THE DESIRABILITY AND FEASIBILITY OF A SOUTH PACIFIC NUCLEAR WEAPON FREE ZONE

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I. INTRODUCTION

International law is but one of the avenues of interaction amongst states; as such it can be merely a political tool, susceptible to manipulation by ambitious countries and leaders.[1] Nonetheless, it serves as a restraint, limiting the range of possible actions a state may take to achieve its ends. It is widely recognised that a state will restrict its sovereignty and course of action only when it is seen to be in its interests,[2] and it may be argued that therefore, international law is necessarily always a political tool. It follows that the determination of the desirability and feasibility of a South Pacific Nuclear Weapon Free Zone, even from the standpoint of international law, may encompass a discussion of at least some of the political aspects and motivations. However, to do so is beyond the scope of this paper, which will be limited to a narrower discussion of the 'pure' legal interests.

The starting point of this paper then, must be the determination of whether or not international law presently prohibits nuclear weapons.[3] If answered in the affirmative, States are obliged not to use them, and possibly not to possess them. At the very least, their existence is impractical, for they serve no lawful purpose. Further efforts aimed at establishing a nuclear weapon free zone, within the legal context, would be superfluous. On the other hand, many treaties have been implemented which merely serve to codify international law, reaffirming and concretising international policies considered to be of utmost importance.[4] Should nuclear weapons be lawful, then various legal and quasi-legal matters must be considered to ascertain the desirability of a nuclear weapon free zone in the South Pacific.

Crucial to this discussion is the feasibility of such a zone, for in the broader sense, if it is not feasible it might well be termed undesirable. Other methods of nuclear arms control may well be more appropriate. In a narrower sense, practical aspects may be divorced from idealistic considerations. Regarded in this way, and irrespective of the answer above, present legal limitations on such a notion may be identified and discussed. Hence, such a question logically neither precedes, nor follows the ideal, but is distinct from it. These considerations must be canvassed before embarking on efforts to draft or examine a text of a nuclear weapon free zone.

[1] Epstein, "NWFZ in Africa?", "Occasional Paper 14". The Stanley Foundation, Iowa, 1977, p.13, (hereafter NWFZ in Africa), claims that the NZFZ proposals in the Middle East and South Asia are strategically and politically inspired rather than co-operative efforts conceived and worked out by the main countries. Barton, *The Politics of Peace,* Standford University Press, Stanford 1981, p.49 poits out that this is the general view of Marxist countries.

[2] See, for example, the comments in Barton, ibid., pp.50-55; Dahlitz, *Nuclear Arms Control,* George Allen & Unwin, London, 1983, p.91. Edwards, *Arms Control and International Politics,* Holt, Rinehart and Winston, Sydney, 1969, pp. 43-57. Phillips, *Alternatives to ANZUS,* New Zealand Foundation for Peace Studies, Auckland, 1977, p.9.

[3] Abbreviations will be the same for both singular and plural.

[4] See the Vienna Convention on the Law of Treaties 1969, and the Geneva Convention of the High Seas, 1958, whose preambles include the phrase "generally declaratory of established principles of international law".

II. International Law and Nuclear Weapons

Attempts to draw an opinion on the legal desirability of a nuclear weapon free zone must necessarily be preceded by agreement on terminology. What exactly is a nuclear weapon, and does 'free' necessarily entail total absence? What limitations, if any are there on the geographic scope of such a zone. After these basic questions have been answered, there still remains the task of reviewing existing international law to determine whether or not such a zone in effect already exists. Finally, implications arising from these conclusions, and their impact on international law as a whole, must be analysed. The first part of this paper will deal with these problems.

1. *Terms*

Despite the numerous calls for nuclear weapon free zones in various regions,[5] agreement on what actually constitutes a nuclear weapon is far from universal.[6] One author, in alluding to this problem, claimed "it is useless to draw up a generally applicable model of a nuclear free zone".[7] However, the Conference of the Committee on Disarmament in 1975 said that most experts in the working group considered it "essential that the fundamental concepts underlying the idea of a nuclear weapon free zone be clearly defined in the instrument establishing the zone".[8] The Committee on Disarmament defined nuclear weapons as a term that "should apply to any nuclear device whatever its detailed characteristics or intended use".[9] The latter part, "whatever its use" was undoubtedly inserted to prevent any disagreements similar to those engendered by the nuclear weapons definition of Article 5 in the Tlatelolco Treaty.[10]

On 8 March 1982, a draft treaty for the establishment of a nuclear weapon free zone in Europe was published by Norway's Ambassador Jens Evenson.[11] Article 4(3) of the Draft defines a nuclear weapon as "any weapon or device which will release nuclear energy when exploding and which had characteristics for use for warlike purposes". Apart from minor changes, this is not very different from that used in the Tlatelolco Treaty, so peaceful nuclear explosions would still be allowed. It does not go very far towards solving any of the problems.

The difficulty still remains of defining this universal but vague term. Given the problems of distinguishing between a peaceful nuclear explosion and nuclear weapon explosion,[12] it would seem prudent to avoid such a distinction. For the purposes of this paper, a nuclear weapon is any device

[5] For a concise survey of NWFZ proposals see Delcoigne "An overview of nuclear weapon free zones", IAEA Bulletin, Vol. 24, No. 2, pp. 50-55.

[6] For example, Brazil and Argentina claim peaceful nuclear explosions are allowed, while Mexico maintains they are prohibited by present technology levels, which cannot differentiate between NW and PNE. See Epstein, p.7 for comment and Dhalitz, p.34.

[8] CCD 1476 (1975) Geneva, Section IV, para. 2.

[9] Ibid., para. 4.

[10] Treaty for the Prohibition of Nuclear Weapons in Latin America. The UN and Disarmament, 1945-1965. UN Publication 67.I.8 (1967) pp. 309-322, and see n. 6 supra.

[11] Also published by the Bertrand Russell Peace Foundation Ltd., England 1982.

[12] On this see references n. 6 supra. Alley, op.cit.; p.30 questions the feasibility of a definition for treaty purposes given this uncertainty. Such problems were also alluded to in the Report by the Chair of the Working Group on a South Nuclear Free Zone, p.13, no. 26 (hereafter Report).

capable of releasing nuclear energy in any uncontrolled manner, irrespective of the purported intended use.

The word 'free' also has broad connotations. Alley identifies two possible interpretations: (i) free from - the exaction of a self denial from nuclear powers to threaten actual war (ii) free of — ensuring the absence of nuclear weapons in the zone.[13] Concerning this point, transit through the region and/or the supporting infrastructure may or may not be prohibited.[14] Obviously, there could also be an amalgam of the options.

On the final analysis, it might be said that each of the treaties[15] prohibiting the presence of nuclear weapons within their respective regions, by virtue of their content, have modified, shaped and dictated the meaning the word assumes. Guidelines as to content were put forward by the Mexican delegation to the 1975 Committee on Disarmament discussions as obligations expected of nuclear powers towards nuclear free weapon zones. They were subsequently adopted by the U.N. General Assembly in resolution 3472. All nuclear weapon States must (i) respect in all parts the status of total absence of nuclear weapons as defined in the relevant treaty or convention; (ii) refrain from contributing in any way to actions involving a violation of the relevant treaty or convention; (iii) refrain from using or threatening to use nuclear weapons against States included in the zone.[16] A private Stanley Foundation Conference on nuclear weapon free zones added that the total absence of nuclear weapons included a prohibition of foreign bases, and a legally binding commitment not to threaten or use nuclear weapons against countries in the zone.[17]

It is evident that the acceptability of treaty content will dictate how 'free' the zone actually is.[18] Similar considerations apply to the geographic scope of the treaty, e.g. how far it should extend beyond territorial waters.[19] The legal constraints on these issues will be examined in the second part of the paper.

2. *Treaty Law*

(a) Treaty on the Non-Proliferation of Nuclear Weapons[20]

Two different approaches have been taken to the problem of preventing the spread of nuclear weapons - the nuclear weapon free zone and the Non-Proliferation Treaty - both being supplementary to nuclear weapons test bans.[21] The Non-Proliferation Treaty is part of a tripartite regime designed to prevent or limit horizontal proliferation.[22] Articles I and XI

[13] Alley, ibid.

[14] Fry, *A Nuclear Free Zone for the Southwest Pacific: Prospects and Significance,* Strategic and Defence Studies Centre, Australian National University, 1983, p.2.

[15] The Treaty of Tlatelolco, 1967; Antarctic Treaty 1959; Outer Space Treaty 1967; Sea-Bed Treaty 1970; South Pacific Nuclear Free Zone Treaty 1985 (and see Report).

[16] UNGA, 11 December 1975; Bulletin of Peace Proposals, Vol. 7, No. 2, (1867) pp. 141-2, as cited in Alley, op.cit., p.31.

[17] Alley, op.cit., p.32.

[18] See for example, Report, p.12, no. 25.

[19] This and other questions are addressed in the Report, p.8, no. 127 et seq.

[20] UN Document A/Res/2373 (XXII), 18 June 1968 (hereafter NPT). For an enlightening discussion on the limitations that the concept for Jus Cogens imposes on proliferation, see Gangl, "The Jus Cogens Dimensions of Nuclear Technology", Cornell ICJ, Vol. 13, 1980, p.63.

[21] NWFZ in Africa, p.5.

[22] Dahlitz, op.cit., p.133, includes the IAEA statute and Tlatelolco Treaty.

are, conjunctively, the operative articles, and although their limitations and verification procedures are extensive, weak areas do exist.

