The South Pacific Nuclear Free Zone Treaty

Nigel Fyfe
Christopher Beeby*

The South Pacific Nuclear Free Zone Treaty (SPNFZ) was adopted by the South Pacific Forum just over a year ago. It is a good Treaty; it would have been a better one had those who prepared it not been deprived, through his untimely death, of the advice of Professor Quentin-Baxter. In view of his interest dating back to the Nuclear Tests Case, *Quentin's advice would certainly have been sought and, as always, generously given. This article explains the provisions of the Treaty and its associated protocols, and examines it in the context of other disarmament treaties and applicable international law.*

On 6 August 1985 the sixteenth South Pacific Forum, the annual meeting of Heads of Government of the thirteen independent or self-governing countries of the South Pacific,[1] agreed to adopt and open for signature the South Pacific Nuclear Free Zone Treaty. The date was significant: exactly forty years had passed since the destruction of Hiroshima by an atomic bomb. The event was significant for the Forum, representing the first formal "security" commitment undertaken by all its members. It was significant, too, on a wider scale, as the first international arms control agreement since the ill-fated Salt II accords of 1979.

The Treaty has now been signed by ten of the thirteen members of the Forum. Four members (Cook Islands, Fiji, Niue and Tuvalu) have ratified it. New Zealand is committed to ratification following the passage through Parliament of the New Zealand Nuclear Free Zone, Disarmament and Arms Control Bill, which implements a number of provisions of the Treaty into domestic law. The Treaty will enter into force once it has been ratified by a total of eight Forum members.

* The authors are employees of the New Zealand Ministry of Foreign Affairs, each of whom was involved in the work, at the officials' level, leading to the adoption of the SPNFZ Treaty and its three Protocols. They wish to acknowledge particularly the assistance they obtained in the preparation of this article from a Ph.D. thesis by Dr K. G. M. Graham, "Nuclear Weapon Free Zones as an Arms Control Measure", Victoria University of Wellington, November 1983. The views expressed in the article are the authors'.

1 Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa. The Federated States of Micronesia is an observer. A map illustrating the zone of application of the Treaty appears opposite the final page of this article.

Three Protocols to the Treaty were adopted by the Forum at its seventeenth meeting in August 1986. The three outside countries having territory within the zone — the United States, the United Kingdom and France — are eligible to become parties to the first Protocol, while those three states and the Soviet Union and China are eligible, in their capacity as nuclear weapon states, to become parties to the other two. The establishment of the necessary legal structure to create a nuclear free zone in the South Pacific is therefore complete: the political task of attracting commitments to that structure is still far from finished.

I. HISTORY OF THE PROPOSAL

The notion that the countries in the South Pacific might join together to create a nuclear free zone in the region began to appear in resolutions of the Australian and New Zealand Labour Parties during the 1960s (both were then in opposition). The adoption of the Antarctic Treaty[2] in 1959, which demilitarised the whole area to the south of 60°S, and the Treaty for the Prohibition of Nuclear Weapons in Latin America[3] in 1967 ("the Treaty of Tlatelolco"), which created a "militarily denuclearised zone" in Latin America, provided impetus and inspiration.

A specific proposal to create a South Pacific zone appeared in the New Zealand Labour Party's winning election platform in 1972. Conscious of its security relationship through the ANZUS Treaty to Australia and the United States, the new government sought agreement from those two allies. They, however, believed that American "strategic interests and its security arrangements in the South Pacific" would be disadvantaged "more directly than those of any other power",[4] and refused to endorse the principle. Nevertheless, in early 1975 New Zealand resolved to advance the policy. In July the South Pacific Forum agreed to a New Zealand proposal to include in its communiqué a paragraph commending "the idea of establishing a nuclear weapon free zone in the South Pacific" as a means of achieving the "aim of keeping the region free from the risk of nuclear contamination and of involvement in a nuclear conflict". It agreed to seek wider endorsement of the idea through the adoption of a resolution by the United Nations General Assembly and for a study of the ways and means of establishing a zone to be undertaken.

Fiji, New Zealand and Papua New Guinea duly introduced a draft resolution to the First Committee of the General Assembly at its 30th Session on 20 October 1975. Eventually Chile, Ecuador, Peru, the Philippines, Malaysia and Singapore, but not, significantly, Australia, signed as additional co-sponsors. On 28 November the resolution was adopted by the First Committee by 94 votes to none, with eighteen abstentions, including the socialist bloc, several Nato countries and Egypt.

2 Washington, 1 December 1959.
3 Mexico City, 14 February 1967.
4 From a letter by Gough Whitlam, Australian Prime Minister, to New Zealand Prime Minister Wallace Rowling, 7 October 1975. Quoted in R. Wake and G. Munster *Documents on Australian Defence and Foreign Policy 1968-75* (Angus and Robertson, Sydney, 1980) 129, 130.

On 11 December, the day before a new National Party government, antipathetic to the proposal, was sworn into office in New Zealand, the General Assembly adopted the resolution by 110 votes to none with twenty abstentions. The resolution[5] "endorsed the idea of the establishment" of a zone, invited the "countries concerned to carry forward consultations about ways and means of realising it"; and "expressed the hope that all States, in particular the nuclear weapon States, [would] cooperate fully in achieving the objectives" of the resolution.

The election of the new National government effectively brought the initiative to an end. The consultations called for in the resolution did not take place, although the members of the South Pacific Forum agreed at their next meeting in March 1976:

> that, in carrying forward their consultations under the resolution . . . their objective would be to advance the cause of general disarmament and to seek the cessation of nuclear weapons testing in the South Pacific. In taking such action they would respect the principle of the freedom of navigation of the high seas. They agreed that in developing the concept embodied in the General Assembly resolution along these lines there would be no incompatability with existing security arrangements.

