carnivorous fish in the lagoon which, in turn, transmit it to man. The symptoms of this disease, which is often chronic, are vomiting, diarrhoea, abdominal pain and sensory or motor disorders. The applicants allege that the increased incidence of ciguatera in French Polynesia is an indirect effect of the tests, caused not by radioactivity but by the resulting destruction of the coral.

Workers on the Mururoa site, whether they be from metropolitan France or from the neighbouring area, are given medical check-ups by the medical service of the armed forces throughout the duration of their contract. These check-ups cease, however, on termination of their contract. Several tens of thousands of individuals, 8,000 to 10,000 of them Polynesians, are estimated to have spent shorter or longer periods on the Mururoa and Fangataufa atolls.

As regards the population of French Polynesia generally, a report by *Medecins Sans Frontières* of July 1995 found that life expectancy had progressed from 44 years in the late 1940s to 70 years in the early 1990s, that the infant mortality rate was comparable with that of European countries and that 45% of all deaths are now caused by diseases which are typical of developed countries, i e cardio-vascular diseases or chronic degenerative diseases such as diabetes or cancer

The report regrets, however, the lack of any epidemiological health surveys of the population, which would yield results only in the long term and would have enabled reliable statistics to be compiled on, *inter alia*, the rate of deaths from cancer There is no register of congenital malformations and no register of deaths from cancer was set up until 1980, becoming operational only from about 1985 No specific data is available on the individuals who worked on Mururoa atoll or on the people who were most exposed during the period of the atmospheric tests (i e the inhabitants of the Gambiers archipelago)

The Government argue that given the infinitesimal rates of radioactivity found in the environment, even despite the conducting of atmospheric tests over a number of years, it is utterly false to claim that there is a risk of an increase in radiobiological diseases The Atkinson Report of 1983 in particular did not find any significant increase in the number of cancers

On this point, the Government point out that the dose of radioactivity received from natural, telluric and cosmic radiation is estimated at values of between 500 and 1,000 microsieverts (mSv) per year in Polynesia and between 1,000 and 5,000 in metropolitan France, natural radiation varying considerably from one hemisphere to the other and even from one area to another The dose received by Polynesian adults from artificial radioactivity in 1994 was between 1 4 and 1 7 mSv while children received between 0 8 and 4 3 mSv Similarly, the average concentration of caesium 137 in atmospheric aerosols in Polynesia in 1994 was only one third of the level measured in metropolitan France, while the level of caesium from the earlier atmospheric tests in the area had fallen, as early as 1985, to a barely measurable level, according to tests carried out by the New Zealand Radiation Laboratory In the light of the respective rates of radioactivity found, the Government emphasise that an epidemiological survey of the population would be of far greater use in metropolitan France

Finally, the Government argue that although it may be true that there has been a slight increase in the number of cancers in French Polynesia since 1986, that increase, which is comparable to the increase observed everywhere else in the world, can be explained by an increasing number of cases of lung cancer due to tobacco addiction and of gynaecological cancer

- Risks posed by the nuclear tests

A Risks of fracturing of the Mururoa atoll

The Government submit that there is no credible scientific basis for such a catastrophic scenario. They refer on this point to the Atkinson Report of 1983 and the Brisbane Report of 1995 which conclude that it is unlikely that the seven or eight remaining tests planned by the French authorities will cause fracturing of the atoll Further, they argue, since the tests have been conducted beneath the lagoon, the risk of sediment slips, which is moreover a natural phenomenon, is virtually nil

The applicants allege that Mururoa atoll "has as many holes as a Swiss cheese' and that a risk of fracturing does exist, requiring at the very least a thorough investigation, for in the event that the atoll should fracture, all the radioactive residues would leak and contaminate the ocean over thousands of kilometres Mururoa has become an enormous nuclear waste repository over the years, but the conditions for conserving and storing radioactive waste do not even approximately conform to the standards required for civil nuclear energy They allege that the authorities have not undertaken any comprehensive studies allowing them to rule out all risk of fracturing of the volcanic base, despite the fact that as early as 1987 the Cousteau mission had noted major fractures and fissures on the southern flank of the atoll following an incident in July 1979 in which a nuclear load had to be detonated at only 400 metres underground instead of 800 metres as planned, causing approximately 1 million m3 of the limestone layer to collapse and a small tidal wave (*tsunami*) to occur