There are explicit provisions for the promotion of peaceful uses of nuclear energy.[23] Since achievement of nuclear weapons capability is inextricably linked with the acquisition of nuclear power,[24] it follows that the very foundation and purpose of the Non-Proliferation Treaty is attacked - when a nation gets nuclear power, it gets nuclear weapons capability. Consequently, the net result is the spread of nuclear weapons to non-nuclear weapon States.[25]

There is no express binding commitment by nuclear powers not to use or threaten to use nuclear weapons against non-nuclear weapon States party to the Non-Proliferation Treaty.[26] However, the preamble contains a statement calling on all countries to abide by United Nations Charter provisions obliging States to refrain from the use or threat of use of force. It does not prohibit foreign nuclear bases; in fact it prohibits non-nuclear weapon States from acquiring control over any nuclear weapons on their territory,[27] and it does not prohibit tests of nuclear devices in non-nuclear weapon States. At the Second Review Conference, the Group of Seventy-Seven pointed out that non-nuclear weapon States can transfer nuclear technology to other non-nuclear weapon States allowing the latter to acquire nuclear weapon capabilities.[28]

These clearly reduce the Non-Proliferation Treaty's effectiveness in limiting the acquisition of nuclear weapons.[29] On the positive side, Article VII was introduced to ensure that the Tlatelolco Treaty would not be affected by the success or failure of the Non-Proliferation Treaty,[30] and Alley points out that the obligations under Article VI would be fulfilled by a nuclear weapon free zone.[31] So, although the Non-Proliferation Treaty imposes restraints on the geographical and political spread of nuclear weapons, they are by no means comprehensive.

(b) Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water[32]

The Treaty seeks to prohibit the testing of any nuclear explosive device[33] in the air, sea and outer space, as a first step towards a comprehensive test ban treaty.[34] Article I(1) of the Treaty begins: "Each of the Parties

[23] Articles IV and V.

[24] See NWFZ in Africa, pp. 14-15; Barton, op.cit., p.210; Szegilongi, "Unilateral Revision of International Nuclear Supply Arrangements", 12 International Law 860, as cited in Gangl, op.cit., p.68, n. 35.

[25] For example, Brazil and Argentina.

[26] In fact, the U.K. and the U.S. expressly excluded these provisions from being inserted. See Beres, *Apocalypse Nuclear Catastrophe in World Politics,* University of Chicago Press, Chicago, 1980, p. 221. Furthermore, France and China are not party to the treaty.

[27] Articles I and XI.

[28] NPT/CONF II/C I/2, as cited in Dahlitz, op.cit., p.135.

[29] In addition, several Pacific countries are not party to the NPT, e.g. Vanuatu, Kiribati.

[30] Epstein, *The Last Chance,* Free Press, New York, 1976, p. 207.

[31] Op.cit., p.30. For a review of Article VI, see Epstein, "Non-Proliferation Treaty Article VI: How have the parties met their obligations?" in The Non-Proliferation Treaty Paradoxes and Problems, Marks (ed.), Arms Control Association, Washington D.C., 1975, pp. 88-89.

[32] United Nations, Treaty Series, Vol. 480, 1963 No. 6964, p.43 (hereinafter PTBT).

[33] It would appear all nuclear explosions (NE) are covered — see discussion infra.

[34] See the Preamble and Aricle I(1)(b).

to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control: (a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas; or (b) in any other environment if such explosion causes radio-active debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted".[35]

Setting aside for the moment the jurisdiction/control requirements, it may be possible to conclude, using the ordinary and natural meanings of the words[36] that the use of nuclear weapons is illegal, as is nuclear war, for all parties to the Treaty. First, all nuclear explosions appear prohibited by virtue of the phrase "or any other nuclear explosion", which could negate any claim that the explosion must be for the purpose of testing. Second, each party is obliged "to prevent and not to carry out" an explosion. Clearly, if a State cannot explode nuclear weapons, then their use is illegal. As for preventing nuclear explosions, it could be said that parties are thereby obliged to take all steps to ensure none occur. The best assurance is not to possess any nuclear weapons - which would require disarmament.

Returning to the "control or jurisdiction" limitation, it would apply to ships and submarines, even under the law of the flat,[37] when they were in or on the high seas.[38] As for the oceans themselves, the principles of freedom of the seas and air space over the high seas[39] by their nature appear to preclude, or at least vitiate, any allegation of sovereign control. On the other hand, various States have, at times, cordoned off portions of the high seas for missile tests without objection, giving them de facto control over the areas.[40] In these limited circumstances, and in territorial waters and the air space above, which by definition are under the control and jurisdiction of the State,[41] a party would be subject to the obligations incurred under the Treaty. (Yet an explosion outside their jurisdiction control could be done with impunity.)

The same proposition, viz., prohibition of nuclear war and nuclear weapons use, might be reached through Article I(2) of the treaty in the undertaking "to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear explosion anywhere".[42] It has been said that the mere existence of nuclear weapons encourages their use, so by extension, it could be said the parties are obliged to disarm.

[35] PTBT, op.cit., pp. 45-47.

[36] This interpretation method is in accordance with the advisory opinion of the ICJ of 3 March 1950, dealing with the competence of the General Assembly for admission of States to the UN (ICJ Report 1950, p.8); for a review of problems with this method, and interpretation generally, see Haraszti, *Some Fundamental Problems of the Law of Treaties,* Oxford, 1961.

[37] On the Law of the Flag, see Greig, *International Law,* 2nd ed. London (1976), p.284; Queneudec, "The Peaceful Use of International Maritime Areas", in *The New Law of the Sea,* Rozakis and Stephenson, (eds), New York, 1983, pp. 189.

[38] In fact, this prohibition may extend to nuclear powered ships which run a risk of exploding. However, the risks should be reasonable, not remote, and this intrepretation may be used only in so far as it does not lead to unreasonable results; see ICJ Report 1950, op.cit., pp. 244-245.

[39] See pp. 13-17 infra. The High Seas are "a regime of internalisation by exclusion of all territorial sovereignty", Queneudec, op.cit., p. 189.

[40] Greig, op.cit., p.323 et seq.

[41] See Geneva Convention on the Territorial Seas, 1958.

[42] Cf. PTBT, op.cit. p. 47.

(Of course, such a position is an opinion, and an opposite but equally valid inference could also be drawn.) But, the parties are only obliged to "refrain" from the activities, which may or may not be the same as concrete obligations.[43]

These inferences and conclusions have been reached only through the use of one method of interpretation, ignoring to a certain extent, the context.[44] As the title and preamble of the treaty indicate that the purpose is to ban the testing of nuclear weapons, the conclusions drawn would be tenuous at best. Other methods of interpretation lead to conclusions consonant with the stated objectives. Lastly, only parties to the treaty are bound.[45] For these reasons, it would be unwise to rely on this treaty alone as evidence of the illegality of nuclear weapons use, let alone their possession.

(c) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.[46]

The Outer Space Treaty has little effect on any existing or potential nuclear weapon free zone on Earth, although some of its principles are analogous to the high seas. For example, transit of nuclear weapons is not prohibited, so an inter-continental ballistic missile could pass over a state in outer space[47] without violating international law.[48] Similarly, any claims of national sovereignty in outer space are barred.[49] Article IV precludes nuclear weapons being tested or stationed in outerspace either in orbit or on a celestial body, while Article III directs the parties to act in accordance with international law and the United Nations Charter; so should the status of nuclear weapons be made illegal or affirmed as such parties will be bound to restrain actions in outer space accordingly.[50] Notably, there is no definition of nuclear weapons, so a peaceful nuclear explosion (e.g. for exploration or mining) is not necessarily excluded, and in fact may be explicitly endorsed by Article IV:

"The use of any equipment or facility necessary for peaceful exploration shall also not be prohibited".

However, exploration must be so conducted that "harmful contamination" of celestial bodies is avoided.[51] The narrow extent of these provisions implies that their contribution to exant nuclear weapon free zones on earth is minimal.

[43] Webster's 3rd New International Dictionary (1976) gives as one of the means of "refrain" — to forbear, abstain, p. 1909.

[44] Haraszti, op.cit., p.104 et seq. asserts interpretation must occur in context. See also Article 31, Vienna Convention on the Law of Treaties, 1969.

[45] This is subject to the possibility that the PTBT has gained currency as a rule of customary international law. See discussion post, pp. 18-19.

[46] Outer Space Treaty, reproduced from United States Executive Document D. 90th Congress, 1st Session (February 7, 1967), pp. 15-19 as cited in Glover, *Documents Relevant to Nuclear Arms Control,* University of Canterbury (1984), pp. 501-505.

[47] No definition or indication is given as to when air space stops and outer space begins, but the vertical extent of a NWFZ over territorial air space is clearly limited.

[48] However, military manoeuvres would be prohibited. For similar rules on the High Seas, see discussion post, pp. 13-17 and references noted there.

[49] Article II.

[50] For a summary of the current status of the UNC in relation to NW, see pp. 10-11 post.

[51] Article IX.

(d) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof.

The Sea-Bed Treaty is also of limited relevance, but notably, it extends the prohibition of nuclear weapons stationed on the sea-bed to the twelve mile limit, removing national jurisdiction over the exclusive economic zone in this respect only.[53] Similar to the Outer Space Treaty, nuclear weapons are not defined, again permitting peaceful nuclear explosions. Article IX states that none of the provisions of the Treaty will affect any obligations assumed by Parties also party to a nuclear weapon free zone. Conceivably, this would give double coverage to an exclusive economic zone if sea-bed jurisdiction is claimed in the nuclear weapon free zone.

O'Connell points out several other deficiencies, notably vagueness with respect to "emplant or emplace" and "structures, launching installations or any other facilities".[54] The result is that submarines and submersible delivery systems able to navigate above the sea-bed are permissible, even if designed for nuclear weapons, provided no contact is made with the sea-bed. Perhaps most importantly, installations or facilities not specifically designed for nuclear weapons, but convertible to such use, are not prohibited.[55] The effect of the Sea-Bed Treaty is to create a limited nuclear weapon free zone, with several loopholes enabling nuclear explosive device, and facilities convertible for that purpose, to be stationed on or in this "heritage of mankind".

(e) Charter of the United Nations.[56]

Several provisions of the United Nations Charter, though general in scope, appear relevant to the discussion at hand. In particular, Article 2(3) dictates that members must settle any international dispute peacefully, without endangering international peace and security, while Article 2(4) enjoins all members, in their international relations, to refrain from the threat or use of force against the territorial integrity and political independence of a State or in any manner inconsistent with the purposes of the United Nations.[57]

The weak points are:

(i) the parties may claim the dispute is not international;
(ii) they may claim the dispute does not threaten international peace and security;[58]

[52] Also referred to as The Sea-bed Treaty. Reproduced in International Legal Materials, Vol. 10, 1971, pp. 146-150.

[53] Articles I(2) and II.

[54] O'Connell, *The International Law of the Sea,* Vol. II, pp. 826-829.

[55] Ibid.

