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# The South Pacific Nuclear Free Zone Treaty: Regional Autonomy Versus International Law and Politics

MATTHEW LIPPMAN\*

Our world faces a crisis as yet unperceived by those possessing the power to make great decisions for good and evil. The unleashed power of the atom has changed everything save our modes of thinking and thus we drift toward unparalleled catastrophe . . . a new type of thinking is essential if mankind is to survive and move toward higher levels.<sup>1</sup>

Removing the threat of a world war—a nuclear war—is the most acute and urgent task of the present day. Mankind is confronted with a choice: we must halt the arms race and proceed to disarmament or face annihilation.<sup>2</sup>

## I. INTRODUCTION

On August 6, 1985, the thirteen independent and self-governing states which are South Pacific Forum members adopted the South Pacific Nuclear Free Zone (SPNFZ) Treaty.<sup>3</sup> Parties to the Treaty renounce the manufacturing, acquisition and possession of nuclear ex-

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1. Albert Einstein quoted in Aldridge & Stark, *Nuclear War, Citizen Intervention, and the Necessity Defense*, 26 SANTA CLARA L. REV. 299, 326 (1986).

2. Final Document of the Special Session of the General Assembly on Disarmament, G.A. Res. S-10/2, 10 U.N. GAOR Supp. (No. 4) at para. 18, U.N. Doc. A/5-10/4 (1978), reprinted in 17 I.L.M. 1016 (1978).

3. South Pacific Nuclear Free Zone Treaty, adopted Aug. 6, 1985, 29 I.L.M. 1442 [hereinafter South Pacific Treaty].

The members of the South Pacific Forum include Australia (and its territories), Cook Islands, Fiji, Kiribati, Vanuatu, New Zealand (and its territories), Naru, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu and Western Samoa. Chesneaux, *France in the Pacific: Global Approach or Respect for Regional Agendas?*, 18 BULL. CONCERNED ASIAN SCHOLARS 73 n.1 (Apr.-June 1986); see generally, Fry, *The South Pacific Nuclear-Free Zone: Significance and Implications*, 18 BULL. CONCERNED ASIAN SCHOLARS 61 (Apr.-June, 1986).

The boundaries of the South Pacific Nuclear Free Zone extend from the zone of application of the Treaty for the Prohibition of Nuclear Weapons in Latin America in the east to Australia's west coast in the west. The southern boundary is the Antarctic zone, while the

plosive devices;<sup>4</sup> agree to abide by safeguards in the provision of nuclear material and equipment;<sup>5</sup> undertake to prevent the stationing of any nuclear explosive device on their territory;<sup>6</sup> and agree not to dump radioactive wastes and materials at sea anywhere within the SPNFZ.<sup>7</sup>

This Article reviews the political background and provisions of the SPNFZ Treaty. It concludes by arguing that the Treaty has a number of shortcomings which, when combined with the opposition of the major western powers, are likely to limit the Treaty's effectiveness.

## II. NUCLEAR TESTS IN THE PACIFIC

Since World War II ended, the South Pacific has been a major

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equator forms the northern boundary with some extension to include Kiribati in the north. *Id.* at 63. This is the area bounded by a line:

1. commencing at the point of intersection of the Equator by the maritime boundary between Indonesia and Papua New Guinea;
2. running thence northerly along that maritime boundary to its intersection by the outer limit of the exclusive economic zone of Papua New Guinea;
3. thence generally north-easterly along that outer limit to its intersection by the Equator;
4. thence east along the Equator to its intersection by the meridian of Longitude 163 degrees East;
5. thence north along that meridian to its intersection by the parallel of Latitude 3 degrees North;
6. thence east along that parallel to its intersection by the meridian of Longitude 171 degrees East;
7. thence north along that meridian to its intersection by the parallel of Latitude 4 degrees North;
8. thence east along that parallel to its intersection by the meridian of Longitude 180 degrees East;
9. thence south along that meridian to its intersection by the Equator;
10. thence east along the Equator to its intersection by the meridian of Longitude 165 degrees West;
11. thence north along that meridian to its intersection by the parallel of Latitude 5 degrees 30 minutes North;
12. thence east along that parallel to its intersection by the meridian of Longitude 154 degrees West;
13. thence south along that meridian to its intersection by the Equator;
14. thence east along the Equator to its intersection by the meridian of Longitude 115 degrees West;
15. thence south along that meridian to its intersection by the parallel of Latitude 60 degrees South;
16. thence west along that parallel to its intersection by the meridian of Longitude 115 degrees East . . . .

South Pacific Treaty, *supra* this note, Annex 1.

4. *Id.* art. 3.
5. *Id.* art. 4.
6. *Id.* art. 5.
7. *Id.* art. 7.

atomic testing site. Between 1946 and 1958 the United States exploded sixty-six nuclear devices in Bikini and Enewetak atolls resulting in the destruction of six of the Marshall Islands and rendering others uninhabitable due to irradiation.<sup>8</sup> Over forty other United States nuclear tests were carried out at Christmas Island in the mid-Pacific.<sup>9</sup>

During 1953 and 1957, Great Britain conducted major tests in South Australia; including seven at Maralinga and two at Emu Field.<sup>10</sup> Between 1952 and 1957, three bombs were detonated at Monte Bello Islands, eighty kilometers off the northwest coast of Western Australia.<sup>11</sup> In 1957, three bombs were also exploded at Malden Island followed by six tests on the Christmas Islands in 1958.<sup>12</sup> Additionally, Great Britain conducted numerous minor atomic tests in Australia during the early 1960's.<sup>13</sup>

French Polynesia has been the site of 115 French atomic atmospheric tests<sup>14</sup>—initiated by a 120 kiloton blast on September 11, 1966.<sup>15</sup> A total of forty-two tests occurred at Moruroa and at Fangataufa, 1,500 kilometers from Tahiti.<sup>16</sup> Beginning in 1975, France began a series of underground tests at Moruroa<sup>17</sup> and as of April 1986, it had conducted seventy-one underground tests in Polynesia.<sup>18</sup>

Since the end of World War II, the United States, Great Britain and France have tested 250 nuclear bombs in the Pacific.<sup>19</sup> The Pacific has provided a distant laboratory in which bombs have been tested with little public attention and few major political ramifica-

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8. *Introduction to the Issue*, 18 BULL. CONCERNED ASIAN SCHOLARS 3, 9 (Apr.-June 1986).

9. P. HAYES, L. ZARSKY & W. BELLO, AMERICAN LAKE NUCLEAR PERIL IN THE PACIFIC 240 (1986).

10. R. MILLIKEN, NO CONCEIVABLE INJURY IX (1986).

11. *Id.* at IX, 41.

12. *Id.* at XI.

13. *Id.* at 238-80.

14. B. DANIELSSON & M. DANIELSSON, POISONED REIGN FRENCH NUCLEAR COLONIALISM IN THE PACIFIC XVII (2d ed. 1986).

French Polynesia comprises five archipelagos, the Society Islands, Tuamotu Archipelago, Marquesas Islands, the Mangareva and Austral Islands. *Id.* at 10. There are 130 islands spread over a surface almost as extensive as Europe. *Id.* at 172.

15. *Id.* at 102.

16. *Id.* at 59, 205, 213.

17. *See id.* at 204-05.

18. *Introduction to the Issue*, *supra* note 8, at 9.