It was not until 1983, with the election of a Labour government in Australia, that the proposal surfaced again. Ironically, the situation was the reverse of that which had prevailed in 1975. Now it was Australia that set about convincing its Forum partners, including a sceptical New Zealand, of the merits of the proposal. Most other members of the Forum still supported it, although with perhaps some wariness in view of the fate of the 1975 exercise. In mid-1983 the Forum was able to agree to do no more than define the limits within which further studies might be made. But in July 1984 a Labour government was returned to power in New Zealand. It was again committed by its election manifesto to seek to establish a South Pacific nuclear free zone.

Under Australian nurturing, the initiative had matured sufficiently for the 1984 Forum held in Tuvalu in August, to agree to establish a working group of officials, under Australian chairmanship, to "undertake an examination of the substantive legal and other issues involved with a view to preparing a draft of a treaty for consideration by the Forum meeting in 1985". All Forum members were eligible to take part in the working group.

The Treaty was to be drafted in accordance with certain principles. In summary, it was to reflect Forum members' aspirations to enjoy peaceful development free from the threat of environmental pollution; their acknowledgement of existing relevant treaties; their willingness to undertake commitments not to acquire or test nuclear explosives, and their wish that nobody should test, use or station such explosives in the South Pacific. But each should retain "unqualified sovereign rights" to make its own security arrangements, including the question of access to their ports and air fields by vessels and aircraft of other countries. The Treaty should also reflect the "particular importance of the principle of

5 Resolution 3477 (XXX).

freedom of navigation and overflight and the treaty obligations of Forum members."

In addition, the working group was directed to examine a proposal by Nauru to amend Annex 1 of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[6] (known as "the London Dumping Convention" or "LDC") to provide for a complete prohibition on the dumping of radioactive waste at sea. "The dumping and disposal of nuclear waste in the region was intolerable and unacceptable", the Forum's communiqué observed.

The working group met five times between November 1984 and June 1985. A legal drafting group appointed by the working group met once, in December 1984, to prepare a basic text. The only Forum member not to attend any of the meetings was Tonga.

A draft treaty was submitted to the Forum at its 1985 meeting in Rarotonga. It was accompanied by the report of its extremely able Australian Chairman, Mr David Sadleir, an invaluable document recording the working group's method of work, the consideration given to prominent issues, and, where requested by specific delegations, their particular concerns or understandings regarding some of those issues. The decision to submit the draft Treaty was unanimous, and no delegation requested that its dissent to any particular article or provision be recorded. The consensus tradition of the Forum was therefore maintained by the working group, as it was by the Forum itself when it dealt with the matter in Rarotonga. It is on the public record, however, that at least one leader was not entirely happy about the draft and only agreed to allow the Treaty to be adopted ("endorsed" was the term actually used) and opened for signature after considerable debate. Eight Forum members signed at Rarotonga.[7]

The Forum deferred a decision concerning adoption of the three draft Protocols until its 1986 meeting. "Since the Protocols involved countries outside the region", it agreed that "consultations should be held with all the countries eligible to sign the Protocols before they were finalised".[8] The officials' working group was requested to organise the consultations.

After one planning meeting in November 1985, the working group appointed a representative delegation to visit the capitals of the five states concerned. The visits took place in January and February 1986. The delegation comprised the Australian Chairman of the working group and representatives of the Cook Islands, Fiji, New Zealand (one of the authors of this article), the Solomon Islands and

6 London, 13 November 1972.

7 Australia, Cook Islands, Fiji, Kiribati, New Zealand, Niue, Tuvalu and Western Samoa. Nauru and Papua New Guinea have signed subsequently.

8 Tuvalu Forum Communiqué. Experts in the United Nations' ad hoc experts' group (see n.12 below) disagreed as to whether nuclear weapon states had a right to be consulted in the drafting process, and if so, from what point (paras. 96-98). In the present case, the views of the nuclear weapon states were not sought until after the adoption of the Treaty, and they were not given the right to negotiate over the draft Protocols, but rather to enter into consultations only.

Papua New Guinea. The full working group considered the delegation's report on the consultations at a meeting in April and the Chairman resubmitted the draft Protocols with his accompanying confidential report to the Forum at its seventeenth meeting in Suva in August 1986.

II. THE SOUTH PACIFIC NUCLEAR FREE ZONE TREATY

A. Its Precedents

The Chairman's 1985 report records that the working group had regard to the criteria for nuclear free zones accepted by the United Nations. It also studied and drew on relevant existing international agreements, such as the Treaty on the Non-Proliferation of Nuclear Weapons[9] ("the NPT"), the Treaty of Tlatelolco, the Antarctic Treaty, the Seabed Arms Control Treaty[10] and the Partial Test Ban Treaty.[11]

The United Nations has been seized of proposals for the establishment of zones for a long time. Among the first was a suggestion in 1956 by the Soviet Union of a ban on the stationing of nuclear weapons in Central Europe. Other areas for which nuclear weapon-free zones have been proposed include Africa, Latin America, the Middle East, the Balkans, Scandinavia, the Mediterranean, South Asia and, of course, the South Pacific. Only the Latin American and, now, the South Pacific proposals have resulted in the adoption of a treaty.

In 1974 the United Nations commissioned the Conference of the Committee on Disarmament (the precursor of the current United Nations Conference on Disarmament) to establish an ad hoc group of governmental experts to undertake a comprehensive study[12] of the issue. By consensus the group identified a number of relevant principles. Among others, it agreed that the zone must be effectively free of all nuclear weapons; the initiative should come from states within the region; the participation of all militarily significant states, and preferably all states, in the region would enhance the zone's effectiveness; there must be an effective system of verification to ensure full compliance with the agreed obligations; and the treaty establishing the zone should be of unlimited duration. Other principles were identified, though they were not agreed by consensus.

In 1975 and 1976 the General Assembly, in resolutions[13] welcoming the report, said that the establishment of a nuclear-weapon-free zone can contribute to the security of its members, to the prevention of the proliferation of nuclear weapons, and to the goals of general and complete disarmament.