[56] For a commentary on the Charter, see Goodrich, Hambro, *Charter of the United Nations — Commentary and Documents.*

[57] Ibid. p.339.

[58] The General Assembly (GA) by virtue of Articles 10 and 11, may discuss any matter relating to international peace and security. In so far as the Security Council (SC) is not exercising any of the functions assigned to it, the GA may make recommendations. The effect of such recommendations in terms of creating a binding obligation on the disputing parties is doubtful (but see Article 21(1), and discussions and references post, pp. 22-25. The SC appears to

(iii) they may claim that there is no dispute;[59]
(iv) Article 2(4) only requires parties to "refrain" from the threat, or use, of force, allowing some manoeuvring room should such threats or force be employed;[60]
(v) threats and/or use of force are permitted in connection with self-defence measures[61] and collective security.[62] Dahlitz points out that the distinctions between offensive and defensive measures or situations are not always obvious, again providing leeway for argument;[63]
(vi) "territorial integrity" and "political independence" are not defined, which permits quite different interpretations, leading to diverse consequences;
(vii) the restrictions apply only to United Nations members.[65]

The list is far from exhaustive but sufficient to point out the deficiencies inherent in arguments that rely on the Charter for asserting the illegality of nuclear weapons. On the positive side, article 52(1) certainly allows, if not encourages, the development of regional arrangements for the maintenance of international peace and security; a role which a nuclear weapon free zone may well fulfil.[66]

(f) The Hague Convention of 1907 (IV) respecting the Laws and Customs of War on Land.[67]

The issue of the legality of nuclear weapons may be examined, jurisprudentially, as a question of whether a new weapon automatically becomes prohibited until legalised (a Calvinistic approach); or, as is generally accepted, legal until expressly prohibited.[68] Yet, accepting the latter view, the mere fact that a weapon is new does not make it lawful it if is contrary to a general rule prohibiting the use of certain types of weapons,[69] or general principles of law recognised by civilised nations which do so implicitly.[70]

have all powers of decision making in respect of the Charter provisions and determination of threats to international peace and security (see Articles 33(2); 34; 36; 37 and especially 39). The five veto powers of the permanent members clearly weaken the SC's ability to determine such a substantive issue (as does the use of the 'double-veto' via Aricle 27(2). For discussion, see further Bassiouni and Nanda, (eds), *A Treatise on International Criminal Law* (1973), Vol. I, p.163 et seq. (Henceforth, Bassiouni).

[59] This is also subject to discussion, supra, n.58.
[60] For a more restrictive interpretation of the word, see supra and n.43.
[61] Article 51.
[62] Articles 2(5), 106 and 107; Chapters VII and VIII.
[63] Dahlitz, op.cit., p.63.
[64] For discussion, see Goodrich and Hambro, op.cit., pp.68-69; Bassiouni, p.164 et seq.
[65] Article 2. But 2(6) enjoins the Organisation to ensure that non-member States comply with the principles in so far as is necessary for the maintenance of international peace and security.
[66] In favour of this proposition see UNGA resolution 3471 (XXX) 11 December 1975; Resolutions and Decisions of UNGA 10th special session, 1978; Remarks by Prime Minister Lange in a speech given in Los Angeles, California, 26 February 1985. As cited in Bulletin of Atomic Scientists, June/July 1985, p.17; contra, see Starke, op.cit. pp.200-201; The Christchurch Press, 2 October, 1985, p.7; ibid, 5 October, p.9.
[67] For a complete record see Scott, (ed), *The Hague Convention and Declaration of 1899 and 1907,* 3rd ed. (1918).
[68] For discussion, see Kelsen, *Principles of International Law,* 2nd ed. (1966).
[69] E.g. the rule with respect to weapons causing unneccessary suffering in the U.S. Department of the Army, Field Manual, The Law of Land Welfare, para. 34 (1956) as cited in Thomas and Thomas, *Legal Limits on the Use of Chemical and Biological Weapons* (1970), p.41. (Hereafter Thomas).
[70] Ibid.

The use of poison and poisoned weapons existed as a prohibition under two separate headings in customary international law, which were fused by codification in The Hague Conventions, (IV), 1907, Article 23.[71]

Although expressly accepted by forty-eight states parties to the Convention,[72] as a rule of customary international law all states are bound to abide by it.[73] Some authors doubt the applicability of The Hague Regulations to nuclear weapons: the reasoning is that nuclear weapons were not in existence at that time, were not contemplated and are therefore excluded.[74] But to maintain this argument is to ignore the principles underlying the rules, namely, civilised and humanitarian concerns.[75] In accordance with these principles, and judicial practice,[76] it is appropriate to consider whether a nuclear weapon and its effects can be classified as poison.

Thomas and Thomas among others, have noted, that 'poison' is rarely defined, and after a critical examination, they proceed to define it as "a substance producing chemically an injurious or deadly effect when introduced into an organism in relatively small quantities".[77] It is widely agreed that nuclear explosions generate a blast effect, a heat explosion, and emission of radioactive radiation, with the fallout creating deferred radiation.[78] If left to a tribunal of fact, which would decide on the basis of expert opinion, it is uncertain if the effects may be equated with poison; but Schwarzenberger concludes that since all fallout destroys life and/or injures health, including future generations through deleterious changes in body chemistry, there is at least a strong case for it being considered a poisonous substance.[79] In fact, one author has accepted that radioactivity can cause poisoning.[80]

If poisonous gases are emitted from nuclear explosions, which is possible, then nuclear weapons would clearly fall under The Hague Regulations.

[71] Ibid. p.49; Lawrence, *The Principles of International Law* 3rd ed. (1909) p.438; Schwarzenberger, *International Law and Order* (1971), p.199.

[72] Scott, op.cit., pp.129-132.

[73] The Hague Conventions IV (1907). Article 2 states: "the provisions . . . do not apply except between contracting powers and then only if the belligerents are parties to the Convention". This appears to be an attempt to restrict the CIL rules the Convention is codifying. For discussion, see Thomas, pp. 78-79; "Judgement of the Nürnberg Tribunal", 30 September 1946 from an excerpt in Bassiouni, p.614.

[74] See McDougal and Feliciano, *Law and Minimum World Order* (1961); Stone, *Legal Controls of International Conflicts* (1959) both as cited in Thomas, p.55; cf. Schwarzenberger, op.cit. pp.199-200 Vitanyi, "Military Weapons and Targets Forbidden by International Public Law", in *Contribution to the Study of Problems of Disarmanent* (1978); Haraszti, "On the Problem of the Prohibition of Weapons" in *Questions of International Law* (1962).

[75] Thomas, p.49. For a review of the position, see Schwarzenberger, op.cit., p.195 et seq.

[76] The *Shimoda* decision followed this line of thought; the court concluded the effects of NE could be classified as poison. The plaintiff took the line of Schwarzenberger et al. in n. 75 supra, whearas the defence agued with Stone and McDougal. See Falk "The Shimoda Case: A legal appraisal of the atomic attacks upon Hiroshima and Nagasaki", AJIL 59 (1965), 759 et seq.

[77] Thomas p.50, cf. Schwarzenberger op.cit., p. 194 "a substance that when introduced or asorbed by a living organism destroys life or injuries health".

[78] Report by the Secretary General of the UN on "Effects of Possible Use of Nuclear Weapons" (A 6858, 1967) as cited in Bassiouni op.cit., p.338 and Schwarzenberber, op.cit. p.193.

[79] Schwarzenberber, op.cit., p.199.

[80] Schubert, "Approaches to Treatment of Poisoning by Both Radio-active and Non-radioactive Elements Encountered in Atomic Energy Operations", Proceedings, Vol. 13, p.274, as cited in Standard, op.cit., p.30, n.7.

However, the divergence of opinion[81] makes this a tenuous and unsatisfactory basis for asserting the illegality of nuclear weapons use.[82]

3. *The Law of the Sea*

(a) The High Seas

There is one basic principle that lays the foundation for all activity in, on and above the high seas; as Standard writes: "Freedom of the High Seas is today recognised by all authorities on International Law, without exception, as a fundamental precept of the rules of law which have developed to guide peacefully and with justice the relations between the nations of the earth".[83] Despite its genesis, development and consolidation in customary international law, it has been formally recognised in The Geneva Convention on the High Seas 1958,[84] and United Nations Convention Law of the Sea III, 1982.[85] Yet both treaties contain the further stipulation that the freedom is not unlimited, but subject to international law and a reasonable regard for other States' interests in their exercise of the freedom of the seas.[86] Unfortunately, the problems attendant upon undefined terms plague the treaties, with the result that State practice must be examined to shed light on the meaning of 'reasonable regard'.[87]

Some indication of what is considered reasonable may be gleaned from missile testing on the high seas. There have been, and still are, various test programmes conducted on the open sea. Although all tests are not unlawful per se,[88] they necessitate the establishment of danger or warning areas, which are not stated as claims of right to exclude others (but have this as their practical effect). Rather, it is said the areas are "predicated on the principles of voluntary compliance", and "these areas are generally observed".[89] If true, it evinces a state practice which regards some de facto closure as reasonable, but it is clear that if interference with freedom of navigation was appreciable, closure would become illegal.[90]

The issue of nuclear tests is a different matter. Although any signatory to the partial test ban treaty is prohibited from conducting tests in or on

[81] Noted supra, p.12, no.74.

[82] Restrictions of time and space preclude a similar discssion on the Geneva Protocol of 17 Juine 1925, but it is subject to the same polemics. See Schwarzenberger, op.cit., p.200 et seq. for discussion.

[83] Standard, "Impact of Atomic Explosions on International Law" in *Contribution to the Study of the Problems of Disarmament* IADL, (1958), p.32. For concurring statements see e.g. Greig, op.cit., p.317 and O'Connel op.cit. Vol. I, chapter 1 for a brief history on the concept.

[84] Article 2. Found Oda, *The International Law of the Ocean Development, Basic Documents* (1972), Vol. I, p.2.

[85] United Nations Convention on the Law of the Sea, III, 1982 Article 87. See Simmonds, *UN Conference on the Law of the Sea,* 1982, Oceana Publications, New York, 1983. UNCLOS III has not yet come into force. Nonetheless, it is still regarded as representing, to a great extent, the present status of the Laws of the Sea. See generally, O'Connell, op.cit., Vol. I and II.