B. Risks of pollution from atmospheric fallout

The Government maintain that this risk is non-existent now that atmospheric tests have been abandoned They argue that, in theory, there can be no atmospheric pollution since the tests are conducted underground Studies carried out by both New Zealanders and Australians show, moreover, that radioactive emissions have been below detection levels since the early 1980s

There may, however, be limited leakage of volatile isotopes into the atmosphere after an underground blast through a process known as venting, essentially by the release of radioactivity back into the drilling shaft The isotopes concerned are tritium (half-life 12 years), iodine-131 and noble gases such as krypton and xenon but, as they do not enter the food-chain or are short-lived, cases of radioactive contamination are negligible. If there is a leak, it is in any event limited to the Mururoa site and there is no risk of radioactive dust fallout being carried by wind or air over long distances Moreover, tests for volatile isotopes are systematically made after each blast, for if none are detected, this indicates that the test shaft was well sealed.

The applicants submit that the absence of any such risk is far from proven, given that many scientists refer to it as a possible source of contamination

C. Risks of marine pollution and contamination through the food-chain

The Government state that there is a hydrogeological system in the basalt base of the atolls and the limestone rock overlaying it, but that it would be rash to conclude that radio-elements are likely to be discharged back up into the marine environment through the infiltration of fractured rocks or through leakage In any event, given the strong diluent power of the ocean, only the lagoon water is affected by this slow migration. Only some radio-elements are concentrated in greater amounts in the lagoon water than can be observed in the ocean. An example is plutonium, which has specific activities of 0 3 Becquerel (Bq)/m3 in the lagoon water and 0.03 Bq/m3 in the ocean, this being due, they maintain, to the earlier atmospheric tests

Finally, the measurements taken in the ocean beyond the coral reef by, among others, the I A E A., including 1,000 km north-west of Mururoa, showed no trace of radioactivity and the most recent readings taken by the French authorities, which have not been refuted by any contrary reading, have shown no trace of radioactivity in fish.

The applicants counter that submission by arguing that the presence of even low radioactivity in water may, nonetheless, lead to a significant concentration in food exposed to radioactivity in marine waters. Thus, a concentration of 8 Bq/l caesium-137 in the water will result in a concentration of 400 Bq/kg in fish and, with an annual consumption of 200 kg of fish, an individual would be subject to an annual exposure of 1 mSv, which is the maximum annual exposure permissible according to the International Commission for Radiological Protection.

While it may be true that there is relatively little direct contamination of the water in which fish are caught near the test sites, there are nonetheless highly migratory species such as tuna Neither the fishermen nor the buyers of tuna sold in Tahiti and, as a rule, caught to the south of that island are in a position to know whether the tuna in question has or has not been in the area polluted by the tests.

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional and regulatory provisions

Article 5 of the Constitution of 1958:

"The President of the Republic shall be the guarantor of national independence and of territorial integrity"

Article 15 of the Constitution of 1958

"The President of the Republic shall be Commander of the Armed Forces He shall preside over the councils and committees of national defence "

Article 21 of the Constitution of 1958

"The Prime Minister shall direct the operation of the Government He shall be responsible for national defence He shall, if necessary, stand in for the President of the Republic as Chairman of the councils and committees provided for under Article 15 "

Article 1 of Decree No 64-46 of 14 January 1964

"The Defence Council is presided over by the Head of State and is composed of the Prime Minister, the Ministers of Foreign Affairs, of the Interior, of Defence and of Finance and attended by the Chief of Staff of the Armed Forces, the general delegate to the armaments department and the Joint Chiefs of Staff of the three armed forces It determines the tasks, organisation and conditions of engagement of nuclear forces "

Article 2 of the Decree of 14 January 1964

"The Prime Minister shall ensure that the general measures to be taken pursuant to decisions adopted by the Defence Council concerning the organisation and conditions of engagement of nuclear forces are applied The Defence Minister is responsible for the organisation, management and preparation for engagement of nuclear forces and for the necessary infrastructure "

Article 5 of Decree 64 46 of 14 January 1964

"The Commander of Strategic Air Forces is in charge of executing operations by these forces on an order for engagement given by the President of the Republic, the President of the Defence Council and the Commander of the Armed Forces "