19. *The Pacific: A New Stage For War?*, BULL. OF THE AM. FRIENDS SERV. COMM. DISARMAMENT PROGRAM 3 (1987).

tions.<sup>20</sup> The people of the Pacific, until relatively recently, have not been informed of the complete results, consequences and dangers of nuclear tests.<sup>21</sup> Journalist Robert Milliken notes that if the nuclear powers and their allied governments in the Pacific "had been as frank with the public as it now seems clear they should have been, the whole nuclear testing program could well have ground to a halt. Secrecy and public reassurance thus became primary tools of governments and their scientific advisors . . . ."<sup>22</sup>

The full impact of atmospheric testing on humans still remains uncertain.<sup>23</sup> It appears that "[r]adiation can have three main types of effect on people: acute, long term and genetic. The acute and long-term impacts together are known as somatic effects because they relate to the effect on the body of a living person. Acute effects result from heavy exposure to radiation."<sup>24</sup> Those effects include nausea, vomiting, diarrhea, cramps, weight loss, fatigue, sweat, fever, headaches, skin burns and hair loss.<sup>25</sup> Death from acute radiation can occur up to two months following exposure.<sup>26</sup>

A high threshold of exposure is required for acute radiation, but even a small dose can result in long-term effects such as cancer, leukemia and eye cataracts—and can cause genetic damage that is transmitted to future generations.<sup>27</sup>

The United State's first large thermonuclear device (Bravo) was detonated in March 1954.<sup>28</sup> The fifteen megaton weapon (750 times more powerful than Hiroshima) produced heavy fallout almost 200 kilometers downwind from ground zero, on the inhabited atolls of Uterik, Rongerik and Rongelap. The islanders were evacuated two days following the test, but by then many had received skin burns and

20. B. DANIELSSON & M. DANIELSSON, *supra* note 14, at 195.

21. R. MILLIKEN, *supra* note 10, at XIV, 92-93.

22. *Id.* at 313. The same secrecy and lack of information characterized atmospheric nuclear testing conducted in the United States prior to 1963. See *Allen v. United States*, 588 F. Supp. 247, 404 (C.D. Utah 1984).

23. Prior to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43, 362 atmospheric tests were conducted: 193 by the United States, 142 by the Soviets, 21 by the British and 6 by the French. It is established that this resulted in 84,500 cancer deaths and up to 168,000 genetic effects, 7,200 of which are considered serious. R. MILLIKEN, *supra* note 10, at 283.

24. *Id.* at 289.

25. *Id.*

26. *Id.* at 290.

27. *Id.*

28. *Id.* at 291.

were subject to vomiting and diarrhea. More than sixty-five percent of those on Rongelap who were under age ten at the time of the explosion underwent surgery to remove thyroid cancers caused by iodine ingested through water.<sup>29</sup> Eighteen of the nineteen children who received one-thousand-rad thyroid doses from United States hydrogen bomb tests died.<sup>30</sup> In the four years following the explosion, women exposed to the Bravo test had a miscarriage and stillbirth rate more than twice that of unexposed Marshall Island women.<sup>31</sup>

French nuclear explosions in the Pacific between 1966 and 1972 caused widespread fall-out and resulted in "measurable concentrations of radio-nuclides in foodstuffs and in man and have, therefore, resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular."<sup>32</sup> The Australian government alleged in the early 1970's that the people of the Pacific have and will "pay with their lives for France's decision, in the face of constantly expressed disapprobation by world public opinion, to commence and to continue atmospheric nuclear weapon tests."<sup>33</sup>

The French tests became a point of controversy in April 1973 when the Pacific Forum<sup>34</sup> issued a joint declaration in which "they reaffirmed their strong opposition to these tests which exposed their people as well as their environment to radioactive fall-out, against their wishes and without benefit to them which demonstrated deplorable indifference to their future well-being."<sup>35</sup> Countries in Latin America,<sup>36</sup> Africa<sup>37</sup> and Asia<sup>38</sup> also condemned the tests.

The French refused to cease atmospheric testing or even to provide the dates or expected size and yield of the explosions.<sup>39</sup> On May 9, 1973, Australia<sup>40</sup> and New Zealand<sup>41</sup> separately instituted proceed-

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29. *Id.* at 291-92.

30. H. WASSERMAN & N. SOLOMON, *KILLING OUR OWN THE DISASTER OF AMERICA'S EXPERIENCE WITH ATOMIC RADIATION* 86 (1982).

31. R. MILLIKEN, *supra* note 10, at 292.

32. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. Pleadings para. 46, at 13 (Judgment of Dec. 20, 1974).

33. *Id.* at 166, 178 (argument of Sen. Murphy, Counsel for the Government of Australia).

34. Attended by the Prime Ministers of Australia, New Zealand, Fiji, Western Samoa and Tonga and the Premier of the Cook Islands, with the Chief Minister of Papua New Guinea and the leader of the Niue present as observers. *Id.* para. 2, at 365.

35. *Id.*

36. *Id.* paras. 6-10, at 367-69.

37. *Id.* paras. 11-13, at 369-70.

38. *Id.* paras. 14-17, at 370-71.

39. *Id.* para. 18, at 6-7.

40. *See generally id.*

ings against France in the International Court of Justice (I.C.J.).

The court voted eight to six to grant interim protective measures in both the Australian<sup>42</sup> and the New Zealand<sup>43</sup> applications. The court elaborated upon its reasoning in the Australian case, noting that France had carried out atmospheric tests and planned to carry out additional tests in the future.<sup>44</sup> These nuclear tests, according to the court, have and will continue to cause lasting damage by depositing wide-spread and measurable radioactive fall-out on Australian territory and elsewhere. The court noted that:

any radio-active material deposited on Australian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere creates anxiety and concern among the Australian people; . . . [that] any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace cannot be undone . . . .<sup>45</sup>

The I.C.J. ordered that neither Australia nor France should undertake action which "might aggravate or extend the dispute . . . or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render . . . and, in particular, the French Government should avoid nuclear tests causing the deposit of radioactive fall-out on Australian territory . . . ."<sup>46</sup>

In its final judgment of December 20, 1974, the I.C.J. took notice of public statements by French authorities expressing their intent to cease atmospheric nuclear tests following the conclusion of the 1974

41. See generally *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. (Judgment of Dec. 20, 1974).

42. *Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. 99, 106 (Interim Protection Order of June 22, 1973).

43. *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135, 142 (Interim Protection Order of June 22, 1973).

44. *Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. 104, paras. 25-26.

45. *Id.* para. 27.

46. *Id.* at 106. See also *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 142 para. 36. The decisions were decided under Article 41 of the Statute of the International Court of Justice stating:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

*The Statute of the International Court of Justice*, 1976 U.N.Y.B. 1052, art. 41.

series.<sup>47</sup> The court determined that in announcing that the 1974 tests would be the final series, France had satisfied the claims of both Australia<sup>48</sup> and New Zealand.<sup>49</sup> The court considered these statements legally binding on France to halt atmospheric testing<sup>50</sup> and it ruled that there was "no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony."<sup>51</sup>

Although abandoning atmospheric tests, since 1975 France has conducted underground nuclear tests in Polynesia.<sup>52</sup> The Pacific is also used as a missile testing range by the United States<sup>53</sup> and, to a limited extent, the Soviet Union.<sup>54</sup>

### A. Militarization of the Pacific

United States nuclear strategy is based upon a limited nuclear war, involving a series of nuclear exchanges, which either may end in a cease fire or escalate into a full-scale nuclear war.<sup>55</sup> A component of this strategy is "horizontal escalation"—the ability to initiate a nuclear exchange on various regional fronts in order to strain Soviet military resources.<sup>56</sup>

Part of this strategy is to aggressively expand and deploy the United States' Seventh Fleet on the Southern Soviet coast.<sup>57</sup> Peter Hayes, Lyuba Zarsky and Walden Bello observe that "[t]he Seventh Fleet's forward deployed surface ships increased by almost 100 per

47. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 267, para. 41 (Judgment of Dec. 20, 1974); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 472, para. 44 (Judgment of Dec. 20, 1974).

48. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 270, para. 52.

49. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 475, para. 55.

50. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 269-70, para. 51; Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 474-75, para. 53.

51. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 271, para. 58.

The nuclear test cases are reviewed in Comment, *The International Court of Justice, the Nuclear Test Cases: Judicial Silence v. Atomic Blasts*, 16 HARV. INT'L L.J. 614 (1975); Keith, *The Nuclear Tests Cases after Ten Years*, 14 V.U.W.L.R. 345 (1975); Kos, *Interim Relief in The International Court: New Zealand and the Nuclear Test Cases*, 14 V.U.W.L.R. 357 (1975).

52. See generally B. DANIELSSON & M. DANIELSSON, *supra* note 14.

53. P. HAYES, L. ZARSKY & W. BELLO, *supra* note 9, at 240-50.

54. *Id.* at 326.

55. F. KNELMAN, *REAGAN, GOD, & THE BOMB: FROM MYTH TO POLICY IN THE NUCLEAR ARMS RACE* 23-25 (1985).

56. P. HAYES, L. ZARSKY & W. BELLO, *supra* note 9, at 124-26.

57. See *id.* at 129-31.



cent between 1980 and 1983, from twenty-one to forty;" the United States' warship strength in the Western Pacific (including missile and attack submarines) rose from thirty-seven to fifty-two; and naval personnel afloat in the Pacific increased from 15,000 to 34,000.<sup>58</sup> In total, the Commander-in-Chief Pacific (CINCPAC) commands 320,000 Army, Navy, Marine and Air Force personnel and a fleet, which will include 300 ships by 1988.<sup>59</sup>

The following provides some indication of the United States' Pacific force potency:

- Three aircraft carriers usually are deployed in the Western Pacific.<sup>60</sup> Each carrier can launch up to three waves of seventeen to twenty-one bombers.<sup>61</sup> The carriers store nuclear weapons, and the carrier strike aircraft are nuclear capable.<sup>62</sup>

- Ten Ohio-class submarines will be deployed in the Pacific by 1989.<sup>63</sup> Each carries twenty-four Trident I missiles and is able to fire 192 nuclear warheads to within 500 yards of their target up to a range of 4,500 miles.<sup>64</sup> These submarines eventually will be equipped with the even more lethal Trident II missile.<sup>65</sup>

- Thirty-eight Los Angeles-class and converted Polaris submarines are armed with nuclear missiles and torpedoes and are responsible for attacking Soviet submarines.<sup>66</sup>

- Deploying up to 400 sea-launched Tomahawk cruise missiles<sup>67</sup> will increase the number of ships capable of launching a nuclear attack from five to fifty by 1990.<sup>68</sup>

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58. *Id.* at 135.

59. *Id.* at 153, 162. "The U.S. Navy's Pacific Fleet is divided into . . . the [Seventh] Fleet, which cruises the West Pacific and Indian Ocean; and the [Third] Fleet, which operates in the East Pacific along the broad littoral of North and South America." *Id.* at 158.

60. *Id.* at 163.

61. *Id.* at 164.

62. *Id.*

63. Zarsky, Hayes & Bello, *Brinksmanship in the Pacific*, 5 NUCLEAR TIMES 17 (May/June 1987).

64. *Id.*

65. *Id.*

66. P. HAYES, L. ZARSKY & W. BELLO, *supra* note 9, at 220.

67. *Id.* at 264.

68. Zarsky, Hayes & Bello, *supra* note 63, at 17. Sea launched cruise missiles, referred to as Tomahawks, are torpedo-shaped, low-flying bombs powered by turbofan engines. "The Tomahawk reaches subsonic speeds of 550 miles per hour and carries onboard computers . . . which can place the weapon within one hundred yards of target from a distance of fifteen hundred miles." The conventional Tomahawk "carries a one-thousand-pound warhead, while the nuclear version has a two hundred-kiloton warhead (with an explosive power fifteen times that of the Hiroshima bomb)." M. BEDFORD, *THE STRATEGIC ROLE OF U.S. DEPLOYMENTS*

- "Twenty B-52G nuclear bombers of the 43rd Strategic Wing are based at Anderson Air Force Base in Guam."<sup>69</sup> Each is armed with from four to eight short-range nuclear attack missiles and four big gravity bombs.<sup>70</sup> Between 216 and 264 additional land-based aircraft are stationed in the Western Pacific and are capable of being equipped with nuclear bombs that are stored in Guam, Alaska or Hawaii.<sup>71</sup>

- The Pacific contains a vast communications network based on satellites and on land-based communication and detection stations. This network provides a link to United States ships and planes, monitors Soviet satellites and communication systems, and provides an early warning system in the event of a Soviet attack.<sup>72</sup> Northwest Cape, Pine Gap and Nurrungar in Australia are particularly vital, and would be targeted in the event of a nuclear exchange.<sup>73</sup>

Soviet Pacific nuclear forces also have expanded.<sup>74</sup> The Soviets deployed approximately 115 submarine-launched ballistic missiles, 50-60 nuclear-tipped cruise missiles, and 240 anti-submarine warfare depth charges and rockets, surface-to-air missiles and anti-ship cruise missiles.<sup>75</sup> This nuclear force includes:

- "Two Yankee-class submarines carrying SS-N-6 ballistic missiles with a firing range of 3,000 [kilometers]."<sup>76</sup> These submarines normally sail in the Pacific and one remains within firing range of the United States.<sup>77</sup> Twelve Delta-class submarines carrying SS-N-8 missiles capable of hitting the United States from 9,000 kilometers remain in port or venture into the Japan or Okhotsk Seas.<sup>78</sup> Nine old Golf II and Hotel II-class ballistic submarines sail in the Pacific,

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IN THE PACIFIC AND INDIAN OCEANS, 141, 156, *reprinted in* THE DEADLY CONNECTION: NUCLEAR WAR & U.S. INTERVENTION (J. Gerson ed. 1986).

69. P. HAYES, L. ZARSKY & W. BELLO, *supra* note 9, at 218.

70. *Id.*

71. *Id.* at 172.

72. *Id.* at 193, 199, 201, 204; M. BEDFORD, *supra* note 68, at 154.

73. P. HAYES, L. ZARSKY & W. BELLO, *supra* note 9, at 410; *see also* M. BEDFORD, *supra* note 68, at 154.

74. *See generally* A. COCKBURN, THE THREAT INSIDE THE SOVIET MILITARY MACHINE (1984). However, the United States and its East Asian allies out number the Soviet Pacific Fleet and North Korea by a 5:1 ratio; displace nearly twice as many tons; and have more powerful and accurate armaments. The Soviet advantage in landpower may be offset by China's possible support of the United States in any conflict. P. HAYES, L. ZARSKY & W. BELLO, *supra*, note 9, at 311, 314.