[86] Article 2 Geneva Convention; Combination of Articles 88 and 301, UNCLOS III.

[87] See Greig, op.cit., p.316; Bowett, *The Law of the Sea,* Manchester University Press, 1967, pp.49-50.

[88] See Greig, op.cit., p.323; Bowett op.cit. p.49; O'Connell, op.cit. Vol. II, p.809. "The use of the High Seas for any practice and testing of weapons is only an aspect of the freedom of the seas, and hence it cannot justify the enclosure of areas of High Seas solely for that purpose".

[89] Whiteman, Digest, Vol. 4, p.547, as cited in O'Connell, op.cit. Vo. II, p.810.

[90] As in perhaps a NE with the effect of excluding all people for health reasons. See further, O'Connell, op.cit. Vol. II, p.809.

the high seas,[91] a non-party may still be legally entitled to do so via a claim based on preparation for self-defence. O'Connell identifies two aspects of the nuclear test problem: (1) the right to use the high seas for detonation of nuclear explosive devices; (2) the right to prevent shipping from entering the fallout area.[92] The latter problem was considered above.

On the former, Bowett considers that the determinant of lawfulness is: "the causing of injury to other States and their nationals, to a degree that outweighs any reasonable assessment of the value to the [State] protecting its own interests in security".[93] Although Greig concurs with this test, he contends that included in the scope of reasonable is the right, in some situations, for a State to carry out large scale nuclear explosive device tests on the high seas.[94]

One immediately looks to prohibition on polluting the seas as a basis for refuting the argument, but Article 25(2) of the High Seas Convention[95] merely requires that States "cooperate in taking measures for the prevention of pollution of the seas or air-space above, resulting from any activities with radioactive materials".[96] Still, there exists a general rule of international law that no sovereign has the right to so pollute the seas as to impair others' rights to traverse the high seas and take its riches.[97] The resulting radiation would certainly preclude free passage, and although the extent of damage may be difficult to ascertain, pollution of the fisheries would be unavoidable.

Furthermore, in *The Trail Smelter* case,[98] the United States was indemnified for damage to the State of Washington as a result of sulphur fumes emitted from the smelter in Canada, the legal grounds for recovery being the right of a sovereign state not to have its air polluted by dangerous fumes.[99] It has been established that clouds of radioactive fallout from atmospheric nuclear explosives may circle the globe before finally settling,[1] and clearly this is pollution of sovereign airspace by dangerous fumes. Article 25(1) of the High Seas Convention prohibits the dumping of radioactive waste in the high seas.[2] O'Connell notes that to the extent radioactive fallout may be likened to dumping, this treaty prohibition would be in addition to the partial test ban treaty.

Finally, the lawfulness of nuclear explosives must be considered in light of the provisions of United Nations Convention Law of the Sea III.[4] Queneudec is of the opinion that Article 88, which reserves the high seas for peaceful purposes, is a new element in the law of the sea.[5] His assessment

[91] Article I(1)(a), PTBT.
[92] O'Connell, op.cit, Vol.II, p.810.
[93] Bowett, op.cit., p.49.
[94] Greig, op.cit., pp.323-324. See also McDougal and Schlei, *Studies in World Public Order,* (1960) p.763 et seq. for arguments in favour of the legality of NW tests.
[95] Geneva Convention on the High Seas, 1958.
[96] Ibid, in Oda, op.cit., p.13.
[97] Standard, op.cit., p.34; O'Connell op.cit., Vol. II, p.810.
[98] 3 U.N. Rep. International Arbitral Awards, 1905, 1965 (1938-41), as cited in Standard, op.cit., p.31.
[99] Ibid.
[1] Miyake, "Radioactivity in Rainwater and the Air Observed in Japan, 1954-1955", Proceedings, Voo. 13, p.345, as cited in Standard, op.cit., p.31.
[2] See n. 96, supra.
[3] O'Connell, op.cit., Vol.II, p.813.
[4] See no. 85, supra.
[5] Queneudec, op.cit., p.187.

of the obligations generated thereunder is that 'peaceful use' entails a prohibition on aggression, exclusive of military activities and the right of legitimate self-defence granted by Article 51, United Nations Charter. The new law of the sea appears to contain no elaboration on the status of nuclear explosives or nuclear weapons over and above the existing rules.

The issues canvassed tend to reveal that the opinion of the international community weighs against nuclear tests in the atmosphere, including on the high seas. Nevertheless, latitude remains for the proposition that a test would be legally justified in certain circumstances, and transit of ships or aircraft and any weapons they may carry is most probably lawful.

(b) International Straits

The status of international straits is identical to that of the high seas, with the exception that Article 14(6) of the Territorial Sea Convention requires submarines "to navigate on the surface and show their flag".[6] In contrast, Article 38(2) of United Nations Convention Law of the Sea III contains no such restriction,[7] allowing a nuclear submarine to pass through an international strait submerged. Another notable difference in the new treaty relates to the right of innocent passage: whereas under the Territorial Sea Convention, Article 16(4), the right of passage exists only insofar as it is innocent, in the new law of the sea this stipulation no longer exists with respect to straits used for international navigation.[8] Conceivably, the rights attendant upon innocent passage previously accorded to coastal states (e.g. the authority to exclude warships[9]) will be terminated. The effect is that any rights of exclusion from territorial waters[10] have been removed by the creation of international straits.

(c) Territorial Waters

Articles 14 to 23 of the Territorial Sea Convention[11] deal with the rights of innocent passage. Article 14(4) stipulates that "passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal State".[12] The Convention excludes public vessels from the jurisdiction of coastal states, but Greig contends it is still possible, under general international law, that for "an act flagrantly prejudicial to the security of the coastal State, jurisdiction could even be exercised over a foreign warship".[13] He does not, however, elaborate on what acts could constitute "flagrantly prejudicial".

The possibility exists that a State could assert that the presence of a nuclear-armed, or even propelled, ship was prejudicial to its "good order" and exclude the ship from its territorial waters.[14] The other obligation incurred under Article 14(4) is that passage must be in conformity with

6 Geneva Convention on the Territorial Seas, 1958, in Oda, op.cit., p.5.
7 Simmonds, op.cit., p.B39.
8 Articles 37 and 38(1) UNCLOS III.
9 This authority is claimed by some States. See further Bowett, op.cit., pp.6-9.
10 See discussion infra.
11 See n. 105, supra.
12 Ibid.
13 Greig, op.cit., p.292 et seq.
14 Under Article 23 of the Convention. Greig argues that contravention of State laws covered by Article 17 would give the wronged State powers of arrest, pp. 292-293. This would be relevant to New Zealand should be proposed nuclear weapon ban legislation be enacted.

other rules of international law. Should the claim that nuclear weapons are illegal be accepted, the repercussions for nuclear weaponed ships needs no elaboration.

Finally, it must be said that some States have made reservations to the Convention, to the effect that their understanding was Articles 14 and 23 could not "in any sense be interpreted as establishing a right of innocent passage for warships through territorial waters".[15] On the other hand, several states contended that the absence of any express provision had the effect of retaining the existing rule that warships do have a right of innocent passage.[16] Lack of agreement on this issue is fatal to assertions that inherent in the law of the sea is an effective nuclear weapon free zone.

4. *Customary International Law*

(In light of the broad scope of customary international law and the limitations of this article only some of the major issues will be canvassed.)

A primary reason for the universally binding nature of customary international law is its reflection of current standards in the world community; but it is precisely this reflection which is its downfall. To assert that current legal standards are consonant with State practice begs the question 'by what criteria are these standards evaluated?' Underlying the reply are further questions: need there be unanimity of practice, and if not, are those States not conforming to the practice bound by it? How and why is this so?

In response to the first issue, it is well established that existence of a customary international law rule is determined by evidence that:

(i) States act in accordance with the purported rule; and
(ii) the actions were undertaken because they were regarded as legal obligations.[17]

Answers to the latter questions pose real difficulties for they are somewhat vague. The act required may merely be a verbal statement,[18] or may include verbal statements.[19] There may be a substantial number of states required,[20] or only one,[21] and surprisingly, the lengthy time span implied by 'customary' is not necessarily required.[22] As for legal compulsion being the basis of the act, proof of such is extraordinarily difficult.[23] At least for acts inconsistent with national interests, it is rare for any state to declare legal compulsion as the reason.[24]

[15] Greig, op.cit., p.296.
[16] Ibid. Also on express v. implied provisions see the dispute concerning poisonous weapons; n.68 supra.
[17] On this, see Greig, op.cit., p.17 et seq.
[18] In the *Nuclear Tests* case ICJ Rep. 1974, p.457, a unilateral declaration of France was held binding. For a discussion of the implications for CIL see Sohn, AJIL, 1975, p.310.
[19] *Fisheries Jurisdiction* case, ICJ Rep. 1974, p.48.
[20] Ibid., where the practice of 24 States was held insufficient.
[21] E.g. Norway's unique boundary system. See *Anglo-Norwegian Fisheries* case, ICJ Rep. 1950. p.139.
[22] For example, Greig at p.25 cities the establishment of national sovereignty over air-space as taking only six years.
[23] See Greig op.cit., p.25 et seq; Dahlitz, op.cit., pp.96-7, 106-7.
[24] It is acknowledged that legal justification is often employed by States as vindication for actions consonant with national interet.