B Case-law of the "Conseil d'Etat" on the concept of "prerogative acts"

Prince Napoléon judgment of 19 February 1875

"Whereas in his application for the annulment of the decision dismissing his request for his name to be re-entered in the list of major-generals in the Armed Forces Yearbook, Prince Napoléon-Joseph Bonaparte submits that the rank of Major-General which the Emperor, exercising the powers conferred on him under Article 6 of the *senatus consultum* of 7 November 1852, had bestowed on him by Decree of 9 March 1854, was a rank guaranteed to him under Article 1 of the Law of 19 May 1834,

but whereas Article 6 of the *senatus consultum* empowered the Emperor to establish the titles and station of the members of his family and to determine their rights and obligations, that Article also provided that the Emperor had full authority over all the members of his family, any station which could be conferred on the Princes of the Imperial Family was therefore always subject to the Emperor's will; the station bestowed on Prince Napoléon-Joseph by Decree of 9 March 1854 was not therefore definitive and irrevocable under Article 1 of the Law of 19 May 1834 .. giving the officer on whom it is bestowed the right to appear in the annual seniority list in the Armed Forces Yearbook; in the circumstances, Prince Napoléon-Joseph has no valid grounds on which to complain that his name has ceased to be included in the list of general staff, . ."

Paris de la Bollardière and Others judgment of 11 July 1975

"Whereas the decree being challenged, which set up a 60 nautical mile security zone around Mururoa atoll, adjoining the territorial waters, and the judgment being challenged, which suspended sea traffic in that zone, concern France's international relations; that being so, these decisions cannot be referred to the administrative courts,

Association Greenpeace France judgment of 29 September 1995

"Whereas on 13 June 1995 the President of the Republic made public his decision to resume a series of nuclear tests prior to the negotiation of an international treaty, that these tests had been suspended in April 1992 in support of a French diplomatic initiative for nuclear disarmament and that this moratorium had been extended until July 1993 after the main nuclear powers had themselves announced that they were suspending their own tests; that the decision being challenged cannot be dissociated from the conduct of France's international relations and cannot therefore be reviewed by a court, that the administrative courts do not therefore have jurisdiction to entertain the application filed by Greenpeace France for that decision to be set aside on the ground that it was *ultra vires*, . "

COMPLAINTS

The applicants complain of the decision by the President of the French Republic on 13 June 1995 to resume a series of nuclear tests on Mururoa and Fangataufa atolls in French Polynesia.

1. The applicants complain of a violation of their right to life as guaranteed by Article 2 of the Convention. They submit that given the specific effects of radioactivity, which causes long-term cancer, leukaemia and congenital malformations and

spreads invisibly and insidiously in the air, in water and in the food chain, France has breached its positive obligation to take all necessary precautions to protect their life by failing to implement precautionary health measures (such as evacuating the population) or to provide any systematic medical follow-up The applicants submit that the resumption of nuclear tests poses a real, substantial and immediate risk to their lives

2 The applicants complain of a violation of Article 3 of the Convention, arguing that they suffered extreme feelings of fear and anxiety upon the announcement of the decision to resume the tests, particularly as that announcement coincided with the 50th anniversary of the Hiroshima bomb, in commemoration of which there was extensive press, radio and television of the suffering endured by the Japanese population The applicants submit that they have suffered cumulative degrading and humiliating treatment, as the Polynesian population lives in terror of the consequences of the numerous earlier tests and in fear of the potentially tragic consequences of the further series of tests

3 The applicants, relying on the Lopez Ostra judgment (Eur Court H R , Series A no 303 C) also invoke a violation of their right to respect for their private life and their home under Article 8 of the Convention They submit first that this interference was not prescribed by law within the meaning of paragraph 2 of Article 8, since a decision taken by the President of the Republic alone is unconstitutional and vitiated by a material procedural defect in so far as no prior public enquiry or impact assessment was made in respect of the work and operations necessary to conduct the tests Secondly, they argue that the interference is unjustified, as it cannot be said to be necessary in a democratic society in the interests of national security if the State does not show that it took all necessary precautions to strike a fair balance between the individual interest and the public interest