75. P. HAYES, L. ZARSKY & W. BELLO, *supra* note 9, at 324.

76. *Id.*

77. *Id.*

78. *Id.*

equipped with SS-N-5 ballistic missiles with a range of 1,200 kilometers.<sup>79</sup> The Soviets also utilize a fleet of roughly ninety diesel-powered submarines, armed with anti-ship nuclear cruise missiles and torpedoes.<sup>80</sup>

- The Soviet Union surface fleet carries "a small number of nuclear-armed cruise missiles, and an unknown number of nuclear anti-submarine depth bombs and torpedoes."<sup>81</sup>

- The bulk of the Soviet nuclear arsenal aimed at the Pacific is comprised of warheads on land-based intermediate-range missiles.<sup>82</sup> At least 163 mobile SS-20 launchers are positioned in Mongolia and are able to strike a broad arc encompassing China, the Aleutians and Southeast Asia.<sup>83</sup>

Thus, "[e]nmeshed in superpower politics, the Pacific is suspended in a state of perpetual nuclear terror. Living in the shadow of the nuclear bomb . . ."<sup>84</sup> A regional nuclear exchange could be precipitated by tensions in Korea, by conflict along the Soviet-Chinese border, or by a nuclear shoot-out between a United States and a Soviet ship. A Pacific-launched United States attack on Vladivostok likely would result in a Soviet retaliatory nuclear strike against Guam, Okinawa, South Korea or other Pacific territories.<sup>85</sup> A Soviet first-strike against Europe or the United States likely would be accompanied by a nuclear assault on Pacific early warning radar in the Aleutians, satellite launch radar in the Philippines, Guam and Marshall Islands, or against satellite ground stations in Australia, Guam or Japan.<sup>86</sup> In a two-day all-out nuclear exchange, it is estimated that approximately 5,200 United States and Soviet weapons would release roughly 1,100 megatons of nuclear explosives in the Pacific.<sup>87</sup> This is the equivalent of 87,000 Hiroshima-sized bombs and "would totally destroy the Far East and the Pacific."<sup>88</sup>

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79. *Id.* at 325.

80. *Id.*

81. *Id.*

82. *Id.* at 327.

83. *Id.* at 330.

84. *Id.* at 337.

85. *See id.* at 346.

86. *Id.* at 239-41, 351.

87. *Id.* at 354.

88. *Id.* The 5,220 estimate is comprised of "2,400 warheads and 435 megatons from the U.S. arsenal, and 2,800 warheads and 656 megatons from the Soviet arsenal." *Id.* It is estimated that 500 United States warheads would be sufficient to destroy Soviet sites in Siberia and the Far East and that 200 to 400 Soviet nuclear warheads would destroy all U.S. forward

The danger of a nuclear accident also exists. In 1983, over one third of the visits to Pacific forward ports by United States ships were by nuclear-powered vessels.<sup>89</sup> While the United States will "neither confirm nor deny the presence of nuclear weapons or components on board any ship," virtually all United States warships visiting Pacific ports are certified to carry nuclear weapons.<sup>90</sup> Accidents may occur when weapons are shifted between ships or storage depots,<sup>91</sup> or when a warhead mistakenly is dropped.<sup>92</sup>

### III. ANTI-NUCLEARISM IN THE PACIFIC

#### A. Political Protest

In reaction to the Pacific's nuclearization, a trans-Pacific "peoples' diplomacy" movement has developed, which is calling for the region's denuclearization.<sup>93</sup> The movement gained momentum in 1985, when agents of the French intelligence service blew up the Greenpeace anti-nuclear vessel, the Rainbow Warrior.<sup>94</sup>

One of the most controversial developments in the Pacific anti-nuclear movement is New Zealand's decision to prohibit nuclear-armed and nuclear-powered ships from entering its harbors.<sup>95</sup> The United States has a world-wide policy of refusing either to "confirm or deny" whether its vessels carry nuclear weapons and as a result, all United States ships have been excluded from entering New Zealand.<sup>96</sup> In retaliation, New Zealand has been excluded from the Security Treaty between Australia, New Zealand and the United States (ANZUS Treaty).<sup>97</sup> The United States appears to fear the spread of

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bases in the Pacific. *Id.* at 355. Both the Soviet and United States Pacific nuclear arsenals are expected to increase by 50 to 60% by 1990. *Id.*

89. *Id.* at 282.

90. *Id.* at 282-83.

91. *Id.* at 286-87.

92. *Id.* at 287. "The U.S. Navy reports that 381 naval-nuclear accidents and incidents occurred between 1965 and 1977." *Id.*

93. *Id.* at 405-06; Zarsky, *For a Nuclear-Free and Independent Pacific*, 95 S.E. ASIA CHRONICLE 25 (Nov. 1984); Salzman, *The Genesis of New Zealand's Ban*, 43 BULL. ATOM. SCIENTISTS 45 (July/Aug. 1987).

94. See generally M. KING, *DEATH OF THE RAINBOW WARRIOR* (1986); D. ROBIE, *EYES OF FIRE, THE LAST VOYAGE OF THE RAINBOW WARRIOR* (1986).

95. See generally Clements, *New Zealand Paying for Nuclear Ban*, 43 BULL. ATOM. SCIENTISTS 41 (July/Aug. 1987).

96. *Id.* at 42.

97. Security Treaty, Sept. 1, 1951, United States-Australia-New Zealand, 3 U.S.T. 3420, T.I.A.S. No. 2493, [hereinafter ANZUS Treaty]; see generally U.S. - *New Zealand Disagreement on Port Access for U.S. Ships*, 86 DEP'T ST. BULL. 87 (Sept. 1986).

the "kiwi disease."<sup>98</sup> On June 27, 1986, United States Secretary of State George Schultz observed:

I'd hate to see the New Zealand policy spread, because it would basically cripple the ability of the United States and our allies to defend the values that we and New Zealand and others share . . . . And if we don't have nuclear weapons and have the capability to deter . . . aggression . . . then we subject everybody—including ourselves—to nuclear blackmail by the Soviet Union. So it would be a tragedy for freedom and Western values for the policy of New Zealand to spread. [O]ne of the reasons why we must insist that our vessels can call on a "no confirmation or deny" basis and not deviate from that is that if we deviate in one place, we deviate all over the world instantly. And so we have to have a policy that is basically consistent, and we do.<sup>99</sup>

Despite United States opposition, the Pacific denuclearization movement has gathered strength, and in 1985, the independent states of the Pacific Forum declared their region a nuclear free zone.<sup>100</sup> This step is part of a larger movement to create nuclear-weapon-free zones throughout the world.

### B. Nuclear-Free-Zones

In 1976, the Conference of the United Nations Committee on Disarmament published a special report on nuclear-weapon-free zones.<sup>101</sup> The report noted that the dominant factors in the concept of nuclear-weapon-free zones is the desire to secure the absence of nuclear weapons from various portions of the globe, to spare the nations involved from the threat of nuclear attack or involvement in nuclear war, and to contribute to general and complete nuclear disarmament.<sup>102</sup> The report concluded that nuclear-weapon-free zones must be considered an "additional means for averting nuclear-weapon proliferation and halting the nuclear-arms race. [N]uclear-weapon-free zones provide complimentary machinery to other collateral meas-

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98. "Kiwi disease" refers to New Zealand's anti-nuclear stance which the United States fears may spread to other South Pacific countries. See Fry, *supra* note 3.