The difficulty in asserting that a State is bound by a rule it has not necessarily acceded to, is further compounded when the purported customary international law rule is incorporated in a treaty to which the State is not party. The Vienna Convention directs that the mere inclusion of a provision in a treaty does not exclude the possibility of its becoming customary international law, thereby recognising treaties may codify existing law in addition to creating specific obligations.[25] Dahlitz considers that within the category of nuclear arms control, given the divergent views of States on the status of nuclear weapons, it is quite unreasonable and unrealistic to expect a State to be bound by a treaty provision it has not acceded to, and for this reason, customary international law is "not suited for the establishment of the rights and duties of states in relation to nuclear arms control, or any other vital issue of international peace and security".[26]

It is difficult not to concur; yet it is foreseeable that convergence and consolidation of world opinion on the status of nuclear weapons may, in future, make customary international law a viable method for establishing those rights.[27]

(a) General Principles of International Law

Article 38(1)(c) of the International Court of Justice Statute recognises that general principles of international law can be evidence of a rule of international law.[28] Nevertheless, dispute remains: some authors maintain these general principles are part of international law only in so far as they are embodied in treaties or recognised by state practice, while at the other end of the jurisprudential spectrum, a stance based on natural law is taken.[29] The legal principles adverted to govern weapons and methods of warfare, but despite containing an ethical element, they have been judicially employed.[30]

The Hague Regulations prohibiting unnecessary suffering and treacherous wounding or killing of individuals[31] are based on principles of humanity,[32] as are the Geneva Red Cross Conventions of 1929 and 1949, and the St Petersburg Declaration of 1868.[33] Other principles, as listed by Thomas, are: military necessity; chivalry; reprisal; and self-defence.[34]

From these sources crystallises the notion that the civilian population is not a legitimate object of warfare. The argument continues that any weapon which fails to discriminate between combatants and non-combatants is illegal. However, Schwarzenberger argues that attempts to prove this inviolability have a tendency to oversimplify the functions of both general considerations and the specific rules used for this inductive process.[35] After

[25] Vienna Convention op.cit., Article 38.
[26] Dahlitz, op.cit., p.97.
[27] See, for example, the various legal claims in various countries on the legality of NW, summarised in *Disarmanent Campaigns,* Vol. 37, October, 1984.
[28] Statute of the International Court of Justice, in Goodrich op.cit., p.373.
[29] Thomas, p.187.
[30] For example, in the Nuremburg Trials.
[31] Article 23(b) and (e), Hague Convention of 1907 (IV). See n.67 supra.
[32] Thomas, p.49. On the Humanitarian Law of Armed Conflict, generally, see Bassiouni, Chapter VIII, Part III.
[33] Schwarzenberger, op.cit., pp.188-189.
[34] See n. 131 supra.
[35] See n. 132. For example in total war, all civilians are involved in the struggle to further military prowess — and as such cease to be non-combatants and therefore are ligitimate

an examination of these rules, he considers it highly doubtful that their primary rationale is the protection of civilians.[36]

The tenet is further undermined by the use of 'terror tactics' in World War II - for example, Blitzkreig bombing to demoralise civilians. Indeed, this was even recognised at Nuremberg: "Technological advancement in weapons and tactics used in the actual waging of war may have rendered obsolete or inapplicable certain rules relating to the actual conduct of hostilities and what is considered legitimate warfare".[37]

State practice, evidenced by the failure of the Nuremberg Tribunal to raise the issue as a crime, may have usurped any value these rules possessed. On the other hand, some authors still contend that the rule remains despite the violations, covering a very limited segment of the civilian population capable of being labelled non-combatants and legally immune from attack.[38] This class constitutes a prohibited target and therefore a nuclear weapon free zone, but clearly, problems such as isolating them from the rest of the community render this impractical.

(b) Subsidiary Sources

(i) Judicial Decisions

Judicial decisons, not binding on the International Court of Justice,[39] still offer evidence of rules of international law.[40] In *The Shimoda Case*[41] the plaintiffs argued that the use of the atomic bomb in World War II was a violation of customary and conventional law. Despite the court's attempts to limit the case to the legality of the two instances of nuclear weapons use,[42] most of the admissible evidence was general in nature, relating to the use of weapons with certain characteristics. Falk argues that the issue was thereby extended to one of general legality.[43] Seeming to support this argument the court concluded that the decisive consideration underlying the evidence was whether weapons caused unnecessary suffering and were cruel in their effects. In their opinion, the answer, with respect to nuclear weapons, was in the affirmative.[44]

In the *Corfu Channel (Merits)* case[45] the International Court of Justice held that the tortfeasor state had broken a customary international law obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other states".[46] In the *Trail Smelter* case a similar proposition was employed.[47]

targets. See Thomas, pp. 201-202; Bindschedler Robert, section 3, Chapter IV, Part III, in Bassiouni, pp. 304-318.

[36] Schwarzenberger, op.cit., pp.189-190.

[37] Excerpt from the *Farbon Trial,* 10 Law Reports of Trials of War Criminals 49 (1947), as cited in Thomas, p.202.

[38] See Thomas p.203 et seq; Schwarzenberger, pp. 190-193.

[39] Article 59, ICJ Statute, Goodrich op.cit., p.376.

[40] Ibid, Article 38(1).

[41] Found in Talk, "The Shimoda Case", op.cit., p.759 et seq.

[42] I.e. the attacks on Hirshima and Nagasaki: 6 and 9 August 1945 respectively.

[43] Falk, op.cit., p.769.

[44] Ibid., p.775.

[45] ICJ Rep. 1949, 4.

[46] Ibid, p.22.

[47] See n.98, supra.

By extrapolation, if the testing, storage or use of nuclear material causes injury to the life, health or property of foreign nations, then the culprit State could be liable.

In the *Nuclear Tests* case, Australia and New Zealand sought, inter alia, a declaration that the rules of customary international law prohibited atmospheric nuclear explosive device tests, but the Court declined to rule on the matter.[48] Dahlitz contends that the evidence prepared by the applicants, with respect to customary international law, "was unassailable".[49] With China still conducting atmospheric tests, it may yet be possible to obtain a decision on the issues raised from the International Court of Justice.

(ii) United Nations General Assembly Resolutions

There has been a plethora of United Nations resolutions on the topics of nuclear weapons, nuclear explosive devices, and nuclear weapon free zones. In the *Nuclear Tests* case, twenty General Assembly resolutions were referred to by the applicants, all condemning nuclear tests.[50] But the Court avoided making a determination on the value of General Assembly resolutions for the creation of legal norms. Since the General Assembly is a forum of debate for the international community, it is obvious that an indication of consensus among nations upon a particular subject may be inferred from the records.[51] The International Court of Justice in *The Reservations* case,[52] was influenced in the decision reached by the "profound divergence of views" expressed in the course of debate by a subcommittee.

Yet, though there may be universal acceptance of a resolution, states do not necessarily intend by their actions to create legal obligations. Nevertheless, as one judge stated in referring to international conferences and organisations, "[it could not] be denied, with regard to the resolutions which emerge therefrom, or better, with regard to the vote expressed therein in the name of States, that these amount to precedents contributing to the formation of custom".[53]

Perhaps the most important resolution of the General Assembly was resolution 1653 (XVI) 24 November, 1961, which declared, inter alia: that the use of nuclear weapons is contrary to the spirit, letter and aims of the United Nations and a violation of the United Nations Charter; that their use is contrary to the rules of international law and the laws of humanity; and any State using nuclear weapons commits a crime against humanity. It was passed by a vote of fifty-five for, twenty against, twenty-six abstentions and three absent. Such a majority in favour of a statement declaring the use of nuclear weapons illegal would by implication, appear to bind states. Since 1961, several other resolutions in affirmation or support of resolution 1653 have also been passed.[54] One could contend that "the United Nations has made it clear that a greater than two-thirds majority of the General

[48] ICJ Rep. 1974, p.253.
[49] Dahlitz, op.cit., p.104.
[50] As cited in Dahlitz, op.cit., p. 104.
[51] It is recognised that various other factors limit the reliance which may be placed on such records.
[52] ICJ REP. 1951, 15.
[53] Judge Ammoun, *Barcelona Traction* case, ICJ Rep. 1970, p.303.
[54] E.g. Res. 1909 (XVIII) UN Document on Disarmament 1963, p.626; Res. 2289 (XXII), ibid, 1967, pp. 626-7.

Assembly regard initiating the use of nuclear weapons as illegal and criminal".[55]

There have also been numerous resolutions calling for preparations for the establishment of various nuclear weapon free zones.[56] Yet, among others, Epstein is of the opinion the General Assembly resolutions are not legally binding and therefore a nuclear weapon free zone should be embodied in a legally binding document.[57]

(iii) Unilateral Declarations

In the *Nuclear Tests* case, a majority of the court held that a unilateral declaration by France, stating their intention to cease atmospheric tests, was legally binding.[58] But in a strong joint dissenting opinion, four judges considered this not nearly so legally secure "as would result from a declaration by the court".[59] The legal grounds on which the court based its decision have been widely questioned, some critics contending that it accords unilateral declarations the same status as treaties.[60]

However, the court was careful enough to distinguish between unilateral declarations that were legally binding, and those that were not: "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking".[61] There are several problems inherent in this test, foremost of which is how one determines when a state has the requisite intent. Moreover, no State could be certain that a declaration would not, at some future date, be held to a legal obligation - a status it may or may not intend, and even want left undetermined.

Relevant to this uncertainty are the positive and negative security assurances given by the major nuclear powers in various resolutions.[62] One such assurance is not being the first to use nuclear weapons, undertaken by China and the USSR. As Dahlitz points out, nuclear weapons were used in World War II, so *pro tanto*, the assurances hold no meaning; but irrespective of textual ambiguities, the circumstances in which the statements were made suggest the States intended to be bound.[64] Unfortunately, we may only discover their actual legal status after a nuclear war. As a legal obligation, unilateral declarations are weakest when they are needed most. Shrouded in uncertainty, they provide meagre assurance for those wishing to rely on them.

(iv) Rules Derived from the Fourth Law-Creating Process

[55] Falk, "Renunciation of Nuclear Weapon Use" in *Nuclear Proliferation: Prospects for Control,* Boskey and Willrich, (eds), 1970, p.134.

[56] E.g. GAR 347 (XXX) 11 December 1975, calling for the establishment of a SPNWFZ.

[57] NWFZ in Africa, p.15. On the weight to be given GA resolutions, see Castaneda, *Legal Effects of UN Resolutions* (1969); Sohn, "Voting Procedures in UN Conferences for the Codification of International Law", AJIL, Vol. 69, p.310.

[58] ICJ Rep. 1974, p.253 at p. 268.

[59] Ibid, p.320.

[60] Dahlitz, p.113, n.7; see also Greig op.cit., pp.452-56; Rubin, "The International Legal Effects of Unilateral Declarations", AJIL, Vol. 71, 1977, p.1.

[61] ICJ Rep. 1974, p.267.

[62] S.C. Res. 255, 1968; during SSDI; and presented to the Committee on Disarmament, CD/133 and CD/139, 1980.

[63] See Dahlitz, op.cit., p.61-62.

[64] Ibid., pp. 63-65.