9 London, Washington and Moscow, 1 July 1968.

10 "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", Washington, London and Moscow, 11 February 1971.

11 "Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water", Moscow, 5 August 1963.

12 Official Records of the General Assembly, Thirtieth Session, Supplement No. 27A (A/10027/Add 1), Annex 1.

13 Resolution 3472 (XXX) and Resolution 31/70. See also the Final Document of the First Special Session of the General Assembly Devoted to Disarmament in 1978 (A/Res/S-10/2, paras. 60-62).

A further expert group was set up by the General Assembly in 1982[14] to review and supplement the initial study. Despite being granted an extension of the time available to it to complete its work, the group failed to agree on a report at its final meeting early in 1985,[15] and has since disbanded.

The Antarctic Treaty of 1959 created the world's first fully demilitarised zone. It has succeeded in keeping that continent free from weaponry of all kinds. According to Article 1(1):

> Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia,* any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons.

and Article 5(1):

> Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

Antarctica is a unique region of the world, being an area of disputed legal status and without a permanent population other than a small number of scientists and support staff. The Treaty of Tlatelolco therefore had much greater value as a precedent to the SPNFZ working group. Upon its adoption in 1967, that Treaty established the first zone covering a populated region. Its success, in terms of the support it has attracted within its zone of application, from the states covered by its two Protocols and from the world community generally, has inevitably made it a benchmark against which subsequent efforts would be judged.

Twenty-four of the twenty-seven eligible Latin American countries are parties to the Treaty. It is in force for all those parties except Brazil and Chile, neither of which has given the waiver under Article 28(2) that would allow the Treaty to become binding on them before all eligible states had become parties. Argentina has signed the Treaty, but not ratified it, while neither Cuba nor Guyana have signed it. Two "Additional Protocols" — the first applying the Treaty to the territories of metropolitan states[16] within the Treaty's zone of application, and the second providing, inter alia, for the provision of security guarantees to parties to the Treaty by the nuclear weapon states — have attracted almost complete support. Only France, eligible to become a party to both Protocols, has so far not ratified Additional Protocol I, which it signed in 1979.

The basic obligations of parties to the Treaty are contained in Article 1. In essence, the parties undertake not to possess, test or use nuclear weapons, or to allow their storage or stationing in their territory, which is defined by Article 3 as the:

> territorial sea, air space and any other space over which the State exercises sovereignty in accordance with its own legislation.

14 Resolution 37/99F.
15 Resolution 40/94B.
16 Metropolitan states possessing territories within the Treaty of Tlatelolco's zone of application are France, the Netherlands, the United Kingdom and the United States.

The NPT should be briefly noted for two reasons. "Non-nuclear weapons States parties" to that Treaty, among which are included all members of the South Pacific Forum except Vanuatu, undertake not to acquire or to receive the transfer of or the control over any "nuclear weapons or other nuclear explosive devices". The NPT does not, however, prohibit the stationing of such devices belonging to a nuclear weapon state in the territory of a non-nuclear weapon state party; nor does it include security guarantees by the former to the latter. Secondly, Article 7 of the NPT recognises:

> the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.

B. Area of Application

The Treaty establishes a zone — the South Pacific Nuclear Free Zone — of vast dimension.[17] It stretches in the west from the west coast of Australia to the boundary of the Latin American zone in the east (see attached map). It thus spans approximately 130 degrees of longitude, from 115°E to 115°W. It extends from the equator (with small bumps into the northern hemisphere to incorporate the exclusive economic zones of Papua New Guinea, Kiribati and Nauru), to 60° south, the boundary of the area of application of the Antarctic Treaty. The zone encloses within its boundaries sovereign territory and areas of the high seas. Provision is made to extend the zone should there be new members of the South Pacific Forum who become parties to the Treaty.

The zone includes the territory of all Forum members, except the Antarctic territories of New Zealand and Australia, which are already covered by the more extensive demilitarisation provisions of the Antarctic Treaty. Australian islands in the Indian Ocean are also included, although they are separated by extra-zonal high seas areas. Special provision has been made in Annex 1B to allow their removal from the zone if Australia declares that they have become subject to "another Treaty having an object and purpose substantially the same as that of this Treaty." Existing proposals which might, upon fruition, apply to those territories are those for an Indian Ocean Zone of Peace[18] and for a Southeast Asian Nuclear Free Zone.[19] The special provisions for these territories ensure that they will not be subjected to separate and differing treaties governing their denuclearised status.

The Treaty and its Protocols apply, unless otherwise specified, to "territory" within the zone (Article 2). "Territory" is defined in Article 1 as:

> internal waters, territorial sea and archipelagic waters, the seabed and subsoil beneath, the land territory and the airspace above them.

The Treaty obligations that apply outside such "territory" are Article 3 ("Renunciation of Nuclear Explosive Devices") which applies globally, and

17 Although not as large as the full potential extent of the Treaty of Tlatelolco. That will not be attained until all eligible states have ratified the Treaty and the Additional Protocols, and safeguard agreements have been negotiated with the International Atomic Energy Agency.

18 See, for example, General Assembly Resolution 40/153.

19 See, for example, General Assembly Resolution 40/83.

Article 7 ("Prevention of Dumping") which applies throughout the zone. In addition Article 4 ("Peaceful Nuclear Activities") and Article 6(b) ("Prevention of Testing of Nuclear Explosive Devices" in so far as it relates to the non-facilitation of testing) are global as they are not specified to pertain to parties only within geographical limits.