99. *Excerpts from Joint News Conference, Manila, June 27, 1986*, 86 DEP'T ST. BULL. 36, 37 (Sept. 1986); see also, *U.S. and Australia Hold Ministerial Talks*, 86 DEP'T ST. BULL. 43, 46 (Oct. 1986) (remarks of Secretary of Defense Caspar W. Weinberger).

100. South Pacific Treaty, *supra* note 3.

101. Comprehensive Study of the Question of Nuclear-Weapon-Free Zones in all its Aspects: Special Report of the Conference of the Committee on Disarmament, U.N. Doc. A/10027/Add.1, U.N. Sales No. E.76.I.7 (1976).

102. *Id.* para. 82.

ures of disarmament, non-proliferation of nuclear weapons and the development of peaceful uses of nuclear energy.”<sup>103</sup>

The creation of such zones finds implicit legal support in the United Nations Charter.<sup>104</sup> Article 1(1) states that one purpose of the United Nations is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace . . . .”<sup>105</sup> Article 52(1) provides that:

[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.<sup>106</sup>

Article 52(3) adds that “[t]he Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies . . . .”<sup>107</sup> The creation of regional arrangements specifically to safeguard against nuclear weapons was recognized in Article VII of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, which provides that “[n]othing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.”<sup>108</sup>

Nuclear-weapon-free zones were endorsed in 1978 in the Final Document of the Special Session of the General Assembly on Disarmament (“Final Document”).<sup>109</sup> The instrument sets forth “fundamental principles” to guide negotiations and measures in the field of disarmament.<sup>110</sup> Among these principles are that:

(t)he establishment of nuclear-weapon-free zones on the basis of agreements or arrangements freely arrived at among the States of

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103. *Id.* para. 83.

104. U.N. CHARTER, 1976 U.N.Y.B. 1043.

105. U.N. CHARTER art. 1, para. 1.

106. *Id.* art. 52, para. 1.

107. *Id.* para. 3. Such regional arrangements, however, arguably do not abrogate a States’ right of self-defense under Article 51 of the Charter. *Id.* art. 51.

108. Treaty on the Non-Proliferation of Nuclear Weapons, art. VII, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

109. Final Document of the Special Session of the General Assembly on Disarmament, G.A. Res. S-10/2, 10 U.N. GAOR Supp. (No. 4) at para. 60, U.N. Doc. A/S-10/4 (1978), reprinted in 17 I.L.M. 1016 (1978).

110. *Id.* para. 25.

the zone concerned, and the full compliance with those agreements or arrangements, thus ensuring that the zones are genuinely free from nuclear weapons, and respect for such zones by nuclear-weapon States, constitute an important disarmament measure.<sup>111</sup>

The Final Document's "Programme of Action"<sup>112</sup> states that "[t]he process of establishing such zones in different parts of the world should be encouraged with the ultimate objective of achieving a world entirely free of nuclear weapons."<sup>113</sup>

The United Nations, in various proposals and resolutions, has recognized the desirability of states declaring nuclear-weapon-free zones<sup>114</sup> in Latin America,<sup>115</sup> the Middle East,<sup>116</sup> South Asia,<sup>117</sup> Africa<sup>118</sup> and in the South Pacific.<sup>119</sup> The United Nations has called upon states within each of these zones to enter into treaties or conventions prohibiting all nuclear weapons and providing for an international system of verification.<sup>120</sup> Nuclear weapons states have been requested to pledge their respect for the integrity of the zones and to refrain from using or threatening to use nuclear weapons against states in the zones.<sup>121</sup>

### C. Existing Nuclear-Weapon-Free Zones

Various geographic areas already have been internationally recognized as nuclear-weapon-free zones.

The 1959 Antarctic Treaty<sup>122</sup> recognizes in its preamble "that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the

111. *Id.* para. 33.

112. *Id.* art. III.

113. *Id.* para. 61.

114. See generally Special Report of the Conference of the Committee on Disarmament 19-28, U.N. Doc. A/10027/Add.1, U.N. Sales No. E.76.I.7 (1976); K. COATES, *THE MOST DANGEROUS DECADE* 63-77 (1984).

115. G.A. Res. 3262, 29 U.N. GAOR Supp. (No. 31) at 26, U.N. Doc. A/9631 (1974); G.A. Res. 3473, 30 U.N. GAOR Supp. (No. 34) at 24, U.N. Doc. A/10034 (1975).

116. G.A. Res. 3263, 29 U.N. GAOR Supp. (No. 31) at 26, U.N. Doc. A/9631 (1974); G.A. Res. 3474, 30 U.N. GAOR Supp. (No. 34) at 24, U.N. Doc. A/10034 (1975).

117. G.A. Res. 3265, 29 U.N. GAOR Supp. (No. 31) at 29, U.N. Doc. A/9631 (1974); G.A. Res. 3476, 30 U.N. GAOR Supp. (No. 34) at 26, U.N. Doc. A/10034 (1975).

118. G.A. Res. 3471, 30 U.N. GAOR Supp. (No. 34) at 22, U.N. Doc. A/10034 (1975).

119. G.A. Res. 3477, 30 U.N. GAOR Supp. (No. 34) at 26, U.N. Doc. A/10034 (1975).

120. G.A. Res. 3472(B), 30 U.N. GAOR Supp. (No. 34) at 23, U.N. Doc. A/10034 (1975).

121. *Id.*

122. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

scene or object of international discord . . . .”<sup>123</sup> Article I(1) provides that “Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.”<sup>124</sup> Article V(1) bans “[a]ny nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.”<sup>125</sup>

Outer space, the moon and other celestial bodies, has also been designated as a nuclear free zone.<sup>126</sup> Article IV of the 1967 Outer Space Treaty requires that state parties “undertake not to place in orbit around earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.”<sup>127</sup> Celestial bodies including the moon, “shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden.”<sup>128</sup>

The installation of nuclear weapons on the seabed and ocean floor also is prohibited by the 1971 Seabed Treaty.<sup>129</sup> The state parties:

undertake not to emplant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the outer limit of a seabed zone . . . any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.<sup>130</sup>

The state parties also “undertake not to assist, encourage or induce any State to carry out [these] activities . . . and not to participate in

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123. *Id.* at preamble.

124. *Id.* art. 1.

125. *Id.* art. V(1).

126. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

127. *Id.* art. IV.

128. *Id.*

129. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337.

130. *Id.* art. 1(1).



any other way in such actions."<sup>131</sup>

The Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) is the model regional nuclear-weapon-free zone treaty.<sup>132</sup> The Treaty obligates twenty-two Latin American states to limit the "testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons;"<sup>133</sup> and to refrain from the "receipt, storage, installation, deployment and any form of possession of any nuclear weapons, directly or indirectly . . . by anyone on their behalf or in any other way."<sup>134</sup> Further, "[t]he Contracting Parties also [pledged] to refrain from engaging in, encouraging or authorizing, directly or indirectly, or in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon."<sup>135</sup>

Treaty Protocol I obligates nuclear states "to apply the statute of denuclearization . . . in territories for which, de jure or de facto, they are internationally responsible and which lie within the limits of the geographical zone established in that Treaty."<sup>136</sup> Treaty Protocol II obligates contracting nuclear states to respect the Latin American nuclear zone<sup>137</sup> and "not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America."<sup>138</sup>

#### *D. The South Pacific Nuclear Free Zone*

On August 6, 1985, thirteen independent and self-governing states in the South Pacific region adopted the South Pacific Nuclear Free Zone Treaty.<sup>139</sup>

The Treaty's preamble recognizes that "the continuing nuclear

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131. *Id.* art. 1(3).