4 The applicants complain of an interference with their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No 1 to the Convention They argue that, on the facts, a substantial risk of radioactive contamination must be likened to a *de facto* expropriation since, if contamination occurs, the applicants' lands and property would become unusable or, at the very least, their ability to use their land and property would be reduced to such an extent that there would be interference with their right to use their property

5 The applicants also invoke a violation of Article 13 of the Convention, arguing that they do not have an effective remedy under French law with which to put a stop to the alleged violations, as French case-law defines presidential decisions as prerogative acts" which, by virtue of the raison d'Etat" principle, are not subject to control by the courts Furthermore, the presidential decision merely took the form of a press release and was not published in the "Journal officiel"

6 The applicants consider that the choice of test site makes them victims of discrimination on the ground of their race, contrary to Article 14 of the Convention There are, they argue, sites in metropolitan France (for example in the Massif Central) with sufficiently solid geological structures to withstand the huge pressure of an underground nuclear blast Moreover, they argue, conducting tests in Polynesia is an extremely costly exercise, as the bomb is manufactured in metropolitan France and then has to be transported to Mururoa at great expense The only logical explanation for the choice of Mururoa as test site is, in their view, the greater political acceptability of exposing a minority non European population to risks generated by nuclear tests

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced by the first two applicants by fax on 8 August 1995 and was registered on 9 August 1995 as file No 28204/95 On 10 August 1995 the President of the Commission rejected the applicants request for application of Rule 36 of the Rules of Procedure to invite the French Government not to resume nuclear tests

In a fax of 17 August 1995 Applicants Nos 1 and 2 reiterated their request for application of Rule 36 of the Rules of Procedure and Applicants Nos 3 to 13 stated their intention to join Application No 28204/95 also requesting the application of Rule 36 These requests were rejected by the President of the Commission on 21 August 1995

In a fax of 31 August 1995, Applicants Nos 14 to 19 declared that they had joined Application No 28204/95 and all the applicants again requested that the Commission apply Rule 36 of its Rules of Procedure

On 5 September 1995, the Commission decided not to apply Rule 36 of its Rules of Procedure It decided to give precedence to the application pursuant to Rule 33 of the Rules of Procedure and to give notice of the application in its entirety to the respondent Government, inviting them to submit in writing their observations on its admissibility and merits

The Government submitted their observations on 20 October 1995 The applicants replied on 10 November 1995

THE LAW

The applicants invoke Articles 2, 3 8, 13 and 14 of the Convention and Article 1 of Protocol No 1 to the Convention complaining of the decision by the President of the French Republic of 13 June 1995 to resume a series of nuclear tests from September 1995 until the spring of 1996 on Mururoa and Fangataufa in French Polynesia

1. The Commission notes that in a letter of 17 August 1995 Applicant No. 1, Vaihere Bordes, stated her intention to withdraw her application submitted on 8 August on the ground that she had filed an application at the same time with the United Nations Committee on Human Rights in Geneva The Commission concludes that the applicant does not intend to pursue her application and that it must therefore be struck out of the list of cases pursuant to Article 30 para 1 (a) of the Convention

2. The Government's main submission is that the applicants cannot claim to be victims of a violation of the Convention within the meaning of Article 25 as they have failed to establish the existence of any interest which would enable them to bring proceedings before the Commission. Article 25, referred to above, does not provide for an *actio popularis* but requires the applicant, as an individual, to establish that he is or will be personally and directly affected by an act or omission amounting to an actual infringement of a right and not the mere threat of an infringement.

Unlike the Soering and Beldjoudi cases (Eur. Court H.R., Series A no 161 and no 234-A respectively), which concerned extradition and deportation orders which had been issued but not yet enforced, the decision to resume nuclear testing is not an act which, if implemented, would *ipso facto* and necessarily give rise to a violation of the rights guaranteed by the Convention. It is not the conduct of this final series of tests in itself which constitutes a violation, but only the consequences which the applicants assume it will have, i.e. pollution of the environment to the detriment of the population in the area The Government claim to have proved that such consequences are highly unlikely

According to the case-law (the above-mentioned Soering judgment of 7 July 1989, p. 33, para. 85), there cannot be a violation if the "consequences [of a particular act] are too remote" The Government argue that the applicants have failed to prove that the tests will have adverse consequences and that there is no duty on the authorities to prove that the tests are entirely risk-free, as the applicants demand that they do, since such proof cannot be produced in scientific matters, science being expressed only in terms of probabilities which, however small, are never nil.

