

## THE SOUTH PACIFIC NUCLEAR-WEAPON-FREE-ZONE, THE LAW OF THE SEA, AND THE ANZUS ALLIANCE: AN EXPLORATION OF CONFLICTS, A STEP TOWARD WORLD PEACE

New Zealanders have felt deepening frustration at the inability of the States that hold nuclear weapons, in particular the two superpowers, to agree on practical measures to halt and reverse the process of building more and "better" nuclear weapons. If ordinary people everywhere can see the irrationality of that race, they ask, why cannot the superpowers see it also? And, if they can see it, why don't they do something about it?<sup>1</sup>

Recently, the New Zealand government refused to allow United States warships, allegedly carrying nuclear weapons, into its ports.<sup>2</sup> In taking this action, New Zealand expressed its frustration at the dangerous escalation of the United States and the Soviet Union's weapons development. New Zealanders are cognizant of the superpowers' apparent inability to resolve the conflict between the need for national security and the threat to global survival posed by massive build-up of nuclear weapons.<sup>3</sup>

Since 1972 New Zealand has periodically declared its territory free of nuclear weapons.<sup>4</sup> In 1974 the government began pressing for a Nuclear-Weapon-Free Zone (NWFZ) for the entire South Pacific

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1. Address by the Prime Minister of New Zealand, David Lange, in the general debate of the United Nations General Assembly in New York City (Sept. 26, 1984) [hereinafter cited as Lange, U.N. General Assembly Address] (copy on file with the California Western International Law Journal).

2. *U.S. Responds Sharply to New Zealand*, L.A. Times, Feb. 5, 1985, at 5, col. 1; *U.S. Calls off Exercise in Slap of New Zealand*, *id.*, Feb. 6, 1985, at 1, col. 3; *Nuclear Issue Stirs Up Fire in New Zealanders*, *id.*, Feb. 10, 1985, at 1, col. 3. The Pentagon maintains a "long standing policy of refusing to confirm or deny the presence of nuclear weapons on its ships." *Id.* Feb. 10, 1985, at 13, col. 4.

3. See generally NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL (B. Boskey & M. Willrich eds. 1970) (a useful and insightful discussion of the dynamics of nuclear proliferation).

4. Prime Minister Lange states: "The New Zealand Labour Party has been consistent over the years in its opposition to nuclear weapons." Address by the Prime Minister of New Zealand, David Lange, *Nuclear Policy and Sporting Contacts with South Africa*, Diplomatic and Commonwealth Writers Association in London (Sept. 28, 1984) (copy on file with the California Western International Law Journal). For a more complete discussion, see R. ALLEY, NUCLEAR WEAPON-FREE ZONES: THE SOUTH PACIFIC PROPOSAL 27-29 (Stanley Foundation Occasional Paper 14, 1977).

region.<sup>5</sup>

The recently elected Prime Minister of New Zealand<sup>6</sup> has continued the policy, popular in his nation<sup>7</sup> but unpopular in the United

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5. W. EPSTEIN, *THE LAST CHANCE: NUCLEAR PROLIFERATION AND ARMS CONTROL* 207 (1976) [hereinafter cited as EPSTEIN, *LAST CHANCE*]; ALLEY, *supra* note 4, at 31-32.

There is considerable debate on an internationally valid definition of the concept of a Nuclear-Weapon-Free Zone. See *Comprehensive Study of the Question of Nuclear-Weapon-Free Zones in All Its Aspects: Special Report of the Conference of the Committee on Disarmament*, U.N. Doc. A/10027/Add.1 (Sales No. E.76.I.7) (1976) [hereinafter cited as CCD Special Report]. Annexes II and III provide a summary of the delegates' positions on the NWFZ concept. Mr. Antonio Gonzales de Leon, the Mexican delegate at the U.N. Conference of the Committee on Disarmament in 1975, suggested this working definition:

A "nuclear-weapon-free-zone" shall be deemed to be any zone, recognized as such by the United Nations General Assembly, which any group of States, in the free exercise of their sovereignty, has established by virtue of a treaty or agreement whereby:

(a) The status of total absence of nuclear weapons to which the zone shall be subject is defined; and

(b) An international system of verification and control is established to guarantee compliance with the obligations deriving from that status.

*Id.* at 68, 97.

6. In the 1984 elections, David Lange defeated the incumbent Prime Minister Robert D. Muldoon. Taft, *The Kiwis Turn Dovish: New Zealand Presses for Nuclear-Free South Pacific*, L.A. Times, Oct. 7, 1984, § IV at 5, col. 1.

The party platform of the Labour Party for the 1984 election states, *inter alia*, the following:

Labour reaffirms its prohibition of visits by nuclear armed and/or powered warships and/or craft in New Zealand waters. As well, it will actively seek the establishment of a South Pacific nuclear weapons free zone and the prohibition of dumping of nuclear waste and testing of nuclear weapons in the Pacific.

The next Labour government, in accordance with its objectives of a South Pacific nuclear weapons free zone and its long-term desire for a nuclear free Pacific, will continue to oppose visits to New Zealand by nuclear powered and/or armed vessels and aircraft.

MINISTRY OF FOREIGN AFFAIRS, NEW ZEALAND, *SPEC. BULL. ELECTION '84 POLICIES 1* (1984) (taken from the "International Law" Section of the Labour Platform) [hereinafter cited as *Election '84 Policies*] (copy on file with the California Western International Law Journal).

7. Prime Minister Lange states:

I am satisfied that in implementing the policy of excluding nuclear weapons from New Zealand the government is expressing the opinion of the majority of New Zealanders. This is not a flight of radical fancy. Those of you who have been to New Zealand will know how conservative a country it is on moral and social issues. It is that conservative country which wants to exclude nuclear weapons. We know that we are taking a step which is serious. We know that we face opposition. We have thought about the issues because they have been forced on our attention.

Lange, *Diplomatic Writers Address*, *supra* note 4.

As support for his statement that the government's policy of excluding nuclear-armed warships from territorial waters is an expression of the voice of the people, the Prime Minister cites the following facts: (1) The exclusion of nuclear weapons was challenged and made an issue by the National Party government who received only 36% of the vote in the 1984 election. (2) Over 90 local administrations, governing 60% of the population, have declared their territories nuclear-free zones (NFZs). (3) After Secretary of State George Schultz' visit to New Zealand last year and his statement that a ban on nuclear vessels was incompatible with the Australia/New Zealand/United States defense pact, a public opinion poll was conducted. Sev-

States,<sup>8</sup> of declaring the country's territory free of nuclear weapons.

Following the leadership of New Zealand and Australia, in August 1984,<sup>9</sup> the South Pacific nations (which comprise a group called the South Pacific Forum)<sup>10</sup> agreed on several principles as a foundation for the NWFZ initiative:

(1) there would be no use, stationing, or testing of nuclear devices in the South Pacific;

(2) no South Pacific nation would manufacture, acquire, or test any nuclear explosive device;

(3) nuclear activities in the South Pacific would be conducted in accordance with international law, particularly the Non-Proliferation Treaty;<sup>11</sup>

(4) the South Pacific nations would respect the principles of navigation and overflight;<sup>12</sup> and

(5) South Pacific nations would retain their unqualified sovereign rights to determine their own security arrangements (and such questions as access to their ports and airfields by foreign vessels), consistent with the purposes of a NWFZ.<sup>13</sup>

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enty-six percent of the respondents did not want nuclear weapons in New Zealand's territory. *Id.* See also *Mail Supports New Zealand Prime Minister*, L.A. Times, Feb. 6, 1985, at 17, col. 1.

8. See *supra* note 2.

9. Lange, U.N. General Assembly Address, *supra* note 1.

10. The South Pacific Forum consists of Australia, New Zealand, Papua New Guinea, Fiji, Vanuata, the Cook Islands, Kiribati, Nauru, Niue, Tonga, the Solomon Islands, Tuvalu, and Western Samoa. The Federated States of Micronesia have observer status in the Forum. Conversation with Grant Kinnear of the New Zealand Consulate, Los Angeles (Oct. 18, 1985).

11. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature*, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 [hereinafter cited as Non-Proliferation Treaty].

The Non-Proliferation Treaty has been in force since March 5, 1970 and has currently been ratified by 129 nations. U.S. DEP'T OF STATE PUB. NO. 9433, TREATIES IN FORCE 276 (1985). For a more complete discussion of the Treaty, see, SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 209 (Library of World Affairs No. 69, 1971).

The Non-Proliferation Treaty states: "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons . . . and not in any way to assist, encourage or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons. . . ." Non-Proliferation Treaty, art. I.

The Treaty further provides: "Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer . . . of nuclear weapons; not to manufacture or otherwise acquire nuclear weapons . . . and not to seek or receive any assistance in the manufacture of nuclear weapons. . . ." *Id.* art. II.

Finally, the Treaty allows for the existence of NWFZs: "Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories." *Id.* art. VII.

12. See *infra* notes 84-91 and 141-69 and accompanying text.

13. Lange, U.N. General Assembly Address, *supra* note 1.

During 1985, the South Pacific NWFZ Treaty was drafted. On August 6, 1985, the 40th anniversary of the bombing of Hiroshima, the States of the South Pacific Forum met in Rarotonga, in the Cook Islands, for their annual convocation. At that time the drafted NWFZ Treaty was presented for signature. Eight of the thirteen Member States signed the Treaty.<sup>14</sup>

The Treaty prohibits the testing and stationing of nuclear weapons, the exporting of nuclear material without adherence to strict safeguards, and the "manufacturing, acquiring or receiving from others any nuclear explosive device."<sup>15</sup> It also creates a Nuclear-Weapon-Free Zone which extends from Australia to South America and from the Equator to Antarctica.<sup>16</sup>

The main issue presented by the adoption of the South Pacific

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14. *South Pacific Countries Sign an Antinuclear Pact*, N.Y. Times, Aug. 7, 1985, at A4, col. 1. The Treaty is of course only in effect for those Member States who have signed and ratified it.

As this Comment goes to press, the Treaty has been signed (subject to ratification) by representatives of the Governments of New Zealand, Australia, Cook Islands, Fiji, Kiribati, Niue, Tuvalu, and Western Samoa. Article 15 of the Treaty provides that the Treaty will not enter into force until eight instruments of ratification have been deposited. *South Pacific Nuclear Free Zone Treaty and Draft Protocols* (Aug. 1985) [hereinafter cited as *South Pacific NWFZ Treaty*]. (Copy on file with the California Western International Law Journal.)

15. See *supra* note 14; Acting Minister of Foreign Affairs, the Hon. F.D. O'Flynn, states as follows:

The Minister described the Treaty as containing a preamble, sixteen articles and four annexes. Under its terms, the parties to the treaty pledge to each other not to possess, manufacture, or acquire nuclear explosive devices anywhere. They pledge to prevent the testing of nuclear explosive devices in their territory and not to allow the stationing of nuclear explosive devices in their territories. They agree to take measures to prevent the diversion of fissionable material to non-peaceful purposes, and not to dump radioactive waste in the zone.

Press release issued by Acting Minister of Foreign Affairs, Aug. 7, 1985 [hereinafter cited as *Press Release of Aug. 7, 1985*] (copy on file with the California Western International Law Journal.)

16. *South Pacific Countries Sign an Antinuclear Pact*, *supra* note 14; *South Pacific NWFZ Treaty*, *supra* note 15, Annex 1, at 8. The preamble to the South Pacific NWFZ Treaty states as follows:

The Parties to this Treaty

UNITED in their commitment to a world at peace;

GRAVELY CONCERNED that the continuing nuclear arms race presents the risk of nuclear war which would have devastating consequences for all people;

CONVINCED that all countries have an obligation to make every effort to achieve the goal of eliminating nuclear weapons, the terror which they hold for humankind and the threat which they pose to life on earth;

BELIEVING that regional arms control measures can contribute to global efforts to reverse the nuclear arms race and promote the national security of each country in the region and the common security of all;

DETERMINED to ensure, so far as lies within their power, that the bounty and beauty of the land and sea in their region shall remain the heritage of their peoples and their descendants in perpetuity to be enjoyed by all in peace;

REAFFIRMING the importance of the Treaty on the Non-Proliferation of Nuclear

NWFZ is whether it will be a viable and effective security arrangement. To be effective, the Treaty can neither (a) contravene peremptory norms of international law,<sup>17</sup> nor (b) conflict with the present international legal obligations of the Parties.<sup>18</sup> It is reasonable to as-

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Weapons (NPT) in preventing the proliferation of nuclear weapons and in contributing to world security;

NOTING in particular, that Article VII of the NPT recognises the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories;

NOTING that the prohibitions of emplantation and emplacement of nuclear weapons on the seabed and the ocean floor and in the subsoil thereof contained in the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof apply in the South Pacific;

NOTING also that the prohibition of testing of nuclear weapons in the atmosphere or under water, including territorial waters or high seas, contained in the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water applies in the South Pacific;

DETERMINED to keep the region free of environmental pollution by radioactive wastes and other radioactive matter;

GUIDED by the decision of the Fifteenth South Pacific Forum at Tuvalu that a nuclear free zone should be established in the region at the earliest possible opportunity in accordance with the principles set out in the communique of that meeting;

HAVE AGREED as follows:

17. The Vienna Convention outlines the limits of treaty obligations in Article 53.

*Treaties conflicting with a peremptory norm of international law (jus cogens)*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law. For the purposes of the present Convention, a peremptory norm of international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, reprinted in 63 AM. J. INT'L L. 875, 8 INT'L LEG. MAT. 679 (entered into force Jan. 27, 1980). See also Dhokalia, *Problems Relating to Jus Cogens in the Law of Treaties*, ESSAYS ON THE LAW OF TREATIES 149-177 (S.K. Agrawala ed. 1972); SCHWARZENBERGER, *supra* note 11, at 27-57.