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

133. *Id.* art. 1, para. 1(a).

134. *Id.* art. 1, para. 1(b).

135. *Id.* art. 1, para. 2.

136. Additional Protocol I to Latin American Nuclear Weapons Treaty, art. 1, 22 U.S.T. 754, T.I.A.S. No. 10147, 634 U.N.T.S. 360.

137. Additional Protocol II to Latin American Nuclear Weapons Treaty, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 364.

138. *Id.* art. 3.

139. The thirteen states are: Australia, Cook Islands, Fiji, Kiribati, New Guinea, New Zealand, Naru, Niue, Papua New Guinea, Solomon Islands, Tonga, Tavalu, Western Samoa.

Nine states had signed the treaty by Sept. 19, 1985: Australia, Cook Islands, Fiji, Kiribati, New Zealand, Niue, Papua New Guinea, Tuvalu and Western Samoa. The South Pacific Nuclear Free Zone Treaty, Introductory Note, 24 I.L.M. 1440 (1985).

arms race presents the risk of nuclear war which would have devastating consequences for all people"<sup>140</sup> and that "regional arms control measures can contribute to global efforts to reverse the nuclear arms race and promote the national security of each country in the region and the common security of all . . . ."<sup>141</sup> Regional arms control measures also help to ensure "that the bounty and beauty of the land and sea in their region shall remain the heritage of their peoples and their descendants in perpetuity to be enjoyed by all in peace."<sup>142</sup>

Each party to the Treaty undertakes:

- (a) not to manufacture or otherwise acquire, possess or have control over any nuclear explosive device by any means anywhere inside or outside the South Pacific Nuclear Free Zone;
- (b) not to seek or receive any assistance in the manufacture or acquisition of any nuclear explosive device;
- (c) not to take any action to assist or encourage the manufacture or acquisition of any nuclear explosive device by any State.<sup>143</sup>

Signatory states also undertake not to provide:

fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material for peaceful purposes to:

- (i) any non-nuclear-weapon State unless subject to the safeguards of the [1970 Treaty on the Non-Proliferation of Nuclear Weapons, which prevents "diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices."<sup>144</sup>] or
- (ii) any nuclear-weapon State unless subject to applicable safeguards agreements with the International Atomic Energy Agency (IAEA).<sup>145</sup>

In addition to the above obligations, each signatory state promises not to station nuclear explosive devices in its territory;<sup>146</sup> not to test any nuclear explosive device;<sup>147</sup> and not "to assist or encourage

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140. South Pacific Treaty, *supra* note 3, at preamble.

141. *Id.*

142. *Id.*

143. *Id.* art. 3. These provisions are similar to the Latin America Treaty, *supra* note 132, art. 1.

144. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, art. III, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161; see Latin America Treaty, *supra* note 132, art. 13.

145. South Pacific Treaty, *supra* note 3, art. 4.

146. *Id.* art. 5(1).

147. *Id.* art. 6(a).

the testing of any nuclear explosive device by any State.”<sup>148</sup>

Lastly, the South Pacific Treaty imposes unique obligations on parties to refrain from dumping “radioactive wastes and other radioactive matter at sea anywhere within the South Pacific Free Zone;”<sup>149</sup> to prevent the dumping of such material by anyone in its territorial waters;<sup>150</sup> and not “to assist or encourage the dumping by anyone of radioactive wastes and other radioactive matter at sea anywhere within the South Pacific Nuclear Free Zone.”<sup>151</sup>

The Treaty establishes a control system for verifying compliance.<sup>152</sup> This system is comprised of signatory party reports to the director of the South Pacific Bureau for Economic Co-operation (Director) on events arising under or in relation to the Treaty;<sup>153</sup> meetings of the Consultative Committee (comprised of government representatives of signatory states) concerning matters arising in relation to the Treaty and for reviewing its operation;<sup>154</sup> and the previously mentioned state party agreements with the IAEA prohibiting the diversion of nuclear material from peaceful nuclear activities to nuclear explosive devices.<sup>155</sup>

The Treaty also provides a complaints procedure.<sup>156</sup> A state party that suspects another party is in breach of its treaty obligations shall bring the complaint to the attention of the party alleged to have breached the Treaty.<sup>157</sup> If the matter is not resolved, the complainant may refer it to the Director, requesting that the complaint be brought to the Consultative Committee’s attention.<sup>158</sup> If after considering any

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148. *Id.* art. 6(b). The Latin America Treaty permits explosions of nuclear devices for “peaceful purposes.” Latin America Treaty, *supra* note 132, art. 18(1).

149. South Pacific Treaty, *supra* note 3, art. 7(1)(a).

150. *Id.* art. 7(1)(b).

151. *Id.* art. 7(1)(c). As anticipated in Article 7(1)(d) the South Pacific Treaty was supplemented by the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, *adopted* Nov. 25, 1986, 26 I.L.M. 38 (1987) [hereinafter Convention]. Article 11 of the Convention requires parties “to prevent, reduce and control pollution in the Convention Area resulting from the storage of toxic and hazardous wastes. In particular, the Parties shall prohibit the storage of radioactive wastes or other radioactive matter in the Convention Area.” *Id.* art. 11. Article 12 provides that “the Parties shall take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices.” *Id.* art. 12.

152. South Pacific Treaty, *supra* note 3, art. 8.

153. *Id.* art. 9.

154. *Id.* art. 10; *see also id.* Annex 3.

155. *Id.* art. 8(2)(c); *see also id.* Annex 2.

156. *Id.* art. 8(2)(d); *see also id.* Annex 4.

157. *Id.* Annex 4, para. 1.

158. *Id.* para. 2.

explanation offered by the alleged offender, the Consultative Committee decides there is "sufficient substance" in the complaint to warrant a "special inspection," it shall order an inspection by three "suitably qualified" special inspectors.<sup>159</sup>

The state party against whom the complaint has been lodged shall provide the special inspectors "full and free access to all information and places within its territory which may be relevant . . ."<sup>160</sup> The special inspectors shall report their written conclusions to the Consultative Committee, which in turn is to report its decision to the members of the South Pacific Forum.<sup>161</sup> The parties shall meet "promptly" at a meeting of the South Pacific Forum if it is determined that the party complained of is in breach of the Treaty; that the complaint procedures have not been complied with; or at the request of either party.<sup>162</sup> No specific sanction is provided in the case of a state party's breach of its treaty obligations.<sup>163</sup>

159. *Id.* para. 4.

160. *Id.* para. 6.

161. *Id.* para. 8.

162. *Id.* para. 9.

163. The Vienna Convention on the Law of Treaties Article 60(2), U.N. Doc. A/CONF. 32/27 (1969) (done at Vienna, May 22, 1969; opened for signature, May 23, 1969). Article 60(2) states that:

(2) A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation in whole or in part or to terminate it either:

(i) in relations between themselves and the defaulting State, or  
(ii) as between all the parties;

(b) a party specifically affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

*Id.*

Article 60(3) states that:

(3) A material breach of a treaty, for the purposes of this article, consist in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

*Id.* art. 60(3).