The Government submit, in the alternative, that the applicants have failed to exhaust domestic remedies They reject the applicants' submission that they did not bring proceedings for want of an effective remedy, arguing that had the applicants suffered damage, they could at any time have applied to the administrative courts for damages Moreover, they argue, the French rules of liability governing such claims are particularly favourable to victims The applicants contest this, arguing that any damages they may be awarded in such proceedings would inevitably come too late but, the Government contend, that objection is based on the (mistaken) notion that nuclear tests do necessarily cause irreparable damage, which is not the case.

The Government argue further that, contrary to the applicants' assertions, an application to the 'Conseil d'Etat for the decision to be set aside on the ground that it was *ultra vires* would not necessarily fail, first, because such a remedy is possible even where the impugned decision has not been published and, secondly, because the applicants have an antiquated conception of what is meant by a "prerogative act" not subject to control by the courts The Government argue that since the Prince Napoléon judgment of 1875, it is no longer permissible to affirm that political decisions are prerogative acts and they observe that the Association Greenpeace France judgment of 29 September 1995 was not based on the fact that the President's decision concerned nuclear testing but on the circumstance that the impugned decision could not be dissociated from the conduct of France's international relations

The Government submit, in the further alternative, that the applicants' complaints are manifestly ill founded As regards the alleged violation of Article 2 of the Convention, while it may be true that the case law of the Commission appears to impose positive obligations on member States, not only does there also have to be a real and serious threat to life but it must be of a substantial degree, which is not the case here In response to the applicants' allegation that France's announcement of its intention to resume nuclear testing amounted to inhuman and degrading treatment contrary to Article 3 of the Convention, the Government argue that, in addition to the fact that the necessary intention was lacking, the fear and anxiety allegedly instilled in the local population do not attain the degree of severity necessary to constitute inhuman or degrading treatment and, further, that these fears, if they exist, are caused less by the risks allegedly inherent in nuclear testing than the alarmist information put about by the opponents of the tests

As regards the alleged violation of Article 8 of the Convention, the Government consider that this case is distinguishable from the cases referred to by the applicants (i e th Powell and Rayner and Lopez Ostra judgments of 21 February 1990 and 9 December 1994 respectively), as Article 8 prohibits actual interference and not the risk of a hypothetical interference The Mururoa site is not radioactive, the population are not affected by the nuclear tests in any way and nor have they been forced to abandon their homes For the same reasons, the applicants' right to the peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No 1 cannot be deemed to have been infringed As regards the complaints under Articles 13 and 14 of the Convention, the Government recall that these provisions do not apply unless the facts at issue fall within the ambit of the substantive clauses of the Convention, which is not the case here

The applicants recall first that the tests recently resumed by the Government are the sequel to a long series of tests which were conducted first in the atmosphere and then, from 1975 onwards, in the base of Mururoa and Fangataufa atolls That series of tests has, they allege already had adverse effects on the environment and on the health of a number of the applicants who worked on the site, so that in actual fact all past and future tests constitute a continuing violation of the applicants' rights

Even if the tests were to be completed by the date of the Commission s decision, the applicants would continue to be victims of the violations complained of as the area will remain contaminated for years to come and the possibility of subsequent rupturing of the atolls as a result of the current tests cannot be ruled out The 1964 lease provides for the atolls in question to be returned to French Polynesia free of charge in the condition they are in at that time (i e once the tests have been completed) and for no damages or compensation of any kind whatsoever to be payable by the State This means that the civil authorities of the territory will be left alone to bear the heavy burden of providing protection without being given the financial means with which to do so

As regards their capacity as victims the applicants argue that it would be unfair to consider that their interest in bringing an action decreases in proportion to the rise in the number of persons affected The fact that there are numerous other people who could claim to be victims does not in any way detract from the applicants' interest in bringing an action in this case Applicants Nos 7, 9 and 11 have already suffered health problems as a result of the tests, so their capacity as victims is established beyond all doubt since at the time of examining whether the case is admissible, the facts alleged by the applicant have to be deemed to be established