18. The United Nations Charter states as follows:

In the event of a conflict between obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligation under the present Charter shall prevail.

U.N. CHARTER art. 103. The obligations established by the South Pacific NWFZ Treaty are compatible with and indeed fulfill obligations under the U.N. Charter. See *infra* note 75.

Subject to Article 103 of the U.N. Charter, article 30 of the Vienna Convention on the Law of Treaties determines the application of successive treaties relating to the same subject matter. It states in pertinent part:

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

sume that the South Pacific NWFZ Treaty would not conflict with any peremptory norm of international law.

The multilateral treaty establishing the South Pacific NWFZ is the primary basis in international law for the Zone.<sup>19</sup> Obligations set by this Treaty may conflict with its signatories' other international legal obligations. The purpose of this Comment is to examine the potentiality of those conflicts and offer solutions to those conflicts that exist.

This Comment will first outline the history of the NWFZ concept to provide perspective. Next, it will examine potential conflicts between obligations under the South Pacific NWFZ Treaty and other international legal obligations created by accession to the Third United Nations Convention on the Law of the Sea (UNCLOS III)<sup>20</sup> and the Security Treaty between Australia, New Zealand, and the

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- (a) as between States parties to both treaties the same rule applies as in paragraph 3;  
(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

Vienna Convention on the Law of Treaties, *supra* note 17, art. 103, paras. 2-4.

Professor Fenwick states:

Law between nations, as between the citizens of the more highly developed states, performs a twofold function. In the first place it determines the legal relation of states to the community of which they are members and their respective relations to one another within that community. . . . In the second place international law performs the function of promoting common interests, in respect to which there is not so much a conflict of rights as a need of cooperative action to bring about an orderly regulation of matters of mutual benefit to all. This second function of international law has been of relatively late manifestation; but having once more come into being it has grown with striking rapidity and has within recent years come to occupy a significant place in the foreign relations of states, paralleling the adjustment of mutual rights and duties.

C. G. FENWICK, *INTERNATIONAL LAW* 585 (4th ed. 1965).

19. "[M]ulti-partite treaties are now the primary instruments of the development of international law." FENWICK, *supra* note 18, at 96. For a more complete discussion, see *id.* at 94-95, 514-17; C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 28, 34 (1965); SCHWARZENBERGER, *supra* note 11, at 27-57.

20. Third United Nations Convention on the Law of the Sea, April 20, 1982, U.N. Doc. A/CONF. 62/122 [hereinafter cited as UNCLOS III], reprinted in K.R. SIMMONDS, *U.N. CONVENTION ON THE LAW OF THE SEA* (1983). Over 150 nations have signed the 1982 U.N. Convention on the Law of the Sea, only 13 have ratified it. The United States, Britain, France and Japan are not ratifying the treaty primarily because of disputes over the treaty's codification of seabed mining rights. The United States, Argentina and Turkey have openly declared that they will not sign the Convention. The Soviet Union has signed, but may not ratify if the principles provided in the Convention become customary law. Platzoeder, *Who Will Ratify the Convention?* 17 *L. SEA INST. PROC.* 662-67 (1984); telephone conversations with Frank Simpson, Manager, Ocean Mining Exploration Division of Lockheed Advanced Marine Systems (Oct. 1984 and Feb. 1985).

United States (ANZUS).<sup>21</sup> Finally, this Comment will advance proposals to enhance the effectiveness of the NWFZ Treaty and to render the South Pacific NWFZ a viable and effective arrangement.

## I. A BRIEF HISTORY OF THE NWFZ CONCEPT

After World War II, policymakers developed at least two different approaches to the problem of preventing the proliferation of nuclear weapons: (1) the creation of NWFZs in which all nuclear weapons would be prohibited; and (2) the enactment of a treaty that would ban the dissemination and acquisition of nuclear weapons.<sup>22</sup> The second approach was accomplished by the Non-Proliferation Treaty of 1968.<sup>23</sup> The first approach has been manifested by several treaties establishing NWFZs, one of which is the Treaty of Tlatelolco<sup>24</sup> which established Latin America as a NWFZ. The new South Pacific NWFZ manifests the influence of both approaches. Several proposals in the recent past have been advanced to establish NWFZs.

### A. *Proposals to Establish NWFZs*

One of the first proposals to establish a NWFZ took place in 1956. The Soviet Union introduced a plan to the Sub-Committee of the United Nations Disarmament Commission to prohibit the stationing of nuclear military formations and the locating of nuclear or hydrogen weapons of any kind in Central Europe.<sup>25</sup> One year later, the Polish foreign minister also proposed the creation of a NWFZ in Central Europe.<sup>26</sup> According to his program (known as the Rapacki

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21. Security Treaty Between Australia, New Zealand and the United States, Sept. 1, 1951, 3 U.S.T. 3420, T.I.A.S. No. 2493, 131 U.N.T.S. 83 [hereinafter cited as ANZUS].

22. Epstein, *Nuclear-Free Zones*, 233 SCI. AM. 25 (Nov. 1975) [hereinafter cited as Epstein, SCI. AM.]; W. EPSTEIN, A NUCLEAR-WEAPON-FREE ZONE IN AFRICA? 5 (Stanley Foundation Occasional Paper 14, 1977) [hereinafter cited as EPSTEIN, AFRICA].

These two approaches were in addition to a ban on nuclear weapons tests, which was also designed to aid in the non-proliferation of nuclear weapons. *Id.* at 6; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (*entered into force* Oct. 10, 1963). Under the Nuclear Test Ban Treaty, all nuclear weapon test explosions at any place under the control or jurisdiction of the contracting parties "in the atmosphere and beyond its limits, including outer space and underground, including territorial water or high seas are prohibited." *Id.* at art. I(G); SCHWARZENBERGER, *supra* note 11, at 215.

23. *See supra* note 11.

24. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 281 [hereinafter cited as Treaty of Tlatelolco].

25. CCD Special Report, *supra* note 5, at 19.

26. *Id.*; EPSTEIN, LAST CHANCE, *supra* note 5, at 55, 208. The Rapacki Plan was named

Plan) Poland, Czechoslovakia, and East and West Germany would be declared NWFZs. The plan provided for a system of verification and recognition of nuclear-weapon-free status by other States.<sup>27</sup> Western powers objected to the Rapacki Plan on several grounds centered around the complex political and strategic issues involved.<sup>28</sup> To meet the objections, the plan was revised twice; however, the divergent positions could not be reconciled.<sup>29</sup>

In 1959 Ireland proposed a plan to the UN General Assembly to prevent the proliferation of nuclear weapons, particularly in Central

for Adam Rapacki, the Foreign Minister of Poland who proposed the plan. On October 2, 1957, at the 12th Session of the General Assembly of the United Nations, Poland indicated its readiness to "impose a ban on the production and stockpiling of nuclear and thermonuclear weapons in its territory," contingent upon a similar agreement on the part of the two German States. On the same day, Czechoslovakia joined in the Polish proposal. On October 4, 1957, the German Democratic Republic expressed its support and on October 10, the Soviet Union did likewise.

The Rapacki Plan was published on February 14, 1958. It provided, *inter alia*, that the States located in the NWFZ would "undertake the obligation not to manufacture, maintain or possess nuclear weapons of any type and not to permit the installation on their territories of such weapons." CCD Special Report, *supra* note 5, at 20-21.

27. EPSTEIN, LAST CHANCE, *supra* note 5, at 208-09. The plan provided for France, the Soviet Union, the United States, and the United Kingdom to undertake the following obligations:

- (a) Not to maintain nuclear weapons in their armed forces stationed in territories of the States of the zone and neither to maintain nor install in those territories any installations for servicing nuclear weapons, including missile-launching equipment;
- (b) Not to transfer those weapons or equipment to the States of the zone;
- (c) Not to use nuclear weapons against the zone.

CCD Special Report, *supra* note 5, at 21.

The Rapacki Plan also provided for an elaborate system of control, including ground and aerial reconnaissance and the creation of a supervisory body open to participation by NATO and Warsaw Pact representatives and others. *Id.*

28. Epstein outlined several of the problems.

The plan was unacceptable to the Western powers, who regarded it as an attempt to weaken their military and political position in Central Europe, since it contained no limitations on conventional arms and forces and would, in effect, amount to a form of recognition of East Germany, which the Western powers were not willing to give at that time, as they were pressing for a unified Germany.

EPSTEIN, LAST CHANCE, *supra* note 5, at 209.

29. In response to objections, Rapacki submitted a revised version of the plan on November 4, 1958, proposing its implementation in two phases: (1) a freeze on nuclear armaments in the proposed zone; and (2) a reduction of conventional forces to occur simultaneously with a complete denuclearization of the zone. Poland submitted a third version in 1962, to the 18-nation Committee on Disarmament at Geneva. This revised plan would have been open to any European State that wanted to accede to the plan. *Id.*; CCD Special Report, *supra* note 5, at 22.

Epstein points out: "The Western powers remained opposed to all three versions of the Rapacki Plan on the ground that they were intended to reduce Western nuclear strength in Europe and would give the Soviet Union a military advantage because of its superiority in conventional arms and forces." W. EPSTEIN, LAST CHANCE, *supra* note 5, at 209.



Europe.<sup>30</sup> Today, work on a NWFZ in Central Europe is still going forward. On June 14, 1983, the Prime Minister of Sweden formally requested support for a NWFZ in Scandinavia and Central Europe.<sup>31</sup>

World leaders have advocated the military denuclearization of the Balkan Peninsula since 1957.<sup>32</sup> Greece and Rumania have agreed on the most recent proposal to establish a Balkan NWFZ.<sup>33</sup>

The African nations have been working to set up a NWFZ in their region since 1960, the year of the first nuclear test explosion by France in the Sahara Desert.<sup>34</sup> In 1965 the UN General Assembly endorsed the "Declaration on the Denuclearization of Africa," adopted by the Organization of African Unity.<sup>35</sup> However, two of the most powerful African nations, South Africa and Egypt, are not currently participating in the work to establish Africa as a NWFZ.<sup>36</sup>

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30. During the general debate at the 14th Session of the U.N. General Assembly, Ireland proposed that the non-nuclear weapon States in a given area "would undertake, first, not to manufacture or acquire nuclear weapons or other weapons of mass destruction, and secondly, to subject themselves to United Nations inspections to ensure that they were keeping to that agreement." In exchange, "the nuclear weapon States and all members of the United Nations would undertake in advance, by specific engagements, to assist the members of the area, in case of attack, by means of a standing United Nations force." CCD Special Report, *supra* note 5, at 19-20.

31. The Prime Minister of Sweden, Olaf Palme, made this request in a speech before the North Atlantic Assembly. He was the first non-NATO leader ever to address the Assembly. Wall St. J., June 14, 1983, at A6, col. 3.

In 1961 at the 16th Session of the U.N. General Assembly, Sweden had suggested another approach toward establishing a non-specific NWFZ. Sweden proposed that the Secretary-General conduct an inquiry into the conditions under which a non-nuclear country would be willing to agree to refrain from manufacturing or acquiring nuclear weapons and to refuse to receive on their territory such weapons in the future on behalf of any other country. The Swedish proposal was approved by the General Assembly in Resolution 1664 (XVI) on December 4, 1961. The Secretary-General conducted the inquiry and received replies from 62 member States. CCD Special Report, *supra* note 5, at 20.

32. CCD Special Report, *supra* note 5, at 22-23.

33. Prime Minister Andreas Papandreu made this proposal at a Balkan Conference on the NWFZ concept. Western analysts objected that "formation of a nuclear-free zone would suit the policies of the Soviet Union without compelling Moscow to make any parallel concessions." N.Y. Times, Nov. 6, 1982, at L3.

34. CCD Special Report, *supra* note 5, at 23. France later shifted its nuclear testing from Algeria to the South Pacific island of Mururoa and then, after repeated formal protests from South Pacific nations, to an underground area. EPSTEIN, LAST CHANCE, *supra* note 5, at 210; See also Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Judgment of Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Judgment of Dec. 20).

35. CCD Special Report, *supra* note 5, at 24; EPSTEIN, LAST CHANCE, *supra* note 5, at 209-11. For a complete history of the efforts to create an African NWFZ, see EPSTEIN, AFRICA, *supra* note 22, at 10-12. For a text of the resolution entitled "Implementation of the Declaration on the Denuclearization of Africa" (G.A. Resolution A/Res. 31/69, adopted Dec. 10, 1976), see *id.* at 25.