It is interesting that article 13(1) of the South Pacific Treaty states that the "Treaty is of a permanent nature and shall remain in force indefinitely." South Pacific Treaty, *supra* note 3. Consistent with Article 60 of the Vienna Convention, Article 13(1) provides that "in the event of a violation by any Party of a provision . . . essential to the achievement of the objectives of the Treaty or of the spirit of the Treaty, every other Party shall have the right to withdraw from the Treaty." *Id.* Withdrawal shall be effected by giving twelve months notice. *Id.* art.

The South Pacific Treaty is supplemented by three protocols. Protocol I extends the Treaty to French, United States, and English territories in the South Pacific.<sup>164</sup> In Protocol II, France, the People's Republic of China, the Soviet Union, the United Kingdom and the United States are requested "not to contribute to any act which constitutes a violation of the Treaty or its Protocols by Parties to them."<sup>165</sup> Each party to Protocol II further "undertakes not to use or threaten to use any nuclear explosive device against: (a) Parties to the Treaty; or [against] (b) any territory within the South Pacific Nuclear Free Zone for which a State that has become a Party to Protocol I is internationally responsible."<sup>166</sup>

### E. *An Assessment of the Treaty*

The South Pacific Treaty goes farther than the Latin American Treaty in two respects: "it bans so-called peaceful nuclear explosions as well as explosions concerned with weapons testing; and it bans the dumping of radioactive wastes."<sup>167</sup>

However, the Treaty's effectiveness in insuring a nuclear-free South Pacific, is questionable. The prohibition on a signatory state "in its territory . . . stationing . . . any nuclear explosive device"<sup>168</sup> is qualified by article 5(2) which permits states to allow visits and navigation of its airspace by foreign aircraft and of its territorial seas by foreign ships and vessels.<sup>169</sup> In 1983, United States' vessels spent 251

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13(2). Article 13 is of limited legal utility since a retaliatory withdrawal by a state or states only will further weaken the Treaty's scope and legitimacy.

164. *Id.* Protocol I, art. 3.

165. *Id.* Protocol II, arts. 1, 4.

166. *Id.* art. 2.

167. Fry, *supra* note 3, at 62. Article 1(c) of the South Pacific Treaty arguably prohibits explosions for both peaceful and non-peaceful purposes. Article 1(c) defines a nuclear explosive device as "any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used." South Pacific Treaty, *supra* note 3, art. 1(c). Article 6(a) prohibits signatory states from testing "any nuclear explosive device" within its territory. South Pacific Treaty, *supra* note 3, art. 6(a).

The Latin America Treaty permits explosions of nuclear devices for "peaceful purposes." Latin America Treaty, *supra* note 132, art. 18.

168. South Pacific Treaty, *supra* note 3, art. 5(1).

169. *Id.* art. 5(2). This article states:

Each party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits.

*Id.*

The United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/

ship-days in Australian ports, a substantial proportion of these vessels were likely armed with nuclear weapons.<sup>170</sup> Australia's continued policy of permitting visits by United States' ships, in effect, results in a de facto nuclear presence in that country.

Yet, Australia and New Zealand's legal authority to prohibit the entry of nuclear armed or powered United States' ships arguably is constrained by their obligations under the ANZUS Treaty.<sup>171</sup> One author concludes that "[t]he implementation and development of the ANZUS alliance to the present day indicate that the assurance of unconditional access for U.S. nuclear ships to Australian and New Zealand ports has generally constituted part of the Treaty's function."<sup>172</sup> "Perhaps more important, except for a brief period in the mid-1970's, the consistent practice of Australia and New Zealand under ANZUS has been to provide such naval base support for U.S. ships."<sup>173</sup> Of course, either country is free to withdraw from the ANZUS Treaty—a step which both countries concede would weaken regional security.<sup>174</sup>

The South Pacific Treaty and its Protocols shall apply to terri-

CONF. 62/122 [hereinafter UNCLOS III] *reprinted in* K. SIMMONDS, U.N. CONVENTION ON THE LAW OF THE SEA (1983), guarantees the right of innocent passage through territorial waters. *Id.* art. 17. The right of innocent passage does not include entering internal waters or calling at a port facility. *Id.* art. 18.

The right of innocent passage also does not include passage which is "prejudicial to the peace, good order or security of the coastal State." *Id.* art. 19(1). Such non-innocent passage includes "any exercise or practice with weapons of any kind." *Id.* art. 19(b); *see also id.* art. 19(f). It is non-innocent passage by nuclear powered and armed ships that Article 19(2) arguably recognizes implicitly as remaining within the sovereign discretion of signatory states.

170. *See generally* P. HAYES, L. ZARSKY & W. BELLO, *supra* note 9, at 432-433. A total of forty ship-days were spent in the ports of other Southwest Pacific States. *Id.*

171. ANZUS Treaty, *supra* note 97.

172. Comment, *The Incompatibility of ANZUS and a Nuclear-Free New Zealand*, 26 VA. J. INT'L L. 455, 473 (1986). *But see* Glover, *Is A Nuclear-Free ANZUS Possible?* 2 CANTERBURY L. REV. 328 (1985); McLachlan, *ANZUS: The Treaty Reappraised*, 1985 N.Z.L.J. 271 (1985).

The argument that Australia and New Zealand are obligated to provide port-access to United States nuclear-powered and nuclear armed vessels primarily is based on the language of Article II of the ANZUS Treaty. Article II reads as follows:

"In order more effectively to achieve the objective of this Treaty the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack." ANZUS Treaty, *supra* note 97, art. II.

173. Comment, *supra* note 172, at 472.

174. The United States, of course, has stated that it considers New Zealand's limited port access policy to constitute a de facto withdrawal from the ANZUS Treaty. 86 DEP'T ST. BULL., *supra* note 98. New Zealand disputes this claim. McLachlan, *supra* note 172, at 279.

tory within the South Pacific Nuclear Free Zone.<sup>175</sup> Article 2(2) emphasizes that "nothing in th[e] Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to freedom of the seas."<sup>176</sup> Although the Treaty's area of legal application is limited to the territory of signatory states in the South Pacific, the Treaty's geographic scope as set forth in Treaty Annex I<sup>177</sup> purportedly stretches:

from the border of the Latin American nuclear weapons-free zone in the east to the west coast of Australia in the west, and from the border of the Antarctic zone in the south to the equator—with some extension into the northern hemisphere to include Kiribati—in the north. *This includes a vast area of ocean over which the treaty signatories do not have jurisdiction, and in relation to which the treaty does not seek to apply any nuclear prohibitions.*<sup>178</sup>

The preamble to the 1982 United Nations Convention on the Law Of The Sea (UNCLOS) recognizes "the desirability of establishing . . . a legal order for the seas and oceans . . .,"<sup>179</sup> and aspires to "contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights . . ."<sup>180</sup> UNCLOS III, however, does not explicitly limit the ocean transit of military vessels.

Freedom of the high seas<sup>181</sup> which, *inter alia*, includes freedom of navigation<sup>182</sup> and freedom of overflight<sup>183</sup> is guaranteed to all states.<sup>184</sup> Thus, "[n]o State may validly purport to subject any part of the high seas to its sovereignty."<sup>185</sup>

Although the high seas are "reserved for peaceful purposes,"<sup>186</sup> Article 95 states that "[w]arships on the high seas have complete immunity from jurisdiction of any State other than the flag State," suggesting that the transit on the high seas of [nuclear] armed vessels is

175. South Pacific Treaty, *supra* note 3, art. 2(1).

176. *Id.* art. 2(2).

177. *Id.* art. 1(a), Annex 1.