C. Scope of the Prohibitions

1. *Application to all nuclear explosive devices*

An issue which has bedevilled other nuclear free zone proposals, including the Treaty of Tlatelolco, is whether the prohibitions must apply only to nuclear *weapons*. Should parties to a zone treaty be free to develop, possess and use a nuclear explosive for peaceful applications, albeit with some constraints? The Treaty of Tlatelolco reserves to parties the right "to carry out explosions of nuclear devices for peaceful purposes — including explosions which involve devices similar to those used for nuclear weapons."[20]

The manufacture of a nuclear explosive device requires access to the same techniques and material whether its intended use is military or civilian. Possession of a device by a state which claims only peaceful designs may, nevertheless, cause the same apprehensions among its neighbours as if it had acknowledged its military application, with a consequential impulse towards nuclear proliferation throughout the region concerned. Nevertheless, some states insist that the distinction can be maintained, and have refused to surrender the right to manufacture or acquire allegedly peaceful devices. India in fact tested a device under just this cover in 1974.

The SPNFZ Treaty resolves the question in favour of a comprehensive prohibition on all nuclear explosive devices. That term is used throughout. That is one of the reasons why the Treaty creates a "nuclear free zone", rather than a "nuclear-weapon-free zone". A nuclear explosive device was defined to mean:

> any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used. The term includes such a weapon or device in unassembled and partly assembled forms, but 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.

20 Article 18. But it must be done in accordance with other provisions of the Treaty, including Article 1 and Article 5. The latter defines a "nuclear weapon":

> as any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes.

Logically, since any nuclear explosive device has "a group of characteristics that are appropriate for use for warlike purposes", it must be a nuclear weapon, and therefore subject to the prohibition in Article 1, rather than governed by Article 18. Some parties, notably Argentina, still maintain that they are permitted to develop nuclear explosive devices. The United States accompanied its ratification of Additional Protocol II to the Treaty of Tlatelolco with an understanding denying that any nuclear explosive device might not be covered by the definition in Article 5. See also Alfonso Garcia Robles *The Latin American Nuclear Weapon-Free Zone* (The Stanley Foundation, Iowa, Occasional Paper, 19 May 1979) 18-19.

2. *Renunciation of nuclear explosive devices*

Under Article 3, the parties undertake not to "manufacture or otherwise acquire, possess or have control over any nuclear explosive device". As already noted, the obligations are global. The terms used are mostly drawn from Article 2 of the NPT.

> Under sub-paragraph (c) of Article 3, parties undertake:
> not to take any action to assist or encourage the manufacture or acquisition of any nuclear explosive device by any State.

This has a precedent in Article 1 of the NPT. A problem with such a "non-facilitation" clause is the limits which must be inferred on its operation. On its face the prohibition is capable of including in its compass all activities which might in some way lend assistance to a state seeking to acquire by any means a nuclear explosive device. Is an element of intention required to "encourage" or "assist" a state in such a course? What degree of remoteness is sufficient to remove a party's action from the ambit of the prohibition?

These questions have particular relevance in the South Pacific, where the testing of nuclear explosive devices is conducted by France at Mururoa Atoll in the Tuamotu Archipelago. Normal commercial relations between South Pacific countries and France (including French Polynesia) as well as scientific intercourse (including the provision of meteorological advice) might, on a liberal interpretation of the clause, fall within its scope. The Chairman's Report records the working group's views on these questions:

> The terms used in the draft "not to take any action to assist or encourage" were understood to relate to any deliberate action, either positive or permissive, to facilitate such activity. It was understood to exclude actions which have other intended purposes but might unintentionally and incidentally assist the activities mentioned.

3. *Prevention of stationing of nuclear explosive devices*

Each party's undertaking in Article 5 to "prevent in its territory the stationing of any nuclear explosive device" is arguably the single most significant additional obligation that will be assumed by those which are already also parties to the NPT.

> "Stationing" is defined in Article 2 to mean:
> emplantation, emplacement, transportation on land or inland waters, stockpiling, storage, installation and deployment.

This is somewhat more comprehensive than the definition in Article 1 of the Treaty of Tlatelolco, which does not refer to "emplantation, emplacement, transportation on land or inland waters", or to "stockpiling". The words "emplantation" and "emplacement" have precedents in the Seabed Arms Control Treaty.[21] But whether any of the additional prohibitions, other than that relating to "transportation on land or inland waters", in fact extend the scope of the prohibition is doubtful. Is there any significant difference between "stockpiling" and "storage"?

21 Article 1.

Does not a prohibition on "installation" and "storage" also embrace a prohibition on "emplantation" or "emplacement"? Nevertheless, the use of these terms in previous arms control treaties obliges those who would follow to justify their omission.

The term "inland waters" is not in common usage in international law. Its use in the Treaty distinguishes transportation on lakes, water courses and rivers ("inland waters") from transportation in "internal waters", a more generally understood term describing those maritime areas, such as ports, within the boundary from which the limits of the territorial sea and exclusive economic zone are drawn. It ensures that a hypothetical deployment system sited on, or in, lakes, rivers and canals will be covered by the prohibition on stationing in Article 5(1).

This prohibition raises several questions. When might the presence of a nuclear explosive device within the zone amount to stationing? Can a legitimate distinction be drawn between transit through, and deployment within, the zone? To what extent can or should zonal states prohibit the carriage of nuclear explosive devices through the zone, including through territory under their jurisdiction? All have been addressed by the United Nations ad hoc experts' group, the Treaty of Tlatelolco, and the SPNFZ Treaty.

Only a minority of the ad hoc experts' group thought that zonal treaties could prohibit the transit of nuclear weapons "through the territory of the zone",[22] or should prohibit transit, including entry into ports within the zone, of vessels having nuclear weapons on board, or the entry into airspace of similarly laden aircraft. The group was, however, unanimous that zonal states must be precluded from "transporting" weapons in "vehicles under their jurisdiction or control", since transport, however brief or temporary, could be interpreted to imply possession.

The Treaty of Tlatelolco does not prohibit transit through the zone, including, it seems, into the territory of parties to the Treaty, so long as the carrier itself is not a party to the Treaty. Transportation by such a party is generally understood to be prohibited by Article 1.