36. EPSTEIN, LAST CHANCE, *supra* note 5, at 214-16. Because of its apartheid policy and its refusal to grant independence to Namibia (Southwest Africa), most African states boycott

In 1974 the UN General Assembly adopted an Iranian/Egyptian draft to establish a NWFZ in the Middle East.<sup>37</sup> While Israel abstained, all nuclear-weapon-free States, some maintaining reservations, voted for the draft.<sup>38</sup> Even though Israel has announced support in principle for a Middle Eastern NWFZ, the traditional Israeli/Arab antagonism has so far prevented substantial agreement.<sup>39</sup>

Also in 1974 Pakistan proposed the creation of a South Asian NWFZ.<sup>40</sup> At that time, the five nuclear States in the area expressed their acceptance of the South Asian NWFZ concept.<sup>41</sup>

In 1971 the UN General Assembly declared that the Indian Ocean was thenceforth designated as a "zone of peace."<sup>42</sup> The United States, the Soviet Union, the United Kingdom, and France have repeatedly abstained from voting in favor of an Indian Ocean peace zone.<sup>43</sup> Negotiations on such a zone are aimed at the military denuclearization of the Indian Ocean itself,<sup>44</sup> a concept which raises

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South Africa and do not communicate with the country. In addition, Egypt will not agree to an African NWFZ unless Israel does so as well. Epstein points out that "while it is quite possible and feasible to establish a nuclear-free zone in Africa without the participation of South Africa and Egypt, there is little sense of urgency about doing so and hence not much impetus in this regard." *Id.* at 210-11. Also, Egypt could be regarded as a Middle Eastern, rather than an African, state; it would have the option of joining either a Middle Eastern or an African NWFZ or both, were either region to take the initiative.

37. CCD Special Report, *supra* note 5, at 26.

38. *Id.*; EPSTEIN, *LAST CHANCE*, *supra* note 5, at 214-15. China, France and the Soviet Union voted for the draft, with reservations on the provisions referring to certain treaties. The United States expressed its doubts about the part of the resolution which "urged States in the region to undertake certain commitments in advance of actual negotiations and the conclusion of an agreement." Israel explained its abstention by holding that the best way to establish a NWFZ was by direct consultations between the regional States rather than, as Iran and Egypt suggested, by preliminary negotiations between the Secretary-General and the regional States. CCD Special Report, *supra* note 5, at 26.

39. EPSTEIN, *LAST CHANCE*, *supra* note 5, at 215. Epstein suggests that Israel's willingness to become a party to a NWFZ in the Middle East could become a cornerstone of settlement between Israel and the Arab States.

40. *Id.* at 215-16; CCD Special Report, *supra* note 5, at 27-28.

41. CCD Special Report, *supra* note 5, at 27. The five nuclear States with interests in the area are China, France, the United Kingdom, the United States and the Soviet Union. EPSTEIN, *LAST CHANCE*, *supra* note 5, at 215.

42. Epstein points out that the concept of a "peace zone" is more expansive than that of a NWFZ. The concept is supported by almost all of the littoral States around the Indian Ocean. The declaration of the Indian Ocean as a peace zone goes beyond denuclearization and would be tantamount to a requirement of demilitarization. China and India have already voted in favor of such a zone. EPSTEIN, *LAST CHANCE*, *supra* note 5, at 216.

43. The reason for abstention by the four nuclear powers is not known. Two years after the declaration the U.N. General Assembly urged all States to accept the principles and goals of the declaration, but these four powers continued to withhold their support. *Id.* at 216-17.

44. *Id.* at 217.

issues similar to those raised by the South Pacific NWFZ.

Some proposals have gone beyond the conceptual level and have led to creation of nuclear-weapon-free legal status through the concrete process of treaty enactment.

### B. *Treaties Establishing NWFZs*

1. *The Antarctic Treaty.* The first multi-lateral agreement to set up a NWFZ was the Antarctic Treaty of 1959.<sup>45</sup> This Treaty was established to ensure the use of Antarctica "for peaceful purposes only"<sup>46</sup> and thus designated the continent as a demilitarized zone which, by implication, renders the region nuclear-weapon-free.<sup>47</sup> The Treaty provisions do not extend the Zone to the high seas of the area.<sup>48</sup>

2. *The Treaty of Tlatelolco.* The Treaty for the Prohibition of Nuclear Weapons in Latin America or the Treaty of Tlatelolco established the first NWFZ in a populated area.<sup>49</sup> The Latin-American Zone now protects about 7.5 million square miles and some 200 million people.<sup>50</sup>

The Treaty of Tlatelolco also was the first agreement in arms limitation and disarmament to establish an effective system of control

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45. CCD Special Report, *supra* note 5, at 10. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 72.

46. The Treaty provides: "1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapon." The Antarctic Treaty, *supra* note 45, art. 1.

47. CCD Special Report, *supra* note 5, at 10. The New Zealand government is "fully committed to, and will defend vigorously, the Antarctic Treaty which demilitarized a whole continent to the south of New Zealand and prohibited the basing or testing of nuclear weapons and which, for more than 20 years, has effectively guaranteed the stability of the region." Lange, U.N. General Assembly Address, *supra* note 1, at 18.

48. The Antarctic Treaty, *supra* note 45, art. VI.

49. EPSTEIN, AFRICA, *supra* note 22, at 9; THE STANLEY FOUNDATION, VANTAGE CONFERENCE REPORT: NUCLEAR-WEAPON-FREE ZONES 12 (Oct. 7-9, 1975) [hereinafter cited as NWFZ REPORT].

50. EPSTEIN, AFRICA, *supra* note 22, at 9. "What is more important," Epstein comments, "the number of its parties and supporters, including the nuclear signatories of the Protocols, keeps growing year by year. Such potential nuclear powers as Mexico, Venezuela, Colombia and Peru are full parties." *Id.* See also EPSTEIN, LAST CHANCE, *supra* note 5, at 212; CCD Special Report, *supra* note 5, at 13. For a complete discussion of this topic, see A. GARCIA ROBLES, THE DENUCLEARIZATION OF LATIN AMERICA (Carnegie Endowment for International Peace, 1967); A. GARCIA ROBLES, THE LATIN-AMERICAN NUCLEAR-WEAPON-FREE ZONE (Stanley Foundation Occasional Paper No. 19, 1979) [hereinafter cited as ROBLES, LATIN-AMERICAN NWFZ].

and verification of compliance.<sup>51</sup>

This Treaty prohibits the "development or production, as well as the receipt or installation, of nuclear weapons by a Latin American Country."<sup>52</sup> In addition, the parties pledge not to permit the deployment of such weapons on their territory.<sup>53</sup> Furthermore, the Latin American parties are required to submit their nuclear power facilities to safeguards set by the International Atomic Energy Agency.<sup>54</sup>

The Treaty of Tlatelolco defines "nuclear weapon" as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes."<sup>55</sup> The Treaty further provides that all nuclear materials and facilities are restricted to "exclusively" peaceful purposes.<sup>56</sup> One separate document (Protocol I) obligates the for-

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51. NWFZ REPORT, *supra* note 49, at 12-13.

52. *Id.* at 12. The Treaty states:

1. The Contracting Parties hereby undertake to use exclusively for peaceful purposes the nuclear material and facilities which are under their jurisdiction, and to prohibit and prevent in their respective territories:

(a) the testing, use, manufacture, production, or acquisition by any means whatsoever of any nuclear weapons by the Parties themselves, directly or indirectly, on behalf of anyone else or in any other way, and

(b) the receipt, storage, testing, installation, deployment and any form of possession of any nuclear weapons, directly or indirectly, by the Parties themselves, by anyone on their behalf or in any other way.

2. The Contracting Parties also undertake to refrain from engaging in, encouraging, or authorizing, directly or indirectly, or in any other way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon.

The Treaty of Tlatelolco, *supra* note 24, art. 1.

53. The Treaty of Tlatelolco, *supra* note 24. NWFZ REPORT, *supra* note 49, at 12.

54. NWFZ REPORT, *supra* note 49, at 12. The International Atomic Energy Agency [hereinafter cited as IAEA] is an organization developed as a result of President Eisenhower's "Atoms for Peace" proposal in 1953 to permit and facilitate the international allocation of fissionable material. The Statute of the IAEA entered into force on July 29, 1957. EPSTEIN, LAST CHANCE, *supra* note 5, at 13-14.

IAEA operates under the aegis of the United Nations but is not one of its Specialized Agencies. . . . IAEA is authorized to establish and administer safeguards which are designed to ensure that materials, services, equipment, facilities, and information it makes available are "not used in such a way as to further any military purpose." At the request of the parties, IAEA may also apply safeguards to any bilateral or multi-lateral arrangement or, at the request of a State, to any of that State's activities in the field of nuclear energy.

SCHWARZENBERGER, *supra* note 11, at 208.

55. The Treaty of Tlatelolco, *supra* note 24, art. 5. The Treaty's definition of "nuclear weapon" continues: "An instrument that may be used for the transport or propulsion of the device is not included in this definition if it is separable from the device and not an indivisible part thereof." *Id.*

56. The Treaty of Tlatelolco, *supra* note 24, art. 17. See also EPSTEIN, LAST CHANCE, *supra* note 5, at 212; ROBLES, LATIN-AMERICAN NWFZ, *supra* note 50, at 27. Restricting nuclear power to use for "peaceful purposes" is a basic element of a NWFZ agreement. However, the construction of that phrase raises many practical issues. For example, the question of

sign States that are responsible for territories within the Zone to apply the Treaty in those territories.<sup>57</sup> An additional document (Protocol II) provides for nuclear-weapon States to undertake to observe the nuclear-weapon-free status of the Zone and not to use or threaten to use nuclear weapons against the States in the Zone.<sup>58</sup> In addition to being the first NWFZ in the world that covers a populated region, the Treaty of Tlatelolco serves as a working model for the South Pacific NWFZ Treaty, as well as a precedent for practical application of the Zone.<sup>59</sup>

3. *The Outer Space Treaty.* Originating in two resolutions adopted unanimously by the UN General Assembly, the Outer Space Treaty was signed in 1967.<sup>60</sup> The parties to the Treaty have undertaken "not to place in orbit around the Earth any objects carrying

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peaceful nuclear explosions has been a source of controversy in the Latin American NWFZ and represents "one of the most difficult and complex obstacles to the full success of the Latin American zone." NWFZ REPORT, *supra* note 49, at 13. "The majority view is that, under current technology, such explosions are banned." EPSTEIN, AFRICA, *supra* note 22, at 8.

57. Protocol I provides for the extension of nuclear-weapon-free status to certain territories within the Treaty's zone of application which are, *de jure* or *de facto*, under the jurisdiction of States outside the Zone. The effect of this Protocol is to confine the system of control with regard to those territories to the application of the IAEA safeguards. Protocol I has been ratified by the Netherlands and the United Kingdom. The United States has declared that neither the Virgin Islands nor Puerto Rico could be included in the Latin American NWFZ, while the Panama Canal Zone could be included, provided the rights of transit were preserved. France has declared that no part of its territory could be given nuclear-weapon-free status. CCD Special Report, *supra* note 5, at 14. For the complete text of Protocol I, see ROBLES, LATIN AMERICAN NWFZ, *supra* note 50, at 30-31.

58. During the drafting of the Treaty of Tlatelolco, an important condition for the effectiveness of the NWFZ was a clear commitment by the nuclear weapon States to respect the nuclear-weapon-free status of the Zone. Protocol II embodies this condition. Under this Protocol, nuclear weapon States agree to respect fully the "statute of denuclearization of Latin America for warlike purposes as defined, delimited and set forth in the Treaty" and "not to contribute in any way to the performance of acts involving a violation of the obligations of article I of the Treaty in the territories to which the Treaty applies." Moreover, nuclear weapon States undertake the duty to forbear the use or the threat to use nuclear weapons against any party to the Treaty. China, France, the United Kingdom, and the United States have so far accepted Protocol II. CCD Special Report, *supra* note 5, at 15-18. France has since moved away from its earlier declaration and has ratified Protocol I. The Soviet Union has also ratified Protocol II. Argentina and Brazil, who have not ratified the Non-Proliferation Treaty, have announced their intent to ratify the Treaty. ROBLES, LATIN AMERICAN NWFZ, *supra* note 50, at 7-8.

59. Epstein, SCI. AM., *supra* note 22, at 28; THE INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES, COMMON SECURITY: A BLUEPRINT FOR SURVIVAL 168 (1982); THE STANLEY FOUNDATION, VANTAGE CONFERENCE REPORT, CONFERENCE ON THE INTER-AMERICAN SYSTEM AND WORLD ORDER (1974). See also NWFZ REPORT, *supra* note 49, at 12-15.

60. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410,

nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.”<sup>61</sup> As a result, the Outer Space Treaty establishes outer space and the celestial bodies as NWFZs.<sup>62</sup>

4. *The Seabed Treaty.* In 1969 the Soviet Union submitted to the Conference of the UN Committee on Disarmament a draft treaty which prohibited the use of the seabed and ocean floor for military purposes including the emplacement of nuclear weapons.<sup>63</sup> This draft led to the Seabed Treaty, which entered into force on May 18, 1972.<sup>64</sup> The main provision sets forth:

The State Parties to this Treaty undertake not to emplant or emplace on the sea-bed and the ocean floor and in the subsoil thereof beyond the outer limit of a seabed zone, as defined in article II, any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.<sup>65</sup>

At the urging of coastal non-nuclear States, the United States and the

T.I.A.S. No. 6347, 610 U.N.T.S. [hereinafter cited as The Outer Space Treaty]. CCD Special Report, *supra* note 5, at 12; SCHWARZENBERGER, *supra* note 11, at 208.

61. The Outer Space Treaty, *supra* note 60, art. IV. In addition, the Treaty contains:

(a) A prohibition of all military activity on the Moon and other celestial bodies, including the establishment of military bases, installations, and fortifications, the testing of any type of weapons and the conduct of military personnel in scientific research or for other peaceful purposes, as well as the use of equipment necessary for peaceful exploration (art. IV); and

(b) A provision that all stations, installations, equipment and space vehicles on the Moon and other celestial bodies would be open to representatives of States parties “on a basis of reciprocity” (art. XII).