Two general principles are regarded as being fountains of legal precedent, viz. 'laws of humanity' and the 'dictates of public conscience'.[65] The proponents of this theory call in aid the de Martens clause,[66] statements in the Nuremburg trials,[67] the *Corfu Channel* case,[68] and General Assembly resolution 1653.[69] Crucial to the argument is the jurisprudential position that the essence of war is the breakdown of all order;[70] therefore, restraints placed on the conduct of belligerents have as their purpose the minimisation of human suffering. Some new weapons are covered ~~by~~ this ethical/quasi-legal rule by virtue of their inhumane effects and abhorrence to mankind. Use of such weapons results in 'crimes against humanity' and 'violation of the public conscience'.[71]

Conversely, the majority of authorities embrace a different conception of war - rather than being anarchy, war is a means of effecting change in the world order. Rules of warfare ensure a minimum order is maintained. Hence laws of warfare are derived from traditional sources.[72] In addition, it is contended that the de Martens clause, being in the preamble, was not intended as a legal obligation, could not be of universal application since it is part of a treaty binding only on parties to it,[73] and is historically discounted as a law creating process.[74] Such compelling dissent makes the claims for the existence of a fourth source of international law of dubious reliability, and clearly unsuitable as a basis for asserting the illegality of nuclear weapons.

5. *Conclusion*

One would be overextended, even from a gestaltic and liberal view, to conclude that the provisions and rules embodied in the treaties and customary international law reviewed above, embody a nuclear weapon free zone, in the South Pacific or anywhere. Certainly there are some prohibitions - but there are also a great number of loopholes. To assert that a zone existed amidst such controversy would merely be inviting argument and adversity - for such a claim would jeopardise the stature of international law. Any such assertion could clearly be met by a diametrically opposed but equally valid proposition, merely serving to emphasise and reinforce the ambiguity in the law as it now stands.

The value of a legal system is proportional to its certainty and ability to settle disputes. On such a politically sensitive issue, adjudication by the International Court of Justice, if attempted, would most likely be ignored,[75] resulting in International Law's role as a moderator of international conduct

[65] These are not the same as the general principles of law referred to in Article 38 of the ICJ Statute. See Singh, *Nuclear Weapons and International Law* (1959) as cited in Thomas, p.188; Vitanyi, op.cit., p.42.

[66] The last paragraph in the preamble to the Hague Conventions (IV) 1907, see Scott, op.cit., p.100.

[67] Judgement of the International Military Tribunal of Nuremburg. Cmd. 6964 (1946) p.45.

[68] See n.144.

[69] GAR 1653 (XVI), 24 November 1961.

[70] This is reinforced by UNC provisions calling for peaceful resolution of all conflicts.

[71] Thomas, p.189.

[72] For a fuller treatment of this argument see Thomas, pp. 188-192.

[73] Cf. discussion supra. p.12.

[74] See Schwarzenberger, op.cit., pp. 185-188.

[75] See Greig op.cit., p.893; and see the recent U.S. reaction in The Christchurch Press, 9 October, 1985, p.10 to the ICJ decision concerning Nicaragua.

being undermined - as also would the international community's faith in the Court as a forum for dispute settlement.[76] The consequences of such a predicament are potentially unsettling to the international legal order.

In contrast with these morbid projections, obligations incurred under Article VI of the Non-Proliferation Treaty and Article 52(1) of the United Nations Charter by the respective parties would quite arguably be fulfilled by a South Pacific Nuclear Weapon Free Zone. Moreover, a nuclear weapon free zone is complementary to the Non-Proliferation Treaty,[77] and the pair coextensively with the partial test ban treaty, would go a long way towards establishing a global nuclear weapon free zone; at the least, it would certainly be a major nuclear arms control achievement. Given the requisite political desire and climate, such a zone would be a most favourable step towards regional and global security since it would consolidate the role International Law plays in regulating international relations.

III. FEASIBILITY

1. *Introduction*

The possibility of a nuclear weapon free zone in the South Pacific has long been heralded in political circles, albeit spasmodically.[78] Whether these proclamations were sincere or merely done for political kudos is not germane to this paper; but their basis in legal truth clearly is. Some limitations to such a proposal were indirectly touched on in the previous section, while others have not yet been canvassed. The purpose of this section then, is to investigate the existence, nature and scope of any limitations. That the possession and even use of nuclear weapons is legal becomes axiomatic for the purposes of this discussion.

2. *The ANZUS Treaty*[79]

The ANZUS alliance has been said to lie at the heart of South Pacific defence arrangements authorised by Article 51, United Nations Charter. It has also been said to be merely an arm in the global deterrence strategy of the United States.[80] Yet in 1975, Prime Minister the Right Honourable Wallace Rowling said that "New Zealand's proposals for a nuclear weapon free zone in the South Pacific in no way cut across the ANZUS alliance".[81] Whatever has been said, the purported obligations undertaken by the parties to accept, or at least not exclude, nuclear weapons can only be determined through scrutiny of the relevant article.

The preamble, and several articles, refer to the "Pacific Area" which, being a vague and general term,[82] will include the South Pacific. Article I restates and reaffirms the obligations of the parties undertaken as United

[76] See the effect of the Nuclear Tests case as reviewed by Dahlitz, op.cit., pp.102-108.

[77] But not for the non-parties to the Treaty in the area; Australia, Fiji, New Zealand, Papua New Guinea, Tonga, Tuvalu and W. Samoa and parties; and see n.29 supra.

[78] See for example GAR 3477 (XXX) 11 December 1975; statements by Rowling in 1975, printed in the New Zealand Herald, 13 March 1976. (Hereafter Rowling).

[79] Security Treaty between Australia, New Zealand and the United States of America, Starke, op.cit., p.243-245.

[80] Ibid., pp.3, 153.

[81] Rowling, 1975. This was recently reaffirmed, see Lange op.cit. n. 86.

[82] It is interesting to note the ambiguity in defence arrangements to make a 'threat' credible, in contrast with peace zones or NWFZ which must be rigorously delineated.

Nations members, so any defensive actions are limited by the Charter.[83]

Article IV is the operative provision, requiring parties to act in response to an armed attack on any of the parties. It is based on the right to self-defence under Article 51 of the United Nations Charter. Interpretation of "armed attack" must be made with reference to the Charter, so that an attack provoked by a state's own military activity would make the attack justifiable, and hence the requirement for other parties to respond, void. Starke points out that it is arguable that the presence of nuclear-powered or armed ships constitutes military activity provoking an attack, so that Australia and New Zealand would not be obliged to react.

Obligations to "act" in response to an armed attack do not necessarily entail the use of force. Thakur considers it unclear whether a nuclear threat by the United States would be mandatory or permissible, and whether they could make a unilateral decision on this.[85] On the other hand, Starke concludes that the principle of good faith enjoins the parties to react appropriately even though each party has the right to determine what action it will take, with the exception that the resort to nuclear weapons may well be limited to those situations where a State's 'very survival' is at stake.[86]

The right of the United States to determine unilaterally the question of and proceed with employment of its nuclear deterrents was not disputed by Australia and New Zealand. In 1963, the Australasian partners were vigorously opposed to denuclearisation of the South Pacific.[87] Today the policies have shifted one hundred and eighty degrees.[88] The different positions have grave implications: the stance adopted in 1963 meant there was no limitation on nuclear weapons; conversely, the United States suffers today. The general, open terms of the Treaty allow either position, conceivably placing no restriction on a South Pacific Nuclear Weapon Free Zone.

In the preamble and Article VIII, it is stated that the arrangement is necessary "pending the development of a more comprehensive system of regional security in the Pacific Area".[88a] It has been argued that a nuclear weapon free zone would increase both regional and global security,[89] so it would be cause for termination of the agreement. However, Article VIII also contains the stipulation that the United Nations must develop a more effective means of maintaining international peace and security. Moreover, no guidance as to which authority will determine the extent of developments is given. Presumably it would be the ANZUS Council, although unilateral decisions cannot be ruled out.

Thakur notes that there is no clause obliging either South Pacific partner to be an accomplice to United States nuclear policies, but points to three arguments against this, all arising through a broad treaty interpretation: (1) Article V includes armed forces and public vessels or aircraft, which

[83] See discussion supra, pp. 10-11.

[84] Article V gives some guide to 'armed attack', but it is by no means exhaustive.

[85] Thakur, *In Defence of New Zealand: Foreign Policy Choices in the Nuclear Age,* Pamphlet 46, NZIIA, Wellington, p.34.

[86] Starke, op.cit., pp. 130-132. How NW use will insure survival is not elaborated — the converse seems more likely.

[87] Ibid., pp.230-231.

[88] See Lange, op.cit. n.66.

[88a] ANZUS Treaty in Starke, op.cit., pp.243-4.

[89] See n. 66 Supra.

means United States navy ships are included in ANZUS. If a category of craft not specifically listed can be excluded by a unilateral interpretation, then all categories could be taken off the list;[90] (2) consistency in interpretation of the provisions dictates that a narrow interpretation denying visiting rights would mean there was no obligation to defend rather than consult - making the alliance valueless. If a broad interpretation is used, then defence is required and nuclear ships must be allowed; (3) the Memorandum of Understanding on Logistic Support of May, 1982 between the United States and New Zealand under which the latter agreed to provide assistance to United States ships could be said to include nuclear ships.[91] But this is legally binding only if it has become regional customary international law. Determination of this issue entails considerations similar to those relating to General Assembly resolutions,[92] and the result is therefore of doubtful value.

3. *Restrictions on other Members or Potential Members*

There are no other restricting military alliances within the region, but several potential nuclear weapon free zone members are under foreign control. Guam is an unincorporated territory of the United States and is regarded as militarily valuable.[93] The Northern Mariana Islands have 'commonwealth' status with the United States, which leaves all defence matters in American hands.[94] Also defence matters of Palau, the Federated States of Micronesia and the Marshall Islands, including the right of nuclear weapons storage, overflight and transit, are under United States control by virtue of the Compact of Free Association.[95] French Polynesia, which includes Mururoa and Fangataafa are considered in French law to be part of France and not overseas colonies.[96] No elaboration is needed to conclude that these areas will be unable to comply with any proposed nuclear weapon free zone prohibitions; consequently, they must be considered excluded from the zone. In contrast, Vanuatu's Parliament adopted a resolution in 1982 banning anything and everything nuclear, so it is already a nuclear weapon free zone.