The SPNFZ Treaty takes much the same approach, but is stricter and more explicit. As noted, transportation on land and inland waters is prohibited. The refusal to prohibit transit in the maritime areas stems from a recognition that it was beyond the power of the Forum to do so. The Treaty does not purport to interfere with the freedom of the seas, including the freedom of navigation on the high seas and in exclusive economic zones, and transit rights in territorial seas, archipelagic waters and international straits. Article 2(2) in fact disclaims any such effect. The Chairman of the working group noted in his report that

22 U.N. Experts' Report, supra n.12, para. 90 (m). There is some ambiguity in what this minority view means — does "territory of the zone" mean "national territory within the zone", or the "entire area of the zone"? Paragraph 112 provides strong support for the latter view.

the working group identified these rights and freedoms as a "legal constraint" on its work. He observed that:[23]

> the countries of the South Pacific are themselves major beneficiaries of these rights. . . . any attempt to ban transit through the high seas of the region by ships capable of carrying nuclear weapons would be legally impossible.

Article 5(2) specifically allows each party to decide for itself whether to allow port or airfield visits, transit of its airspace, or navigation in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lanes passage or transit passage of straits. It is possible, therefore, that a nuclear weapon will be within the territory of a party with its acquiescence. So long as the visit, transit or navigation is not of a character that is covered by the definition of stationing, the prohibition in Article 5(1) will not have been breached.

Some critics of the Treaty have maintained that the Forum did have the power to prohibit the transit of nuclear armed vessels through their territorial sea or archipelagic waters. This argument is based in the main on provisions in the United Nations Convention on the Law of the Sea[24] ("UNCLOS"). It is said that a coastal state has a right to make laws throughout its territory unless explicitly denied that right by international law, and that neither UNCLOS nor any other rule of treaty or customary law explicitly does so. The better view — and one from which there is little dissent discernible in state practice — is that UNCLOS does indeed preserve the exercise by nuclear-powered and nuclear-armed ships of the rights of innocent passage and archipelagic sea lanes passage through the territorial sea and archipelagic waters. While certain rights to regulate the exercise of such passage are retained by coastal states,[25] they do not extend to the right to prohibit such passage. The drafting history strongly confirms this view.

4. *Prevention of testing of nuclear explosive devices*

The obligation under Article 6 to prevent testing in the territory of parties is given the prominence of an article to itself, emphasising the strongly held opposition of Forum members to that activity. American, British and French testing programmes in the region gave rise to this opposition, although the Forum is now on record as opposing all testing in all environments by anyone anywhere.

The limitation of the obligation to the "territory" of parties demonstrated some restraint on the part of the Forum, as a party does have some power to regulate activities in its exclusive economic zone and on its continental shelf. In particular, UNCLOS gives a coastal state jurisdiction over the "protection and preservation of the marine environment"[26] in the exclusive economic zone,

23 He also notes that the "projected parties" would not be able to verify such a ban, "and an attempt to apply one would amount to no more than an exhortation leading to international scepticism about the Treaty as a whole".

24 Montego Bay, 10 December 1982, UN Doc. A/CONF. 62/122 (1982).

25 UNCLOS, Articles 19, 21, 22 and 23.

26 Ibid. Article 56 (1) (b) (iii).

and the "exclusive right to authorise and regulate drilling on the continental shelf for all purposes".[27] It is difficult to see how another state could undertake the testing of a nuclear explosive device either within the exclusive economic zone or on or under the continental shelf without the consent of the coastal state. An effective, if not absolute, power to prevent such testing in those areas can be inferred. Nevertheless, a party would clearly be in breach of its obligation under Article 6(b) not to facilitate testing if it did not take action available to it to prevent it.

5. *Prevention of dumping*

The 1984 Tuvalu Forum did not stipulate that the Treaty should prohibit the dumping of radioactive waste at sea. The decision to include Article 7, prohibiting dumping of such waste, reflects the growing concern of Forum members that their region should not be used as a dumping site. Henceforth the radioactive waste generated by many Forum members in medical, industrial and research activities will have to be disposed of on land, or exported from the region for disposal elsewhere.

The dumping of "high-level radioactive wastes" at sea is already prohibited by the London Dumping Convention. Nauru and Kiribati, with support from other Forum members who are also parties to that Convention (notably Australia and New Zealand) are currently attempting to amend it to have it also prohibit the dumping of waste containing lesser levels of radioactivity. A moratorium was declared in 1983 on the dumping at sea of all radioactive wastes while the proposal is considered.

In the South Pacific, the question of dumping has also been scrutinised during several rounds of negotiations on a draft "Convention for the Protection and Development of the Natural Resources and Environment of the South Pacific Region" and associated protocols. The negotiations have included all members of the South Pacific Commission, a regional organisation composed of Forum members as well as France, the United Kingdom and the United States — the last three qualifying because of their possession of territories in the South Pacific. The working group did not want to complicate those negotiations since they include states that not only play a major role in the LDC debate, but also are among the only states that might want to undertake major radioactive waste dumping operations in the region. The negotiations will therefore lead, if successful, to a Convention containing a generally accepted prohibition on dumping. So the working group chose not to draft a protocol to the SPNFZ Treaty inviting non-Forum members to agree not to dump within the zone. It made that choice in recognition of the fact that such a move might have been seen to reflect a lack of commitment to the continuing negotiations. Similarly, the Treaty does not oblige parties to prevent dumping of radioactive wastes in their exclusive economic zones in addition to their territorial seas, although they have the power to do so under Article 210(5) of UNCLOS.