CCD Special Report, *supra* note 5, at 12. See also SCHWARZENBERGER, *supra* note 11, at 208.

62. However, two nuclear weapon States (France and China) are not parties to the Outer Space Treaty. Moreover, any Party to the Treaty may give notice of withdrawal from obligation, one year after entry into force of the Treaty. Outer Space Treaty, *supra* note 60, art. XVI. As of June 1975, the Treaty was in force for 71 States, and another 35 States had signed it. CCD Special Report, *supra* note 5, at 12.

63. CCD Special Report, *supra* note 5, at 18. In 1968 the U.N. General Assembly indicated widespread support for the “principle of reserving the sea-bed and the ocean floor beyond the territorial waters exclusively for peaceful purposes.” *Id.*

64. Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 995 U.N.T.S. 115 [hereinafter cited as Seabed Treaty]. For a discussion of the background of the Treaty, see EPSTEIN, LAST CHANCE, *supra* note 5, at 187.

65. Seabed Treaty, *supra* note 64, art. I, ¶ 1. The established NWFZ does not extend to the seabed beneath a coastal State’s territorial waters. Article II of the Treaty states that the outer limit of the seabed NWFZ should be coterminous with the 12-mile outer limit of the territorial sea, established in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Verification procedures are outlined in Article III. CCD Special Report, *supra* note 5, at 18-19.

Soviet Union agreed to several revisions, including an amendment which provides that the Parties "undertake to continue negotiations in good faith concerning further measures in the field of disarmament for the prevention of an arms race on the sea-bed, the ocean floor and the subsoil thereof."<sup>66</sup>

The NWFZs established by the Antarctic Treaty of 1959, the Outer Space Treaty of 1967, and the Seabed Treaty of 1971 were created by the world community primarily to regulate use of these "unexplored, unexploited and uninhabitable environments."<sup>67</sup> Unlike these treaties, in which arms limitations aspects were secondary, the Treaty of Tlatelolco established the first NWFZ created specifically to prevent the proliferation of nuclear weapons.<sup>68</sup>

The establishment of the South Pacific NWFZ has been motivated by a desire to stop the proliferation of nuclear weapons and by the fundamental concerns of regional security and global survival.<sup>69</sup>

The primary basis of the Zone in international law is the multi-lateral treaty which creates a nuclear-weapon-free regional arrangement by the mutual consent of the States involved.<sup>70</sup> Additional legal bases<sup>71</sup> are: UN Declarations supporting the South Pacific pro-

66. Seabed Treaty, *supra* note 64, art. V. Observers point out that "no negotiations whatsoever, in good faith or otherwise, have taken place in pursuance of the commitment made in Article V." EPSTEIN, *LAST CHANCE*, *supra* note 5, at 188.

67. Epstein, *SCI. AM.*, *supra* note 22, at 27.

68. *Id.*

69. ALLEY, *supra* note 4, at 40-42. Concern about being a target of nuclear attack by having such weapons traverse the region and about the danger of massive annihilation and destruction which increases in proportion to the presence of more weapons in the area has motivated the South Pacific nations to draft a treaty excluding nuclear weapons from the area. Also, however, "for small Oceanic states, an attack on nuclear weapons is part of a broader spectrum of common interests anxious to prevent a cancerous proliferation of powerful external technologies—whatever their form and source—from irreparably harming island environments and lifestyles." *Id.* at 40. See also Lange, U.N. General Assembly Address, *supra* note 1.

70. See *supra* note 14. Professor Corbett states: "The basis of international law as a system and of the rules of which it is composed is the consent of States." C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 2 (1965) quoting Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 *BRIT. Y.B. INT'L L.* 20, 29-30 (1925). Thus, the true basis in international law of the NWFZ is the *consent* of the States involved in its operation.

71. The legal bases of international law are codified in Article 38 of the Statute of the International Court of Justice and include:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

posal,<sup>72</sup> the customary right of self-defense,<sup>73</sup> the principle of territorial sovereignty,<sup>74</sup> the UN Charter,<sup>75</sup> the Non-Proliferation Treaty,<sup>76</sup>

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Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1153.

The structure of Article 38 implies that treaty and custom can be different sources leading to different interpretations. Usually, both of these "recognized manifestations" of international law are simultaneously relevant as evidence of the law pertaining to a subject. Gamble, *The Treaty/Custom Dichotomy: An Overview*, 16 TEX. INT'L L.J. 305, 307-14 (1981).

72. United Nations General Assembly Resolution 3477 endorsed, by a vote of 110 in favor, none against and 20 abstentions (*inter alia*, Cuba, Egypt, France, USSR, United Kingdom, United States), the establishment of a NWFZ in the South Pacific on December 11, 1975. ALLEY, *supra* note 4, at 50. However, General Assembly Resolutions do not have binding force as primary legal authority.

73. FENWICK, *supra* note 18, at 275-85. The underlying principle, as Elihu Root stated, is "the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself." He also stated, "It is well understood, that the exercise of the right of self-protection may and frequently does extend beyond the limits of the territorial jurisdiction of the state exercising it." *Id.*, at 275, quoting 8 AM. J. 427 (1914). See also I. BROWNLEE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 214-350 (1963).

74. The rule of territorial sovereignty may be stated as follows:

It is believed that the proposition is unquestionable that under international law every nation may prohibit the introduction into its territory of any commodity which it sees fit to exclude.

JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 219 (1927) quoted in MCDUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 66 (1962).

The "territory" of a coastal State extends, within varying limits, into the seas surrounding that State. Moreover, every valid foreign policy goal assumes the inviolable integrity of the national territory. A nation maintains territorial supremacy only to the extent that this supremacy is respected by other nations and is limited by international law or treaty. G. SMITH, RESTRICTING THE CONCEPT OF FREE SEAS 20 (1980). Articles 2 and 3 of UNCLOS III, *supra* note 20, specifically outline the legal status of the territorial sea, its breadth, and how it is measured.

75. The U.N. Charter is consistent with and supports the formation of NWFZs. In particular, Article I of the Charter provides that States "take effective collective measures for the prevention and removal of threats to the peace . . . to develop friendly relations among nations . . . and to take other appropriate measures to strengthen universal peace" (emphasis added). The existence and deployment of nuclear weapons is an existing threat to world peace and global survival, as expressed in the Non-Proliferation Treaty, *supra* note 11, and the Treaty of Tlatelolco, *supra* note 24.

The creation of the South Pacific NWFZ is also consistent with Article 52 of the U.N. Charter, which envisions regional arrangements for dealing with matters concerning the preservation of international peace that are appropriate for regional action. See CCD Special Report, *supra* note 5, at 48-51.

76. Non-Proliferation Treaty, *supra* note 11, art. VII. The establishment of the NWFZ is at least implicitly supported by the Non-Proliferation Treaty and would be in furtherance of the same objectives. EPSTEIN, LAST CHANCE, *supra* note 5, at 322-23; Epstein, SCI. AM., *supra* note 22, at 35. For a broader view of the history and effect of the Non-Proliferation Treaty, see NEGOTIATING SECURITY: AN ARMS CONTROL READER, 142 (The Carnegie Endowment for International Peace, 1979); W. EPSTEIN, RETROSPECTIVE ON THE NPT REVIEW CONFERENCE: PROPOSALS FOR THE FUTURE (The Stanley Foundation Occasional Paper 9, 1975); The Stanley Foundation, VANTAGE CONFERENCE REPORT, NON-PROLIFERATION: 1980's (Jan. 29-Feb. 3, 1980); M. WILLRICH, NON-PROLIFERATION TREATY: FRAMEWORK



and the argument for the international illegality of nuclear weapons.<sup>77</sup>

### Of crucial importance to the success of the South Pacific NWFZ

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FOR NUCLEAR ARMS CONTROL (1969); L. DUNN, CONTROLLING THE BOMB: NUCLEAR PROLIFERATION IN THE 1980's (1982); and III THE FUTURE OF THE INTERNATIONAL ORDER: CONFLICT MANAGEMENT (C. Black & R. Falk eds. 1971).

77. An analysis of the major conventions establishing the law of armed conflict makes it clear that the use of strategic nuclear weapons is illegal under international law. Those conventions listed *infra* prohibit weapons which cause unnecessary suffering and slow death, weapons which violate neutral territory, and weapons which kill civilians and non-civilians indiscriminately. Like the use of biologic and chemical weapons, the use of nuclear weapons produces these results (through radioactive fallout and massive destruction by fire and genetic alteration). The use of nuclear weapons is therefore prohibited under international law, according to the major conventions addressing the law of armed conflict. In addition, customary principles have emerged from these conventions which bind non-signatories. See The Hague Convention, Oct. 18, 1907, War on Land, 36 Stat. 2277, T.S. 539, 1 Bevans 631; The Hague Convention, Oct. 18, 1907, Rights and Duties of Neutral Powers in Naval War, 36 Stat. 2415, T.S. 545, 1 Bevans 723; Treaty of Peace with Germany (Versaille Treaty), June 28, 1919, 2 Bevans 43; Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, *reprinted in* 16, AM. J. INT'L L. pp. 187-189; Geneva Protocol on Poison Gas and Bacteriological Warfare, June 17, 1925, 26 U.S.T. 575, T.I.A.S. No. 8061; Charter of the International Military Tribunal, Oct. 6, 1945, 59 Stat. 1555, E.A.S. 472; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (adopted by the U.N. General Assembly in G.A. Res. 2670, 3 U.N. GAOR Pt. 1 at 174, U.N. Doc. A1810 (1948)); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War between the U.S. and the USSR, Sept. 30, 1972, 22 U.S.T. 1590, T.I.A.S. No. 7186, 807 U.N.T.S. 87; Geneva Protocol on Humanitarian Law Applicable in Armed Conflict, Aug. 15, 1977, U.N. Doc. A/32/144. See also G. SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS (The Library of World Affairs No. 43 1958). N. SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW (1959); CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS (1971); Q. WRIGHT, THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF WAR (1961); SCHWARZENBERGER, *supra* note 11, at 185-219.

Since an international judicial ruling on illegality would be unenforceable, the major purpose of an agreement for the illegality *per se* of nuclear weapons under international law is to consolidate international and national public opinion against a government's possession of such weapons for national defense.

The author of this Comment offers the following jurisprudential argument for the illegality of the possession of nuclear weapons:

I. (A) A court of law finds a particular activity illegal in order to uphold certain values of society (for example, to steal is illegal because of the societal value of property ownership; to murder is illegal because of the value society places on human life);

(B) The highest value of mankind (common to all societies) is survival;

(C) The use of any weapon which maims, causes slow death, pervasively destroys the natural environment on which all people depend for life, and kills civilian and non-civilians indiscriminately is contrary to survival, the highest value of mankind;

(D) The use of nuclear weapons produces such results;

(E) *Therefore*, the use of nuclear weapons is contrary to the highest value of mankind.

To hold the use of nuclear weapons as illegal is to uphold the highest value of international society, that of survival.

is the support of nuclear States conducting military exercises in the region, most notably the United States and the Soviet Union.<sup>78</sup> Without this support for the nuclear-weapon-free status of the Zone and the legal obligations undertaken by the Parties creating the Zone, the South Pacific NWFZ will be very difficult to implement.<sup>79</sup>

The New Zealand Minister of Foreign Affairs stated, in a press release concerning the Treaty, that the signatories have taken care not to create obligations which conflict with other international legal obligations.<sup>80</sup> However, there is still potential for such conflict. This Comment will next examine the potential for conflict between the NWFZ Treaty and the existing international obligations of its signatories, incurred by accession to UNCLOS III and ANZUS. Modifications will then be proposed to render the South Pacific NWFZ a more effective arrangement.

## II. POTENTIAL CONFLICT BETWEEN OBLIGATIONS ESTABLISHED BY THE SOUTH PACIFIC NWFZ TREATY AND OTHER INTERNATIONAL LEGAL OBLIGATIONS OF ITS PARTIES

Potential conflict exists between legal obligations established by the Treaty creating a South Pacific NWFZ<sup>81</sup> and the international

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II. (A) Inherent in the development of a weapon is the intent to use it;

(B) If the use of nuclear weapons is illegal, then the intent to use such weapons plus an act in furtherance of that intent is illegal;

(C) *Therefore*, any nation who possesses a nuclear weapon and who has also developed that weapon is engaged in an illegal act.

78. Commenting on the 1975 meeting of the South Pacific Forum at which regional support for a South Pacific NWFZ was first generated, Roderic Alley points out:

[T]he actual outlines of any future South Pacific NWFZ were never clearly spelled out by any of the governments directly concerned. Left unstated were: the geographical scope of any South Pacific NWFZ; identification of key concepts (for example, what is a nuclear weapon?); institutional structure; inspection procedures; working plans for treaty formulation; target dates for implementation; and, what is perhaps one of the most important NWFZ questions of all, the obligations expected of existing nuclear weapon powers towards any future treaty.

ALLEY, *supra* note 4, at 29.

79. *Id.* at 36-49. According to Roderic Alley, critics of the South Pacific NWFZ would argue that the "zonal agreement would be most easily maintained where it was least likely to be breached, while it would be difficult, if not impossible, to enforce when enforcement would be most needed." ALLEY, *supra* note 4, at 36.