The interest of those applicants living in Tahiti (Nos 2 to 13) in bringing an action is based on the risk of leakage of radioactivity during the transport of radionuclides by air over long distances or the risk that they will enter the food chain Living at a distance from the site is not a decisive factor, as can be seen from the Chernobyl accident The applicants living on Mangareva, 400 km to leeward of Mururoa, have an even clearer claim to the status of victim, as their professional activities and their properties have been affected by the tests, in particular Applicants Nos 15 17, 18 and 19 who are in the farming fish farming or diving businesses

Although the damage ultimately caused by the tests cannot yet be ascertained *with certainty, Article 1 of the Convention and the effectiveness of that Article imply* that the applicants cannot be deprived of the capacity of victim where the authorities of the respondent State itself are responsible at least in part, for rendering inaccessible data which would otherwise allow the applicants to produce evidence to support their contention that they have sustained damage (see Eur Court H R , Klass judgment of 6 September 1978, Series A no 28, para 34) By refusing to grant the applicants access to information, insisting that the information concerns military secrets and refusing to disclose medical files, the Government have placed the applicants in a similar position to that of the applicant in the Klass case

The Government's entire reasoning is based on the assertion that it is highly unlikely that there will be radioactive leakage from future tests The applicants submit, however, that the greater the number of tests, the greater the risk and the more manifest the applicants' capacity as victims

As regards the exhaustion of domestic remedies, the applicants note firstly that the Government do not dispute that they had no remedy before the civil, criminal or constitutional courts They submit that an application to the administrative courts can be made only after damage from nuclear testing has occurred and cannot be used to stop the testing However, the only way to reduce the major risk that the applicants will fall victim to an infringement of their right to life would be to stop the tests Whatever the Government may say reference merely has to be made to the decision given on 29 September 1995 following the action by Greenpeace France to see that an application to the Conseil d'Etat" for the impugned decision to be set aside clearly lacks any prospect of success

On the merits of the complaints, the applicants stress that the most effective measure which the Government could take to protect their right to life as guaranteed by Article 2 would be to stop conducting tests That being so, the Government should, at the very least, have undertaken an impact assessment prior to the tests The Rio de Janeiro Conference (point 17 of the Declaration of June 1992) recognised the necessity of such an assessment, as does French law under the provisions of a Law of 19 July 1976 which, the applicants argue, applies to military affairs, even if the EEC Directive 85/337 of 27 June 1985 contains an express provision that projects serving national defence purposes do not require an impact assessment The Government should also have carried out a public enquiry in order to allow the applicants to express their points of view and their fears

In addition, the French authorities should have installed continuous, sound and verifiable facilities for monitoring any radioactive leakage Such facilities are urgently called for by the scientific community and by the European institutions (see Resolution of the European Parliament of 26 October 1995) The authorities should also have given the population in question regular medical check ups, particularly those who had been working on the site or living in the close vicinity

Regarding the violation of Article 3, the applicants contend that the Govern ment's disregard for their fully understandable anxieties (which have, for example, put Applicant No 9 off having children for fear that they will be born with congenital malformations) is proof of the total lack of respect for their dignity As regards interference with their right to respect for their private and family life and their home, the applicants add that the tests have also adversely affected the opportunity of enjoying a family life, since Applicants Nos 7 and 9 apparently have, or are afraid of having, a damaged genetic inheritance

Contrary to the Government's assertions, there can be a violation of Article 13 even where there has not been a violation of a substantive provision The applicants merely have to submit an arguable claim that they have been the victims of a violation which is the case here Furthermore as the sole remedy available will inevitably end with a refusal to hear the matter on the ground that the decision was a prerogative act, there has been a violation of the right to an effective remedy With respect to the

complaints under Article 14 and Article 1 of Protocol No. 1, the applicants reiterate their complaints, specifying that it is particularly the applicants living on Mangareva who are economically affected.

The Commission first examined the issue whether the last eighteen applicants have capacity to introduce this application

The relevant passage of Article 25 of the Convention provides that the Commission may receive applications addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention.