27 Ibid. Article 81.

Under Article 7(2), the obligations on parties not to dump radioactive waste within the zone and to prevent dumping of such waste by anyone in their territorial sea will no longer apply to areas of the zone for which the Convention and its draft "Protocol for the Prevention of Pollution of the South Pacific Region by Dumping" have entered into force. The operation of Article 7(2) could lead to the situation where parties to SPNFZ will no longer be under the obligations contained in Article 7(1)(a) and (b) if they have not themselves become parties to the new Convention and its Protocol by the time it comes into force. While that may be some sort of inducement to SPNFZ parties to ratify the new instruments, it is nevertheless a gap in Article 7(2) which could have been plugged.

Such are the substantive prohibitions in the SPNFZ Treaty. Mention should also be made of Article 4, which obliges parties to avoid contributing to the proliferation of nuclear explosive devices, essentially through the application of safeguards under the NPT or safeguard agreements with the International Atomic Energy Agency ("the IAEA").

D. Verification

The ad hoc experts' group agreed that nuclear free zone arrangements "must contain an effective system of verification to ensure full compliance with the agreed obligations".[28] Unlike the Treaty of Tlatelolco, the SPNFZ Treaty does not establish a permanent secretariat to ensure compliance and undertake administrative functions. Necessary administrative tasks, including the important depositary functions, are entrusted to the Director of the South Pacific Bureau for Economic Cooperation, the organisation based in Suva, Fiji, which serves as Secretariat to the South Pacific Forum. The Director is appointed to a renewable three-year term by the Forum itself. He also has responsibilities under the "control system" established by Article 8 to verify compliance. That system contains provision for:

— reports by a party of any significant event within its jurisdiction affecting the implementation of the Treaty, and exchanges of information on matters arising under or in relation to it (Article 9);

— consultations among parties through the mechanism of an ad hoc "consultative committee" established by Annex 3 on any matter arising under the Treaty or for reviewing its operation (Article 10, and Annex 4);

— the compulsory application of IAEA safeguards to peaceful nuclear activities (Annex 2); and

— a complaints procedure (Annex 4).

This last element is a comprehensive system for the consideration and actioning of complaints. Any complaint will be considered by the consultative committee, constituted of "representatives of the parties". It may decide that there is sufficient substance to warrant a "special inspection" by a team of three suitably qualified inspectors appointed by it in consultation with the complained of and

28 U.N. Experts' Report, supra n.12, para. 90 (e).

complainant parties, provided that no national of either party may serve. Inspectors are to have "full and free access to all information and places" in the territory of the complained of party, if it is relevant to enable them to implement the directives of the consultative committee. Those directives must "take account of the legitimate interests of the party complained of in complying with its other international obligations and commitments", and "not duplicate safeguard procedures to be undertaken by the IAEA" under Annex 2. Inspectors are to be given necessary privileges and immunities. They are to report to the consultative committee, which is in turn to report to all Forum members its decision as to whether a breach of the Treaty has occurred. If its decision is in the affirmative, the parties are to meet promptly at a meeting of the South Pacific Forum. The same result may be precipitated by a request of either of the protagonist parties or in the event of non-compliance with the provisions of Annex 4. There is thus no automatic sanction that takes effect in the event of a proven breach of the Treaty; rather the matter is removed to the political arena at the region's highest political level.

The further action available to the Forum in the event of a proven breach is not specified. Since the Forum is justifiably proud of its record of avoidance of serious dispute, it would no doubt seek to resolve the matter internally. A major breach by a recalcitrant member might lead to the conclusion that the peace and security of the region was endangered, and to recourse to the United Nations Security Council or General Assembly under Article 35 of the U.N. Charter.

E. Withdrawal

Unlike all previous arms control agreements, the Treaty does not provide for a unilateral right of withdrawal. The NPT, for example, allows withdrawal by a party on three months' notice "if it decides that extraordinary events, related to the subject matter of the Treaty, have jeopardized the supreme interests of its country." Parties to the SPNFZ Treaty may withdraw only on twelve months' notice 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." The effect of this provision is in fact little different from that pertaining under general treaty law.[29] It reflects the solemnity of the Forum's opposition to nuclear weaponry and environmental pollution.

F. The Protocols

While there are only two Protocols to the Treaty of Tlatelolco, the SPNFZ Treaty has three. Protocol 1 has similar effect to Tlatelolco's Additional Protocol I. It is open for signature by France, the United Kingdom and the United States, being the only three states with "international responsibility" for territories[30]

29 Article 60, Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 8 I.L.M. (1969) 679.

30 Pitcairn Island (UK), American Samoa and Jarvis Island (US), French Polynesia, New Caledonia and Wallis and Futuna (France).

within the zone. Upon ratification, a party to Protocol 1 will apply the provisions of Articles 3, 5 and 6, containing the prohibitions on the manufacture, stationing and testing of nuclear explosive devices, to those territories. It will also apply the requirement for safeguarding peaceful nuclear activities contained in Article 8(2)(c) and Annex 2.

Protocol 2 has similar effect to Additional Protocol II to the Treaty of Tlatelolco. Its parties (it is open to all five nuclear weapon states) undertake not to use or threaten to use a nuclear explosive device against parties to the Treaty or territories within the zone of parties to Protocol 1.[31] (Interestingly, the scope of the undertaking in Additional Protocol II of the Treaty of Tlatelolco does not extend to the territories of parties to Additional Protocol I.) All five nuclear weapon states have already made general declarations — known in diplomatic parlance as a "negative security guarantee" — along these lines to non-nuclear weapon states. Only the Chinese guarantee, however, is unconditional. The undertaking in Protocol 2 puts such guarantees into a legally binding form, free from any conditions (although parties to the Protocols are not precluded from entering reservations, unlike parties to the Treaty itself or, for that matter, parties to the Treaty of Tlatelolco and its Additional Protocols). Parties also undertake not to contribute to any act by a party violating either the Treaty or a Protocol.