80. Press release by the Acting Prime Minister of Foreign Affairs, the Hon. F.D. O'Flynn. (Copy on file with the California Western International Law Journal.)

81. *See supra* notes 17-21 and accompanying text.

legal obligations of the Parties established by UNCLOS III<sup>82</sup> and ANZUS.<sup>83</sup>

Because neither the South Pacific NWFZ Treaty nor UNCLOS III have entered into force, the obligation, of the Parties under these conventions are potential. However, for the sake of analysis, this Comment will treat these obligations as actual and will illustrate the points at which the South Pacific Parties' obligations under the NWFZ Treaty could conflict with obligations established by UNCLOS III and ANZUS.

### A. UNCLOS III

UNCLOS III was first opened for signature on April 20, 1982. Fiji, a member of the South Pacific Forum which drafted the new NWFZ Treaty, was the first State in the world to ratify the Convention on December 10, 1982. Thirteen States have so far ratified UNCLOS III. Sixty States must do so for the Convention to enter into force.<sup>84</sup> All South Pacific Forum Member States are signatories to UNCLOS III, and most are Parties.<sup>85</sup>

UNCLOS III establishes three categories of ocean space: (1) the territorial seas (up to 12 miles from shore);<sup>86</sup> (2) the Exclusive Economic Zone (up to 200 miles from shore),<sup>87</sup> and (3) the high seas (beyond 200 miles from shore).<sup>88</sup>

The New Zealand Minister of Foreign Affairs stated that the South Pacific NWFZ Treaty, signed by eight Forum States on August 6, 1985, "will go a long way to remove the spectre of the nuclear threat from the South Pacific."<sup>89</sup> There are two important provisions of the new Treaty.

The Treaty does not interfere in any way with the right of each Party to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields. Nor does it interfere with the

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82. See *infra* notes 84-111 and accompanying text. See also, Lee, *The New Law of the Sea and the Pacific Basin*, 12 OCEAN DEV. & INT'L L. 247 (1983).

On December 10, 1982, Fiji became the first State in the world to ratify UNCLOS III. Other South Pacific parties include Australia, New Zealand, Papua New Guinea, Vanuatu, Nauru, the Solomon Islands, Tuvalu, Samoa and the Cook Islands. These states were original signatories in December 1982. SIMMONDS, *supra* note 20, at xxii, xxv-xxx.

83. See *infra* notes 111-28 and accompanying text.

84. See *infra* note 97 and *supra* note 20.

85. See *supra* note 82.

86. See *infra* notes 92-110 and accompanying text.

87. See *infra* notes 142-51 and accompanying text.

88. See *infra* notes 152-68 and accompanying text.

89. Press Release of Aug. 7, 1985, *supra* note 15.

freedoms of navigation guaranteed by international law to such ships and aircraft.<sup>90</sup>

The NWFZ established by the Treaty “extends in the West from the West Coast of Australia to the boundary of the Latin American Zone in the East, from the equator in the north to 60 degrees south, where the Antarctic Treaty already establishes a completely demilitarized zone covering the whole continent.”<sup>91</sup> The Treaty of August 6, 1985, establishes the largest NWFZ on the planet and covers populated regions as well as extraterritorial ocean space.

For the purpose of analysis, the two most important provisions of this Treaty, as publicized by the New Zealand Minister of Foreign Affairs, are the terms of non-interference with the rights of sovereign Member States to decide policy on allowance of nuclear-armed warships into territorial waters and the terms of non-intervention with “the freedom of navigation guaranteed by international law” to ships and aircraft. These two provisions raise the question of whether the South Pacific NWFZ will have any effect. These provisions also raise issues of conflict with obligations already established by accession to UNCLOS III. One such obligation is the duty to observe the right of innocent passage through territorial water.

UNCLOS III guarantees the “right of innocent passage” through territorial waters.<sup>92</sup> Innocent passage of a foreign ship is defined as passage which “is not prejudicial to the peace, good order or security of the coastal State.”<sup>93</sup> (Islands are accorded the same rights and obligation as coastal States under the Convention.<sup>94</sup>) Passage of a ship would be “prejudicial to the peace, good order or se-

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90. *Id.* These two provisions correspond to Articles 5 and 2, respectively, of the South Pacific NWFZ Treaty. *Supra* note 14. *See infra* notes 141-69 and accompanying text.

91. Press Release of Aug. 7, 1985, *supra* note 15, at 2; South Pacific NWFZ Treaty, *supra* note 14, Annex 1, at 8.

92. Territorial waters are established by the coastal State “up to a limit of not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.” UNCLOS III, *supra* note 20, art. 3. Article 17 ensures the right of innocent passage through a nation’s territorial seas.

93. UNCLOS III, *supra* note 20, art. 19. For a more complete discussion of innocent passage, see SMITH, *supra* note 74, at 20.

94. The nations in the South Pacific Forum are islands. Article 121 of UNCLOS III states:

[T]he territorial sea, the contiguous zone, the Exclusive Economic Zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

UNCLOS III, *supra* note 20, art. 121. This Article also defines an “island” as “a naturally formed area of land surrounded by water, which is above water at high tide.” *Id.* *See also* C.R. SYMMONS, *THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW* (1979).

curity” of a Forum Member State, if the ship, while in the territorial sea of the State, engages in any one of the following activities:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind; [or]

(f) the launching, landing or taking on board of any military device.<sup>95</sup>

A warship armed with nuclear weapons arguably has no right of innocent passage through the territorial sea, if it is engaging in “exercise or practice” with nuclear weapons or if, by its presence, it could be perceived by the island State as maintaining a threat of force against its sovereignty and territorial integrity and in fact does present such a threat.<sup>96</sup> As a result, the South Pacific signatories to UNCLOS III have the legal right to challenge the passage of nuclear-armed warships through their territorial waters, when UNCLOS III enters into force.<sup>97</sup> Inasmuch as these provisions on innocent passage codify customary international law, the South Pacific States al-

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95. UNCLOS III, *supra* note 20, art. 19. See also *id.*, art. 301, which states:

Article 301

*Peaceful Uses of the Sea*

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any treaty or use of force against the territorial sovereignty or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

96. *But see* Nakamura, *The Passage Through the Territorial Sea of Foreign Warships Carrying Nuclear Weapons*, 25 JAP. ANN. INT'L L. 1 (1982). See also W. BURKE, *TOWARDS A BETTER USE OF THE OCEAN* (Stockholm International Peace Research Institute 1969); LAW OF THE SEA INSTITUTE, *TWELFTH ANNUAL CONFERENCE, LAW OF THE SEA: NEGLECTED ISSUES* 325-423 (1979).

The opposing argument would be that the exercise and passage of warships, nuclear-armed or otherwise, is necessary to preserve the security of the South Pacific region, which ANZUS obligates its parties to do. See *infra* notes 111-28. In addition, UNCLOS III does not allow for a subjective perception of a threat to rule out innocent passage. See *supra* notes 94-95. On the other hand, the determination that the passage of nuclear-armed warships is non-innocent would be a decision made by multi-lateral agreement of all South Pacific nations. These nations have also agreed by treaty that the security of the region is better served by keeping nuclear weapons out. Moreover, the carriage and deployment of nuclear weapons by any transportation medium presents an objective threat of massive annihilation as well. It is unfortunate that the NWFZ Treaty only addresses surface deployment. Nuclear-armed submarines probably pose a greater threat.

97. For an analysis of the effect of the decision of the United States and 22 other countries not to sign UNCLOS III, see Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541 (1983). The United States objections are based on the deep-sea mining provisions and the procedure for amendment. *Recent Developments, Convention on the Law of the Sea*, 23 HARV. INT'L L.J., at 463, 464 (1983). In September 1982 the United States, France, Britain

ready have the customary right to challenge such passage.<sup>98</sup>

However, one provision of UNCLOS III could be interpreted as allowing for innocent passage of a nuclear-armed ship through territorial water.

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, *when exercising the right of innocent passage through the territorial sea*, carry documents and observe special precautionary measures established for such ships by international agreements.<sup>99</sup>

The emphasized portion indicates that UNCLOS III contemplates "foreign nuclear-powered ships and ships carrying nuclear . . . substances" as being capable of innocent passage through territorial waters.<sup>100</sup> This phrase could be interpreted as including the concept of ships carrying nuclear arms.

The more plausible interpretation is that the phrase "foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous . . . substances" refers to a category of potentially tortious maritime transportation quite different from the passage of warships carrying nuclear weapons.<sup>101</sup> An opposing position would be that UNCLOS III contemplates nuclear-armed ships as ships carrying a "nuclear substance," which would have a right of innocent passage through territorial waters, provided they "carry documents and observe special precautionary measures. . . ." <sup>102</sup> The NWFZ Parties' position should be that nuclear-armed warships are "prejudicial

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and West Germany signed an "interim arrangement" which is almost a "mini-treaty rival to the UN Convention." *Id.*

As of July 1983 only six countries of the 168 States participating in UNCLOS III had ratified the Convention. Article 308 requires 60 instruments of ratification or accession before the Convention enters into force. Platzzoeder, *Who Will Ratify the Convention?* 17 L. SEA INSTIT. PROC. 662-67 (1984). For a more general discussion, see KNIGHT, CONSEQUENCES OF NON-AGREEMENT AT THE THIRD U.N. LAW OF THE SEA CONFERENCE (Am. Soc. Int. Law and Policy No. 11, 1976).

98. See MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CALIF. W. INT'L L.J. 181 (1983). See also Gamble, *supra* note 71, at 305; Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 321 (1981); Chessman, *Treaties and Custom: A Commentary on the Draft Restatement*, 18 INT'L LAW 421 (1984); Oxman, *Customary International Law in the Absence of Widespread Ratification of the U.N. Convention on the Law of the Sea*, 17 L. SEA INSTIT. PROC. 168-80 (1984).

99. UNCLOS III, *supra* note 20, art. 23 (emphasis added).

100. See Zedalis, "Peaceful Purposes" and Other Relevant Provisions of the Revised Composite Negotiating Text: A Comparative Analysis of the Existing and the Proposed Military Regime for the High Seas, 7 SYRACUSE J. INT'L L. & COMM. 1 (1979).

101. UNCLOS III, *supra* note 20, art. 23.

102. *Id.*

to the peace, good order [and] security” of the entire region in the form of a direct threat of massive destruction and thus are excluded by the UNCLOS III provision defining “innocent passage.”<sup>103</sup>

UNCLOS III also provides that “the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.”<sup>104</sup> The institution of a NWFZ is a necessary step to prevent non-innocent passage of a foreign nuclear-armed warship through territorial waters and the concurrent threat to regional security and survival.<sup>105</sup>

UNCLOS III defines “warship”<sup>106</sup> and states: “If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.”<sup>107</sup>

In summary, the Parties to the South Pacific NWFZ have the legal right, under UNCLOS III, to exclude nuclear-armed warships from their territorial waters by regional agreement.<sup>108</sup> This right is based on the argument that the passage of nuclear-armed warships through territorial waters is *per se* non-innocent, that such passage is “prejudicial to the peace, good order [and] security” of the entire region.<sup>109</sup> The argument that such passage is non-innocent is in turn

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103. See *supra* notes 94-97 and accompanying text.

104. UNCLOS III, *supra* note 20, art. 25. See also *id.* art. 24.

105. The South Pacific parties would assert that a NWFZ is necessary to keep nuclear weapons out of the region. This Zone, established on the basis of a valid treaty whose provisions present no actual conflict with the parties’ existing legal obligations (*vis-a-vis* UNCLOS III and ANZUS), will depend for its practical effectiveness on the respect and recognition it receives from the nuclear powers whose nuclear-armed warships now traverse the Zone. This recognition through protocol is necessary. The Zone cannot be enforced by coercive measures, since the nuclear weapons, against which the Zone is directed, are the ultimate coercive force developed by human technology.

106. UNCLOS III, *supra* note 20, art. 29.

107. *Id.* art. 30.

108. See *supra* notes 92-107 and accompanying text; cf. MCDUGAL & BURKE, *supra* note 73, at 130-36, 174-304, and 482-85. “It is . . . reasonable to concede to a State the right to enact regulations regarding the passage of foreign warships through its territorial waters, if considerations based on its safety and protection justify it.” Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4 OCEAN DEV. & INT’L L. 51, 54 (1977), quoting C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 223 (4th ed., 1961).

For an argument that a State may *not* exclude a nuclear-armed warship from its territorial waters (in a different context) on the grounds that its passage is non-innocent, see Nakamura, *supra* note 96, at 6. Nakamura states: “It would seem that in international law the coastal State is not granted the right to hamper the passage through its territorial sea beforehand on grounds of a risk of radioactive pollution and suspected carriage of nuclear weapons.”

109. See *supra* notes 94-96, 103, 105 and accompanying text.

based on the fact that the presence of nuclear weapons in the region increases the unacceptable risk that the weapons would be used.<sup>110</sup>

A second international convention establishing obligations which may conflict with obligations established by the NWFZ Treaty is ANZUS.