178. Fry, *supra* note 3, at 63 (emphasis added).

179. UNCLOS III, *supra* note 169, at preamble.

180. *Id.*

181. *Id.* art. 87. The high seas are defined as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State." *Id.* art. 86.

182. *Id.* art. 87(a).

183. *Id.* art. 87(b).

184. *See id.* art. 89.

185. *Id.*

186. *Id.* art. 88.

not prohibited.<sup>187</sup> In contrast, UNCLOS III is explicit in prohibiting the transportation of slaves,<sup>188</sup> piracy<sup>189</sup> and illicit narcotics traffic<sup>190</sup> on the high seas.

UNCLOS III does permit each state to establish an Exclusive Economic Zone (EEZ).<sup>191</sup> This Zone "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."<sup>192</sup> The coastal state has sovereign rights within the EEZ "for the purpose of exploring, exploiting, conserving and managing the natural resources" of the waters, seabed and subsoil.<sup>193</sup> All states, however, enjoy the same freedoms of navigation and overflight that they do within the high seas.<sup>194</sup>

Thus, the South Pacific Nuclear Free Zone legally cannot extend beyond each State's territorial waters. Yet, "[e]xperts have noted that the [NWFZ] must extend beyond the territorial seas of the Parties to have any effect at all, since nuclear-armed warships seldom pass through territorial waters. Their passage is mainly conducted beyond the territorial waters, in the ocean space traditionally known as the 'high seas'."<sup>195</sup> The "concept of region, then, termed a 'picture frame' approach, represents an intended area of application . . . . The extension of the frame to include high seas over which the treaty has no legal jurisdiction in order that the zone might abut . . . existing zones is essentially a political exercise."<sup>196</sup>

The Treaty's effectiveness in creating a nuclear-free Pacific also is limited by the opposition of some nuclear states. Both France<sup>197</sup> and the United States<sup>198</sup> have declined to sign the Treaty Protocols. On

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187. *Id.* art. 95. An argument might be made that nuclear weapons are illegal and that nuclear-armed ships fall outside of the scope of Article 95. See generally Lippman, *Nuclear Weapons and International Law: Towards a Declaration on the Prevention and Punishment of the Crime of Nuclear Humancide*, 8 LOY. L.A. INT'L & COMP. L.J. 183 (1986).

188. UNCLOS III, *supra* note 169, art. 99.

189. *Id.* arts. 100-07.

190. *Id.* art. 108.

191. *Id.* art. 55. "The exclusive economic zone is an area beyond and adjacent to the territorial sea . . . under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention." *Id.*

192. *Id.* art. 57.

193. *Id.* art. 56(1)(a).

194. *Id.* art. 58.

195. Comment, *The South Pacific Nuclear-Weapon-Free-Zone, the Law of the Sea, and the ANZUS Alliance: an Exploration of Conflicts, a Step Toward World Peace*, 16 CAL. W. INT'L L.J. 138, 169 (1986).

196. Fry, *supra* note 3, at 63.

197. See generally Chesneaux, *supra* note 3.

198. *South Pacific Nuclear Free Zone Treaty*, 87 DEP'T ST. BULL. 53 (Apr. 1987).



February 5, 1987, the United States announced that "in view of our global security interests and responsibilities, we are not, under current circumstances, in a position to sign the protocols."<sup>199</sup> Opposition by France, the United States, and possibly Great Britain,<sup>200</sup> will exclude from the scope of the Treaty such territories as French Polynesia, British Pitcairn Island, and United States' territories in Samoa and the four entities formerly comprising the United States Trust Territory of the Pacific.<sup>201</sup> In addition, United States' nuclear weapons, in all likelihood, are stored or are on vessels or aircraft in Hawaii, Guam, the Philippines and Diego Garcia, all of which border the South Pacific Nuclear Free Zone.<sup>202</sup> Any nuclear conflict in the Pacific will likely involve these bases and spill over into the Southwest Pacific.

Further, the Treaty permits (or does not explicitly prohibit) the involvement of signatory states with nuclear weapons-related missile testing,<sup>203</sup> the stationing of nuclear weapons-related communication and surveillance facilities,<sup>204</sup> and the sale of uranium, which is a major Australian export.<sup>205</sup> Designating the South Pacific as a "nuclear free zone" (as opposed to a "nuclear-weapons-free zone") is also misleading since energy, biomedical and research applications of nuclear power are not prohibited,<sup>206</sup> and radioactive material may be stored so long as it is not converted to "non-peaceful purposes"<sup>207</sup> or dumped at sea within the South Pacific Nuclear Free Zone.<sup>208</sup>

Thus, the integrity of the South Pacific Nuclear Free Zone is threatened by permitting signatory states to grant port access and passage within its territorial waters to nuclear-powered and armed vessels,<sup>209</sup> the internationally recognized rights of transit on the high

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199. *Id.* But see *Soviet Gains a South Pacific Toehold*, N.Y. Times, May 17, 1987, at 6, col. 3. China also has expressed support for the Treaty. Fry, *supra* note 3, at 66.

200. Fry, *supra* note 3, at 66.

201. *Id.*

202. See generally M. BEDFORD, *supra* note 68.

203. South Pacific Treaty, *supra* note 3, art. 1(c). A nuclear explosive device "does not include the means of transport or delivery of such a weapon or device if separable from and not an indivisible part of it." *Id.* Australia, for instance, has been considered as a launching point for United States MX missile tests. P. HAYES, L. ZARSKY & W. BELLO, *supra* note 9, at 247-48.

204. Fry, *supra* note 3, at 71.

205. *Id.*

206. *Id.* at 62.

207. South Pacific Treaty, *supra* note 3, art. 3.

208. *Id.* art. 7.

209. See *supra* notes 168-73 and accompanying text.

seas<sup>210</sup> and through EEZs,<sup>211</sup> the refusal of some nuclear powers to sign and ratify Treaty Protocols,<sup>212</sup> and permitting (or not prohibiting) certain nuclear-weapon related activities.<sup>213</sup> It also is uncertain whether the economically and politically weak South Pacific States will be able to maintain their nuclear free policies and their nuclear free zone when confronted by pressure exerted by powerful nuclear states which oppose the Treaty.<sup>214</sup> The existing qualifications on the Treaty's provisions and scope, in part, reflect the reluctance of some Pacific States to antagonize the western nuclear powers.<sup>215</sup>

#### IV. CONCLUSION

The Pacific is one of the globe's most militarized regions and the South Pacific Treaty is a strong statement of opposition to nuclear weapons. Yet, the constraints of international law and politics appear to prevent the creation of an effective Pacific nuclear free zone and thus insure that the region will continue to be held hostage by the nuclear superpowers. Nuclear free zones are comforting political symbols, but absent global arms control, all countries and peoples remain potential victims of a nuclear holocaust. One dilemma is that there appears to be no viable alternative to living within the present system of superpower military dominance.<sup>216</sup> Helpless, we cling to comforting symbols and illusions.

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210. See *supra* notes 180-89 and accompanying text.

211. See *supra* notes 190-93 and accompanying text.

212. See *supra* notes 196-201 and accompanying text.

213. See *supra* notes 202-07 and accompanying text.

214. See *generally Crisis Casts Shadow on Fiji's Future*, N.Y. Times, May 28, 1987, at 3, col. 1.

215. Fry, *supra* note 3, at 61-62.

216. See Lippman, *supra* note 187, at 185. But see *id.* 232-34.