Neither Protocol 2 nor any other obligation in the Treaty prohibits the launching of a nuclear explosive device within the zone against a target outside it. Nor does it prohibit parties to the Treaty from being members of a security alliance with a nuclear power, or, within the constraints imposed by Articles 3, 4, 5 and 6, from contributing to the ability of a nuclear power to maintain a deterrence policy. Facilities in Australia under the joint supervision of the Australian and American Governments, which have a publicly stated role[32] in contributing to the deterrence of nuclear war, are clearly relevant in this context. Is it reasonable, in these circumstances, for the parties to the Treaty to expect that the nuclear weapon states will provide unconditional security assurances?

It is correct that the Treaty does not prohibit the deployment by non-parties of nuclear explosive devices outside the territorial limits of parties (and of the territories of Protocol 1 parties). The possibility that a device might be launched from a vessel or aircraft patrolling within the zone must be admitted. However,

31 To have been entirely consistent with the principled approach that all nuclear explosive devices are covered by the Treaty, Protocols 2 and 3 should perhaps have been also open for signature by India, in view of its 1974 detonation. It can be distinguished, although far from satisfactorily, from the other five states on the grounds that it alone does not admit to possession of a nuclear arsenal. Nor is it generally acknowledged as a nuclear power either by parties to the NPT or the United Nations. Equally, to have called on it to sign the Protocols would have led to questions about other near-nuclear states. The Forum, because of its commitment to the NPT, did not wish to countenance the prospect that commitments under the Protocols might now or soon be required from states other than the original five.

32 *Uranium, the Joint Facilities, Disarmament and Peace* (Australian Government Publishing Service, Canberra, 1984) 11.

the security assurances contained in Protocol 2 apply in respect of territory only: there is no prohibition against the use of nuclear explosive devices against targets outside territory within the zone. Moreover, while the Treaty does not purport to interfere with the exercise of navigational freedoms, such as the right of innocent passage, within sovereign territory, the launching of a weapon, or any other threatening activity, is utterly inconsistent with such passage. A nuclear weapon state which indulged in such behaviour would be in breach of international law. An additional prohibition in the Treaty to prevent that kind of activity is unnecessary. Neither could the vessel of a nuclear weapon state navigate in a party's territorial sea under Article 5(2) with the intention of launching a nuclear tipped missile. That would amount to deployment and is covered by the prohibition on stationing in Article 5(1).

Nor should membership of an alliance with a nuclear weapon state render a party ineligible for an unconditional security assurance. None of the negative security guarantees given by the nuclear weapon states have made such factors the subject of a disqualifying condition. The Soviet Union, which might be assumed to be most concerned about Australian policies regarding its joint facilities and cooperation with the United States under the ANZUS Treaty, requires only that non-nuclear weapon states "renounce the production and acquisition of [nuclear] weapons and do not have them on their territories". It is true that the United States, the United Kingdom and France have all given guarantees which are inapplicable in the case of an attack by the non-nuclear weapon state on the nuclear weapon state (including its dependent territories, allies or armed forces) in association with another nuclear weapon state. But the guarantees are only rendered inapplicable because of the fact of an attack by the non-nuclear weapon state, in alliance with another nuclear weapon state — the fact of the existence of a nuclear security alliance is not enough.

Protocol 3 has no equivalent in the Additional Protocols to the Treaty of Tlatelolco. Nuclear weapon states which become parties to it will undertake not to test any nuclear explosive device anywhere within the zone, not just within the territories subject to Protocol 1. In practical terms the Protocol will require a substantially new undertaking only by France and China: the other three nuclear weapon states are parties to the Partial Test Ban Treaty, which already bans testing under or over water, including territorial waters or high seas. It reflects, however, the strong feeling of Forum members that the SPNFZ regime should provide for the preclusion of testing throughout the zone. Such an obligation could not satisfactorily have been added to Protocol 2, for to have done so would, in view of France's testing programme, have jeopardised the prospects that that Protocol would be signed by all five nuclear weapon states. Protocol 3 represents the single initiative by the Forum in the SPNFZ regime directly aimed at imposing restraints on activity by non-Forum members on the high seas.[33]

33 Although Articles 88 and 141 of UNCLOS, reserving the high seas (as well as those areas of the seabed, ocean floor and subsoil beyond the limits of coastal jurisdiction) "for peaceful purposes", should be noted.

The Protocols each contain a broad right of withdrawal, similar to the precedent in the NPT. Such a right was not provided in the draft Protocols, but some of the nuclear weapon states, during the consultations on the Protocols, advised that the absence of a right to withdraw cast in liberal terms could adversely affect their decision as to signature. The Forum would have preferred that the intended permanence of the SPNFZ regime not be qualified by the inclusion of such a right to withdraw. It must be noted, though, that no party has ever exercised a withdrawal right under any arms control treaty. The Forum's acceptance of the change reflects a pragmatic conclusion that the security of members will be better guaranteed if the nuclear weapon states are parties to the Protocols, albeit with a right to withdraw, than if they decline to sign them altogether.

Provision is made for the possibility that an amendment to the Treaty (permitted under Article 11, if all parties agree) might affect the nature of the obligations originally assumed by each Protocol party. A Protocol party is deemed not to be bound by such an amendment until it specifically accepts it. Similarly, a party to Protocol 2 or 3 must itself accept an extension of the area within which its obligations under those Protocols apply, before it will be bound by an extension of the boundaries resulting from the accession to the Treaty of a new Forum member.

The provision may prove to be particularly significant in regard to the component entities of the Trust Territories of the Pacific Islands, which are now moving rapidly towards self-governing, autonomous status and eligibility for membership of the Forum. Each has entered into compacts of association with the United States, their administering power, which guarantee the United States certain rights that would have a direct bearing on their ability to undertake the commitments in the Treaty. The Forum has thus established an ingenious system allowing both for the equal rights of all Forum members, present and future, to become parties, while reserving control over commitments entered into under the Protocols to the Protocol parties themselves. The Forum cannot unilaterally alter the nature of a Protocol party's commitments.