### B. ANZUS<sup>111</sup>

The Preamble to ANZUS states:

The Parties to this Treaty,

Desiring to declare publicly and formally their sense of unity, so that no potential aggressor could be under the illusion that any of them stand alone in the Pacific Area, and

Desiring further to coordinate their efforts for collective defense for the preservation of peace and security *pending the development of a more comprehensive system of regional security in the Pacific Area,*

Therefore declare [the provisions of this Treaty]. . . .<sup>112</sup>

ANZUS states the procedure to follow if an armed attack on the Parties occurs, outlines the Treaty area of coverage, and provides for a Council to implement the Treaty.<sup>113</sup> Australia and New Zealand can assert that a NWFZ in fact *is* "a more comprehensive system of regional security," provided that the United States gives its support

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110. See *supra* note 105 and accompanying text. However, an additional fact is that the intercontinental range of nuclear missiles on board foreign warships would deride any exclusion of such weapons from a regional boundary. Thus, ultimately, the South Pacific NWFZ will have practical effect only as an unambiguous communication to the nuclear States that the Forum States do not want such weapons in the region. New Zealand Prime Minister Lange, for example, maintains no illusions about the range of strategic nuclear weapons or the "going down with the ship" factor were even a small percentage of current arsenals of such weapons unleashed, whether by computer error, human miscalculation, or terrorist design.

111. ANZUS, *supra* note 21. The members of ANZUS meet annually to discuss developments in Asia and the Pacific. Although the agreement has served "primarily as a vehicle for political consultation," there is a history of mutual support in armed conflict. Australia and New Zealand both sent troops to support the U.S. military activity in Korea and in Vietnam. L.A. Times, Feb. 6, 1985, at 17, col. 1.

Prime Minister Lange of New Zealand states:

New Zealand is committed to the ANZUS Alliance. So too is the United States, as the President himself has made clear. That treaty reflects, not the narrow question of *which* particular American ships visit our ports, but the total commitment of our people, Americans, Australians and New Zealanders, to keep the Pacific an area of freedom, stability and peace.

Statement by the Prime Minister of New Zealand, David Lange, in Los Angeles (Feb. 26, 1985). [hereinafter cited as Lange, ANZUS Statement]. (Copy on file with the California Western International Law Journal.)

112. ANZUS, *supra* note 21, Preamble (emphasis added).

113. *Id.* arts. 4, 5, & 7.



to this arrangement.<sup>114</sup> These Parties can also maintain that ANZUS is outdated, contemplates only conventional defensive forces, and arose out of a geopolitical situation which has evolved considerably and which demands a unique contemporary response.<sup>115</sup>

The purpose of ANZUS is the collective security of the region.<sup>116</sup> This purpose is enhanced by the imposition of a NWFZ in the region because, in theory, no nuclear weapons could enter and none could be built within the Zone.<sup>117</sup> Such a Zone must of course be verifiable with respect to all nuclear States.

ANZUS provides:

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.<sup>118</sup>

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114. At the 1975 Conference of the Committee on Disarmament, most experts noted as an essential principle that "any arrangements for the establishment of a zone must provide for appropriate guarantees by the nuclear-weapon States not to use or threaten to use nuclear weapons against members of the zone." CCD Special Report, *supra* note 5, at 32.

However, other representatives pointed out that "while such undertakings would contribute to the effectiveness of a Zone, they *should not be considered a prerequisite* for the establishment" of a NWFZ, but should instead be considered on an *ad hoc* basis. CCD Special Report, *supra* note 5, at 32 (emphasis added).

115. A long history of mutual involvement in trade, a shared democratic tradition and comradeship in war produced one . . . association—the security alliance we call ANZUS. For a third of a century, from the days when the perceived threat was different and the alliance was clearly a conventional defensive association, we have shared a commitment to the protection of the Pacific. We are not about to turn our backs on long standing friendships because of our nuclear policies.

Address by the New Zealand Prime Minister, David Lange, to the Foreign Policy Association in New York (Sept. 24, 1984) [hereinafter cited as Lange, Foreign Policy Address] (copy on file with the California Western International Law Journal).

116. See *supra* note 112 and accompanying text.

117. The purpose of collective security can be completely fulfilled only with mutual and verifiable assurances from the nuclear States in the form of legal obligations undertaken, to observe and respect the nuclear-weapon-free status of the zone.

Prime Minister Lange states:

We form no part of the Western nuclear deterrent. Unlike NATO, the ANZUS alliance has in the past been regarded by the treaty partners as a conventional alliance not a nuclear alliance . . . We believe it is in the interest of the South Pacific and the Western alliances as a whole that the South Pacific not become part of a nuclear confrontation.

Lange, ANZUS Statement, *supra* note 111.

In the 1975 Conference of the Committee on Disarmament, several participants agreed that "a non-nuclear-weapon State allied to a nuclear-weapon State can . . . also be a party to a nuclear-weapon-free zone treaty." Those delegates also pointed out that "such alliances should not be regarded as being in all cases competitive with" NWFZs but could be *complementary* to the effectiveness of a NWFZ. CCD Special Report, *supra* note 5, at 33.

118. ANZUS, *supra* note 21, art. 1.

This vague but important language raises no express legal obligations with which the obligations established by the NWFZ Treaty would conflict. Australia and New Zealand may, in fact, assert that the United States has breached its duty "to refrain in their international relations from the threat or use of force," by endangering the region with the transport of nuclear weapons and by a genocidal foreign policy of nuclear deterrence. The goals and correlative obligations of ANZUS and of a NWFZ treaty are identical—to maintain the collective security of the region.<sup>119</sup>

ANZUS further provides that "[i]n order more effectively to achieve the objective of this Treaty the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop *their individual and collective capacity to resist armed attack.*"<sup>120</sup> The NWFZ is just such a means of "self-help" in response to an increasingly dangerous world in which "nuclear weapons that may have helped to maintain an uneasy peace between two great countries for more than three decades have become a threat to the security and survival of countries and peoples everywhere."<sup>121</sup>

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119. See *supra* note 117. The United States could, in turn, contend that the presence of nuclear weapons in the South Pacific presents no reasonable threat of force against Australia or New Zealand, who are allies, and that the purpose of the nuclear presence is for deterrence only and that this presence is necessary to balance the Soviet possession of nuclear weapons. The United States could further point out that if a South Pacific NWFZ were employed and the East/West strategic balance of power were not changed by the existence of the NWFZ, there could be no guarantees that the Soviets would honor any commitment in signing a protocol agreement to respect the nuclear-weapon-free status of the South Pacific Zone. The NWFZ proponents could counter that there are *never* any guarantees, and that peaceful and constructive international relations *must* be based on trust, supported by *mutual* and *verifiable* assurances of compliance (such as inspections authorized by a regional supervisory agency or a comprehensive monitoring system).

The New Zealand position, *vis-a-vis* ANZUS, the domestic NWFZ in New Zealand, and the South Pacific NWFZ is as follows:

We do not ask, we do not expect, the United States to come to New Zealand's assistance with nuclear weapons or to present American nuclear capability as a deterrent to an attacker. We do not wish to have nuclear weapons on New Zealand soil or in our harbors. As an inescapable consequence, we have had to tell [the U.S.] Administration that we will provide access to our ports only to vessels that are demonstrably conventionally armed. By doing this we are expressing the commitment of New Zealanders to a nuclear-free New Zealand.

Once in place, the zone will help keep the South Pacific free, as it is now, of strategic confrontation. This is a very great contribution to security in the region and to global peace. It is also in full conformity with the ANZUS Treaty and with the spirit of that treaty where it talks of "strengthening the fabric of peace" in the Pacific.

Lange, ANZUS Statement, *supra* note 111. See also *supra* notes 1-2, 4, and 6-7. *But cf.* Alves, *Tiff With New Zealand Imperils Pacific Security*, Wall St. J., Feb. 14, 1985, at 19. Alves addresses the Soviet military presence in the Pacific.

120. ANZUS, *supra* note 21, art. 2 (emphasis added).

121. Lange, UN General Assembly Address, *supra* note 1. Complicating the issue is the fact that the Soviet Union's Pacific fleet has grown by 30% in recent years. The United States

Further evidence of the out-moded nature of ANZUS is the fact that there is no "individual and collective capacity" to resist nuclear attack, except by building nuclear weapons, which is contrary to obligations under the Non-Proliferation Treaty and the official policy of the South Pacific States.<sup>122</sup> Furthermore, building nuclear weapons is not an effective defense to nuclear attack but is merely an assurance of the opponent's mutual annihilation.<sup>123</sup>

An additional obligation under ANZUS is for the Parties to "consult together whenever in the opinion of any of them the territorial integrity, political independence or security of any of the Parties is threatened in the Pacific."<sup>124</sup> This consultation is in progress.<sup>125</sup>

In conclusion, ANZUS does not establish any express legal obligations which would conflict with Australia's and New Zealand's obligations established by the South Pacific NWFZ Treaty. Critics of the NWFZ contend that such a zone violates the "spirit" of ANZUS, because the United States nuclear warships are instruments for the defense of the Pacific region.<sup>126</sup> However, ANZUS does not provide for nuclear retaliation in support of the alliance, nor does it include by its terms the stationing of nuclear weapons on the territories of the

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Department of State has maintained that a South Pacific NWFZ "would destabilize regional security." Taft, *supra* note 6; *The Kiwi Disease*, Wall St. J., Aug. 22, 1984, at 20, col. 1.; Alves, *supra* note 119. According to Article 2 of the South Pacific NWFZ Treaty, *supra* note 14, the Zone would have no effect on oceanic travel by conventionally armed warships. The strategic balance of power would be maintained since it would be nuclear weapons of all States that would be excluded, with verification mechanisms established by protocol. Article 2 states: "Nothing in this Treaty shall prejudice or in anyway affect the rights or the exercise of the rights of any State under international law with regard to freedom of the Seas."

122. Lange, U.N. General Assembly Address, *supra* note 1. The Non-Proliferation Treaty states:

Each non-nuclear weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive device.

Non-Proliferation Treaty, *supra* note 11, art. II.

123. See DUNN, *supra* note 76; THE INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES, *supra* note 59; EPSTEIN, LAST CHANCE, *supra* note 5.

124. ANZUS, *supra* note 21, art. 3.

125. N.Y. Times, Sept. 15, 1985, at 1, col. 4.

126. That Washington expressed its opposition to the South Pacific NWFZ proposals (particularly in 1974 and 1975) directly to New Zealand as well as within the ANZUS setting, is an established fact. Thus opponents have maintained such proposals are basically incompatible with ANZUS. So long as member governments perceive their security interests as linked to the presence of nuclear weapons in the South Pacific and a U.S. position of deterrence, the essential political will for NWFZ formation will not be forthcoming.

ALLEY, *supra* note 4, at 38.

allies.<sup>127</sup> Thus, the literal terms of ANZUS do not raise obligations which conflict with obligations under the NWFZ Treaty.<sup>128</sup>

### III. PROPOSALS FOR RESOLVING POTENTIAL CONFLICT BETWEEN THE SIGNATORIES' LEGAL OBLIGATIONS UNDER THE SOUTH PACIFIC NWFZ TREATY AND OTHER INTERNATIONAL LEGAL OBLIGATIONS

#### A. *Re-negotiation of ANZUS*

A primary key to the effectiveness of the South Pacific NWFZ is the support and respect for the Zone by the United States. For a NWFZ to succeed, the United States and its allies have set forth four requirements: (1) that the establishment of a NWFZ not upset the existing military balance; (2) that the NWFZ be initiated by those States in the region of the Zone; (3) that the NWFZ include all the States in the area if feasible, or at least those with significant military power; and (4) that the Zone be subject to verification to ensure that it remains nuclear-weapon-free.<sup>129</sup> These four elements should be addressed in detail by the South Pacific Parties to the NWFZ Treaty.

Since support from the United States for the NWFZ is uncertain, ANZUS should be carefully re-negotiated to accommodate both the existence of the South Pacific NWFZ and the concern for deterring any regional threat of potential Soviet aggression.

The Labour Party, the majority party in New Zealand, has already proposed this re-negotiation of ANZUS "for the purpose of ensuring the economic, social and political stability of the South East Asian and Pacific regions."<sup>130</sup> The Labour Party platform presents requirements for re-negotiation as an indication of official policy:

127. New Zealand has already made this point. See *supra* notes 117, 119 and accompanying text.

128. CCD Special Report, *supra* note 5, at 33.

Most experts expressed the view that if a State included in a nuclear-weapon-free zone is a member of a security alliance, the membership of that alliance cannot justify any exceptions to the obligations arising from the nuclear-weapon-free zone agreement.

*Id.* at 34.

129. EPSTEIN, AFRICA, *supra* note 22, at 6. Epstein points out elsewhere that the United States and its allies are concerned that any reduction of United States military power would give military or political advantage to the Soviet Union. Epstein, SCI. AM., *supra* note 22, at 26-27.

130. ELECTION '84 POLICIES, *supra* note 6, at 2. "Our policies are not anti-ally; they are not anti-alliance; they are anti-nuclear. They arise from deeply-felt sentiments held by a majority of our people." Lange, Foreign Policy Address, *supra* note 115.

[T]he basic requirements of such an updated agreement should be:

- (a) New Zealand's unconditional anti-nuclear stance;
- (b) the active promotion of a nuclear weapons free South Pacific;
- (c) the acceptance of absolutely equal partnership on all issues handled within the terms of the agreement and unanimous agreement on all decisions taken under those terms; [and]
- (d) an absolute guarantee of the complete integrity of New Zealand's sovereignty.<sup>131</sup>

The re-negotiation of ANZUS must address the shared goals of all Parties, as well as the collective security of the Pacific region. Australia and New Zealand must assert that the South Pacific NWFZ, strengthened by the support of the United States, is a safer and more effective method of assuring the security of the region than is the nuclear militarization of the South Pacific.<sup>132</sup>

Because of the Parties' differing perceptions of their obligations, ANZUS should be re-negotiated to accommodate the conflicting policies. The re-negotiation would reconcile the existence of a viable and effective South Pacific NWFZ with the goals and policies of the United States regarding national security and deterrence of international conflict.