In order to rely on that provision, two conditions have to be satisfied: the applicant must fall into one of the categories of applicants referred to in Article 25 and must, *prima facie*, be able to claim to be the victim of a violation of the Convention. The first condition is clearly satisfied here, as the applicants are individuals.

As regards the second condition, the Commission recalls its case-law according to which the concept of "victim" must be interpreted independently of concepts of domestic law concerning such matters as interest or capacity to take legal proceedings. In order for an applicant to claim to be a victim of a violation of the Convention, there must be a sufficiently direct link between the applicant and the loss which he considers he has suffered as a result of the alleged violation (No 9939/82, Dec 4 7.83, D.R. 34 p. 213) Thus, the Convention does not provide for an *actio popularis*, but imposes as a condition for the exercise of the right of individual petition that every applicant should have an arguable claim to be himself a direct or indirect victim of a violation of the Convention as a result of an act or omission attributable to a Contracting State (No. 6481/74, Dec 12.12.74, D.R 1 p. 79).

It can be observed from the terms "victim" and "violation" and from the philosophy underlying the obligation to exhaust domestic remedies provided for in Article 26 that in the system for the protection of human rights conceived by the authors of the Convention, the exercise of the right of individual petition cannot be used to prevent a potential violation of the Convention: in theory, the organs designated by Article 19 to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention cannot examine - or, if applicable, find - a violation other than *a posteriori*, once that violation has occurred. Similarly, the award of just satisfaction, i.e. compensation, under Article 50 of the Convention is limited to cases in which the internal law allows only partial reparation to be made, not for the violation itself, but for the consequences of the decision or measure in question which has been held to breach the obligations laid down in the Convention.

It is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the Convention owing to the risk of a future violation An example of this would be a piece of legislation which, while not having

been applied to the applicant personally, subjects him to the risk of being directly affected in specific circumstances of his life. Another example is an expulsion or extradition case where the applicant may be able to prove that there is a *prima facie* risk of inhuman and degrading treatment for which responsibility will lie with the State taking the decision to expel or extradite him if it has not taken all due precautions to ensure that the applicant will not be subjected to such treatment

In order for an applicant to claim to be a victim in such a situation, he must, however, produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect.

In this case, the applicants claim that the decision of the President of the Republic of 13 June 1995 to resume a series of nuclear tests in the South Pacific will result in a violation of the rights they enjoy under the Convention, owing to the consequences which are likely to occur as a result of that decision. The applicants argue further that they are the victims of a continuing violation, given the consequences which the previous nuclear tests have already had on their situation and that they will continue to be victims even after this final series of tests is over, as the risk of leakage of radioactivity will persist

The applicants have submitted a whole series of scientific reports and articles in support of their fears of a future violation of Articles 2, 3 and 8 of the Convention and of Article 1 of Protocol No. 1 These show, they argue, that the resumption of the tests increases the existing risk of radioactive contamination of the environment and, consequently, the risk of exposing the applicants themselves to such contamination The Government dispute the conclusions of these reports and submit alternative ones.

The Commission does not consider it within its remit to rule on the scientific validity of the various reports to which the parties refer, especially as there is controversy surrounding a number of points, not only between the parties, but also amongst experts.

Nor does the Commission consider it within its remit, in examining the present individual applications, to assess the appropriateness or necessity of France's decision to resume the impugned series of nuclear tests; its sole task is to examine whether this measure can or cannot be considered, on the facts, to have infringed one of the rights enjoyed by the present individual applicants under the Convention

Merely invoking risks inherent in the use of nuclear power, whether for civil or military purposes, is insufficient to enable the applicants to claim to be victims of a violation of the Convention, as many human activities generate risks. They must have

an arguable and detailed claim that, owing to the authorities' failure to take adequate precautions, the degree of probability that damage will occur is such that it may be deemed to be a violation, on condition that the consequences of the act complained of are not too remote (Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 33, para. 85).

It is not disputed in this case that the risk of radioactive contamination is much lower since France decided in 1975 to abandon atmospheric tests and to conduct only underground tests. Neither is it disputed that the only incident resulting from implementation of these underground tests goes back to July 1979 when a nuclear load had to be detonated at less than the planned depth. The applicants have therefore failed to substantiate their claim that the French authorities failed to take all necessary measures to prevent an accident which could have occurred at any time.