III. CONCLUSION

The idea of a nuclear free zone in the South Pacific had first appeared more than twenty years earlier. While the Treaty itself required only a scant seven months to draft, the development of the political inclination to authorise its negotiation had spanned many years. The entire process reflects the South Pacific Forum's emergence as a mature, assertive and responsible regional authority, able and willing to project its views onto a wider stage.

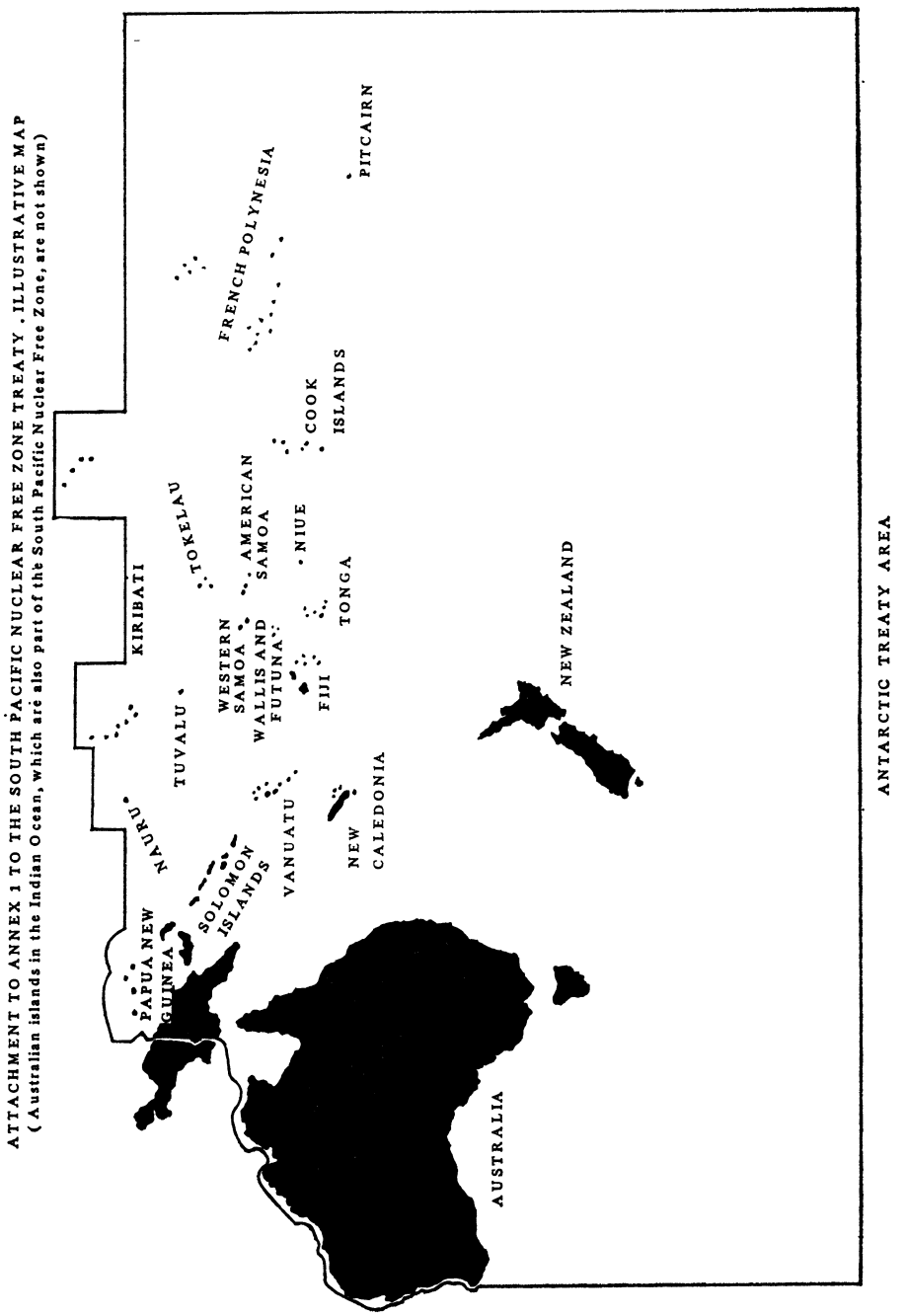
It is an evolution which New Zealand should welcome. New Zealand is a small country, but is nevertheless a major presence in this region. We speak with greater authority if we do so in concert with our neighbours. The South Pacific Nuclear Free Zone Treaty has already commanded the respect of the international community, having been unanimously welcomed by the 86 nations

present at the Third Review Conference of the Non-Proliferation Treaty in Geneva in August and September 1985.[34] The focus of the world's disarmament negotiators has been directed, however briefly, at the achievement of the thirteen Forum members. Perhaps it has provided them with some inspiration in their admittedly greater task.

34 Final Document of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT/CONF. III/64/I, page 15).

ZONE OF APPLICATION OF THE TREATY FOR THE PROHIBITION OF NUCLEAR WEAPONS IN LATIN AMERICA

ATTACHMENT TO ANNEX 1 TO THE SOUTH PACIFIC NUCLEAR FREE ZONE TREATY . ILLUSTRATIVE MAP
(Australian islands in the Indian Ocean, which are also part of the South Pacific Nuclear Free Zone, are not shown)



Allen & Unwin/Port Nicholson Press

POLICING AT THE CROSSROADS

Edited by Neil Cameron and Warren Young

Policing at the Crossroads examines the major questions facing the police today – their strategies, their objectives, their accountability. Public, political and community issues are raised in a time of intense debate and change. Contributors include the Minister of Justice, the Right Hon. Geoffrey Palmer, leading criminologists and members of the police force.
Policing at the Crossroads is the first book to provide a scholarly and critical analysis of the New Zealand police and is essential reading for criminologists, criminal lawyers, police officers and anyone concerned with policing and social issues.
Paperback: $24.95 incl. GST