4. *Nuclear Arms Control Agreements*

In so far as other treaties prohibited nuclear weapons,[98] similar provisions in a nuclear weapon free zone may be deemed superfluous. Against this, it can be said that they reinforce, codify, or crystallise customary international law. The previous section dealt with the relevant nuclear arms control treaties in detail; their relevance to feasibility is summarised here for convenience.

The architects of the Non-Proliferation Treaty were unable to jeopardise any nuclear weapon free zone efforts undertaken in future, for they had to accommodate the existing nuclear weapon free zone in Latin America.

[90] Against this, a NWFZ only prohibits NW, not nuclear ships. This applies to point (2).
[91] Thakur, op.cit., pp. 128-29; see also n. 86.
[92] See Section II 4(b)(ii) supra.
[93] Fry, op.cit., p.15.
[94] Ibid.
[95] Ibid., pp.15-16.
[96] Ibid., p.13.
[97] Thakur, op.cit. p.126.
[98] See the review in Section II 2 supra.

Article VII was included to allay any fears that the success of failure of the Treaty might affect the Tlatelolco accord, while the obligations assumed under Article VI would be met by creating a nuclear weapon free zone - indeed the Non-Proliferation Treaty and nuclear weapon free zone are meant to be complementary.

The Partial Test Ban Treaty can be considered the first major step on the way towards a comprehensive nuclear weapon free zone for it outlaws all nuclear explosive device tests in the air, outer space and water. The truism that any party to it cannot conduct any tests highlights two flaws: (1) non-members[99] are not bound by the restriction; and (2) any explosions that are not tests would appear legitimate - so nuclear weapons and their use are clearly not prohibited. In no way could it be said the Partial Test Ban Treaty was incompatible with a nuclear weapon free zone.

Both the Outer Space and Sea-Bed Treaties create nuclear weapon free zones, but apart from the possibility of a 'double prohibition' overlap being created in the exclusive economic zone, they have little bearing on this issue.

Any nuclear weapon free zone would have to be made in accordance with the United Nations Charter. Few, if any, restrictions exist, and as a regional arrangement created to maintain international peace and security, a South Pacific nuclear weapon free zone would fulfil Article 52(1) obligations. The one possible important constraint is that threats and/or use of force are permitted in self-defence and collective security measures, so to that extent nuclear weapons use would appear legal - arguably even within a nuclear weapon free zone - by operation of the rule that Charter provisions override any other treaty obligations the member may enter into.[1]

5. *The Law of the Sea*

The primary restriction imposed by the law of the sea is contained in the notion of freedom of the seas - as long as interference with other states' rights is acceptable, any activity may be undertaken, including closure of an area. But it is highly doubtful that any one state, let alone all of them, would accept curtailment of its warships' freedom to navigate in the South Pacific. Furthermore, some may advance arguments which maintain that in limited situations, a State has the right to carry out large scale nuclear explosive device tests. As far as the territorial sea is concerned, States asserting what is perceived as their warships' right of innocent passage would not take kindly to another state ostensibly removing that right. This view is demonstrated and justified by the status of international straits in United Nations Convention on the Law of the Sea III.[2]

6. *Customary International Law*

The relationships amongst the entire international community are premised on the notion of sovereign equality of all States.[3] Interest in this

[99] See n. 177 supra.

[1] Article 103, UN Charter.

[2] See Dakuvala, Wilkes et al. *A Perfectible Treaty for a Pacific NWFZ,* Wellington, AdHoc Committee on the Pacific NWFZ 1985 and their regime creating obligations between parties who wish to make a rule of law enforceable between themselves that NW on the High Seas are prohibited.

[3] See Article 2(1) UN Charter.

concept is perhaps the most obvious but nevertheless most important restriction on the feasibility of any treaty; namely that one State cannot by its own acts or proclamations bind any other state. The establishment of a nuclear weapon free zone is then restricted in that membership must be a result of a voluntary and sovereign act.[4]

7. *Conclusion*

This brief survey of the most important treaties and rules of customary international law has highlighted those provisions which create or impinge upon a South Pacific Nuclear Weapon Free Zone. Within the narrow constraints of a 'pure' view of international law, it has been possible to conclude that such a zone is legally expedient, in the main because of its positive effect on the consolidation of international law as a valid and viable avenue for international discourse, dispute prevention, and resolution. Moreover, there are few, if any, real restrictions on the zones - even the difficulty of freedom of the seas can be overcome with imaginative devices. In the legal domain, it can be fairly said that a nuclear weapon free zone in the South Pacific is both desirable and feasible.

Yet there is one variable which could easily force a different conclusion: the political will and climate which creates the Grundnorm of international law. "Unless a rule of international law is based upon the practice of States or is sufficiently general to fit in with both that practice and the reasonable demands of States to be faced with the need to act, it is probable that it will not be observed. And in the international community, rules based solely upon the legal niceties of treaty construction without adequate recognition by States are unlikely to meet those demands".[5]

IV. THE SOUTH PACIFIC NUCLEAR FREE ZONE

The establishment of a broad regime invoking not only prohibitions on nuclear weapons but also on any nuclear explosive device and nuclear waste dumping, thereby creating, in effect, a regional comprehensive test ban treaty, would appear to cover the problems outlined in the previous sections. Yet, upon closer scrutiny the Treaty is not as restricted as is legally permissible; rather, as the Working Group's Report states, there were legal, practical and tactical considerations restricting the approach taken to one of "stretching the fabric of the Treaty to its widest possible extent".[6] The purpose of this section then, is briefly to review those areas where the South Pacific Nuclear Free Zone could be more forceful.

Article 1(c)

The term 'nuclear explosive device' does not include the delivery systems of the weapons. Fry has conveniently categorised the involvement of nuclear material and support structures into three categories (see Appendix).[7] Although the supplying of uranium is regulated to a limited extent,[8] other supports and infrastructures of nuclear weapons technology are not. In

[4] This has been formally recognised in the UN guidelines for NWFZ. See n. 16, supra.
[5] Greig, op.cit., p. 893.
[6] Report, pp. 7-8, no. 15-16.
[7] Fry, op.cit., p.4.
[8] See Article 4, and discussion post.

view of the fact that some weapons may be fitted with either conventional or nuclear warheads, some compatible but separate systems should be barred to ensure complete freedom from nuclear weapons.

Article 3

The provision of nuclear material for the purpose of aiding in any way the manufacture of acquisition of nuclear explosive devices is prohibited by Article 3(c). Yet, recognising the problems associated with the regulation of nuclear material,[9] it would seem appropriate to ban completely dissemination of any fissionable material irrespective of intended purpose, save perhaps small amounts for medical purposes and research at authorised centres. Given that the Treaty as it stands prohibits the dumping of nuclear waste in the South Pacific by parties to the Treaty and obliges them to prevent others from so doing,[10] it is inconsistent to permit parties to sell resources which will increase the quantity, and exacerbate the problems, of nuclear waste.[11]

Article 4

The transit of nuclear weapons in, on or over the territory of a state is left to the discretion of that state by Article 5(2)[12] while Article 5(1) prohibits deployment of nuclear weapons in a state's territory.[13] Yet, as Fry points out, the distinction between transit and deployment is by no means clear cut; in fact nuclear weapon-carrying ships transiting a region may in some cases be considered in a state of 'permanent deployment' [14]. The right of transit of the high seas being inviolable, any restriction of such 'permanent deployment' is limited.[15] Nevertheless, as in the case of most nuclear arms control agreements 'some' is better than 'none' , and a provision prohibiting transit in territorial waters would legally extend the nuclear weapon free zone.

Article 6

Article 6(b) contains the problem alluded to earlier in respect of the dissemination of nuclear material for peaceful purposes under Article 4. The Report recognised this potential, and the parties excluded any activities that unintentionally and incidentally assisted any of the prohibited criteria.[16]

Article 11

This Article stipulates that any amendment must be accepted by all parties before it is incorporated into the Treaty, thereby imposing a limitation on parties wishing to be bound by a provision immediately. A separate treaty could be concluded, and State practice appears to approve of this option - but on the other hand formation of new treaties may merely be

[9] See generaly, SSDI; CDII, NPT second review conference.

[11] It is arguable Article 7(1)(c) prohibits any provision for nuclear material, because to do so may be assisting or encouraging the dumping of waste, possible in the South Pacific.

[12] Support for this position may be found in Thakur, op.cit. p.270.

[13] See Article 1 for the definition of "stationing". In the Report,, p.16, it is noted that an emergency affecting a ship/aircraft resulting in a NW being on the territory of a Party would not be considered a breach.

[14] Fry. op.cit., pp.17-18.

[15] See discussion ante, S.II 3; cf. Ad Hoc Committee, Committee, n. 201.

[16] Report, pp. 13-14.

the result of strict amendment clauses. The Treaty of Tlatelolco provided that it would come into operation immediately between those parties waiving the clause delaying its entry into force.[17] It would not be overly difficult to insert a similar provision in an amendment clause of the South Pacific Nuclear Free Zone.

Article 13

Withdrawal by any party, twelve months after giving notice, is permitted, if there has been a violation of an essential provision by another party. This clause is very broad, and could possibly allow a party to leave at any time after a breach - for example, three years later for reasons unrelated to the breach, provided there has been no acceptance of the breach. The doctrine of good faith would impose limitations, but the route is nonetheless open. It has been noted that withdrawal clauses seriously weaken treaties.[18] To preclude, or at least minimise this result, different approaches may be taken. A time limit for withdrawal and/or a report to the Consultative Committee giving valid reasons as justification for withdrawal, possibly subject to review and requiring approval by the Committee[19] would limit available options.

On the other hand, it is possible to force parties to rely on the doctrine of *rebus sic stantibus*,[20] by eliminating the withdrawal clause: a restrictive approach, yet possibly quite effective. It is unclear whether the doctrine allows withdrawal from the whole Treaty, or merely the relevant clauses.[21] The latter interpretation is preferable since it would maintain in force most, or at least some, of the obligations. The drawback of not having a withdrawal clause is that a party may no longer wish to be bound by the Treaty, and, unable to legally withdraw, be compelled to breach its obligations. The likely result would be a lowering of the party's standing in the world community's eyes, or at the least, it would undermine international law's viability as a regulator of international conduct. Such threats are certainly undesirable, indicating that a balance is required. In the past the scales have been tipped in favour of the states. Perhaps it is time to tip them in favour of the law.