As regards the allegation that the nature of the tests currently being conducted is such that there will inevitably be fracturing of the atolls, which have already been placed under extreme pressure by the numerous earlier tests, the subject is so controversial, including among scientists, that the applicants cannot base their claim to be victims upon this potential fracturing of the atoll. There is no evidence that it is the very tests decided on in June 1995 (and the last which France will be conducting) which will culminate in the disastrous consequences to which the applicants refer.

Neither is it disputed that atmospheric tests have caused radioactive contamination in the past; the point in dispute is the level of that contamination and its consequences on the environment in general and on the health of the population in particular. The Commission considers, however, that a claim to have worked on Mururoa in the past, without providing the slightest evidence of having worked there (Applicants Nos. 7, 9 and 11), or even specifying any dates of employment (Applicants Nos. 5, 6 and 18) is insufficient to prove that the resumption of the tests is a factor increasing the risk that a violation of the Convention will occur The Commission cannot accept the applicants' submission that they are the victims of a continuing violation of the Convention, in particular of Articles 2, 3 and 8, owing to the consequences of the previous atmospheric tests conducted by France

Apart from the fact that the application was directed only against the decision of June 1995 to resume the tests which had been suspended in 1992, the Commission notes that the applicants have not provided the slightest evidence as to their state of health, nor any hospital files, medical certificates or diagnosis of the cause of their health problems (Applicant No. 7), nor any administrative details (application for disablement benefit or similar) to prove, at the very least, that they do actually suffer from health problems. In the circumstances, the Commission considers that as the applicants have not supported their allegations, including the alleged refusal by the

authorities to allow them access to their medical files, they cannot claim to be the victims of a violation of the Articles which they invoke

Similarly, as regards the claim brought by some of the applicants that their right to peaceful enjoyment of their possessions has been violated (Applicants Nos. 15, 17, 18 and 19, living on Mangareva), the Commission notes that they have not submitted any evidence in support of their claims, such as title-deeds to property or documents relating to the nature of their business or to losses they have allegedly suffered as a result of the nuclear tests.

As regards those applicants who have neither worked on Mururoa in the past nor alleged interference with their right of property, the Commission notes that the individuals in question live more than 1,000 km from the test site and that the applicants themselves refer merely to a risk that they will be contaminated through the food-chain by eating a migratory species of fish which has been contaminated near the test site. Here again, the Commission considers that the applicants' allegations have not been sufficiently substantiated for the Commission to conclude, *prima facie*, that they can claim to be the victims of a violation of the Convention, given that to date the resumption of the tests has had only potential consequences which are too remote to be considered to be an act directly affecting their personal situation.

Having regard to the foregoing, the Commission considers that as the applicants cannot claim to be the victims of a violation, the complaints under Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No 1 must be rejected in their current form as manifestly ill-founded, pursuant to Article 27 para 2 of the Convention.

3. The applicants also complain of an infringement of their right to an effective remedy The Commission recalls its case-law in this regard to the effect that the right guaranteed under Article 13 of the Convention can be exercised only in respect of an arguable claim within the meaning of the case-law of the Convention organs (No. 14739/89, Dec. 9.5 89, D R 60 p. 296). As the Commission has considered that the applicants cannot claim to be the victims of a violation of the Convention, it follows that they have not submitted arguable claims within the meaning of the case-law. This part of the application must therefore be rejected as manifestly ill-founded, pursuant to Article 27 para 2 of the Convention

4 The applicants also complain of discrimination contrary to Article 14 of the Convention owing to the choice of test site The Commission has not, on the facts, found any evidence enabling it to conclude that there has been discrimination contrary to Article 14, which prohibits such discrimination only in respect of the enjoyment of the rights and freedoms set forth in the Convention As the Commission has concluded above that the applicants could not claim to be the victims of a violation of the

Convention, it follows that the complaint of an alleged discrimination must also be rejected as manifestly ill-founded, pursuant to Article 27 para. 2 of the Convention.

For these reasons, the Commission,

unanimously,

DECIDES TO STRIKE THE APPLICATION OUT OF ITS LIST OF CASES in so far as it was introduced by Applicant No. 1;

by a majority,

DECLARES THE APPLICATION INADMISSIBLE in so far as it was submitted by the other applicants.