### *B. UNCLOS III: Ratification and Amendment*

1. *Ratification.* Those members of the South Pacific Forum who have not ratified UNCLOS III should do so immediately. It is in the best interests of the South Pacific States that UNCLOS III enter into force as soon as possible. Therefore, the NWFZ Parties should also actively work through the United Nations and all available diplomatic channels to urge all UNCLOS III signatories to ratify the Convention at the earliest opportunity. Forty-seven more States must ratify or accede to UNCLOS III before it enters into

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131. ELECTION '84 POLICIES, *supra* note 6, at 2. See also Lange, Foreign Policy Address, *supra* note 115. However, there is no indication that the election platform is now governmental policy. Official policy is to maintain ANZUS in its present form. The problem, according to the New Zealand government, is not the terms of the Treaty itself, but the differing interpretations of those terms and of the obligations which the terms create. See *supra* note 119 and accompanying text.

Re-negotiation of ANZUS would involve, at least, reconciling the different interpretations and solidifying the exact nature of the obligations. Re-negotiation, at most, would involve drafting a new treaty to manifest the Alliance, in the context of both the South Pacific NWFZ and the United States' modern security interests.

132. ALLEY, *supra* note 4, at 40-45.

force.<sup>133</sup>

When UNCLOS III enters into force, the NWFZ Parties' obligations under this Convention will be established. Until the entry into force of UNCLOS III, arguments for the South Pacific NWFZ must be based primarily on customary international law of the sea, which is less certain and more open to question or challenge.

When UNCLOS III enters into force and the Parties begin following its provisions, those provisions of the Convention which do not codify customary law begin the transformation into customary law, which is binding on third-Party States.<sup>134</sup>

2. *Amendment.* After UNCLOS III has entered into force, an amendment should be composed to provide specifically for the existence of the South Pacific NWFZ. Such an amendment must be proposed by written communication to the Secretary-General of the United Nations, who will in turn circulate the proposal among all States Parties.<sup>135</sup>

The amendment should be drafted in anticipation of the necessity for unanimous approval and should include:

(a) an explicit clarification of the "peaceful purposes" phrase in the Convention to exclude by its meaning the practice or maneuvers by nuclear-armed warships within the area prescribed by the South Pacific NWFZ.<sup>136</sup> The term "peaceful purposes" should be modified to read "purposes not involving the possession or deployment of nuclear weapons;"<sup>137</sup>

(b) procedure for verification of compliance with the nuclear-weapon-free status of the South Pacific Zone, including the documentation of Protocol agreements, similar to the Treaty of Tlatelolco, and remedial recourse to the International Tribunal for the Law of the Sea;

(c) the requirement of a periodic re-confirmation of the NWFZ by the UN General Assembly;

(d) an internationally valid definition of the NWFZ concept. Such a definition should refer to the NWFZ as a regional security arrangement in the common interest and should exclude possible misinterpretation of the Zone as a transnational extension of territo-

133. See *supra* notes 20, 97 and accompanying text.

134. *Id.*

135. UNCLOS III, *supra* note 20, art. 313. If one State Party were to object to the proposed amendment within a twelve month period the amendment would be considered rejected.

136. See *infra* notes 156-63 and accompanying text.

137. *Id.*

rial sovereignty.<sup>138</sup> Such a definition should clarify that the sole purpose of the NWFZ is to eliminate a massive threat to regional peace, security, and survival by excluding nuclear weapons from a defined area;<sup>139</sup> and

(e) a mechanism for observance of the NWFZ by all nuclear States sponsoring military maneuvers involving nuclear weapons near the boundary of the zone.<sup>140</sup>

This Comment will next analyze the possibilities for extending the South Pacific NWFZ within international legal limits, to increase the Zone's effectiveness.

#### IV. PROPOSALS TO EXPAND THE SOUTH PACIFIC NWFZ WITHIN INTERNATIONAL LEGAL LIMITS

The NWFZ Treaty as presently drafted contains two major provisions which, although making ratification by the South Pacific States likely, may seriously reduce the Zone's effectiveness. These two provisions are (1) a blanket preservation of the freedom of navigation and (2) the reservation of the right of each sovereign Member State to decide for itself which ships may or may not enter its territorial waters.<sup>141</sup>

The practical result of these provisions may be that the Zone will be non-existent beyond the signatories' territorial waters, since nuclear-armed warships would retain the freedom of navigation guaranteed by customary international law the NWFZ would be effective in territorial waters only if the signatory adopts nuclear-weapon-free policy.

As already demonstrated the obligations established by the South Pacific NWFZ Treaty are consistent with obligations estab-

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138. Alfonso Garcia Robles, the chief author of the Treaty of Tlatelolco, has recommended that the highest priority be given to the formulation of an internationally valid definition of a NWFZ. ALLEY, *supra* note 4, at 31.

139. See *supra* notes 94-96, 105, 109-10 and accompanying text. See *infra* note 165 and accompanying text.

140. Gaining the recognition of the NWFZ by the nuclear States and their pledges to respect its nuclear-weapon-free status, while not a *sine qua non* for its existence, is important for the effectiveness of the zone. As Epstein points out:

[The establishment of NWFZs] would be facilitated if the nuclear powers would demonstrate their wholehearted support for the creation of such zones not only as a means of preventing the further spread of nuclear weapons but also as a way of furthering the peaceful uses of nuclear energy (though the establishment of large-scale regional nuclear-fuel recycling centers within NWFZs) and of providing security assurance to countries in the denuclearized zone.

Epstein, *SCI. AM.*, *supra* note 22, at 35.

141. See *supra* note 90-92 and accompanying text.

lished by UNCLOS III and ANZUS. The problem is that such consistency may result in practical ineffectiveness of application. To be effective, the South Pacific NWFZ must extend beyond territorial water to the ocean space traditionally known as the "high seas." UNCLOS III has reinforced the legal concept of "Exclusive Economic Zone," which may extend to 200 miles from a State's territorial water. This Comment will next examine the potential conflicts involved in extending the South Pacific NWFZ to the limits of the Exclusive Economic Zones of each signatory and to the high seas.

1. *The Exclusive Economic Zone.* The Exclusive Economic Zone (EEZ) is "an area beyond and adjacent to the territorial sea, subject to the specific legal regime established" in UNCLOS III.<sup>142</sup> This Zone "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."<sup>143</sup>

Experts have noted that the NWFZ must extend beyond the territorial seas of the Parties to have any effect at all,<sup>144</sup> since nuclear-armed warships seldom pass through territorial waters.<sup>145</sup> Their passage is mainly conducted beyond the territorial waters, in the ocean space traditionally known as the "high seas."<sup>146</sup>

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142. UNCLOS III, *supra* note 20, art. 55. For a more comprehensive discussion of EEZs see Fleischer, *The Exclusive Economic Zone Under the Convention and in State Practice*, 17 L. SEA INST. PROC. 241-86 (1984).

143. *Id.* art. 57. It has been estimated that in the South Pacific "the national jurisdiction covered by the new 200-mile EEZs approaches 20 million square nautical miles." Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321 (1979-80). Krueger & Nordquist state that "the establishment of the 200-mile exclusive economic zone (EEZ) is the most significant development in ocean laws since the articulation of the doctrine of the freedom of the high seas." *Id.*

144. Interview with Professor S. Houston Lay, Professor Emeritus, California Western School of Law, in San Diego, California (Jan. 23, 1985).

According to Roderic Alley, critics of the South Pacific NWFZ would argue that the "zonal agreement would be most easily maintained where it was least likely to be breached, while it would be difficult, if not impossible, to enforce when enforcement would be most needed." ALLEY, *supra* note 4, at 36.

145. ALLEY, *supra* note 4, at 48.

146. *See infra* notes 154-69 and accompanying text. Under the UNCLOS III regime, the "high seas" are "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." UNCLOS III, *supra* note 20, art. 86. Article 58 provides that the Article 87 freedom of the high seas is available to all other States in passing through the EEZs. Some commentators are concerned that the 200-mile EEZs will, eventually "creep" into the status of territorial waters and therefore severely limit navigational rights. Although the United States announced its willingness to accept 200-mile EEZs at Caracas in 1974, the Chief of the U.S. Delegation, John R. Stevenson, made it clear that this was conditional on the protection of transit rights through the EEZ. Janis, *supra* note 108, at 60; Cundick, *International Straits: The Right of Access*, 5 GA. J. INT'L & COMP. L. 107 (1975); Booth, *Historic Compromise or*



In the EEZ, the island State has “sovereign rights” for the purpose of exploring, conserving, and managing the natural resources of the waters, seabed, and its subsoil in that area.<sup>147</sup>

With regard to the rights and obligations of other States in the EEZ, UNCLOS III provides:

In the exclusive economic zone, the States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of the navigation and overflight and of the laying of submarine cables and pipelines, and other *internationally lawful* uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.<sup>148</sup>

The “freedoms referred to in article 87” are the freedoms of the high seas.<sup>149</sup> In the context of a NWFZ, the applicable freedom is the freedom of navigation.

The South Pacific Parties would have a collective right to restrict the non-innocent passage of nuclear-armed warships through the EEZ of each Party, if such passage is not an “internationally lawful” use of the sea under Article 87.<sup>150</sup>

Given the specific rights and duties of the coastal State in the EEZ as provided in UNCLOS III, extending the South Pacific NWFZ into the EEZ would conflict with the rights guaranteed to other States by UNCLOS III *unless* the passage of foreign nuclear-

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*Paradigm Shift? Naval Mobility Versus Creeping Jurisdiction in the 1982 U.N. Convention on the Law of the Sea*, 17 L. SEA INSTIT. PROC. 312-35 (1984).

Under UNCLOS III, each coastal State or island is authorized to establish, at maximum, a 12-mile territorial sea and a 200-mile EEZ (which would include the territorial sea and the 24-mile contiguous zone). The enormity of areas covered by the EEZs is of particular importance in the South Pacific.

For example, Tonga can claim 173,800 square nautical miles which is 640 times its land area (270 square miles); Fiji can claim 330,000 square nautical miles which is about 400 times its land area (7,055 square miles); Western Samoa can claim 28,000 square nautical miles which is 25 times its land area (1,133 square miles); [and] Nauru 125,700 square nautical miles which is 15,700 times its land area (8 square miles). . . .

Lee, *supra* note 82, at 248 and 262.

147. UNCLOS III, *supra* note 20, art. 56. “[S]afety zones in which navigation might be restricted or prohibited could be established for installations located in economic zone (such zones are already permitted by art. 5 of the Convention on the Continental Shelf)”. KNIGHT, *supra* note 97, at 52.

148. UNCLOS III, *supra* note 20, art. 58 (emphasis added).

149. See generally THE LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES (L. Alexander ed. 1967).

150. See Vindenes, *The Environmental Rights of Coastal States and the Freedom of Navigation*, 17 L. SEA INSTIT. PROC. 574-83 (1984). See also *supra* note 77 and accompanying text for arguments supporting the international illegality of nuclear weapons.

armed warships through the economic zone is found to be internationally illegal.<sup>151</sup>

An additional option is to extend the South Pacific NWFZ beyond the theoretical boundary of the EEZ to the high seas. An extension of the NWFZ to the high seas could create serious conflict with both UNCLOS III and customary international law of the sea.<sup>152</sup> However, the conflict with UNCLOS III is surmountable.

3. *The High Seas.* The high seas are defined in UNCLOS III as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."<sup>153</sup>

UNCLOS III provides that the high seas are open to all States, whether coastal, island, or landlocked. "Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States: (a) freedom of navigation; [and] (b) freedom of overflight. . . ."<sup>154</sup> UNCLOS III further provides that "these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas and also with due regard for the rights under this Conven-

151. *But see* MCDUGAL & BURKE, *supra* note 73, at 565-627, 730-78.

It is not to be inferred that this widespread acceptance of the general doctrine prescribing freedom of access for navigation absolutely prohibits any activity or authority which may interfere with such freedom. To the contrary, States commonly make certain claims to exclusive use and authority, interfering with inclusive use, which are recognized by the general community to be consistent with international law. . . . Naval operations at sea during times of peace are the most common form of exclusive use considered to be in accord with international law. . . . Exercises involving the use of modern weapons could not be conducted with safety except in relatively unfrequented areas. . . . [T]he most relevant standard prescribed by customary international law is that of reasonableness.

*Id.* at 768-72.

152. *See infra* notes 153-168 and accompanying text. UNCLOS III embodies the customary principle that all States have freedom of navigation on the high seas. *See infra* note 154 and accompanying text. The NWFZ proponents would contend that this freedom should be subject to restriction where the navigator is carrying nuclear weapons that jeopardize regional survival and security. They would demonstrate that the threat comes from the nuclear weapons themselves, not necessarily those in whose hands (or by whose computers) they are controlled. The danger derives from the risk of miscalculation, accident or human error. Such a risk increases in proportion to the proliferation of the weapons and the frequency of their brandishment. The NWFZ parties would emphasize that the Zone would only exclude *nuclear* weapons. Military exercises with conventional weapons would still be an appropriate use of the high seas. *See infra* note 160 and accompanying text.