Protocols

The difficulties encountered in the Treaty of Tlatelolco making the accessions to Protocol II in that Treaty virtually useless,[22] suggest that it would be prudent to ensure the South Pacific Nuclear Free Zone Protocols were also subject to a 'no-reservation' clause. The Continental Shelf Convention[23] did not contain a clause which referred, explicitly or impliedly, to the status of Reservations. Some States considered that Reservations were therefore not allowed, whereas others were of the opinion that, unless

[17] Article 28(2) and (3).
[18] Thakur, op.cit., p.137.
[19] Although this would entail problems similar to those with the ICJ. See discussion post, pp.38-40.
[20] For discussion of its legal nature and standing see Haraszti, op.cit., pp.373-92; McNair, op.cit., Chapters 35 and 42.
[21] Ibid., Haraszti, op.cit., pp.403 et seq.
[22] Thakur, op.cit., pp.120-121.
[23] Convention on the Continental Shelf. See Oda op.cit., p.20.

formally excluded, they were permissible.[24] It appears that the latter view is correct, or at least consistent with international practice.[25] To ensure the achievement of the aims of the South Pacific Nuclear Free Zone, as well as attain consistency therein, a clause containing clear and explicit statements concerning the status of Reservations with respect to Protocols should be included.

Adjudication

Criticism has been levelled at virtually every nuclear arms control treaty for a number of reasons, including their containing little in the way of provisions for effective dispute settlement; or that the areas covered were of little or no significance.[26] In so far as it relates to a South Pacific Nuclear Weapon Free Zone, a brief review of adjudication will be undertaken.

Inclusion of compulsory adjudication provisions for settlements of international disputes in treaties is not uncommon,[27] but it is rare in nuclear arms control agreements. Instead, what Dahlitz labels direct or institutional arrangements are adopted.[28] Each have benefits and drawbacks,[29] but assessment of their role in adjudication rather than an examination of their virtue will be undertaken.

First, identification of what constitutes a justiciable dispute must be made. Any international dispute may be dealt with either diplomatically or legally; but the decision as to how it should be settled must be left to the parties, given that circumstances dictate the most appropriate forum.[30] By their very nature, the disputes are both legal and political, even at the basic level of treaty interpretation.[31] The goal of adjudication being conflict resolution, what is and is not justiciable must be an extra-judicial decision.

Edwards identifies three basic types of ruling which an adjudicating body can be expected to perform: (i) meaning, i.e. interpretation of an agreement; (ii) action, or the determination of what has or has not been done; and (iii) compliance, which is the correspondence of meaning and action.[32] Should a party breach an obligation of customary or conventional international law, not to use nuclear weapons, there are several writers who advocate setting up a special tribunal for the purposes of nuclear crimes to deal with the rulings.[33] Apart from this, there is the tendency of international law to fractionate conflicts into "small bite size chunks" which abstracts from the political basis of the dispute,[34] but Edwards admits that this could be either beneficial or detrimental to conflict resolution.[35]

[24] O'Connell, op.cit., Vol. I, pp. 45-46. For the actual decision see the *Channel Continental Shelf Case,* 18 ILM (1979), p. 397.

[25] For example, see the Treaty of Tlatelolco and Reservations.

[26] E.g. Seabed Treaty; Partial Test-Ban Treaty.

[27] Greig, op.cit., p.617.

[28] Dahlitz, op.cit., p.119.

[29] E.g. using the Security Council under an institutional arrangement may be practically ineffective because of the veto.

[30] Greig, op.cit., p.616.

[31] Ibid., p.617.

[32] Edwards, op.cit., p.104.

[33] Sethna, op.cit., p.16 and generally, see Bassiouni, Vol. I and II. Of course concomitant with this is the necessary liability imposed on individuals through treaties see *Danzig Railway Official case,* PCIJ, 1928, Series B, No. 15, and the reaffirmation of liability generally at the Nuremburg Trials.

[34] Edwards, op.cit., p.105.

[35] Ibid.

In the case of nuclear arms control accords where an impasse has been reached in negotiations, third party settlement of a minor point may provide impetus for concluding negotiations in agreement. Intervention of the third party could be done at the request and consent of all parties. Should the International Court of Justice be the forum, other avenues of access are opened.[36] Apart from advisory opinions, of themselves potentially valuable, there is also the conventional jurisdiction of the Court obtained, inter alia, by specific arrangements in a treaty.[37] Given the dispute in various cases over the Court's jurisdiction,[38] it would seem desirable to incorporate an automatic referral clause in the Treaty to be used when other methods fail. Such use of the International Court of Justice would also further the emergence and crystallisation of rules of customary international law, and increase states' respect for the Court.[39]

Conversely, Cohen considers that litigation is probably the least of the benefits derived from international law.[40] Among a list of five reinforcing aspects of the law he places foremost, along with Edwards, the doubt cast on a State about its own law abiding reputation.[41] Barton includes this concept in his classification under national self-interest, also deemed the most potent factor.[42]

Adjudication is clearly a process leading to an outcome over which the parties have no control. To preclude any possible prejudice to their national interests, compulsory jurisdiction may be rejected. As Dahlitz states, "What appears to be unacceptable is to entrust issues of such magnitude to the unpredictable discretion of individuals, however highly they may be regarded as to their personal integrity".[43]

Related problems surveyed by Dahlitz include uncertainty of customary international law rules;[44] the uncertainty of *actio popularis* and the rules for award of damages;[45] the fact that nuclear arms control cases are likely to create international crises;[46] that in the light of the *Hostages Case*,[47] the absence of compulsory clauses in treaties is not of consequence since the only sanction is an inability to present arguments fully - hardly drastic if the jurisdiction of the Court is disputed;[48] and the fact that the international legal system itself is in dire need of change.[49]

Yet, given the concept of fractionation and the resulting piecemeal approach, viz. tackling small but significant problems rather than trying

[36] For example, through the compulsory jurisdiction of the Court.
[37] Article 36(1), Statute of the ICJ; e.g. Article 18 Trusteeship Argreement in the *Northern Cameroons* case ICJ Rep. 1963, p.15.
[38] E.g. *Nuclear Tests* case, ICJ Rep. 1974, p. 253; *Corfu Channel* case, ICJ Rep. 1947-48, p.15; *Hostages* case, ICJ Rep. 1979-80.
[39] See the recent rejection by the U.S.A., supra, n. 175.
[40] Cohen, *International Politics: The Rules of the Game*, Longman Group, London, 1981, p.82.
[41] Ibid; Edwards, op.cit., p.114.
[42] Barton, op.cit., p.46 et seq.
[43] Dahlitz, op.cit., p. 108; see also n. 174; but these decisions are nonetheless made by a few individuals, biased though they may be.
[44] Dahlitz, op.cit., p.124.
[45] Ibid., p.107.
[46] Ibid., p.111.
[47] ICJ Rep. 1979-80.
[48] See n. 43, idem.
[49] Ibid., p.126 et seq.

to consume the entire cake at one gulp, it is possible for the Court to apply well settled principles of international law, and not merely "anachronistic and vague notions",[50] to arrive at an acceptable decision. A clause submitting parties to compulsory jurisdiction in appropriate areas, when negotiations fail, should not be viewed as a panacea - but as a viable contribution to satisfactory dispute resolution.

V. CONCLUSION

Rules of extant customary international law and nuclear arms control treaties presently in force, conjunctively, limit the use and presence of nuclear weapons in the South Pacific. Yet there is ambiguity as to the scope of their efforts. Politically, this may be desirable; but it is suggested that within the confines of the legal aspect of international law, greater clarity would serve to further the crystallisation of the uncertain rules and tacit under standings with, hopefully, the effect of decreasing the risk of litigation. Furthermore, a nuclear weapon free zone could well satisfy the obligations undertaken by United Nations members in Articles 1 and 2.

The South Pacific Nuclear Free Zone goes a considerable way towards meeting these obligations, and clarifying the ambiguities. Nonetheless, it contains flaws which if left unattended might well lead to dispute. Should this eventuate, the provisions for dispute settlement,[51] or lack of them in key areas, could well result in the treaty being a disruptive, rather than stabilising element of international law.

TABLE 1 - CATEGORISATION OF NUCLEAR INVOLVEMENT

1. WEAPONS
   - (a) *Permanent Facilities*
     - (1) nuclear testing
     - (2) land-based deployment of nuclear weapons
     - (3) bases for nuclear-armed ships
     - (4) bases for nuclear-armed aircraft
     - (5) storage of nuclear weapons
   - (b) *Transit*
     - (1) nuclear-armed ships on high seas
     - (2) nuclear-armed aircraft in international airspace
     - (3) port calls by nuclear-armed warships
     - (4) staging by nuclear-armed aircraft

2. WEAPONS-RELATED
   - (1) missile testing
   - (2) surveillance/communication facilities
   - (3) provision of uranium

[50] Ibid., p.108.
[51] A review of enforcement provisions are not undertaken due to limitations in length.

3. NON-WEAPON
(1) dumping of nuclear wastes
(2) storage of nuclear wastes
(3) provision of uranium
(4) peaceful uses of nuclear energy

ADDENDUM

South Pacific Nuclear Free Zone Treaty. At the time of writing, there are 10 signatories and 5 ratifications from a total of 13 members in the South Pacific Forum:

Fiji	ratified
Cook Islands	ratified
Niue	ratified
Tuvalu	ratified
Australia	
New Zealand	ratified
Papaua New Guinea	
Kiribati	
Western Samoa	
Nauru	

Three more ratifications are required to bring the Treaty into effect.

The Protocols to the Treaty were adopted 8 August 1986 at the Seventeenth Meeting of the Forum. They will be open for signature on 1 December 1986 or upon entry into force of the Treaty, whichever is earlier.

The First Protocol is open to the United Kingdom, the United States, and France. The Second and Third Protocols are open only to the above three countries, China, and the U.S.S.R. Admittedly these are the recognised nuclear-weapon states, but there seems to be no reason for failing to allow other nuclear-capable states to also sign - India for example. Extending the Protocols to other nations would surely serve to further international respect for the desires of the region.

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