153. UNCLOS III, *supra* note 20, art. 86.

154. *Id.* art. 87. *See also* W. BURKE, R. LEGATSKI, & W. WOODHEAD, NATIONAL AND INTERNATIONAL LAW ENFORCEMENT IN THE OCEAN 88-110 (1975).

tion with respect to activities in the Area.”<sup>155</sup>

In addition, UNCLOS III states that “*the high seas shall be reserved for peaceful purposes.*”<sup>156</sup> Were the NWFZ to extend beyond the EEZ, the Parties would contend that the term “peaceful purposes” means “non-warlike,” and therefore “non-military,” activity. This meaning is consonant with the traditional construction of the term “peaceful purposes” in the Antarctic Treaty,<sup>157</sup> the Outer Space Treaty,<sup>158</sup> and the Sea-bed Treaty.<sup>159</sup> The traversing of the South Pacific high seas by nuclear-armed warships is an inherently war-like activity and is a threat to regional security. It is illogical to construe such activity as peaceful.<sup>160</sup> Peace through strength will not occur through superiority.

If the term “peaceful purposes” is interpreted as “non-military purposes,” then Article 88 of UNCLOS III would prohibit nuclear-armed warships from practicing on the high seas, and would be consistent with UNCLOS III.<sup>161</sup> The expanded NWFZ would also be consistent with UNCLOS III if the term “peaceful purposes” were more restrictively defined as “purposes not involving the possession

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155. UNCLOS III, *supra* note 20, art. 87.

156. *Id.* art. 88 (emphasis added).

157. The interpretation of the term “peaceful purposes” as denying any military use of the high seas is consistent with the common interpretation of the same term in Article 1 of the Antarctic Treaty. See *supra* notes 46, 48-49 and accompanying text.

158. See *supra* notes 60-62 and accompanying text.

159. See *supra* notes 63-66 and accompanying text. See also Dore, *International Law and the Preservation of the Ocean Space and Outer Space as Zones of Peace: Progress and Problems*, 15 CORNELL INT'L L.J. 1 (1982) for an analysis of the “peaceful purposes” ambiguity.

160. For an argument that the term “peaceful purposes” should be interpreted as including military activity, see Zedalis, *supra* note 100, at 19. Zedalis defines the distinction:

[I]f only non-military uses are permitted, then the high seas may not be employed for any activity of a military nature, *including the navigation of warships*. On the other hand, if “peaceful purposes” simply prescribes a non-aggressive standard, then the high seas may legally be used for a whole host of activities of a military nature as long as none of the activities are aggressive.

*Id.* at 18-19 (emphasis added).

Zedalis subscribes to the interpretation of “peaceful purposes” which allows for military activity and argues that “the inescapable conclusion is that it establishes a nonaggressive normative standard.” *Id.*

The most widely acknowledged unstated use of the High Seas presently recognized by the general principles of international law is the right of all states to employ the high seas for military purposes. Military vessels are undoubtedly entitled to traverse the waters of the high seas pursuant to the freedom of navigation.

*Id.* at 12. “This freedom is not restricted and in fact [UNCLOS III] contemplates navigation by military as well as civilian vessels. Such use, however, would be clearly inconsistent with a non-military standard.” *Id.* at 19.

161. Such an interpretation could be made by the International Tribunal for the Law of the Sea, or any other decision-making entity with authority to interpret UNCLOS III.

or deployment of nuclear weapons.”<sup>162</sup>

According to UNCLOS III, “no State may validly purport to subject any part of the high seas to its sovereignty.”<sup>163</sup> Critics might contend that the South Pacific Parties are violating this provision.<sup>164</sup> However, this contention would be based on misunderstanding. Establishing the South Pacific NWFZ is not an exercise of sovereignty. It is preventive self-defense and transcends the traditional concept of sovereignty as territorial control by a single State. The purposes of the Zone are to achieve regional security, the prevention of further nuclear-arms proliferation, and the avoidance of catastrophic nuclear confrontation.<sup>165</sup> The provision also refers to “no State” in the singular form. Not only is no extension of sovereignty involved, since the only control asserted is to exclude weapons of mass destruction, but also the establishment of the expanded NWFZ would be undertaken by a *group* of States in multilateral pursuance of their mutual primal value of regional *survival*.

UNCLOS III further provides that “warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.”<sup>166</sup> This provision could be interpreted as contemplating the presence of warships on the high seas.<sup>167</sup>

However, this provision does not contradict a construction of the term “peaceful purposes” as “purposes not involving the possession, deployment or testing of nuclear weapons.”<sup>168</sup> South Pacific NWFZ proponents make clear that no territorial “jurisdiction” is being claimed in the establishment of the NWFZ. In addition, the provision again refers to “any State” in the singular. The NWFZ was established as a *regional* agreement, based on common sense, regional security, and multi-lateral reciprocity, to exclude nuclear weapons within a defined area and is an assertion of neither jurisdiction nor sovereignty.

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162. A contrary position could be that either construction contradicts the common practice of the nuclear States, as well as the customary principle of international law that military activity on the high seas is appropriate, acceptable, and indeed necessary to maintain a balance of power, deter aggression, and present an allied defense. The NWFZ proponents would counter that custom necessarily determines neither moral rightness nor legality. *See also* Alves, *supra* note 119.

163. UNCLOS III, *supra* note 20, art. 89 (emphasis added).

164. *See* LIMITS TO NATIONAL JURISDICTION OVER THE SEA (G.T. Yates & G.D. Billock eds. 1974).

165. *See supra* note 138 and accompanying text.

166. UNCLOS III, *supra* note 20, art. 95.

167. *See supra* notes 156-60 and accompanying text.

168. *See supra* notes 161-63 and accompanying text.

In summary, the two options available for extending the Zone are (1) to the limits of the EEZs of each Party and (2) to the high seas. Since passage of nuclear-armed warships is "non-innocent," meaning "prejudicial to the peace, good order or security" of the State, the NWFZ could exclude nuclear weapons from the Parties' territorial waters under UNCLOS III. If possession and/or deployment of nuclear weapons is *not* an "internationally lawful" use of the sea and passage of nuclear-armed warships is non-innocent, then the NWFZ could be extended to the limits of the EEZ of each Party. If the term "peaceful purposes" in Article 88 of UNCLOS III is construed to mean either "non-military purposes" or "purposes not involving the possession, deployment or testing of nuclear weapons," then the NWFZ could be extended to the high seas without conflicting with the obligations of the South Pacific Parties under UNCLOS III. However, since the reciprocal obligation of the nuclear States to observe the nuclear-weapon free status of the South Pacific NWFZ is essential to its effectiveness, it now seems unlikely, without some inspired diplomacy, that the Zone can be extended in practice beyond the Parties' territorial waters.<sup>169</sup>

## V. CONCLUSION

This Comment has examined two international conventions to which South Pacific Forum members are Parties: the Third United Nations Convention on the Law of the Sea (UNCLOS III)<sup>170</sup> and the Security Treaty between Australia, New Zealand and the United States (ANZUS).<sup>171</sup> If the obligations established by the NWFZ Treaty conflict with obligations under either of these two conven-

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169. The arguments supporting the illegality of nuclear weapons under international law serve to strengthen the proposition that the activity of nuclear-armed warships in traversing the high seas is illegal. However, prevalent customary practice and other considerations (self-defense, national security, maintaining balance of power) are given as rationales to contradict that proposition. See Zedalis, *supra* note 100. See also SINGH, *supra* note 77; CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS, (1971); SCHWARZENBERGER, *supra* note 11, at 185-219; THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT, *supra* note 76.

In view of the short term and the long term international instability which may be generated by the militarization of outer space, the polar zones, or the oceans, it is imperative that the prescriptions of international law affecting military utilization of such areas be thoroughly examined in order to determine if adequate and effective restrictions or limitations on such activities exist.

Zedalis, *supra* note 100, at 3.

170. See *supra* note 20 and accompanying text.

171. See *supra* note 21 and accompanying text.

tions, such conflict could render the NWFZ ineffective.<sup>172</sup>

Several proposals have been made in recent history to establish NWFZs. Their lack of success can be attributed primarily to their failure to address the strategic interests of the nuclear States.<sup>173</sup> The most successful NWFZ to date was established by the Latin-American Treaty of Tlatelolco in 1967.<sup>174</sup> Other NWFZs have been created by the Outer Space Treaty,<sup>175</sup> the Sea-bed Treaty,<sup>176</sup> and the Antarctic Treaty.<sup>177</sup>

For the South Pacific NWFZ to succeed, the Parties must consider the interests of the nuclear States whose warships traverse the region.

Under UNCLOS III, the NWFZ can be legally established in the territorial waters of the parties.<sup>178</sup> Such a territorial NWFZ is valid, since the passage of nuclear-armed warships is characterized as "non-innocent" according to the terms of UNCLOS III.<sup>179</sup>

New Zealand and Australia are members of the 34-year-old ANZUS defense alliance with the United States.<sup>180</sup> The South Pacific NWFZ does not conflict with the express terms of ANZUS.<sup>181</sup> However, there are differing perceptions among ANZUS Parties concerning their obligations under the Treaty.<sup>182</sup> Since ANZUS is vital to United States defense policy, as well as the military security of the South Pacific, the Treaty should be re-negotiated to accommodate the conflicting concerns.<sup>183</sup>

Also, UNCLOS III should be ratified by all NWFZ Parties and should be amended, when the Convention goes into effect, to allow for the South Pacific NWFZ and for the establishment of future NWFZs.

In addition to establishment in territorial waters, the NWFZ could be extended to the limits of the EEZ of each Party,<sup>184</sup> if the transport or possession of nuclear weapons in combat-ready status on

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172. See *supra* notes 17-18 and accompanying text.

173. See *supra* notes 28-43 and accompanying text.

174. See *supra* notes 24, 49-59 and accompanying text.

175. See *supra* notes 60-62 and accompanying text.

176. See *supra* notes 63-66 and accompanying text.

177. See *supra* notes 45-48 and accompanying text.

178. See *supra* notes 92-110 and accompanying text.

179. *Id.*

180. See *supra* notes 21, 112-28 and accompanying text.

181. *Id.*

182. See *supra* notes 114-22 and accompanying text.

183. See *supra* notes 128-33 and accompanying text.

184. See *supra* notes 142-52 and accompanying text.

a warship is illegal under international law.<sup>185</sup> Although there is a strong argument for such illegality,<sup>186</sup> common usage contradicts a classification of this activity as illegal. A finding that such activity was illegal would be difficult, if not impossible, to enforce but would serve to consolidate world public opinion against the transport of nuclear weapons.

The NWFZ could also be extended to the high seas, under the provisions of UNCLOS III, if the phrase "peaceful purposes" is defined to mean "purposes not involving the possession or deployment of nuclear weapons."<sup>187</sup> Whether the South Pacific NWFZ will be effective primarily depends on the decision of nuclear States engaged in the area to abide by the restrictions imposed by the Zone.<sup>188</sup>

Some observers would maintain that the action of the South Pacific Forum in drafting a NWFZ Treaty is a misguided response to a Soviet threat of nuclear annihilation and a misperception of United States military policy. To these critics one might respond that the establishment of a NWFZ in the South Pacific is an intelligent reaction to the unacceptable danger threatened by the deployment of nuclear weapons *themselves*, not a condemnation of those whose policy their carriage is an instrument. The deployment and brandishment of instruments of mass destruction is simply no part of the foreign policy of those nations comprising the Forum. By sovereign action they have mutually agreed on policy for their region and have opted for the sane alternative of excluding nuclear weapons and their concurrent threat from the region. These island nations have taken a courageous leadership role.

The South Pacific States have taken a step toward world peace. The great nuclear Powers should take heed of their courage and determination. The United States, in particular, has the moral responsibility to conduct international relations without brandishing weapons of mass destruction. To move beyond war, we must remove the need to build the weapons.

In the words of the Right Honorable David Lange, the Prime Minister of New Zealand:

The intention of those who for honorable motives use nuclear weapons is to enhance security: They succeed only in enhancing insecurity. The machine has perverted the motive.

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185. See *supra* notes 150-51 and accompanying text.

186. *Id.*

187. See *supra* notes 153-69 and accompanying text.

188. See *supra* notes 128-30 and accompanying text.

The weapon has its own relentless logic, the logic of the arms race. Nuclear weapons make us insecure, and to compensate for our insecurity, we build and deploy more nuclear weapons . . . we know that we are seized by irrationality, and yet we persist. . . . In the South Pacific there is at this moment the chance to turn away from the inhuman logic of nuclear weapons. . . .

There is no humanity in the logic that holds that my country must be obliged to play host to nuclear weapons because others in the West are playing host to nuclear weapons. That is the logic that refuses to admit that there is any alternative to nuclear weapons, when plainly there is.

It is self-defeating logic, just as the weapons themselves are self-defeating: To compel an ally to accept nuclear weapons against the wishes of that ally is to take the moral position of totalitarianism.

The great strength of the West lies not in force of arms but in its free and democratic systems of government. That is why, in spite of all the difficulties New Zealand has got into with our friends and allies, I am not disheartened.

Rejecting nuclear weapons is to assert what is human over the evil nature of the weapon; it is to restore to humanity the power of decision; it is to allow true moral force to reign supreme.<sup>189</sup>

*P. Robert Philp, Jr.*

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189. Address by David Lange, Prime Minister, New Zealand, to the Oxford Union at Oxford University in England (Mar. 1, 1985) (copy on file with the California Western International Law Journal).